

In these Reply Comments, Cox reemphasizes that the 2001 Appropriations Act for the District of Columbia² demands that full-service FM stations retain full interference protections against secondary LPFM stations. In addition, Cox requests that the Commission reject certain comments that ask the Commission to effectively declare LPFM a primary service on an equal footing with full-power FM radio stations.

I. CONGRESS HAS ALREADY SPOKEN TO THIS ISSUE AND THE COMMISSION MUST NOT DISREGARD A STATUTORY MANDATE.

The Commission’s proposal to eliminate second- and third-adjacent interference protections for subsequently authorized full-service FM stations flies in the face of a clear statutory mandate. In the 2001 Appropriations Act for the District of Columbia,³ Congress included an amendment entitled “Radio Broadcasting Preservation Act of 2000” (“RBPA”), which, in pertinent parts, states as follows:

- (1) The Federal Communications Commission shall modify the rules authorizing the operation of low-power FM radio stations . . . to—
 - (A) prescribe minimum distance separations for third adjacent channels (as well as for co-channels and first- and second-adjacent channels); and
 - ...
 - (2): **The Federal Communications Commission may not—**
 - (A) eliminate or reduce the minimum distance separations for third-adjacent channels required by paragraph (1)(A)**
 - ...
- except as expressly authorized by an Act of Congress enacted after the date of this Act.⁴

Congress intended that the RBPA would prohibit the Commission from doing exactly what it now proposes—“eliminate[ing] or reduc[ing] the minimum distance separations for third-adjacent” FM stations.⁵

² Pub. L. No. 106-553, § 632, 114 Stat. 2762, 2762A-111 (2000).

³ *Id.*

⁴ *Id.* § 632(a) (emphasis added).

The statutory language is clear enough; however, in its committee report the House of Representatives Commerce Committee left absolutely no doubt of the intent behind the RBPA: “[T]he [RBPA] requires Congressional authority for the FCC to eliminate or reduce *any* interference standards on the radio dial.”⁶ The report clarifies even further:

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 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.**⁷

Despite this directive, the *Notice* proposes just the opposite. The Commission would permit LPFM stations to continue operations and interfere with subsequently authorized full-service facilities that are on second- or third-adjacent channels.⁸ Rather than require LPFM stations “to modify their facilities or cease operations”⁹—what the House Report demands—, the *Notice* proposes to eliminate interference protections for second- and third adjacent channels, which is exactly what the RBPA prohibits.¹⁰

⁵ *Id.* § 632(a)(2)(A).

⁶ H.R. Rep. No.106-567, at 3 (2000) (emphasis added).

⁷ *Id.* at 8 (emphasis added).

⁸ *See Notice* at ¶ 38.

⁹ H.R. Rep. No. 106-567, at 8 (2000).

¹⁰ *See RBPA* at § 632(a)(2)(A) (“The Federal Communications Commission may not . . . eliminate or reduce the minimum distance separations for third adjacent channels . . . except as expressly authorized by an Act of Congress . . .”). In a quirk of legislative history, Congress wrote section 632(a)(2)(A) only to prohibit the Commission from reducing the protections for third-adjacent channels. Nevertheless, the Commission should recognize that the prohibition applies equally to co-channel, first-adjacent, and second-adjacent protections. Congress passed the RBPA in response to the Commission’s rules eliminating third-adjacent protections for full-power FM stations. *See Creation of Low Power Radio Service*, Report and Order, MM Docket No. 99-25, 15 FCC Rcd 2205

The RBPA is on point and essentially limits the Commission's discretion. Once Congress speaks to an issue, the Commission must give effect to that intent.¹¹ Congress passed the RBPA to ensure that the Commission does not "eliminate or reduce any interference standards on the radio dial."¹² The Commission cannot waive or ignore this federal statute. "[T]he intent of Congress is clear, [therefore] that is the end of the matter."¹³

II. THE COMMISSION SHOULD REJECT CERTAIN PROPOSALS OFFERED BY PROMETHEUS.

In its comments Prometheus Radio Project, et al. ("Prometheus") offers many suggestions, several of which, however, Congress has statutorily precluded. Prometheus proposes that the Commission grant LPFM applicants the option of submitting complex engineering exhibits with contour overlap studies if their proposed facilities violate the minimum distance separation rules.¹⁴ The Commission, however, properly concluded in the *Notice* that section 632(a)(1)(A) of the RBPA requires it to adopt minimum distance separation requirements and that section 632(a)(2)(A) prohibits it from reducing these protections.¹⁵ The statute leaves no room for the Commission to cobble together equivalent protection rules for LPFM applicants. Again the House Report is illuminating. It explains that the RBPA "prohibits the FCC from [making] further changes to the

(2000). It never contemplated that the Commission would later consider eliminating second-adjacent protections. Indeed, it would be absurd if the RBPA only prohibits the Commission from eliminating third-adjacent protections, yet allows it to eliminate co-channel, first-adjacent, and second-adjacent protections.

¹¹ See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

¹² H.R. Rep. No.106-567, at 3 (2000).

¹³ *Chevron*, 467 U.S. at 842.

¹⁴ See Comments of Prometheus Radio Project, et al., MM Docket No. 99-25, at 3 (filed Aug. 2, 2005) ("Prometheus Comments").

¹⁵ See *Notice* at ¶ 34; see also *supra* text accompanying note 4.

minimum distance separation rules.”¹⁶ Congress intended for these rules to prevent interference between LPFM and full-service FM stations. The Commission should not undermine Congress’s intent by allowing LPFM applicants to opt out of the minimum distance separation rules altogether.

Prometheus next suggests that the Commission “grant[] LPFM stations co-equal primary status with full power stations.”¹⁷ This radical proposal turns the RBPA on its head. When Congress passed the RBPA, it clearly contemplated that LPFM would remain a secondary service. As the House Report demonstrates, the entire purpose of the Act was to ensure that LPFM would not adversely affect full-service stations.¹⁸ If an LPFM station interferes with a full-service station, the RBPA requires the LPFM station “to modify [its] facilities or cease operations.”¹⁹ Thus, Congress intended for LPFM stations to remain secondary to full-power FM radio stations. Prometheus cannot square its proposal with this congressional directive.

Prometheus, perhaps sensing that its co-equal, primary status proposal is doomed, suggests an “alternative,” but its alternative is actually primary status thinly disguised. Prometheus suggests that the Commission adopt a processing guideline for when full-service FM applications conflict with existing LPFM stations.²⁰ The processing guideline would effectively grant LPFM primary status

¹⁶ See H.R. Rep. No. 106-567, at 8 (2000).

¹⁷ Prometheus Comments at 13.

¹⁸ The House Report explains that Congress passed the RBPA because it feared that the FCC “rush[ed] to adopt the LPFM rules” without conducting sufficient “studies of the potential for interference from LPFM stations and of the impact of LPFM service.” H.R. Rep. No. 106-567, at 4 (2000).

¹⁹ See *id.* at 8.

²⁰ See Prometheus Comments at 14.

because it would presume that the full-service application does not serve the public interest. Only a vote by the full Commission could override this presumption.²¹

Once again, Prometheus's proposal flies in the face of the RBPA. Whether Prometheus describes its proposal as co-equal status or as a processing guideline, it is wholly inconsistent with the intent of the RBPA. The Commission created LPFM as a secondary service, and Congress intended to maintain that status quo. The Commission must interpret a federal statute reasonably and consistent with its purpose.²² Granting LPFM primary status, or its equivalent, fails that test.

Ultimately, Prometheus offers solutions in search of a problem. **Only one LPFM station has been forced off the air because of a full-service station upgrade.**²³ This one isolated incident cannot justify overturning decades of Commission precedent declaring low-power services are secondary to full-service stations.²⁴ Moreover, Prometheus appears to fundamentally misunderstand why FM stations upgrade their facilities. In the last five years Cox has upgraded several of its FM stations, and it can assure Prometheus that it did not invest several millions of dollars in a secretive effort to "conjure up interference" with nearby LPFM stations.²⁵ Rather, as should be obvious, Cox upgrades its FM stations so it can operate with a more powerful signal to better serve listeners and

²¹ See *id.* at 14-15.

²² *Nuclear Info. Res. Serv. v. Nuclear Regulatory Comm'n*, 969 F.2d 1169, 1173 (1992) (en banc).

²³ See *Notice* at ¶ 38.

²⁴ See, e.g., *Creation of a Low Power Radio Service*, Report and Order, MM Docket No. 99-25, 15 FCC Rcd 2205, ¶ 62 (2000) (declaring that LPFM stations "with their much smaller service areas and fewer service regulations" are secondary to full power FM stations); *Amendment of Part 74 of the Commission's Rules Concerning FM Translator Station*, Notice of Inquiry, MM Docket No. 88-140, 3 FCC Rcd 3664, ¶ 32 (1988) (noting that full power FM stations "make more efficient use of the spectrum than . . . [low-power stations] in that the ratio of coverage to interference area is much larger for full-service stations than for low-power [stations]").

²⁵ See Prometheus Comments at 12.

advertisers in its local communities of license and surrounding areas. Prometheus's paranoid fears of full-service FM stations waging "calculated attacks" against the LPFM service²⁶ do not warrant further consideration by the Commission.

The National Association of Broadcasters offers a far more reasonable solution to the perceived problem of full-service FM stations displacing LPFM stations.²⁷ In the rare event that an upgrade of a full-power FM station displaces an LPFM station, the Commission should permit the LPFM licensee to submit an application to relocate its displaced station without waiting for a filing window. Under this approach, the Commission will treat displaced LPFM stations much like displaced low-power television stations. Rather than restructure its interference rules for the FM band, the Commission should adopt a solution commensurate with the scope of the problem. Allowing a few LPFM licensees to submit displacement applications is the most reasonable solution to a rare problem.

²⁶ *See id.*

²⁷ *See* Comments of the National Association of Broadcasters, MM Docket No. 99-25, at 11-12 (filed Aug. 22, 2005).

CONCLUSION

For these reasons, Cox urges the Commission to protect all subsequently authorized FM stations from LPFM interference and to reject the radical proposals offered by Prometheus.

Respectfully submitted,

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