

Executive Summary

The National Association of Broadcasters (“NAB”) submits this reply to comments filed in response to the *Second Order on Reconsideration and Further Notice of Proposed Rulemaking* addressing various Low Power FM (“LPFM”) ownership and technical issues. The comments filed by broadcasters, trade associations, translator owners, and radio listeners affirm FM translators’ proven track record for delivering essential news, weather, emergency information and Amber Alerts, as well as entertainment to the communities broadcasters serve. Hundreds of these translators are listener-supported, municipality-owned, or federally funded. NAB agrees with the Educational Media Foundation that the public has a legitimate expectation that the FM service they enjoy and financially support via FM translators should continue uninterrupted.

The comments filed in this proceeding do not present any factual findings upon which the Commission can make a determination that a change in regulatory priority status between low-power FM (“LPFM”) stations and FM translators is warranted. While there are many filings generally supporting LPFM service, there is no evidence that the pending applications from the 2003 FM translator window have impeded, in any measure, the Commission’s ability to process LPFM applications under the existing rules. And as Edgewater Broadcasting, *et al.* observes, LPFM applicants had first choice of available frequencies during the LPFM filing windows of 2000-2001, in excess of nineteen months *before* the opening of the 2003 FM translator window. Thus, the 2003 FM translator window comprised of frequencies that had either been rejected by LPFM

applicants or were not suitable for LPFM service based on the distance separation requirements.

The Commission should accordingly refrain from taking further unwarranted actions urged by certain parties, including the extreme measure of dismissing pending FM translator applications. The Commission currently possesses the authority to investigate any allegations of translator application abuse without holding properly-filed FM translator applications in limbo. And although the current freeze on FM translators expired before the Commission has had an opportunity to consider the numerous comments and replies, NAB urges the Commission to act expeditiously so as not to hold pending applications in abeyance indefinitely. Further, extending the freeze will have a significant adverse impact on full power FM radio service with little commensurate benefit.

Finally, as several parties recognize, the issue of interference protection between LPFM and full power FM stations – both new and existing – is governed by statute and cannot be limited to co- and first adjacent channels. Contrary to the assertions of Prometheus Radio Project, *et al.*, the Commission does not have the authority to modify interference protections for LPFM stations to include contour overlap methodology. As the Commission has correctly determined, it cannot alter its interference protection requirements – the “[a]doption of a contour overlap approach is statutorily barred at this time.” Aside from statutory restrictions, NAB agrees with the Commission that modifying interference protection methodology is contrary to the public interest.

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a legitimate expectation that the FM service they enjoy and financially support via FM translators should continue uninterrupted.³

The comments filed in this proceeding do not present any factual findings upon which the Commission can make a determination that a change in regulatory priority status between low-power FM (“LPFM”) stations and FM translators is warranted. While there are many filings generally supporting LPFM service,⁴ there is no evidence that the pending applications from the 2003 FM translator window have impeded, in any measure, the Commission’s ability to process LPFM applications under the existing rules. Thus, the Commission should refrain from taking further unwarranted actions urged by certain parties, including the extreme measure of dismissing pending FM translator applications. And although the current freeze on FM translators expired before the Commission had an opportunity to consider the numerous comments and replies, NAB urges the Commission to act expeditiously so as not to hold pending applications in abeyance indefinitely.⁵ Any such action would have a significant adverse impact on full power FM radio service with little commensurate benefit.

³ Comments of Educational Media Foundation at 3 (filed Aug. 22, 2005) (“EMF”). As EMF correctly points out, the Commission has recognized in the FM and television allotment context, “[t]he public has a legitimate expectation that existing service will continue.” *Amendment of the Commission’s Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094, ¶ 19 (1990).

⁴ To date, over 15,400 comments have been filed in this proceeding.

⁵ See Prometheus Radio Project, *et al.*, *Motion to Extend Freeze on Pending FM Translator Applications*, MM Docket No. 99-25, Sept. 15, 2005 (requesting an indefinite freeze).

Finally, as several parties recognize, the issue of interference protection between LPFM and full power FM stations – both new and existing – is governed by statute and cannot be limited to co- and first adjacent channels or reduced by any other measure. Contrary to the assertions of Prometheus Radio Project, *et al.*,⁶ the Commission does not have the authority to modify interference protections for LPFM stations. As the Commission has correctly determined, it cannot alter its interference methodology because the “[a]doption of a contour overlap approach is statutorily barred at this time.” *Further Notice* at ¶ 34. Aside from statutory restrictions, NAB agrees with the Commission that modifying interference protection methodology is contrary to the public interest.

II. The Record Does Not Support Altering The Regulatory Status Between FM Translators And LPFM Service.

It is well established that an agency must explain the reasoning for changing its course. Although NAB recognizes that “[r]egulatory agencies do not establish rules . . . to last forever,”⁷ the courts have required “an agency changing its course . . . to supply a reasoned analysis for the change beyond that which may required when an agency does not act in the first instance.”⁸ Because in this proceeding there is no evidence that the current co-equal regime between LPFM stations and FM translators is deficient or that

⁶ Comments of Prometheus Radio Project, *et al.* at 3 (filed on Aug. 22, 2005) (“Prometheus”).

⁷ *American Trucking Association v. Atchison, T. & S.F.R. Co.*, 387 U.S. 397, 416 (1967).

⁸ *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983). *See also ACT v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987) (court found that the FCC had failed to establish “the requisite ‘reasoned basis’ for altering its long-established policy” on certain television commercial limits).

the proposed rules would remedy any perceived inadequacies, changing the regulatory balance could well constitute arbitrary and capricious rulemaking by the Commission.⁹

The comments filed in this proceeding do not show that FM translators have had *any* adverse impact on LPFM license availability under the existing rules.¹⁰ In fact, as Edgewater Broadcasting, *et al.* observes, LPFM applicants had first choice of available frequencies during the LPFM filing windows of 2000-2001, in excess of nineteen months *before* the opening of the 2003 FM translator window.¹¹ Thus, the 2003 FM translator window comprised of frequencies that had either been rejected by LPFM applicants or were not suitable for LPFM service based on the distance separation requirements.¹²

Nor does the record support any hypothesis that granting LPFM stations primary status over certain classes of FM translators best serves the public interest.¹³ To the contrary, the substantive comments in this proceeding demonstrate the valuable service

⁹ See, e.g., *Mountain States Telephone and Telegraph Co. v. FCC*, 939 F.2d 1021 (D.C. Cir. 1991) (court vacated FCC order altering accounting requirements applicable to telecommunication service companies); *ALLTEL Corp. v. FCC*, 838 F.2d 551 (D.C. Cir. 1988) (FCC's modification of certain rules for local exchange carriers was found arbitrary and capricious).

¹⁰ See, e.g., Comments of NRC Broadcasting, Inc. at 8 (filed on Aug. 16, 2005).

¹¹ Comments of Edgewater Broadcasting, Inc. and Radio Assist Ministry, Inc. at 4 (filed on Aug. 22, 2005) ("Edgewater").

¹² Once again Prometheus claims that the licenses awarded pursuant to the 2003 FM translator window "take the place" of potential LPFM stations. Comments of Prometheus, Appendix B at 1. This argument, however, has already been rejected by the Commission. See *Further Notice* at ¶ 31 (noting that because LPFM stations and FM translators are licensed under fundamentally different technical rules, Prometheus' characterization of the timing of the FM Translator window is incorrect). See also 47 C.F.R. § 74.1203(a); Comments of Eastern Sierra Broadcasting at 2 (filed on Aug. 22, 2005) (noting that the technical rules between the services are fundamentally different).

¹³ See Comments of Prometheus, Appendix B at 2-8.

FM translators provide to local communities must be preserved. The Commission has consistently recognized translators' value to local communities: "translator-based delivery of broadcast programming in an important objective", and [the FCC] continue[s] to support this objective."¹⁴ NAB agrees with Radio Training Network that FM translators "have a proven track record" of serving their communities.¹⁵ Indeed, without fill-in FM translators, many small towns would not receive any broadcast signals at all.¹⁶ NRC Broadcasting, Inc.'s comments highlight this critical point – without FM translators, "vast portions" of its listeners in Colorado could not receive service because of "intervening mountain terrain."¹⁷ FM translators, therefore, are utilized to reach unserved and underserved communities.

NAB also concurs with NRC that, because translator use for commercial FM service is limited to the service area of the broadcasters' primary station, "FM translators necessarily serve localism."¹⁸ As detailed in our initial comments, FM translators are critical for the delivery of community-responsive programming.¹⁹ As Galaxy Communications, *et al.*, aptly states, FM fill-in translators are "quintessentially a local service which guarantees the local audience has access to local programming that the

¹⁴ *Further Notice* at ¶ 32 (citing *In re Creation of a Low Power Radio Service, Order on Reconsideration*, 15 FCC Rcd 19208, 19224 (2000) ("LPFM Order On Reconsideration").

¹⁵ Comments of Radio Training Network, Inc. at 2 (filed on Aug. 22, 2005).

¹⁶ Comments of NAB at 18-19 (filed on Aug. 22, 2005).

¹⁷ Comments of NRC Broadcasting, Inc. at 2 (filed on Aug. 16, 2005) ("NRC").

¹⁸ *Id.* at 3.

¹⁹ Comments of NAB at 22-23.

Commission has already determined, in granting the full-power authorization, the audience should receive.”²⁰ The importance of FM translators was similarly noted by radio listeners, who rely upon FM translators to receive over-the-air signals.²¹

And as Hurricane Katrina recently demonstrated, the “public interest demands that [full power FM] stations be received clearly,”²² both via the primary signal and FM translators, in order to ensure timely delivery of critical weather and emergency information to all (and not just some) listeners within a community. Moreover, as broadcasters deploy digital radio and deliver through multicasting technology a wealth of community-responsive programming, consumers should not be denied receipt of advanced digital radio services.²³ Thus, NAB urges the Commission to again recognize the valuable service FM translators provide.

²⁰ Joint Comments of Galaxy Communications, L.P. and Desert West Air Ranchers Corporation at 4 (filed on Aug. 22, 2005). *See also* Comments of KOFI, Inc. at 1 (filed on Aug. 16, 2005) (noting that “Rocky Mountain area translators “generally rebroadcast *local stations* that listeners rely and depend upon”) (emphasis in original); Comments of Progressive Broadcasting System, Inc. and Christian Friends Broadcasting Inc. at 1 (filed on Aug. 22, 2005) (noting that its listeners depend on the “rebroadcast [of] local stations”).

²¹ *See, e.g.*, Comments of Brian Krumm (filed on Aug. 18, 2005) (noting that Montana “translators bring us local, state and national news and we depend on them for most our news”); Comments of Sheila Callahan (filed on Aug. 16, 2005) (stating that the “FCC should not approve this change because it would diminish the ability of local broadcasters to reach their audience with local content”).

²² Comments of Saga Communications, Inc. at 3 (filed on Aug. 22, 2005).

²³ *See, e.g.*, Comments of the Colleges of the Seneca, Inc. at 4 (filed on Aug. 22, 2005). Digital radio has the potential to carry via its multicasting capabilities even greater detailed weather and emergency information.

As discussed in detail in our initial comments, the Commission has already struck a reasonable balance between LPFM stations and FM translators by putting them on essentially equal-footing.²⁴ NAB agrees with National Public Radio that nothing has changed to justify the altering of this balance.²⁵ In fact, as the National Translator Association points out, LPFM stations “do not provide the full spectrum of service that is provided by regular broadcast stations,” and thus, as a matter of public policy, there is no “basis for providing LPFM stations a priority over FM translator stations.”²⁶ NAB therefore urges the Commission to retain the existing regulatory status of LPFM stations and FM translators.

III. The Commission Should Reject Proposals To Condition Co-Equal Regulatory Status.

Prometheus has proposed conditions upon which the co-equal status of LPFM translators and FM stations could be maintained, including: (1) a requirement that the FM translator be sited within ten miles of a transmitter; and (2) the originating station has produced a minimum of eight hours of programming.²⁷ Prometheus also proposes

²⁴ See Comments of NAB at 12-16.

²⁵ See Comments of National Public Radio at 5 (filed on Aug. 22, 2005) (“NPR”).

²⁶ Comments of The National Translator Association at 5 (filed on Aug. 22, 2005). See also Comments of WFCR(FM) at 2 (filed on Aug. 22, 2005) (“LPFM stations are not unique in providing a service of and for their communities”). See also Comments of Public Radio FM Translator Licensees at 1 (filed on Aug. 22, 2005) (“public interest would be best served by keeping the current priorities of both services”).

²⁷ Comments of Prometheus, Appendix B at 3-6.

that, regardless of regulatory priority status, all FM translator ownership be limited to local entities and that FM translator ownership be capped at twenty (20) per entity.²⁸

These limitations, however, are inherently arbitrary, and would not best serve the public interest. For example, as set forth in our initial comments,²⁹ WTOP relies on a translator sited in Leesburg to service the Washington suburban community, and the translator is located more than ten miles from the WTOP transmitter. The licensee of WTOP, Bonneville International Corporation, is based in Salt Lake City, Utah. Under Prometheus' proposal, an LPFM station could apply for the frequency occupied by the Leesburg translator and displace tens of thousands of WTOP listeners who rely on the station's all-news format for continuous reporting of weather, traffic, emergency, and other relevant information. Prometheus' proposed regulatory scheme, which premises interference protection upon a randomly-selected distance between the FM transmitter and the FM translator, does little to further the goals of localism. Rather, it proposes to deny local radio service to listeners within a full power station's community of license.³⁰ What the Prometheus proposal fails to understand is that commercial FM translators are sited at varying distances from an FM transmitter due to signal obstruction and the need to reach the audience. This is purely a matter of physics, not policy, and should not be limited by arbitrary criteria.

²⁸ *Id.*, Appendix B at 2-3, 10-11.

²⁹ Comments of NAB at 23.

³⁰ Prometheus offers no explanation as to why an FM translator located within ten miles of an FM transmitter is entitled to greater regulatory status than an FM translator located, *e.g.*, eleven miles from an FM transmitter.

Thus, consistent with Section 307(b) of the Communications Act, “to ensure a fair, efficient, and equitable distribution of radio service throughout the country,”³¹ the Commission should afford equal protection to all FM translators and the listeners they serve. A local-entity ownership requirement for all FM translators not only is contrary to the goals Section 307(b), it is also outside the scope of this proceeding.³² NAB vehemently disagrees with Prometheus that “[t]here is little legitimate use of translator licenses for non-local entities.”³³ This statement, as evidenced by the WTOP example (along with hundreds of FM translators and the communities they serve), is wholly without merit.

Turning to Prometheus’ next proposal, that an FM translator should be protected from a subsequently-authorized LPFM station only if the originating full power station airs eight or hours of more locally-produced programming per day,³⁴ NAB urges the Commission to summarily reject such content-based restrictions. In *Motion Picture Association of America v. FCC*, 309 F.3d 796, 807 (D.C. Cir. 2002), the D.C. Circuit concluded that the Commission lacked authority to require television broadcasters to provide video described programming because no specific statutory provision authorized

³¹ *Office of Communications of the United Church of Christ v. FCC, et al.*, 707 F.2d 1413, 1430 n.54 (D.C. Cir. 1983) citing *Loyola University v. FCC*, 670 F.2d 1222, 1226 (D.C. Cir. 1982).

³² See also Comments of Eastern Sierra Broadcasting at 4 (stating that is not controlling whether the translator applicant is locally-owned because a “local/regional FM station may still be translated even if the owner is non-local”); Comments of Progressive Broadcasting System, Inc. and Christian Friends Broadcasting, Inc. at 1 (filed on Aug. 22, 2005) (stating a locally owned translator requirement does not make regulatory sense).

³³ Comments of Prometheus, Appendix B at 3.

³⁴ *Id.* at 5. Prometheus also proposes that the programming relate “to a commitment to local public affairs programming.” *Id.* at 6.

such a requirement and because the Commission’s general powers under Sections 1, 4(i) and 303(r) of the Communications Act did not authorize the adoption of rules “about program content.” Because proposals to require broadcasters to air minimum amounts of locally-produced and local public affairs programming obviously “implicate program content,” and are not explicitly authorized by any provision of the Communications Act, the Commission’s statutory authority to adopt such content requirement is very much in doubt. *Id.* at 802-803. Contrary to their assertions,³⁵ Prometheus’ proposed regulatory scheme expressly implicates content-based regulation because it gives greater regulatory interference protection solely to parties that pledge to re-transmit specific types of programming.³⁶

Prometheus’ content-based proposals are apparently premised on the assumption that locally-produced programming somehow better serves communities than programming retransmitted on FM translators. The factual record, however, undermines this premise. Indeed, as the Commission has recognized, FM translators “provide an

³⁵ Comments of Prometheus, Appendix B at 7.

³⁶ This content-based proposal raises serious constitutional questions as well. *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 650 (1994) (“FCC’s oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations”); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 334, 354 (D.C. Cir. 1998) (any “content-based definition” of “diverse programming” gives “rise to enormous tensions with the First Amendment”); *Office of Communications of United Church of Christ v. FCC*, 707 F.2d 1413, 1430 (D.C. Cir. 1983) (Congress “has explicitly rejected proposals to require compliance by licensees with subject-matter programming priorities,” and any “Commission requirement mandating particular program categories would raise very serious First Amendment questions”).

opportunity to import programming formats otherwise unavailable” in local markets.³⁷

And numerous parties have demonstrated in this proceeding that community-responsive programming is not limited to locally-produced programming. For example:

- EMF provides programming to communities that might not otherwise be able to sustain quality family-friendly radio programming, including public affairs programming, that serves the needs of “local listeners.”³⁸
- NPR utilizes “daisy chain” networks to extend radio service in an “economical fashion”³⁹ to communities that might not otherwise be able to afford locally-produced public radio service.
- Many FM translators are owned by communities as a means of importing “full-service FM radio stations . . . to under-served areas that lie outside the primary station’s service contour.”⁴⁰ Many communities have therefore determined that a nearby FM station services the needs of their local community and have financially supported the FM translator to ensure signal delivery.

Thus, limiting interference protection to these and other FM translators, based upon whether or not programming is locally-produced, would eviscerate these and other valuable programming services listeners enjoy.

Moreover, because FM translators may be owned by municipalities, or may be federally or listener-supported, NAB urges the Commission to refrain from conditioning interference protections based on the geographical distance between program origination

³⁷ In the Matter of Amendment of Part 74 of the Commission’s Rules Concerning FM Translator Stations, *Report and Order*, 5 FCC Rcd 25 (1990) at ¶ 49 (in which the Commission also recognized the benefit translators have in disseminating emergency information) (“*1990 FM Translator Order*”).

³⁸ Comments of EMF at 7.

³⁹ Comments of NPR at 5.

⁴⁰ Comments of The National Translator Association at 3.

and listeners served.⁴¹ Rather, public policy dictates that local communities are best situated to determine which programming serves their needs. In fact, community investment in FM translator services can be significant. For example, EMF computes its average per translator donation is “approximately \$60,000 per year.”⁴² And as Station Resource Group points out, 1 out of every 6 translators, be it licensed to a commercial or noncommercial licensee, is associated “with a public radio service supported by federal funds distributed by the Corporation of Public Broadcasting.”⁴³ Even if the FM translator receives federal funding, construction is almost always community-funded.⁴⁴ NAB agrees with radio station KRCW that any regulatory scheme granting primary status to LPFM stations over FM translators could result in communities losing service in which they have financially invested, particularly in small and rural communities.⁴⁵ NAB thus urges the Commission not to substitute Prometheus’ programming prejudices for the

⁴¹ REC Networks has proposed that LPFM stations be given primary regulatory status over FM translators that import distant signals, but not “legacy” translators that “have existed for decades,” for to “subject these translators to displacement would cause more harm and would be contrary to the public interest.” Comments of REC Networks, Inc. at 16 (filed on Aug. 22, 2005) (“REC”).

⁴² EMF Comments at 4.

⁴³ Comments of Station Resource Group at 5-6 (filed on Aug. 22, 2005). *See also* Comments of NPR at 6 (substantive funding for FM translators is provided by federal government through the National Telecommunications Information Administration and “Public Telecommunications Facilities Program”); Comments of the Public Radio Regional Organizations at 1 (filed on Aug. 22, 2005) (over nine million persons in the U.S. receive a public radio signal through a public radio translator station).

⁴⁴ Comments of NPR at 7 (citing as an example the extension of Yellowstone Public Radio from Billings to WolfPoint, Montana).

⁴⁵ Comments of KRCW at 3 (filed Aug. 8, 2005).

judgment of local communities, local municipalities and federal officials in determining which types of translators are or are not entitled to regulatory parity with LPFM stations.

Finally, Prometheus' proposal that FM translator ownership be capped at twenty (20) would severely hinder the build-out of FM translator services, and in many instances, requires ownership divestiture in currently-authorized FM translators. For example, in the 2003 FM translator window, Vermont Public Radio submitted applications in order to build a twenty-two (22) FM translator system.⁴⁶ Under Prometheus' proposal, Vermont Public Radio would arbitrarily be forced to deny some communities the benefits of public radio service. Prometheus offers no evidence to support its theory that restrictions in ownership are, in any measure, necessary to protect LPFM service. Moreover, ownership divestiture for all licensed FM translators would unnecessarily disrupt tens of thousands of listeners without any commensurate benefit. The Commission should therefore summarily reject proposals to condition co-equal regulatory status between LPFM stations and FM translators based on arbitrary ownership and geographic regulations that bear no relationship between FM translators and their ability to serve their communities.

IV. Co-Equal Status Between LPFM Stations And Full Power FM Stations Is Unwarranted.

In an attempt to bolster their position, Prometheus has made a number of unsubstantiated, derogatory claims about full power FM service. Allegations such as that the "radio industry is even worse"⁴⁷ since LPFM was authorized, and that the secondary

⁴⁶ Comments of Station Resource Group at 6 (filed on Aug. 22, 2005).

⁴⁷ Comments of Prometheus at 16.

status of LPFM service should be changed due to the “automation and consolidation”⁴⁸ of full power FM service, should be flatly rejected by the Commission. Notably absent from the record are any facts that support these assertions. To the contrary, as discussed in our initial comments, and extensively detailed in NAB’s comments and reply comments in the pending localism proceeding, radio stations provide a broad mix of entertainment and informational programming to listeners in local communities throughout the country.⁴⁹ In fact, as the Commission has previously recognized, radio stations must study and react to the needs and interests of their local communities to survive in a competitive marketplace.⁵⁰ Prometheus proffers no data that shows broadcasters are not serving their local communities. Additionally, Prometheus’ request for co-equal status between LPFM stations and full power FM stations is outside the scope of this proceeding.⁵¹ Therefore, the Commission could not adopt co-equal status between these two services without initiating a further rulemaking.

⁴⁸ *Id.*, Appendix B at 5.

⁴⁹ *See* In the Matter of Broadcast Localism, *Comments of NAB*, MM Docket No. 04-233 (Nov. 1, 2004) at 12-19; In the Matter of Broadcast Localism, *Reply Comments of NAB*, MM Docket No. 04-233 (Jan. 3, 2005) at 2-25; *See also* Joint Comments of Named State Broadcasters Associations at 6 (filed on Aug. 22, 2005) (the Commission’s localism proceeding “well evidences the prodigious efforts” of the broadcast industry to “meet the needs, issues, and problems of America’s local communities”).

⁵⁰ As the Commission recognized nearly a quarter century ago, radio stations present programming that serves “the wants and needs of the public,” including news and other informational programming, in “response to market forces.” *Deregulation of Radio, Report and Order* in BC Docket No. 79-219, 84 FCC 2d 968, 978, 1023 (1981) (“*Radio Deregulation Order*”). In fact, the Commission determined that “marketplace and competitive forces are *more likely* to [result in community-responsive programming] than are regulatory guidelines and procedures.” *Id.* at 1023 (emphasis added).

⁵¹ The Commission’s reevaluation of co-equal status is limited to LPFM stations and FM translators. *Further Notice* at ¶ 31.

Moreover, it is outrageous to suggest broadcasters would “conjure”⁵² interference in order to displace a LPFM station, with whom a commercial broadcaster is not competing for advertising dollars, by investing substantial resources towards changing a community of license, facility upgrade, or new radio service. As Station Resource Group explains, full power FM stations sometimes must modify their facilities for a number of reasons, including landlord-required relocation.⁵³ Prometheus cannot cite to any example of broadcaster abuse of its primary status to displace existing LPFM stations simply because such abuse does not exist. As the Commission clearly stated in its *Further Notice*, to date only one LPFM station has been displaced. *Further Notice* at ¶ 38. Prometheus’ conspiracy theories are thus meritless.⁵⁴

Ironically, Prometheus’ call to grant primary status to LPFM stations over full power FM service would discriminate against the very entities Media Access Project, Common Cause, United Church of Christ, *et al.*, have historically strove to protect, namely niche, minority-owned broadcasters. For example, by reducing interference protections for subsequently-authorized full power FM stations, the harm “will likely fall disproportionately on niche broadcasters, including minority owners and religious

⁵² Comments of Prometheus at 14.

⁵³ Comments of Station Resource Group at 3.

⁵⁴ NAB agrees with Point Broadcasting, *et. al* that “[i]t stretches credulity to suggest that this single instance of discontinuance somehow endangers the integrity of the LPFM service as a whole, or justifies a radical revision of the current LPFM framework that would certainly harm full-power operations.” Joint Comments of Point Broadcasting Company, Gold Coast Broadcasting LLC and High Desert Broadcasting LLC at 3 (filed on August 22, 2005).

operators, who often buy more affordable stations on the fringe of a market and rely on upgrades and other facility improvements to reach their intended service areas.”⁵⁵

In lieu of Prometheus’ cumbersome proposal to require subsequently-authorized full power FM service (in which an existing LPFM station will be sited within the full power FM station’s protected contours) to require “a full Commission vote and a public interest evaluation,”⁵⁶ NAB again urges the Commission to focus on constructive means by which the displaced LPFM service can be relocated *without creating harmful interference*. NAB agrees with Prometheus that LPFM stations that are displaced by a subsequently-authorized full power FM station should be afforded “every opportunity to move” outside a major filing window.⁵⁷ We also agree with Christian Community Broadcasters that the Commission should simplify procedures for LPFM services to relocate to available frequencies.⁵⁸

FM translators and LPFM stations, however, are allocated under fundamentally different technical rules. Thus, relocation is not appropriate for “any frequency that meets the translator rules.”⁵⁹ And because LPFM stations were authorized as a secondary service, the Commission should not require full power FM broadcasters to

⁵⁵ Comments of EMF at 11. Other organizations have similarly noted that minority broadcasters often have “lower powered properties some distance from their audiences,” and therefore support proposals to facilitate changes in stations’ community of license and other streamlining of the *full power* FM allotment. Comments of the Minority Media and Telecommunications Council, RM-10960 (filed May 24, 2004).

⁵⁶ Comments of Prometheus at 17.

⁵⁷ *Id.* at 20.

⁵⁸ Comments of Christian Community Broadcasters’ at 3 (filed on Aug. 22, 2005).

⁵⁹ *Id.*

“cover the expense” of relocation.⁶⁰ As a matter of fundamental fairness to both LPFM and FM translator licensees, both parties were “aware of their status”⁶¹ as first-come, first-serve, when they originally applied for their licenses.⁶² Neither party, therefore, is entitled to relocation expenditure-recovery. Further, Prometheus’ proclamation that the FCC “wrongly assumes that because a service is primary in interference, then it can ignore secondary services altogether,”⁶³ underscores their ignorance of the basic tenants of a secondary service. It is inherent in the Commission’s rules that a secondary service is not entitled to interference protection from a primary service.⁶⁴

Finally, we agree with Edgewater Broadcasting that the Commission previously determined that one of its “paramount goals in introducing LPFM service was that it not interfere with existing service.”⁶⁵ Granting primary status to LPFM service over full power FM service clearly would contravene this goal. Moreover, it would contravene the goals articulated by Congress in passing the *Radio Broadcast Preservation Act*.⁶⁶ The legislative history clearly states:

⁶⁰ See Comments of Highland Community Broadcasting at 2 (filed on Aug. 22, 2005).

⁶¹ Comments of Randal J. Miller at 2 (filed Aug. 22, 2005).

⁶² See also Comments of Steven White at 3 (filed on Aug. 23, 2005).

⁶³ Comments of Prometheus at 19.

⁶⁴ See Comments of NAB at 9.

⁶⁵ Comments of Edgewater at 8 (citing In re Creation of Low Power Radio Service, *Memorandum Opinion and Order on Reconsideration*, 15 FCC Rcd 19208, ¶ 28 (2000)).

⁶⁶ District of Columbia Appropriations Act, FY 2001, Pub. L. No. 106-553, § 632, 114 Stat. 2762, 2762A-111(2000) (“*Radio Broadcast Preservation Act*” or “*RBPA*”).

The Commission is directed to maintain the same level of protection from interference from other stations for existing *stations and any* new full-power stations as the Commission's rules provided for The Committee intends that this level of protection should apply at any time during the operation of an LPFM station. Thus, LPFM stations which are authorized under this section, but cause interference to *new or modified facilities of a full-power station*, would be required to modify their facilities or cease operations.

H.R. Rep. No. 567, 106th Cong., 2d Sess. 4 (2000) at 7-8 (emphasis added). Thus, consistent with prior Commission precedent and Congressional directive, NAB urges the Commission to refrain from granting primary status to LPFM stations.

V. The Commission Should Process Pending FM Translator Applications.

As described in our initial comments, and reaffirmed by the State Broadcasters Associations, there is no evidence that pending applications from the 2003 FM translator window have impeded, in any measure, the Commission's ability to process LPFM applications under the existing rules.⁶⁷ Nor do the comments demonstrate widespread application abuse. To the contrary, the "vast majority" of FM translator licenses were not filed by speculators, nor do they pose a threat to existing LPFM stations.⁶⁸ As NPR correctly states, if the Commission is concerned with speculators or other regulatory abuses, it currently possesses authority to investigate applications filed during 2003 window and "reject those found to be fraudulently filed or otherwise defective."⁶⁹ A freeze on the 2003 FM Translator applications, therefore, is unnecessary.

⁶⁷ Joint Comments of the Named State Broadcasters Associations at 8.

⁶⁸ See Comments of Galaxy at 3.

⁶⁹ Comments of NPR at 12; see also Comments of Montana Broadcasters Association at 1 (filed on Aug. 22, 2005) (stating that if Commission is concerned about abuses of a few applicants, it should promptly investigate, rather than dismiss the entire batch of pending FM translator applications).

Continuation of the unnecessary FM translator application freeze or any dismissal of pending applications will also have a significant adverse effect on radio. We agree with the Joint State Broadcasters Associations that the large volume of translator applications “attests to the degree to which there is a public interest need for such translators.”⁷⁰ Some broadcasters have been waiting since 1997 for approval for a FM translator to fill-in their primary service area to service their local communities – to dismiss their applications based on a speculative harm is not only a “harsh injustice” to the communities that have been awaiting FM translator service, it would also “result in a waste of the enormous amount of time and resources” expended by translator applicants.⁷¹ Broadcasters have invested thousands of dollars in engineering fees to properly file their FM translator applications in the 2003 window.⁷² Because (1) there is no evidence that FM translator applications have impeded LFPM licensing; (2) the Commission possesses the authority to immediately investigate translator applicant abuses; and (3) as a matter of fundamental fairness, the thousands of dollars spent by broadcasters to properly file for FM translators to better serve their local communities, public interest demands that the Commission process expeditiously the pending FM translator applications.

⁷⁰ Joint Comments of Named State Broadcasters Associations at 9.

⁷¹ Comments of Dubois Area Broadcasting, Inc. at 2 (filed on Aug. 25, 2005).

⁷² *See, e.g.*, Reply Comments of Taylor University Broadcasting, Inc. at 2 (filed on Aug. 25, 2005) (Taylor University expended \$8500 in engineering fees to file applications for five FM translators); Comments of Progressive Broadcasting System, Inc. and Christian Friends Broadcasting Inc. at 1 (filed on Aug. 22, 2005) (who have expended tens of thousands of dollars in processing FM translator applications).

VI. The Commission Is Statutorily Prohibited From Reducing Distance Separations Or Utilizing Contour Overlap Methodology To License LPFM Stations.

The Commission has determined that “[a]doption of a contour overlap approach is statutorily barred at this time.” *Further Notice* at ¶ 34. Prometheus characterizes this statement as a mere “tentative conclusion,”⁷³ and states the Commission erred in its interpretation of the *RBPA*. Prometheus’ logic, however, is fundamentally flawed. The Commission did not issue a tentative conclusion, nor did it solicit comments on its statutory analysis. Rather, it plainly (and correctly) stated the obvious: the FCC cannot, consonant with the *RBPA*, utilize fundamentally different methodologies for authorizing LPFM stations. Section 632(a) expressly states:

The Federal Communications Commission *shall* modify the rules authorizing the operation of low-power FM stations, as proposed in MM Docket No. 99-25 to [A] *prescribe the minimum distance separation for third-adjacent channels* (as well as for co-channels and first- and *second-adjacent channels*)...

[2] The Commission may not [A] eliminate or reduce the minimum separations for third-adjacent channels required by paragraph (1)(A) ...[B] except as expressly authorized by an Act of Congress enacted after the date of this Act.⁷⁴

Therefore, Congress’ intent with regard to maintaining adjacent channel protections for all FM stations is clear, and the Commission “must give effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842-43 (1984).⁷⁵

⁷³ Comments of Prometheus at 2-3.

⁷⁴ Pub. L. No. 106-553, § 632, 114 Stat. 2762, 2762A-111 (2000) (emphasis added).

⁷⁵ *See also Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992) (“courts must presume that legislature says in a statute what it means and means in a statute what it says there”).

Were there any ambiguity in the statute itself (which there is not), the legislative history demonstrates Congress' intent to preserve "existing protections," including second and third adjacent channel protections for the FM band:

Before the FCC changes existing protections, protections that are as important to radio stations, public and commercial, as they are to radio listeners across America, I think it is imperative that Congress must have the authority to review any FCC changes over *existing protections*.

146 Cong. Rec. H2303 (daily ed. Apr. 13, 2000) (Statement of Rep. Dingell) (emphasis added). The *existing protections* are the prescribed minimum distance separations – they do not include contour methodology.

Prometheus' claim that the "weight of Section 632 has been diminished, primary because of the results of the [FCC-commissioned] Mitre study"⁷⁶ is inconsistent with even the most rudimentary statutory construction. A study by a third party obviously cannot "diminish," or alter in any way, the force or legal effect of a congressional enactment. As numerous commenters recognize, absent an act of Congress, the Commission is precluded from altering distance separations for LPFM stations.⁷⁷ And

⁷⁶ Comments of Prometheus at 9. Nor, did the Commission, as Prometheus suggests, recommend a *carte blanche* elimination of minimum distance separations. Further, NAB agrees with NPR that FCC decision to eliminate "existing interference protections based on an uncritical acceptance of the Mitre study's conclusion is unlikely to withstand judicial scrutiny." Comments of NPR at 17.

⁷⁷ See, e.g., Comments of Cox Radio, Inc. at 3 (filed Aug. 22, 2005) (stating that the proposed reduction violates both the *RBPA*, which prohibits the reduction of third adjacent channel protections and the Commission's own determination to retain second adjacent channel protections); Comments of Saga Communications at 10; Comments of NPR at 14 (stating that the FCC cannot eliminate existing second and third adjacent channel protections for new full power stations without running afoul of both statutory directive and "sound spectrum management"). See also Comments of Mountain Area Information Network at 1 (filed on Aug. 22, 2005)

the Commission itself has recognized, it is not free to ignore a Congressional directive.

Further Notice at ¶ 34.

Prometheus' next argument is that because Congress did not enumerate distance separations, it "does not bar the Commission from exercising its discretion."⁷⁸ The *RBPA*, however, does bar the Commission from enacting rules that are contrary to the terms of the statute – therefore, by definition *RBPA* prohibits the Commission from acting inapposite of its directive. Certainly the Commission's "discretion" is not so broad as to make the requirements of *RBPA* essentially superfluous.⁷⁹ The fact that Congress did not explicitly provide "the exact numerical distance"⁸⁰ for service separations does not mean that minimum distance separation requirements are only a suggestion that the Commission may contravene by use of contour methodology if it wishes. As the courts have made clear, Congress is not obliged to "expressly negate the existence of a claimed administrative power" by writing statutes in "'thou shalt not' terms."⁸¹ Thus, absent Congressional action altering the clear terms of the *RBPA*, the Commission is precluded from eliminating or reducing either second or third adjacent channel distance separations, or altering its distance separation methodology.

⁷⁸ Comments of Prometheus at 6.

⁷⁹ See, e.g., *Hohn v. U.S.*, 118 S.Ct. 1969, 1976 (1998); *Kawaauhau v. Geiger*, 118 S.Ct. 974, 977 (1998) (stating reluctance to adopt a construction of a statute making another statutory provision superfluous).

⁸⁰ Comments of Prometheus at 7.

⁸¹ *Railway Labor Executives' Ass'n v. National Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (*en banc*). Indeed, "[w]ere courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Id.* (emphasis in original).

Even beyond statutory restrictions, altering the distance separation methodology would be contrary to the Commission’s own policy determinations, for in authorizing LPFM service, the Commission concluded that minimum distance separations would provide “the most efficient means” to process LPFM applications.⁸² In the instant proceeding, the Commission reiterated the policies behind retaining the “simple and reliable” distance separations, namely that the “adoption of a contour methodology would require the preparation of complex and costly engineering exhibits.” *Further Notice* at ¶ 35. NAB concurs with the Commission’s analysis.

Moreover, as Thomas C. Smith observes, there is insufficient “data to support the reduction of separation requirements.”⁸³ We strongly disagree with REC’s proposal that interference protection from LPFM facilities be eliminated for domestic full power and FM translator stations.⁸⁴ Their sole justifications to this proposal is that current FCC rules do not require FM translators to protect a full power station's signal if the translator is operating at less than 100 watts ERP, and therefore LPFM stations (which are limited to a maximum ERP of 100 watts) should therefore be treated similarly.⁸⁵

REC, however, ignores crucial differences between the LPFM and FM translator services, differences that preclude relaxation of the interference protection requirements for LPFM. Admittedly, translator-to-full power interference is sometimes deemed

⁸² *In Re Creation of Low Power Radio Service, Report and Order*, MM Docket No. 99-25, 15 FCC Rcd 2205, ¶ 68 (2000) (“*LPFM Order*”).

⁸³ Comments of Thomas C. Smith at 7 (filed on Aug. 23, 2005).

⁸⁴ Comments of REC at ¶ 30.

⁸⁵ REC cites to 47 C.F.R. §74.1204(g) for support of its proposal.

insignificant when the translators are operating with less than 100 watts ERP (due to the large differences in power levels between the two stations). However, LPFM-to-translator interference and vice versa should not be afforded the same leniency, because in these cases, *both* services are operating at low power levels (and thus, this interference is more likely to be harmful to listeners). FM translators are moreover typically located in areas that full power FM stations and LPFM stations would deem undesirable due to terrain factors or other conditions (such as lack of population to support service) while LPFM stations are typically located in areas also serviced by full power FM stations. As such, LPFM stations are much more likely, as a practical matter, to interfere with a full power FM station. And even though LPFM stations may not frequently be located near FM translators, the maintenance of existing interference spacing requirements is a reliable fail-safe method of ensuring that broadcasters do not interfere with one another, in the event they are close in proximity.

Further, with respect to the intermediate frequency (“IF”) spacing requirement, while it is likely that in the absence of this requirement an LPFM station would cause interference within its 36 mV/m contour to full service stations nearby, it is also quite possible that the entire service area of the LPFM station could be enclosed by a full service station's 36 mV/m contour.⁸⁶ In other words, without a spacing requirement, an LPFM applicant could propose a station that is essentially unreceivable. Avoiding this undesirable situation may require a greater degree of expertise than is typical for LPFM applicants, and assuming otherwise would be inconsistent with the simplified approach

⁸⁶ Note that the current distance spacing requirements for IF-spaced stations results in a “protected contour” value of approximately 36 mV/m.

to LPFM licensing being taken by the Commission.⁸⁷ Thus, as a matter of law, and as a matter of sound spectrum management policy, NAB concurs with the Commission's conclusions that it may not and should not alter the minimum distance separation requirements for LPFM service.

VII. Conclusion.

For the foregoing reasons, the Commission should not alter the regulatory priority status between LPFM stations and FM translators. The record does not demonstrate that LPFM stations "enhance localism" more effectively, and therefore, as a matter of policy, are entitled to primary status. Rather, granting primary status to LPFM stations over FM translators could lead to serious disruption of full power FM service, particularly to populations that rely on a relay of FM translators to receive their FM programming, including critical weather and emergency information.

The Commission should also refrain from taking further action, including dismissing the properly-filed pending FM translator applications or extending the freeze on their processing. As the record in this proceeding clearly shows, pending applications from the 2003 FM translator window have not impeded, in any measure, the Commission's ability to process LPFM applications under the existing rules. Such action will, conversely, have a significant adverse impact on full power FM radio service with little commensurate benefit. In lieu of more radical proposed measures that would allow significant interference to full power FM signals, NAB again urges the Commission to instead focus on constructive means by which an operating LPFM station displaced by

⁸⁷ *Further Notice* at ¶ 35.

new or upgraded full power FM service can be relocated *without creating harmful interference*. Such constructive measures could include granting the displaced LPFM station priority and expedited processing over other LPFM applications without the need for opening an application window.

Finally, the Commission is statutorily prohibited from altering the FM distance separation requirements set forth by Congress in 2000; thus, it may not eliminate second or third adjacent channel interference protection requirements for existing LPFM stations, nor may it adopt contour spacing methodology. Aside from statutory restrictions, NAB agrees with the Commission that modifying interference protection methodology is contrary to the public interest.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
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A handwritten signature in black ink, appearing to read "Marsha J. MacBride". The signature is stylized and includes a large, prominent initial letter.

Marsha J. MacBride
Jerianne Timmerman
Ann West Bobeck

September 21, 2005