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

In the Matter of:)
)
Creation of a Low) MM Docket No. 99-25
Power Radio Service)
)

COMMENTS OF EDUCATIONAL MEDIA FOUNDATION

Educational Media Foundation (“EMF”), by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission’s rules, hereby submits its comments in response to the *Second Further Notice of Proposed Rulemaking* in the captioned proceeding,¹ and in particular to its questions regarding the propriety of “altering the priorities” between the currently “co-equal” low power FM (“LPFM”) and FM translator services. *Id.* at 12095, ¶ 84. EMF, licensee of approximately 350 FM translators, as well as approximately 220 full-power stations, provides noncommercial broadcast service featuring family-friendly music programming, with news and informational content that caters to unique needs of diverse communities throughout the country. While this programming does not, for the most part, originate in a given station’s community of license, it nevertheless fills an audience demand, as witnessed by EMF’s over 4.3 million weekly listeners, approximately 800,000 of which hear its service on translator stations. If this service was not filling compelling local needs of its listeners, the audience would never have grown to these levels.

¹ *Creation of a Low Power Radio Service*, 22 FCC Rcd. 21912 (2007) (“*Second FNPRM*”).

I. SUMMARY

This is the second time in this rulemaking that the Commission has pursued this line of inquiry.² Obviously, the Commission has had a difficult time determining how to weigh the public interest balance between translators and LPFM stations. EMF submits that, in this case, the balance is actually quite clear, and is demanded by prior Commission precedent: the expectations of listeners that they will continue to hear the broadcast services they currently enjoy should not be upset without a compelling public interest justification. Here, where there are thousands of translators nationwide that could be subject to displacement were the Commission to somehow allow new LPFM stations to preempt existing translators, and where, as in the case of EMF's programming, there is a demonstrable public demand for the service provided by these translators, the public's legitimate expectations of continued service from the broadcast stations which they currently receive should not be upset. This is particularly true where the actual service benefits to be provided by new LPFM stations, and whether or not such new service would replace the preempted service, is unknown.

Taking any action which would disrupt the legitimate expectations of the listening public would be difficult to reconcile with the Commission's own observations that "translators provide valuable service" and that "translator-based delivery of broadcast programming is an important objective,"³ as the stated goal of this proceeding has been to "maximize the value of the LPFM service *without harming ... full-power FM stations or other Commission licensees.*" *Id.* at 6763 (emphases added). Indeed, in response to prior calls to grant LPFM stations "modified primary"

² See *Creation of a Low Power Radio Service*, 20 FCC Rcd. 6763, 6776-78 (2005) ("Second R&O").

³ *Id.* at 6777-78. See also *id.* at 6777 ("FM translators provide important aural services to unserved and underserved areas").

or otherwise upgraded status, the Commission specifically noted that among its “paramount goals in introducing LPFM service was that it not interfere with existing service.”⁴ Any “alteration of priorities” the Commission may be contemplating in the *Second FNPRM*, is inconsistent with these objectives.

Moreover, the Commission also has established legitimate expectations of translator operators themselves – that they could invest in their facilities subject only to well-established risks that have existed for as long as the translators have been authorized. To upset these legitimate business expectations of translator licensees by allowing preemption of existing translators and termination of the financial investment they represent, without any opportunity to relocate the translators to other locations on the broadcast dial, is virtually unprecedented in Commission processes, and should not occur at all – and certainly not without a compelling showing of the public interest benefits of the change, which simply has not been made here. Thus, as detailed below, the proposal to give LPFM applications a preference or priority over any existing, authorized translator must be rejected.

II. INTRODUCTION

From the beginning, the Commission’s intent in creating an LPFM service was to authorize a supplemental, highly localized radio service that would provide an outlet to new voices, but that would have equal priority with FM translators and boosters. While the LPFM service was designed to enhance locally focused, community-oriented radio broadcasting to very localized areas, or to underrepresented groups within these communities, *see LPFM R&O*, 15 FCC Rcd. at 2207-08, it is indisputable the service cannot – and was never intended to – replace full-power FM service, which has an established record of providing vital local news, information, and

⁴ *See Creation of Low Power Radio Service*, 15 FCC Rcd. 19208, 19220, *granting recon. in part of*, 15 FCC Rcd. 2205 (2000) (“*LPFM R&O*”).

entertainment on which communities throughout the country have come to rely. Nor was LPFM service intended to displace FM translators, the “role [of which] among aural services ... is to provide secondary service to areas in which direct reception of signals from FM broadcast stations is unsatisfactory due to distance or intervening terrain obstacles.” *Second R&O*, 20 FCC Rcd. at 6776. As the Commission recognized when it initiated LPFM, the limited service areas and reduced regulations applicable to such stations make them an inadequate substitute for existing FM service. *See LPFM R&O*, 15 FCC Rcd. at 2230-31. Unsurprisingly, in adopting LPFM, the Commission thus declared it would not “compromise the integrity of the FM spectrum” and that it would authorize LPFM stations only “where the stations will fit.” *Id.* at 2228.

EMF is the licensee of approximately 220 listener-supported, noncommercial educational radio broadcast stations and 350 FM translator stations serving communities across the country with noncommercial educational programming, including family-oriented programming featuring news, information and contemporary Christian music, as part of either the K-LOVE Radio Network or the Air-1 Radio Network.⁵ Currently, EMF has nearly \$7 million invested in its FM translator operations, including licensing, organizational, and start-up costs, along with equipment required to build out, and needed to operate, its translators. Due to this substantial investment, the quality of EMF’s programming, and the listener response to it, EMF programming is carried on approximately 340 FM translators (some third-party translators carry EMF, and EMF carries some third-party stations on certain of its translators).

As a major licensee of both full power and FM translator stations, EMF strongly opposes any change to the LPFM rules that would harm EMF and other similar FCC licensees by compromising their ability to meet the needs of underserved, niche markets with unique program-

⁵ Additionally, EMF is the licensee of, or is carried by 238 full-power FM stations.

ming. It is not in the public interest to displace an established service on which local niche listeners have come to rely to meet their specialized needs, with a service still in its infancy, and without a solid record of public service. While EMF understands the desires that some groups have to acquire and operate new stations, that desire should not be fulfilled through the disruption of existing service that hundreds of thousands of listeners currently rely upon. This is especially true as there are more and more outlets for expression open to organizations wanting to serve their communities, whether it be through the Internet, or through the reallocation of television channels to the FM band, as proposed in the Commission's recent proceeding on diversity.⁶ EMF would even be willing to support future actions that would combine FM translator and LPFM filing windows for new stations, giving LPFM priority status in the selection of new facilities, while still allowing new translator service in areas with little or no LPFM demand. But existing service, already relied on by the public, must be preserved.

If "[l]ocalism, diversity and competition remain" the Commission's "key radio broadcasting goals," *Second FNPRM*, 22 FCC Rcd. at 12095, FM translators and LPFM stations must maintain their co-equal status. This is particularly the case in that, as described below, no matter how geographically limited or localized an LPFM station's signal may be, there is no guarantee it will carry local *content*, nor can the Commission constitutionally require as much. Furthermore, "altering the priorities" of the FM translator and LPFM services, *id.*, to give the latter greater protection, can only *undermine* – not promote – fair competition between services that are equally likely to serve the needs of underserved, niche audiences.

⁶ *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rulemaking, FCC 07-217 (rel. Mar. 5, 2008).

III. THE DISPLACEMENT OF FM TRANSLATOR STATIONS BY GRANTING PRIORITY TO LPFM WOULD HARM THE PUBLIC INTEREST

Public and nonprofit entities such as EMF, National Public Radio (“NPR”), and other networks, as well as state and local public radio entities, utilize FM translators as an important means of serving diverse communities, which often cannot support a full power station, or where one cannot be operated. These services often serve niche audiences whose program interests are often ignored by commercial radio stations – and these are often the most loyal radio audiences when they are listening to a high-quality service like that provided by EMF or NPR that meets these unmet programming desires of consumers. In EMF’s case, translators form an integral and indispensable role in its provision of programming to meet the unique needs and interests of underserved segments of communities throughout the country. As noted, EMF has made substantial investments over the years in the translator service, in an effort to respond to the inadequately addressed need for and interest in its specialized non-commercial, family-friendly educational programming. And its listeners have responded not only with loyalty, but also with donations.

As a result, EMF’s programming is now heard on the more than 340 aforementioned FM translator stations throughout the United States, some of which have been operational since as far back as 1987. Listeners have shown their support for the programming by sending in donations to keep these listener-supported stations on the air. In countless comments filed in proceedings before the Commission as well as in feedback directly to EMF, listeners have attested to the fact that these translators are an invaluable part of the communities in which they operate. Based on data derived from Arbitron ratings research, EMF has determined that approximately 320,000 people per week listen on the 103 FM translators operating in the noncommercial band and receiving EMF programming directly from satellite feeds. While it is more difficult to compute the number of listeners to translators that rebroadcast the signal of a local EMF full-power affiliate as it is more difficult to determine whether a listener is hearing the translator of the full-

power stations,⁷ EMF estimates that another half million people listen to these other EMF translators each week.⁸ With calculations showing perhaps as many as 1,037,000 persons either now are, or soon could be, listening to the existing EMF translator network (with a conservative estimate being that it is reasonably likely some 800,000 persons currently do so on a weekly basis), there is a substantial, real audience that relies on service from these stations – service that could be disrupted by any change in the rules to favor LPFM operations.

Like EMF, other noncommercial broadcasters with different formats utilize translators to offer listeners in rural and other areas with unique content that often is overlooked by full-power commercial broadcasters. As the Commission has recognized in the FM and television allotment context, “[t]he public has a legitimate expectation that existing service will continue.”⁹ In that

⁷ Arbitron does not break out terrestrially fed translators separately from their feed stations (thus we can only impute the listenership of these types of translators).

⁸ According to Arbitron, in Fall 2007 (the latest data available to EMF from Arbitron), total listening audience for the entire EMF network of full-power stations and translators was 4,360,700 people. Also in Fall 2007, the total 60 dBu network population coverage for EMF was 64,534,000 people. This coverage encompassed 324 FM translator stations covering 15,379,000 people and 238 full-power stations (including affiliates) covering 49,155,000 people. Based on the ratio of 60 dBu population covered, EMF translators represented 23.8% of the total coverage. A proportional allocation of the cumulative ratings between full-power stations and translators would result in an estimate of up to 1,037,000 people listening to EMF translators each week. Thus, given that coverage on many translators is of more recent vintage and has not yet had the time to mature, the 800,000 estimated listeners represent a conservative estimate of current and near-term future EMF translator listening.

⁹ *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) (“*New Community MO&O*”). In the loss of service that would arise from city of license changes discussed in this proceeding, the loss would be replaced by a gain in service elsewhere – and usually a substantial gain or the licensee would not consider the change. Even in those cases, licensees must demonstrate that the loss areas would continue to receive substantial numbers of additional services before a station can be moved. Here, the Commission is proposing to potentially terminate the service of an FM translator for an LPFM, which may not serve the same area and, because of the power limitations inherent in the LPFM service, may well serve fewer people than the translator it displaces.

same context, the Commission also found that “[r]emoval of service is warranted only if there are sufficient public interest factors to offset the expectation of continued service.”¹⁰ In this case, as set forth below, the ability of increased numbers of new LPFM stations to initiate service cannot outweigh the detriment to the public interest that will be caused by disrupting established listening patterns and potentially depriving a very substantial number of listeners of programming on which they have come to depend. Any Commission decision to do so would be an arbitrary and capricious use of its powers.

The translator window opened in Auction No. 83, which drew thousands of applications, is yet another example of the value of translators in providing service to the public. While the number of filings has been decried by some as somehow contrary to the public interest, the outpouring of interest instead indicates the belief of many that the translator service provides an important way of serving the FM broadcast audience.¹¹ If there were no listeners, or if listeners did not value the service provided, no one would seek translator licenses nor operate the stations. The tremendous interest in the filing window demonstrates the importance of this service, which should not be overlooked. As it is, the Commission already has ordered the forced dismissal of

¹⁰ *Id.* See also *Quorum Radio Partners of Va., Inc.*, 23 FCC Rcd. 857, 859-60 (MB 2008); *Roy E. Henderson*, 22 FCC Rcd. 19170, 19173 (MB 2007) (each applying *New Community MO&O*, 5 FCC Rcd. at 7097, to deny proposals that would result in removal of service).

¹¹ Indeed, as the Commission recognized the last time it went down this path, “many NCE licensees use FM translators to distribute programming throughout the country,” so “[n]otwithstanding [] complaint[s] regarding non-local filers in the [] 2003 translator window, this is not a recent development[.]” *Second R&O*, 20 FCC Rcd. at 6768. On a related note, EMF agrees with the tentative conclusion that Prometheus’ proposal to limit priority status to 25 translator stations for each originating stations is administratively infeasible given that FM translators may change their primary stations without prior consent or advance notice, *Second FNPRM*, 22 FCC Rcd. at 12095, and that it stands the risk of depriving communities of service they have come to rely upon, if that service happens to be provided by a translator that is outside the 25 selected for priority status. This proposal also would preclude the establishment of new service, particularly in areas with either little or no demand for LPFM service, or where sufficient channels exist for multiple outlets of both LPFM and translator services.

potentially thousands of FM translator applications in the name of removing an alleged “preclusive impact” on LPFM opportunities, by applying a retroactive cap of ten proposals per applicant to the auction.¹² Considering the proposal to further restrict FM translators now, before the Commission has seen whether its decision to limit the number of FM translator applications withstands review, is grossly premature.¹³

In this regard, it bears noting that, where the Commission has displaced a service in the past (as it appears to be contemplating here with respect to FM translators), it has made a point to find alternate spectrum/means for the displaced service to continue operating in satisfaction of public expectation regarding continuation of service on which it has come to rely. For example, when the Commission relocated the television broadcast auxiliary service in the 2 GHz spectrum in order to facilitate introduction of Advanced Wireless Services, it took steps to ensure that the former’s “operations could continue to be effective” notwithstanding the displacement, and to

¹² See *Third R&O*, 22 FCC Rcd. at 21935; *Media Bureau Invites Applicants to Select FM Translator Applications for Voluntary Dismissal to Comply with Processing Cap*, DA 08-496 (MB Mar. 4, 2008) (“*Public Notice*”). EMF and other similarly situated FM translator applicants in Auction No. 83, have sought reconsideration of this limit, and a stay of the *Public Notice* that seeks to implement it. See *Petitions for Reconsideration of Action in Rulemaking Proceeding*, 73 Fed. Reg. 12733 (Mar. 10, 2008). These requests for relief rest on a number of policy and legal deficiencies in the *Third R&O*, not the least of which is a complete mismatch between limiting potential new FM translators in the predominantly rural and terrain-challenged areas they seek to serve, in order to bolster LPFM opportunities, which are most lacking in urban and other more populous areas. Compare, e.g., *Second R&O*, 20 FCC Rcd. at 6776 (role of FM translators “is to provide secondary service to areas in which direct reception of signals from FM broadcast stations is unsatisfactory due to distance or intervening terrain obstacles”), with *Third R&O*, 22 FCC Rcd. at 21932 (“spectrum for [LPFM] stations has become increasingly scarce, particularly in [] mid-sized communities and in ... urbanized areas”).

¹³ Were LPFM stations able to “bump” FM translators, even the protections that the FCC has provided for 10 translator applications become illusory, as every one of these 10 applications could be displaced by a new LPFM station.

“balance the unique interests” of the two services.¹⁴ From all outward appearances, the FCC does not appear inclined to do anything along these lines for FM translators displaced by LPFM operations, however. This is particularly problematic given the significant limitation that displaced FM translators can move only to an adjacent channel¹⁵ (as compared, for example, to TV translator and LPTV stations that, when displaced due to predicted interference to or from authorized full-power stations, may without any adjacency requirement file an application to change channels and have it considered a minor modification¹⁶). Thus, if translator service is displaced by LPFM service as proposed in the current proceeding, that existing service would likely disappear.

Moreover, in addition to depriving listeners of programming on which they rely, granting LPFM stations priority over FM translators will have a severe financial impact on long-standing, reputable nonprofit organizations such as NPR, EMF, and other public radio entities that utilize translators to provide unique, niche programming in the public interest. For entities like EMF, there are substantial costs already sunk into constructing and maintaining a translator network. The average translator, with its accompanying equipment for receipt of programming and remote

¹⁴ *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for use by the Mobile Satellite Service*, 18 FCC Rcd 23638, 23648, 23651 (2003) (modifying plan for relocation of incumbent television broadcast auxiliary service licenses in 2 GHz spectrum to facilitate introduction of Advanced Wireless Services). *See also, e.g., Improving Public Safety Communications in the 800 MHz Band*, 19 FCC Rcd 14969 (2004) (adopting rules for relocation of incumbent television broadcast auxiliary service licensees in the 2 GHz spectrum as part of rebanding of 800 MHz proposed by Nextel Communications, Inc.).

¹⁵ 47 C.F.R. § 74.1233(a)(1).

¹⁶ *Id.* § 73.3572(a)(4). EMF does not intend to suggest that merely loosening restrictions on FM translators displaced by LPFM stations (if they are elevated above the current co-equal status with FM translators) remedies displacing the former service for the latter, but rather simply underscores the lack of flexibility FM translator licensees will have if the Commission alters the current state of affairs. That said, such relaxation of limits on displaced FM translators may have merit in future contexts.

control, represents an investment of \$18,000. Moreover, substantial donor income that helps support the mission of noncommercial broadcasters is derived from translators. Listeners to noncommercial services support the operations of stations with their donations. These listeners are thus financially tied to the success and continued existence of those stations – even more so than listeners of a commercial station operator might be. EMF computes that listeners of its translators, within a few years of commencing operations, often will contribute \$60,000 per year or more per translator (depending on population covered and local market conditions).

If there were substantial disruption in the operation of existing translators, the service of noncommercial entities like EMF could be impaired by impacting its donations. The very reputations of these nonprofit corporations could be irreparably damaged when listeners lose valued programming services to which they have made donations. Goodwill that has been developed over years of service would be disrupted by the displacement of these services. Perhaps most importantly, the listeners themselves, who have financially supported these services, will be deprived of the services for which, in their minds, they have “paid.” Unlike commercial broadcasting, where consumers have not contributed directly to the financing of their favorite station’s operations (at most the contribution is indirect – through patronizing advertising sponsors, from which the listener receives some value for the products bought), in noncommercial broadcasting the financial contribution is direct. Effectively, the listeners who contribute to support the noncommercial service will feel like they have paid for that service.¹⁷ Thus, these proposals upset not only the legitimate expectations and financial commitments of the licensees

¹⁷ For this, and for obvious equitable, public-interest and sunk-investment-based reasons, if the Commission chooses to give LPFM stations priority over FM translator stations or over some subset of FM translator stations, it must grandfather *all* existing translators, so the public will not lose a valuable service on which it has come to depend, and the operations of nonprofit entities like EMF that have invested significant resources in a translator network will not be impaired.

of FM translators, but also the expectations and financial commitments of their listeners. The Commission should not arbitrarily disrupt this existing service which listeners supported through donations of their hard-earned income.

IV. LPFM'S SPECULATIVE BENEFITS DO NOT JUSTIFY THE CONCRETE HARM THAT DISPLACEMENT OF FM TRANSLATORS WILL CAUSE

The Commission has suggested it may justify granting LPFM stations priority over FM translators by citing that the former may originate local programming.¹⁸ As an initial matter, EMF notes that while LPFM stations are permitted to originate local programming, they are not required to do so, nor can the Commission constitutionally require that LPFM stations carry any particular content, whether “local” in substance, or in some other arguably underserved niche or format. Indeed, the FCC exited the business of regulating and reviewing broadcast format selections and/or changes decades ago, *see, e.g., FCC v. WNCN Listener Guild*, 450 U.S. 582 (1981), and to this day regularly reminds members of the public (and other interested parties) that its role “in overseeing program content is limited” by the “First Amendment ... and Section 326 of the Act,” which “prohibit ... interfering with broadcasters’ free speech rights” that afford the “licensee [] broad discretion ... to choose ... the programming it believes serves the needs and interests ... of its audience.” *Infinity Media Corp.*, 23 FCC Rcd. 1820, 1821 (MB 2008).

LPFM stations can and do acquire programming from national networks, and there is absolutely no basis on which the Commission can conclude these stations will necessarily serve the public with programming that better serves the public interest than that provided by translators. Moreover, many LPFM stations may be shoestring operations, unable to provide the type of content provided by organizations such as EMF, NPR, and public state and regional networks

¹⁸ The Commission expressed the same view in its recently issued broadcast localism report. *Broadcast Localism*, 23 FCC Rcd. 1324, 1379, 1381-83 (2008).

such as Minnesota Public Radio (“MPR”). Given the constitutional and statutory limits on FCC authority, the Commission may not take regulatory action based on a preference for either type of format, and LPFM licensees must be as free as any other broadcaster to carry programming that speaks to local, public concerns – or to not do so in favor of, for example, all-music, or other formats. *Cf. FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978) (the “‘public interest’ standard necessarily invites reference to First Amendment principles”) (quoting *CBS, Inc. v. DNC*, 412 U.S. 94, 122 (1973)).

The Commission’s apparent belief that LPFM stations can provide sources of information more important to a community than that provided by translators – or that the FCC can mandate that they do so – is unfounded. It is EMF’s experience, based on routine and systematized interactions with its listeners, that they value the unique programming that EMF delivers, even if such programming does not address what is traditionally considered “local” matters.¹⁹ For example, EMF’s programming may not address the specifics of local traffic conditions or meetings of local school boards, but it addresses family and spiritual issues that most of its listeners find just as important to their lives as so-called “local” issues. EMF is certain that listeners of NPR or MPR programming delivered by noncommercial translators feel the same way. In most cases, there are other sources of information regarding local traffic and weather, while there may not be other sources of the programming produced by EMF, NPR, MPR and others.

¹⁹ EMF maintains a phone bank where its employees call each of its donors on a regular basis to see if EMF can help with any spiritual needs through prayer requests or other services, and to solicit information about the listener’s views of the programming of EMF stations. There are probably few “local” stations that provide such a one-to-one contact with their listeners as does EMF. EMF is currently in the process of expanding its news department into a 24/7 operation, with the capability of going on the air live on any station at any time (via satellite technology), to allow for immediate coverage of local emergencies. EMF contact information will be provided to local officials in each of our cities of license. EMF’s news department also will be working with its local regional managers and volunteers in order to facilitate timely information as necessary.

Even where there is not another source of local traffic or weather information, how many LPFM stations will have the resources and ability to provide it? The FCC should not substitute an unproven source of programming for one with an established listener base that has proven its programming is valuable, without far more evidence that the replacement programming will be more valuable to local listeners than the mere speculation offered in this proceeding. *But see also infra* at 16-17 (Commission may not favor LPFM based on content of its actual, or anticipated, programming). Without empirical evidence LPFM stations provide more valued service than translators, any decision to prefer the LPFM service over FM translators would be arbitrary.

Moreover, even requiring LPFM stations to originate local programming in order to be granted primary status (making the rather implausible assumption such a step could be withstand constitutional or APA review²⁰) does not resolve the issue. Current FCC rules define “local origination” for LPFM stations as “the production of programming, by the licensee, within ten miles of the coordinates of the proposed transmitting antenna.” 47 C.F.R. § 73.872(b)(3). Thus, LPFM stations are not required to provide programming that addresses issues of special concern to the local community or otherwise serves the specific needs and interests of the community. Rather, so long as the programming is “produced” within certain geographic proximity to LPFM stations, they are permitted to be no more than over-the-air jukeboxes, or sources of other non-informational – and decidedly non-local – content. This is a far cry from the kinds of informational content offered by translators operated by EMF and other noncommercial broadcasters.

²⁰ *See supra* at 12-13 & *infra* at 15-18 (discussing constitutional limits on FCC authority with respect to broadcast content). *Compare also supra* at 12 (exemplar of long-standing and repeated admonition that FCC does not dictate content choices to broadcasters), *with Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 456-57 (2d Cir. 2007), and cases cited therein (all holding FCC must provide reasoned analysis for changing position or departing from precedent).

It accordingly is not clear how the “local origination” requirement enhances localism in any meaningful way, nor how the Commission could ensure that it does. Moreover, regardless of the content of such programming, it is difficult to see how the public interest is served. A rule that prefers LPFM stations over FM translators will simply result in displacement of an established service that serves the specialized needs of niche listeners with an unproven new service, which outcome would not serve the public interest.²¹

V. ALTERING THE PRIORITIES OF THE FM TRANSLATOR AND LPFM SERVICES FOR THE REASONS THE COMMISSION APPEARS TO CONTEMPLATE RAISES SERIOUS FIRST AMENDMENT CONCERNS

Any “altered priority” of status between the FM translator and LPFM services that rests on the identity of the licensees or the content of their broadcasts would violate a variety of bedrock First Amendment principles. As the Supreme Court summarized in *Rosenberger v. Rectors & Visitors of the Univ. of Va.*:

It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). Other principles follow from this precept. In the realm of private speech or expression, government regulation may not favor one speaker over another. *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). Discrimination

²¹ Ironically, emphasizing local origination as an advantage LPFM stations allegedly hold over FM translators underscores a disparity of the Commission’s own creation, in that while it has liberalized its rules to permit noncommercial FM translators to operate on a non-fill-in basis, and to permit noncommercial FM translators operating in the reserved band to be fed by satellite from commonly-owned primary stations, 47 C.F.R. § 74.1231(b), it does not permit the stations to broadcast local content. Thus, one way the Commission could truly enhance localism without harming the public would be to permit noncommercial FM translators to air public service and other local announcements of particular interest to the communities in which the stations are located. Currently, translators are forbidden from originating programming, except emergency warnings of imminent danger and limited announcements seeking or acknowledging financial support. *Id.* §74.1231(g). This rule should be relaxed to permit limited origination by noncommercial FM translators of local public service announcements or local news reports. Such a change would be consistent with current rules described above while not unduly expanding the existing role of these stations, and could provide immediate benefits to the public without disrupting service to listeners who are already rely on it, unlike altering translator/LPFM priorities.

against speech because of its message is presumed to be unconstitutional.
See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641-643 (1994).

515 U.S. 819, 828 (1995). In the present context, modifying the “co-equal” status of FM translators and LPFM stations to afford a regulatory preference to the latter, based on restrictions the FCC places on who may obtain an LPFM license, or the type of programming it anticipates (or will require) from LPFM stations, would not withstand constitutional review.

The Court’s decision in *Turner*, cited in *Rosenberger*, illustrates well the constitutional pitfalls of proceeding in such a manner. In its first *Turner* decision, while the Court was divided on several issues, the one point on which a majority of Justices agreed was that any regulatory regime (in *Turner*, must-carry) that is justified by the value of programming provided by the regulated speakers would be presumptively invalid.²² As Justice Breyer stated in later concurring to make up a slim 5-4 margin by which must-carry survived constitutional review, “governmental intervention and control through [speech-affecting] regulation can prove appropriate” but only “when not content based.” *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 228 (1997) (“*Turner II*”) (Breyer, J., concurring in part) (internal quotation, citations omitted). The Court stressed that if the regulatory impact of must-carry on cable operators, and the advantage it gave to broadcasters, were content-based, the rules could not survive constitutional scrutiny.²³

Here, to the extent that granting prospective LPFM licensees a regulatory advantage, by altering the status of that service vis-à-vis FM translator licensees and applicants, would serve as “a subtle means of exercising a content preference,” *Turner I*, 512 U.S. at 645, it would stand a

²² *Turner Broad. Sys. supra*, at 644-646 (“*Turner I*”). *See also id.* at 652 (where “the FCC exercise[s] more intrusive control over the content of broadcast programming,” a claim that the rules are content-based and thus unconstitutional have “greater weight”); *id.* at 678-681 (O’Connor, J., concurring in part and dissenting in part).

²³ *See id.* at 225 (Stevens, J. concurring) (“If this [must carry] statute regulated the content of speech ... our task would be quite different.”).

strong likelihood of being held unconstitutional. In this regard, if the FCC establishes an LPFM preference, based on expectations about what types of programming LPFM stations will offer – whether characterized as “local,” “diverse,” or “responsive to local community needs and interests,” *see, e.g., Third R&O*, 22 FCC Rcd. at 21922 – there is little doubt it would be unlawful “regulation of speech” based on “agreement ... with [its] message.” *Turner I*, 512 U.S. at 642. Such “speaker-partial laws ... demand strict scrutiny when they reflect the Government’s preference for the substance of what the favored speakers have to say,” *id.* at 658, and as to such regulations, “it is the rare case in which ... a law survives strict scrutiny.” *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality opinion). *See also Bechtel v. FCC*, 10 F.3d 875, 886 (D.C. Cir. 1993) (“[C]ommon sense, not to mention the First Amendment, counsel against the [FCC] trying to decide what America should see and hear over the airwaves. Further, the ability to pick persons and firms who will be ‘successful’ at delivering any kind of services is a rare one, however success might be defined; that is why it commands generous rewards in the market.”)

Moreover, the justifications the Commission appears to have taken under consideration for potentially altering the priorities between the FM translator and LPFM services are not likely to be served by any such re-ordering. As previously noted, the benefits the Commission hopes to realize through its actions on behalf of the LPFM service in this proceeding are entirely speculative. *See supra* Section IV. Further, as also noted, impairing the FM translator service to give a competitive advantage to LPFM is unlikely to do so given the mismatch between the purposes and geographic areas for which the two types of stations are deployed. *See supra* note 12. If, as predicted, FCC displacement of FM translator services and formats that listeners have come to rely upon does not ultimately further any regulatory goal, that incursion on speech opportunities for FM translator licenses and programmers like EMF would violate the First Amendment. *See, e.g., Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 183 (1999) (where the

burden on speech is not balanced by furthering statutory objectives, even a small restriction violates the First Amendment); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001) (“there is no *de minimis* exception for a speech restriction that lacks sufficient ... justification”).

VI. CONCLUSION

For the foregoing reasons, EMF urges the Commission to reject any proposal to give LPFM stations a preference over FM translator stations or full-power FM stations.

Respectfully submitted,

EDUCATIONAL MEDIA FOUNDATION

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