

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Amendment of Service and Eligibility Rules) MB Docket No. 07-172
for FM Broadcast Translator Stations)
)

To: The Commission

**COMMENTS OF
NATIONAL PUBLIC RADIO, INC.**

Introduction

Pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, National Public Radio, Inc. ("NPR") hereby submits its Comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.¹

NPR is a non-profit membership corporation that produces and distributes noncommercial educational programming through more than 800 public radio stations nationwide. NPR's members operate 45 AM stations, and there are a number of additional NPR affiliated AM stations, including 8 in Alaska. In addition to producing and distributing such award winning programs as *All Things Considered*[®], *Morning Edition*[®], *Talk Of The Nation*[®], and *Performance Today*[®], NPR operates the Public Radio Satellite Interconnection System and provides representation and other services to its member stations.

¹ See In the Matter of Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations, Notice of Proposed Rulemaking, MB Docket No. 07-172, 22 FCC Rcd 15890 (2007) [hereinafter "NPRM"].

I. The Commission Should Proceed Cautiously Before Authorizing AM Stations To Use FM Translators

NPR recognizes and supports the valuable public service AM stations have long provided. Indeed, NPR member stations, such as WHA(AM), Madison, WI, WILL(AM), Urbana, IL, and WNYC(AM), New York, NY, are among the oldest continuously operating stations in the country.² We also recognize that authorizing the use of FM translator stations promises to improve the economic viability of retransmitted AM stations as program producers. We have some concerns, however, about the net benefits of the proposal.

The Commission has long prohibited cross-service translating because the different propagation characteristics of AM and FM radio transmission are such that translators serve an important augmenting role for FM stations but have long been considered unhelpful to AM stations.³ Although the NPRM acknowledges this fact,⁴ it offers no explanation for why the Commission believes circumstances may have materially changed.⁵

It is also unclear why authorizing AM stations to use FM translators promotes use of the

² See www.wpr.org/about/hd_innovation.cfm; www.will.uiuc.edu/about/history.htm; www.wnyc.org/about/history.html

³ FM stations propagate in a line-of-sight pattern such that man-made and other obstructions interfere with reception. The groundwave propagation characteristics of AM service generally do not result in service voids. In the Matter of Amendment of Part 74, Subpart L of the Commission's Rules Pertaining to FM Translators, 49 R.R.2d 1499 (1981). See also id. at ¶ 4 ("[I]f an AM station's signal is suitable for use as input to an FM translator, it should also be suitable within the service area of the FM translator for direct off-the-air reception as an AM signal."); id. at ¶ 6 (discussing technical difficulties associated with an AM station attempting to "feed" an FM translator.).

⁴ NPRM, 22 FCC Rcd. at 15893.

⁵ See id. at 15897-98.

AM service, which is the stated objective of this proceeding.⁶ Listeners are likely to associate the programming they receive with the FM translator station through which they receive it rather than the AM station that happens to originate the programming.

The NPRM also proposes to permit daytime-only AM stations to originate programming, including at night when the AM primary station ceases broadcasting. Translator service has always been deemed a supplemental service, augmenting and extending the service of full power stations. If the Commission authorizes general program origination via FM translators in the circumstances of this proceeding, the NPRM offers no obvious basis for limiting the origination authority of FM translator stations to the circumstances presented in this proceeding.

NPR is also concerned about the potential consequences for FM services of authorizing thousands of AM stations to use new FM translator stations.⁷ As the Commission recently described the situation:

This issue has taken on much greater significance over the past few years as demand for new radio stations has increased dramatically while the spectrum for such stations has become increasingly scarce, particularly in many mid-sized communities and in virtually all urbanized areas.⁸

In practical terms, authorizing thousands of AM stations to operate FM translator stations will result in many more broadcast applications for FM station licensees to monitor in the interest of protecting their station coverage area. Because the FM band is already congested, moreover, FM

⁶ See id. at 15891-92.

⁷ There are 4,776 AM stations currently licensed and operating. Broadcast Station Totals as of September 30, 2007, rel. October 18, 2007.

⁸ In the Matter of Creation of A Low Power Radio Service, Third Report and Order and Second Further Notice of Proposed Rulemaking, MM Docket No. 99-25, at ¶ 50, rel. Dec. 11, 2007 [hereinafter "LPFM Third Report and Order and Second Further Notice of Proposed Rulemaking"].

station licensees would also face diminishing opportunities to establish new or relocate existing translators, and they are more likely to confront mutually exclusive FM translator applications when they apply for new or changed FM translator facilities.⁹

For these reasons, and assuming the Commission intends to authorize AM stations to use FM translators as proposed in the NPRM, NPR strongly endorses a phased implementation of such authorization.¹⁰ The Commission is making a significant change in the use of FM translators at a time when it is also considering other far reaching changes to the regulatory status of FM translator stations.¹¹ A phased implementation would reduce the risk and potential severity of any unintended consequences. Given the questions surrounding the NPRM, adopting a series of implementation periods based on needs or priorities, as the NPRM suggests, is the only prudent approach.¹²

⁹ Under the Commission's Regulations, mutually exclusive FM translator applications are resolved by auction in the case of non-reserved band translators, 47 C.F.R. § 74.1233(d), or by applying a point system in the case of reserved band translators, id. § 74.1233(e).

¹⁰ NPRM, 22 FCC Rcd. at 15897.

¹¹ See LPFM Third Report and Order and Second Further Notice of Proposed Rulemaking, MM Docket No. 99-25, at ¶ 84.

¹² NPRM, 22 FCC Rcd. at 15897.

II. FM Translators Operating On Spectrum Reserved For Noncommercial Educational Use Must Satisfy The Statutory and Regulatory Requirements For NCE Broadcasting

In the NPRM, the Commission inquires whether eligibility to own and broker time over FM translators in the reserved portion of the FM is limited to licensees providing an NCE service and otherwise satisfying the criteria for obtaining reserved NCE spectrum.¹³ We think the answer is unquestionably "yes." The Commission reserved channels 200-220 of the FM band exclusively for NCE use,¹⁴ and the Communications Act and the Commission's longstanding NCE eligibility criteria define an NCE station by reference to the nature of the applicant and the service it proposes to offer.

Under the Communications Act, the term "noncommercial educational broadcast station" incorporates the Commission's NCE eligibility rules in effect on November 2, 1978.¹⁵ Those rules, in turn, permit the licensing of an NCE station only to a nonprofit educational organization and upon a showing that the station will be used for the advancement of an educational program.¹⁶ Based on a plain reading of the statute and the underlying regulatory eligibility requirements, the only plausible conclusion is that only NCE entities specifically proposing to offer an NCE service may utilize spectrum reserved for NCE services.

¹³ Id. at 15897-98.

¹⁴ See In re Applications of WQED Pittsburgh & Cornerstone Television, Inc., 15 FCC Rcd 202, 211-212 (1999), vacated in part, 15 FCC Rcd 2534 (2000) ("For more than 50 years through the maintenance of the reserved allocations for noncommercial educational broadcast stations, this Commission has sought to promote the development of a "high quality type of programming" that would be different from the programming generated by the commercial pressures and demands placed on commercial stations.").

¹⁵ See 47 U.S.C. § 397(6).

¹⁶ 47 C.F.R. §§ 73.503(a), 73.621(a).

Beyond the plain language of the statute and the Commission's eligibility rules, the underlying regulatory history confirms that educational service has long been, and remains to this day, a fundamental precondition to constructing and operating an NCE station.

The initial FM educational reservations were made by the Commission early in 1938. Even at that initial stage the intention was that such a facility be made available to the applicant "for the advancement of its educational work and for the transmission of educational and entertainment programs to the general public". However, the rules then adopted also provided that a non-commercial station would be licensed "only to an organized non-profit educational agency and upon a showing that the station will be used for the advancement of the agency's educational program."¹⁷

Moreover, shortly before the November 2, 1978 effective date referenced in the statutory definition, the Commission released a Notice of Inquiry specifically addressing the eligibility requirements for NCE station licenses.¹⁸ In that inquiry, the Commission recounted that it had long licensed NCE stations "only after thorough consideration of their . . . showing that they would provide a service for the advancement of an educational program."¹⁹

Whether because of the enactment of the statutory term "noncommercial educational broadcast station" or for other reasons, the Commission never completed the inquiry.²⁰ In

¹⁷ New York University, 10 RR 2d 215, at ¶ 7 (1967).

¹⁸ Eligibility for Noncommercial Educational FM and TV Broadcast Station License, Notice of Inquiry, 43 Fed. Reg. 30842 (July 18, 1978).

¹⁹ Id. at 30842 (*quoting S. Nisenbaum*, 19 R.R. 1175, 1177 (1960)). Noting that "educational broadcasting" had evolved beyond a purely instructional service, the Commission invited comment on a broad range of alternatives to the then current eligibility criteria, including licensing NCE stations to any not-for-profit organization and without a showing of a proposed educational service -- "the most profound departure from past practice and the premises on which other agencies and the Congress have acted." See id. at 30843.

²⁰ In the Matter of Amendment of the Commission's Rules Governing the Eligibility for Noncommercial Educational FM and TV Broadcast Station Licenses, BC Docket No. 78-164, 5 FCC Rcd. 394 (1990).

eventually terminating the proceeding, however, the Commission confirmed that the standards summarized in the Notice of Inquiry continued to determine the eligibility to construct and operate an NCE station.²¹ The Commission recently confirmed the NCE eligibility criteria in the context of determining the exemption from broadcast auctions for NCE stations.²² Thus, based on this history, an applicant seeking to avail itself of spectrum specifically reserved for NCE services must propose a noncommercial educational service and otherwise qualify as an NCE station.

²¹ Id. at 394 n.1.

²² In the Matter of Reexamination of the Comparative Standard for Noncommercial Educational Applicants; Association of America's Public Television Stations' Motion for Stay of Low Power Television Auction (No. 81), Second Report and Order, 18 FCC Rcd 6691, 6695-96 (2003).

Conclusion

The Commission should proceed cautiously to avoid or minimize any adverse consequences and, in any event, it must preserve the reserved portion of the FM band for NCE use.

Respectfully Submitted,



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