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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Creation of A Low Power Radio Service	)	MM Docket No. 99-25
	)	
Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations	)	MB Docket No. 07-172
	)	RM-11338

THIRD FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: July 12, 2011 **Released: July 12, 2011**

Comment Date: [30 days after date of publication in the Federal Register]
Reply Comment Date: [45 days after date of publication in the Federal Register]

By the Commission:

I. INTRODUCTION

1. In this *Third Further Notice of Proposed Rule Making* ("*Third Further Notice*"), we seek comment on the impact of the enactment of the Local Community Radio Act of 2010 ("LCRA")[1] on the procedures previously adopted to process the approximately 6,500 applications which remain pending from the 2003 FM translator window. The goals of this proceeding are to develop FM translator application processing policies that faithfully implement LCRA directives, to resume promptly the licensing of the remaining translator applications consistent with those directives, and to chart a path forward to the licensing of new LPFM stations in accordance with the framework established by the LCRA. For the reasons set forth below, the Commission tentatively concludes that the previously adopted translator licensing procedures, which would limit each applicant to ten pending applications, would be inconsistent with the LCRA's goals. As detailed below, we propose to modify those procedures and dismiss pending translator applications only where necessary to preserve a certain number of low power FM ("LPFM") licensing opportunities in identified spectrum limited markets. In order to expedite the resumption of translator application processing, we defer consideration of other LCRA implementation issues.[2] We also seek comment on whether, based on the enactment of the LCRA, the Commission should modify its rules permitting only those translator stations authorized on or prior to May 1, 2009, to rebroadcast the signals of AM stations. Finally, we seek comment on whether to open an LPFM-only window no later than summer 2012.

[1] Pub. L. No. 111-371, 124 Stat. 4072 (2011).

[2] The LCRA directs the Commission to, *inter alia*, eliminate third-adjacent channel LPFM protection requirements, establish LPFM interference remediation procedures and establish LPFM protection requirements for translator input signals on third-adjacent channels. The immediate resolution of those issues is unnecessary prior to resuming the processing of translator applications filed in the 2003 window.

II. BACKGROUND

2. Under the Commission's rules, LPFM and FM translator applications may be filed only during "windows" announced by the Commission.[3] Translator applications have priority over later-filed LPFM applications.[4] The last LPFM filing window was in 2001. The translator applications at issue here have been pending since 2003, when they were filed in response to an FM non-reserved band translator-only window, Auction No. 83. This window generated over 13,000 applications.[5] In 2005, the Commission froze processing of the applications due to concerns that they would limit LPFM licensing opportunities.[6] In doing so, the Commission noted the need to address a basic question set forth in a 2004 Notice of Inquiry in the broadcast localism proceeding: "Recognizing that both LPFM stations and translators provide valuable service, what licensing rule changes should the Commission adopt to resolve competing demands by stations in these two services for the same limited spectrum?"[7]

3. On December 11, 2007, the Commission released a *Third Report and Order and Second Further Notice of Proposed Rulemaking* ("*Third Report and Order*" or "*Second Further Notice*")[8] in MM Docket No. 99-25. The Commission considered whether Auction No. 83 filing activity had adversely impacted its goal to provide to both LPFM and translator applicants reasonable access to limited FM spectrum in a manner which promotes the "fair, efficient, and equitable distribution of radio service,"[9] and concluded that processing all of the then-pending 7,000 translator applications would frustrate the development of the LPFM service. To address this concern, the *Third Report and Order* established a going-forward limit of ten pending short-form FM translator applications per applicant from Auction No. 83, and directed the Media Bureau ("Bureau") to resume processing the applications of those applicants in compliance with this numerical cap.[10] The Commission found that this limit would not have an adverse impact on more than 80 percent of those applicants and would appropriately balance the equitable interests of the remaining 20 percent against important LPFM licensing goals and policies.[11]

4. The Commission cited several factors in support of the adoption of these measures including: (1) the sheer volume of Auction No. 83 filings, when compared to historic translator and LPFM licensing levels; (2) evidence of precluded or diminished LPFM filing opportunities in many communities; (3) licensing asymmetries between these two services that make it unlikely that LPFM

[3] *See* 47 CFR §§ 73.870, 74.1233. Any application filed in such a window must not conflict with any existing authorization or any application that is pending when the window opens.

[4] *See id.* at § 73.807(d).

[5] *Creation of a Low Power Radio Service*, 20 FCC Rcd 6763, 6778 ¶ 33 (2005).

[6] *Id.*

[7] *Id.*, citing *Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 12425, 12442 (2004).

[8] *See Creation of a Low Power Radio Service,* Third Report and Order and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 21912 (2007).

[9] 47 U.S.C. § 307(b). *See Third Report and Order*, 22 FCC Rcd at 21932-35.

[10] *See Media Bureau Invites Applicants to Select FM Translator Applications for Voluntary Dismissal to Comply with Processing Cap*, Public Notice, 23 FCC Rcd 3707 (MB 2008). The Media Bureau subsequently suspended the dismissal process to provide the Commission an opportunity to consider petitions for reconsideration of the ten-application cap. *See Media Bureau Suspends Dismissal of FM Translator Applications Related to Processing Cap*, Public Notice, 23 FCC Rcd 5629 (MB 2008).

[11] We have since revisited the data which formed the basis of these percentages and have determined that the number of applicants not affected/affected by the 10-application cap is actually closer to 88 percent and 12 percent, respectively.

filings will materially affect future translator licensing opportunities, whereas translator filings could materially impact the far more limited opportunities for LPFM licenses;[12] and (4) the fact that the next LPFM window may provide the last meaningful opportunity to expand the LPFM service in spectrum-congested areas.[13] The Commission also noted that the two most active filers, commonly-owned Radio Assist Ministries and Edgewater Broadcasting, Inc. (collectively, "RAM"), filed 4,219 proposals, constituting almost one-third of all Auction No. 83 filings, and have since sought to assign more than 50 percent of the 1,046 construction permits they were awarded through the window. The Commission voiced concern that such heavily skewed filing activity compromised the integrity of our FM translator licensing procedures.[14] In the companion *Second Further Notice*, the Commission also invited comment "on the 'co-equal status' between LPFM stations and FM translator stations" and whether altering the relative priorities of the two services would advance its localism, diversity and competition goals.[15]

5. On January 4, 2011, President Obama signed the LCRA into law. Among other things, the LCRA expands LPFM licensing opportunities by repealing the requirement that LPFM stations operate a minimum distance from nearby stations operating on "third-adjacent" channels.[16] Section 5 of the LCRA sets forth criteria that the Commission must take into account when licensing FM translator, FM booster and LPFM stations:

> SEC. 5. ENSURING AVAILABILITY OF SPECTRUM FOR LOW-POWER FM STATIONS
> The Federal Communications Commission, when licensing new FM translator stations, FM booster stations, and low-power FM stations, shall ensure that –

[12] *Compare* 47 C.F.R. §§ 74.1204(d) and 73.807. *See also Third Report and Order*, 22 FCC Rcd at 21934 (translator applicants can often protect second and/or third adjacent channel authorizations and pending applications using a flexible contour-based protection methodology while LPFM applicants face substantially greater difficulty in meeting strict minimum distance separations to authorizations and pending applications).

[13] *Third Report and Order*, 22 FCC Rcd at 21933-34.

[14] *See id.* Several parties filed petitions for reconsideration opposing the cap. *See* Petition for Reconsideration of CSN International, filed Feb. 4, 2008; Petition of National Religious Broadcasters for Reconsideration Regarding Order Imposing Cap on Translator Applications, filed Feb. 15, 2008; Petition for Reconsideration of Positive Alternative Radio, Inc., filed Feb. 19, 2008; Petition for Reconsideration of Educational Media Foundation *et al.*, filed Feb. 19, 2008. In addition, on July 8, 2010, and September 22, 2010, respectively, Prometheus Radio Project and Educational Media Foundation submitted original and revised Memorandums of Agreement which proposed "a resolution of issues raised as a result of the 2003 translator window and addresses issues raised regarding LPFM/FM Translator priorities." On October 7, 2010, twenty-one commercial broadcasters with pending Auction No. 83 translator applications submitted a different application processing proposal. These submissions remain pending.

[15] *Second Further Notice*, 22 FCC Rcd at 21946.

[16] *See* LCRA, Sec. 3(a) ("The Federal Communications Commission shall modify its rules to eliminate third-adjacent minimum distance separation requirements between—(1) low-power FM stations; and (2) full-service FM stations, FM translator stations, and FM booster stations."). Because broadcast station signals are subject to interference from other signals on the same or nearby frequencies within the same geographic area, the Commission's commercial FM and LPFM rules impose spacing requirements to protect prior filed applications and authorized stations that operate on co-, first-, second-, or third-adjacent channels. *See* 47 C.F.R. §§ 73.207(b) and 83.807.

(1) licenses are available to FM translator stations, FM booster stations,[17] and low-power FM stations;
(2) such decisions are made based on the needs of the local community; and
(3) FM translator stations, FM booster stations, and low-power FM stations remain equal in status and secondary to existing and modified FM stations.

III. DISCUSSION

6. Section 5 of the LCRA establishes a framework for future FM translator and LPFM licensing activities but does not expressly set forth application processing policies and procedures. We analyze below Section 5 as it applies to the spectrum availability and licensing goals for these services, and propose modified licensing procedures for the pending applications for new FM translators. Our goals are to interpret the Section 5 licensing standards, to determine whether the existing ten-application cap is consistent with those standards, and to revise our translator licensing procedures as necessary to faithfully implement these standards. After addressing these matters in Sections III.A and B, we turn to issues related to trafficking in FM translator authorizations and FM translator rebroadcasting of AM signals in Sections III.C and D.

A. Issues Relating to Section 5 of the LCRA

(1) Section 5(1) – Ensuring that licenses are available

7. In its broadest terms, Section 5(1) is clear: it mandates that the Commission adopt licensing procedures that ensure some minimum number of licensing opportunities for each service throughout the nation. Read together with Section 5(2), we also interpret Section 5(1) to require the Commission to provide, to the extent possible, licensing opportunities for both services in as many local communities as possible. Prior to the enactment of the LCRA, several commenters raised concerns directly related to this Section 5(1) mandate. They argued that the nationwide cap, which does not operate based on spectrum availability in specific areas, would not ensure future LPFM opportunities in certain larger spectrum-limited markets. These commenters contended that translator applicants would attempt to retain their most valuable applications which propose service to densely populated areas. Due to the very large number of pending applications in these markets, they predict that a cap-based dismissal process would result in the dismissal of some – but not all – applications proposing facilities on channels and at locations otherwise available for LPFM licensing. Thus, they claim, the anticipated dismissals would not, in fact, "free up" spectrum for new LPFM stations at or near the locations specified in the

[17] An FM booster station is limited to same-channel transmissions of its primary station. A booster may be owned only by the primary station licensee and may only provide service within the protected contour of the primary station. *See* 47 C.F.R. §§ 74.1201(f) and 74.1231(i). In these circumstances, the required protection of the primary station provides significant and continuing protection to a licensed or *future* booster station. That is, "competing" uses for the spectrum, *e.g.*, by an LPFM station, are not possible. Moreover, a licensee may file a new booster station application at any time, *i.e.*, outside windows established for the filing of translator applications. Thus, unlike the LPFM and translator services, whose competing demands for spectrum we must consider under the Section 5 directives, FM booster station licensing has no impact on the licensing of LPFM and FM translator stations. Accordingly, we do not address FM booster station licensing in this proceeding.

dismissed translator applications because "blocking" translator applications would remain.[18] The Media Bureau has carefully reviewed the Common Frequency study. It has found that the methodology is reasonable. Using similar assumptions, the Bureau has undertaken limited analyses of a number of other large markets. It also found that "blocking" translator applications would likely remain following the completion of the cap dismissal process due to the very high number of pending applications and/or discrete applicants in these markets. These findings raise significant concerns about whether the ten-application cap would be a certain and effective processing policy for preserving LPFM licensing opportunities in many larger markets. We seek comment on this issue.

8. Following the enactment of the LCRA, the Bureau undertook a nationwide LPFM spectrum availability analysis.[19] The Bureau studied all top 150 radio markets, as defined by Arbitron, and smaller markets where more than four translator applications are pending.[20] The results of that analysis are presented in Appendix A. The total number of identified channels ("LPFM Channels") currently available for LPFM use is listed in the "Channel" column.[21]

9. The Bureau analysis establishes that no or limited useful spectrum for future LPFM stations is likely to remain in numerous specific radio markets unless the translator dismissal procedures reliably result in the dismissal of *all* "blocking" translator applications.[22] For example, no channels would be available for LPFM licensing in 13 of the top 30 markets and only one or two channels would be available in six others if "blocking" translator applications remain. Based on the record developed in the proceeding, we tentatively conclude that the ten-application cap is inconsistent with Section 5(1) because

[18] *E.g.,* Common Frequency *Ex Parte* Presentation (filed Nov. 12, 2010) (finding little or no spectrum for LPFM would remain in the New York, Los Angeles, Chicago, San Francisco, Houston, Seattle or Portland markets following the implementation of the ten-application cap).

[19] The volume and distribution of pending translator applications establish that abundant licensing opportunities remain for this service in virtually all communities. Accordingly, we believe that a comparable translator spectrum availability analysis is unnecessary. For example, 3274 translator applications remain pending in the top 150 radio markets, as defined by Arbitron. These applications propose service to 143 of these 150 markets (and 99 of the top 100 markets). Although the technical acceptability of these applications has not been determined, those standards are both limited and flexible. A key factor in this regard is the ability of translator applicants to meet second- and third-adjacent channel protection requirements with case-by-case showings. *See* 74 C.F.R. § 74.1204(d); *Living Way Ministries, Inc.,* Memorandum Opinion and Order, 17 FCC Rcd 17054, 17056 (2002), *recon. denied,* 23 FCC Rcd 15070 (2008).

[20] In order to assess LPFM spectrum availability, the Bureau centered a thirty-minute latitude by thirty-minute longitude grid over the center-city coordinates of each studied market. Each grid consists of 931 points – 31 points running east/west by 31 points running north/south. Grid points are located at one-minute intervals of latitude and longitude. The Bureau analyzed each of the 100 FM channels (88.1 mHz – 107.9 mHz) at each grid point to determine whether any channels remain available for future LPFM stations at that location. Only channels that fully satisfy co-, first- and second adjacent channel LPFM spacing requirements to all authorizations and applications, including pending translator applications, are treated as available. The area encompassed by the grid is approximately 35 miles (north/south) by 26 miles (east/west). The grid is not intended to approximate radio market boundaries. Rather, the methodology is designed to identify "core" market locations that could serve significant populations. Coordinates located over major bodies of water were excluded. No attempt was made to otherwise ascertain site viability.

[21] The Bureau prepared a similar, although less ambitious, LPFM spectrum availability analysis in connection with the initial Notice of Proposed Rulemaking in this docket. The staff studied sixty markets, equally divided into three population tiers. The analysis used 30-minute by 30-minute grids for the two larger population tiers, 20-minute by 20-minute grids for the smallest community tier. *See Notice of Proposed Rulemaking,* 14 FCC Rcd at Appendix D.

[22] *See* Appendix A.

it would not "ensure" that licenses will be available in spectrum-congested markets for future LPFM licensing. Moreover, the Bureau has determined, using the same spectrum availability methodology, that LPFM licensing opportunities would be increased in certain spectrum-limited markets if LPFM applicants were not required to protect pending translator applications. For example, in Phoenix, the number of available channels available for LPFM licensing would increase from three to five. In Houston the number of available channels would increase from one to two.[23] The Bureau's analysis also establishes that market size, alone, is a poor proxy for LPFM spectrum availability. For example, there appears to be ample spectrum for new LPFM stations in Sacramento (Market #27) and none in Stamford-Norwalk (Market #147). In particular, the proximity of smaller markets to larger ones in the nation's most populous areas appears to impact spectrum availability significantly.

10. We recognize certain limitations in the data used by the Bureau in its analysis and note, in particular, a number of unknowns. These include site suitability and availability, population levels near studied locations, and demand for LPFM licenses at these locations. Future full service station licensing and settlement activity among the remaining translator applicants also could impact spectrum availability. Given these limitations, the "Channel" and "Total Stations" availability determinations likely overstate, and in some cases may substantially overstate, the number of potential *bona fide* licenses that will be available to future LPFM applicants in each market. Nevertheless, we believe the results shown in Appendix A provide a useful measure of LPFM spectrum availability. We seek comment on the Bureau study, the validity of its methodology and its relevance in informing our translator dismissal policy. We also seek comment on other measures of LPFM spectrum availability and welcome the submission of alternate spectrum availability assessments, both nationally and in particular markets.

11. Given our tentative conclusion that the ten-application cap processing policy is inconsistent with the statutory mandate to ensure some minimum number of LPFM licensing opportunities in as many local communities as possible, we must now consider how best to process the remaining translator applications in a manner that is consistent with the LCRA. The Commission could apply several different standards to establish compliance with an "available" licenses threshold for each service consistent with Section 5(1). Specifically, we seek comment on whether we should take into account existing translator and LPFM licenses in making a "licenses are available" finding. In this regard, we note that the word "new" appears in the first clause of Section 5 but not in subparagraph 1, suggesting that we should consider the availability of both new and existing stations. Alternatively, Section 5(1) could be interpreted merely as a going-forward standard, limited to ensuring a future balance between *new* translator and *new* LPFM licenses. Under this interpretation, the presence of a licensed translator or LPFM station would not enter into a licensing decision under Section 5(1). We seek comment on these and other possible interpretations of Section 5(1) and their impact on our treatment of the pending translator applications.

12. The issue whether to take existing licenses into account may be particularly significant in light of the present disparity between the two services. Currently, 1921 translators are licensed at locations within the top 200 Arbitron-rated markets. In contrast, 290 LPFM stations operate in the top 200 markets. The Commission has licensed approximately 2,700 translator stations from the 2003 window and approximately 860 LPFM stations from the 2000-01 windows. Thus, taking into account existing translators and LPFM stations, or even just those licensed for the first time during the past decade, would militate in favor of the dismissal of translator applications, at least in markets where there is little or no remaining spectrum for future LPFM stations or where substantially fewer licensing opportunities remain. Does an interpretation that could have that effect conflict with the Section 5(3)

[23] We note that this analysis could change significantly depending on the extent to which waivers are made available for LPFM proposals that do not meet second-adjacent channel spacing requirements. We are not prejudging that issue here.

requirement that translator and LPFM stations remain "equal in status"?[24] We seek comment on these issues.

13. Finally, it appears that it will be significantly easier to ensure that licenses will be available for future translator stations than for LPFM stations. As previously noted,[25] licensing asymmetries between the translator and LPFM services make it unlikely that LPFM licensing will preclude translator licensing opportunities, even in spectrum-limited markets. The translator protection rule, Section 74.1204,[26] which is substantially more flexible than the minimum spacing requirements governing the LPFM service, facilitates the filing of technically acceptable applications in a window. It also facilitates the resolution of technical conflicts among competing applications, thereby permitting numerous grants from individual mutually exclusive groups under the translator auction settlement procedures. We tentatively conclude that these considerations establish that the Commission's primary focus in effectuating Section 5(1) must be to ensure translator licensing procedures do not foreclose or unduly limit future LPFM licensing. We seek comment on this conclusion.

(2) Section 5(2) – Assessing the "needs of the local community"

14. The Section 5(2) directive to base translator and LPFM licensing decisions on the "needs of the local community" could be interpreted to concern solely the needs of communities for additional LPFM service on the theory that translators cannot be expected to provide meaningful local service, at least in larger markets.[27] We seek comment on whether, based on a consideration of Section 5 in its entirety, the obligation to make licensing decisions based on the "needs of the local community" reflects a Congressional finding that both translators and LPFM stations can be expected to serve community needs.[28] We note that the Commission similarly concluded in 2007 that each of these services can provide important programming to their local communities.[29]

15. We also seek comment on whether and how to compare the two services in assessing local community needs. Significant differences exist in translator and LPFM eligibility, licensing and service rules, differences that can dramatically affect the ability of these stations to serve the needs of their communities. Translators may not, except in certain narrow circumstances, originate programming. A translator is not required to place a certain strength signal over its community of license or comply with minimum operating schedule requirements. A translator licensee is not required to broadcast programs that provide significant treatment of community issues or maintain issues/program lists. Licensing rules for new translator stations neither limit eligibility to nor favor local applicants.

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[24] *See Letter from The Honorable Greg Walden, Chairman, Subcommittee on Communications and Technology, U.S. House of Representatives and The Honorable Lee Terry, Vice Chairman, subcommittee on Communications and Technology, U.S. House of Representatives, to The Honorable Julius Genachowski, Chairman, Federal Communications Commission* (Mar. 14, 2011) ("*Walden/Terry Ex Parte*").

[25] *See supra*, ¶ 4 and n.12.

[26] 47 C.F.R. § 74.1204.

[27] *See Amendment of the Commission's Rules Concerning FM Translator Stations*, Report and Order, 5 FCC Rcd 7212, 7213 (1990) ("the sole purpose of FM translators is to provide service to areas where direct reception of radio service is unsatisfactory due to distance or intervening terrain obstructions").

[28] *See* Section III.D., below, regarding the licensing of translator stations that may retransmit the signals of AM stations on a "fill in" basis.

[29] *Third Report and Order,* 22 FCC Rcd at 21932; *see also* ¶ 2 *supra*.

16. The Commission has traditionally assessed the comparative "needs of a community" for radio service as part of its obligation to "provide a fair, efficient, and equitable distribution of radio service . . . ."[30] For example, the Commission established last year a Tribal Priority to advance Section 307(b) goals "by enabling Indian Tribal governments to provide radio service tailored to the *needs and interests of their local communities* . . . ."[31] Under long-standing and well established case law, translators are accorded *no weight* in assessing local service levels in FM allotment proceedings.[32] The Commission, in the analogous context of low-power television and television translator licensing, has stated that the application of Section 307(b) principles would be "inappropriate" because such cases would not "present a meaningful Section 307(b) issue."[33]

17. The main rationales for the exclusion of translators from Section 307(b) assessments are their status as secondary stations and, as a related matter, their potential preemption by full-service stations.[34] LPFM stations also face potential displacement from full service stations. In sharp contrast to the translator service, however, the LPFM service was specifically created to fill a perceived gap in the way that full-power stations meet community needs – "to foster a program service responsive to the needs and interests of small community groups, particularly specialized community needs that have not been well served by commercial broadcast stations."[35] Thus, under the Commission's rules, LPFM stations may originate programming; those that pledge to do so receive a licensing preference. LPFM stations must be locally owned. No party may hold an attributable interest in an LPFM station and another broadcast station. This restriction ensures that each licensed LPFM station *necessarily* expands ownership diversity in its community of license. The LPFM licensing rules promote share-time settlements between or among competing local applicants, further encouraging ownership diversity where spectrum is limited. For these reasons, the Commission has concluded that LPFM eligibility, selection and service rules "*will ensure* that LPFM licensees will meet the needs and interests of their communities."[36]

18. We seek comment on whether the Commission should take cognizance of the differing eligibility, licensing, and service rules for the translator and LPFM services in assessing the "needs of a community" for additional radio service. If so, how heavily should this directive weigh in favor of future LPFM licensing? What specific translator application procedures should the Commission adopt to give effect to Section 5(2)? We also seek comment on alternate interpretations of Section 5(2) and their impact on licensing procedures for the pending translator applications.

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[30] 47 C.F.R. § 307(b); *e.g., Romar Communications, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 23128 (2004).

[31] *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, First Report and Order and Further Notice of Proposed Rule Making, 25 FCC Rcd 1583, 1588 (2010) (emphasis added).

[32] *E.g., Banks, Redmond, Sunriver and Corvallis, Oregon*, Report and Order, 13 FCC Rcd 6596 (MMB 1998) (FM translators not considered in determining services available to a community); *Chillicothe, Dublin, Hillsboro, and Marion, OH*, Report and Order, 20 FCC Rcd 6305 (MB 2005) (FM translators not considered local service).

[33] *Inquiry Into the Future of Low Power Television Broadcasting and Television Translators in the National Telecommunications System*, Report and Order, BC Docket No. 78-253, 47 Fed. Reg. 21468 (1982 (¶¶ 62-63).

[34] *E.g., id.* at ¶ 62.

[35] First Report and Order, 15 FCC Rcd at 2213.

[36] *Id.* at 2270 (emphasis added); *see also* H.R. Rep. 111-160, 111th Cong., 1st Sess. (2009) at 2 ("Through the creation of LPFM, the [FCC] sought to 'create opportunities for new voices on the airwaves and to allow local groups, including schools, churches, and other community-based organizations to provide programming responsive to local community needs and interests . . .'").

(3) Section 5(3) – "Equal in status"

19. Section 5(3) requires that translator and LPFM stations "remain equal in status and secondary to existing and modified full-service FM stations." We invite comment on whether and how this requirement impacts our treatment of the pending FM translator applications. In particular, we invite comment on whether Section 5(3) limits the Commission's authority to waive its cut-off rules in order to give priority to a later-filed LPFM application over a pending FM translator application. Section 5(3) refers specifically to "stations," not to "applications." If Section 5(3) is interpreted to apply only to stations, the Commission would be able to defer action on any pending FM translator applications that it determines must make way for LPFM licensing opportunities and then process those applications later.

20. On the other hand, a number of factors argue in favor of interpreting Section 5(3) to prohibit cut-off rule waivers in this context. Under current Commission rules, stations in these two services are "co-equal" in this licensing context in one principal way. Specifically, under the Commission's so-called "cut-off" rules, a prior filed application in one service "cuts off" a subsequently-filed application in the other service.[37] This exact issue, characterized as "LPFM – FM Protection Priorities" in the *Third Report and Order*,[38] has been a central point of dispute between LPFM and translator proponents since the imposition of the translator processing freeze in 2005. Moreover, the Commission and parties to this proceeding have used substantially identical language to explain their conflicting policy positions. For example, the Commission noted in 2007 that "[t]he *Third Report and Order* does not reach a conclusion on the *'co-equal' status* between *LPFM stations* and *FM translator stations*. Under the Rules for these services, a first-filed LPFM or FM translator application must be protected by all subsequently filed LPFM and FM translator applications."[39] Given that the cut-off rules are a principal characteristic of the two services' co-equal status and that "stations" and "applications" were used interchangeably in the Commission proceeding before the LCRA was adopted, it seems reasonable to assume that Congress intended the same meaning when it used the term "station" in the LCRA. If so interpreted, the Commission would lack authority to adopt a processing policy which includes the dismissal of prior-filed translator applications in conflict with subsequently filed LPFM applications. Alternatively, does Section 5(3) merely require that the Commission not favor either service in developing translator and LPFM new station licensing rules?[40] If this alternative interpretation is adopted, what criteria are relevant in assessing whether such rules maintain a "co-equal" status between the services, especially when the current technical licensing rules, which provide substantially greater opportunities for future translator licensing in many markets, are taken into account? We seek comment on these alternative interpretations of Section 5(3) and their impact on the processing of the pending translator applications.

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[37] *See* 47 C.F.R. §§ 73.807(d) (requiring LPFM application to meet minimum distance separation requirements with respect to FM translator authorizations and prior filed applications) and 74.1204(a) and Note to Paragraph (a)(4) (barring the acceptance of an FM translator application if the proposed operation would involve prohibited overlap to authorized LPFM stations or prior filed LPFM applications).

[38] *Third Report and Order*, 22 FCC Rcd at 21946.

[39] *Id.* (emphasis added); *see also id.* at 21929 (*"[S]tations* in these two services operate on a substantially *co-equal* basis, with a facility proposed in an application having "priority" over one specified in any subsequent application) (emphasis added); *id.* at 21931 (broadcasters contend that it is premature to reassess "the *'co-equal' status of LPFM and FM translator stations"*) (emphasis added).

[40] *See Walden/Terry Ex Parte* at 1.

B. Proposed FM Translator Application Processing Plan

21. Given our tentative conclusion that the ten-application cap is not a viable means of balancing the competing goals of introducing new FM translator service and preserving LPFM spectrum availability, we must consider alternative options in light of Section 5's requirements and the data in the record, including Appendix A data.

(1) Open a Joint FM Translator/LPFM Application Window

22. Although not raised by any party to this proceeding, one option is to dismiss all pending FM translator applications from the 2003 window and make plans for a joint window for both LPFM and FM translator applications. In theory, such an option could advance the three Section 5 mandates. However, we foresee overwhelming practical and legal difficulties in attempting to implement such a novel licensing process. If the translator and LPFM services were each limited to commercial operations, then Section 309(j) of the Act would appear to require the use of efficient competitive bidding procedures.[41] However, both commercial and NCE translator applications can be filed in a non-reserved FM band filing window. Accordingly, we would need to devise an alternate method for selecting among "mixed" groups of competing NCE and commercial applications.

23. The Commission has developed, not without difficulty,[42] only one methodology to resolve such conflicts. This comparative scheme, which applies to the Auction 83 translator filings, requires the dismissal of NCE applications which remain in conflict with a commercial proposal. This methodology, which would resolve all commercial translator/LPFM conflicts in favor of the translator application, is clearly inconsistent with the cross-service balancing principle inherent in the Section 5 directives. The fact that translator and LPFM stations can provide fundamentally different types of radio service adds additional complexities to the task of crafting a comparative standard. Thus, not only would it be extremely difficult to develop such a selection method that fits within Section 5's framework as to both services, but any method chosen would likely be subject to extensive, time-consuming challenges. Accordingly, we tentatively conclude that we should not pursue this option with respect to the next window or subsequent windows. Instead, we propose to focus on processing the pending FM translator applications in an alternate manner that is consistent with the LCRA. We seek comment on this tentative conclusion.

(2) Establish a Priority for Future LPFM Applications

24. Some parties have urged the Commission not to dismiss any translator applications immediately, and to defer consideration of all translator applications until after the next LPFM window. Only those translator applications in conflict with LPFM filings would ultimately be dismissed under this approach. However, for the reasons stated above, we may implement this approach only if we conclude that Section 5(3) does not bar the Commission from waiving Section 73.807(d).[43] We seek comment on the lawfulness of this licensing procedure. This approach also would necessarily delay further the processing of translator applications, filed in the 2003 window and now frozen for six years, until after the close of the next LPFM window. It is also possible that this approach would increase the disparity

[41] 47 U.S.C. § 309(j). We note, however, that an auctions process would likely result in licensing outcomes that have little or no correlation to the Section 5(1) or 5(2) directives.

[42] *See National Public Radio v. FCC*, 254 F.3d 226 (D.C. Cir. 2001) (vacating licensing rules for resolving conflicts between commercial and NCE applications) (subsequent history omitted).

[43] *See* 47 C.F.R. § 73.907(d).

between the number of LPFM and translator licenses in larger markets where spectrum exists for both services and where the number of pending translator applications is likely to substantially outnumber LPFM licensing opportunities.[44] We seek comment on whether such a licensing outcome is consistent with Sections 5(1) and (2). We also request that commenters who favor this approach address its impact on the timing of future translator and LPFM licensing.

(3) Adopt a Market-Specific Translator Application Dismissal Processing Policy

25. Given the competing goals and constraints described above, we tentatively conclude that a market-specific, spectrum availability-based translator application dismissal policy would most faithfully implement Section 5. This approach would ensure LPFM licensing opportunities in spectrum-limited markets while also ensuring the immediate licensing of translator stations in communities in which ample spectrum remains for both services, including many major markets. It is axiomatic that community groups and niche audiences are more plentiful in larger, more densely populated markets and, therefore, that there is a need for greater numbers of LPFM stations in such markets. Moreover, we think that it is important that our translator processing policy, to the extent possible, ensure that there is sufficient spectrum to establish a robust, dynamic and permanent LPFM service in larger markets. In this regard, we believe that the NCE FM service, the radio service most similar to the LPFM service, provides one measure of the relative needs of communities for LPFM service and a point of reference for setting LPFM licensing availability goals. Both economics and Commission requirements support the notion that if a radio station exists, it is meeting the needs of its listeners. Establishing an LPFM service floor which would limit the scale of potential LPFM licensing levels to a small fraction of the number of licensed NCE FM stations in a market would appear to be inconsistent with Section 5(2)'s requirement to consider local community needs for LPFM service in licensing new FM translators, especially when the limited ability of LPFM station signals to reach audiences is taken into account.

26. We seek comment on the following "LPFM Channel Floors" which are intended to address these concerns and satisfy these licensing goals. We also seek comment on whether a market-tier approach is a reasonable means for effectuating both Section 5(1) and 5(2) directives. In proposing these channel floors, we are principally guided by the number of top150-market NCE FM full power stations, the service that is most comparable to the LPFM service. In most cases, the number of NCE FM stations exceeds, frequently by a wide margin, the proposed market-specific LPFM channel floors. We note that the number of licensed FM translator stations and pending translator applications are each significantly greater than these proposed floors in most markets. In proposing these floors, we recognize that we have no assurance that these identified channels will result in LPFM station licensing. The identified channels are, to some extent, theoretical markers. The Commission will not know until the LPFM window whether interested applicants exist at the locations where LPFM channels are available. Moreover, these channels are at risk every day from full power FM station modification filings. Finally, we are mindful of the fact that the next LPFM window may provide the last best opportunity to create a vital and sustainable community radio service in major metropolitan areas. Given the very limited licensing opportunities that the Bureau has identified in a number of major markets and the far more restrictive technical rules for LPFM station licensing, we tentatively conclude that these floors are essential to the development of the LPFM service in spectrum-limited markets, as intended by the LCRA. We seek comment on this tentative conclusion.

- Markets 1 – 20: 8 LPFM Channels

[44] *See supra*, n.19.

- Markets 21 – 50: 7 LPFM Channels
- Markets 51 – 100: 6 LPFM Channels
- Markets 101 – 150 and, in addition, smaller markets where more than 4 translator applications are pending: 5 LPFM Channels

27. To ensure that licenses are available in all markets, we propose to dismiss all pending applications for new FM translators in markets in which the number of available LPFM channels, as set forth in the Bureau study, are below these channel floors. In calculating "available" LPFM channels, we have included both the identified vacant channels and those channels currently licensed to LPFM stations which are authorized to operate at locations within the thirty-minute latitude by thirty-minute longitude grid for each studied market. We propose to process all pending applications for new translators in markets in which the number of available LPFM channels meets or exceeds the applicable LPFM channel floor.

28. We also seek comment on whether we should impose restrictions on the translator settlement process in the "process all" markets to ensure that engineering solutions to resolve application conflicts do not reduce the number of channels available for LPFM stations in these markets.[45] Restricting applicants from amending their applications to specify adjacent channels and/or different transmitter locations may be necessary to safeguard the available LPFM channels identified in Appendix A. As set forth therein, the Bureau's channel availability analysis incorporates the proposed channels and locations of pending translator applications. The translator settlement process, however, allows mutually exclusive applicants to settle by amending their applications to propose first-, second- and third-adjacent channels and different transmitter locations. If unchecked, that process could significantly impact spectrum availability for future LPFM stations, precluding LPFM licensing opportunities on channels identified as available in the Bureau's analysis.[46] To ensure our ability to carry out the statutory mandate through the LPFM channel floor proposal or whatever approach we ultimately adopt, we propose to restrict applicants from amending applications to specify adjacent channels and/or different transmitter locations. We seek comment on this processing policy and alternative approaches that would advance Section 5 goals.

29. We tentatively conclude that a three-pronged licensing process would promote Section 5 goals. Under this approach, immediately following the resolution of the matters at issue in this *Third Further Notice* the Commission would resume the processing of those translator applications where there remains sufficient spectrum for LPFM based on the channel floors proposed above, i.e., only at locations at which translator licensing will not undermine the Section 5(1) directive to ensure future LPFM

[45] *See* 47 C.F.R. 73.5002 (c) and (d).

[46] For example, a mutually exclusive group of translator applications could consist of four applications, each specifying the same channel at the same location. Absent amendments, one of these applications could be granted without impacting LPFM channel availability. But under the flexible translator technical rules, these four applicants could enter into an agreement under which each application could be granted by proposing one of the four following channels: -3rd adjacent channel to the original channel, -1st adjacent channel, +1st adjacent channel or +3rd adjacent channel. Proposing different sites could increase the potential for LPFM channel preclusion. Such a settlement could eliminate up to 11 channels in an area for possible LPFM use – all the channels from the -5th adjacent channel to the +5th adjacent channel. An even greater range of channels could be precluded at a particular location if the settling applicants specified different channels in their original applications.

licensing opportunities. Following the adoption of rules implementing the other provisions of the LCRA, the Commission would open an LPFM-only window. Thereafter, following the substantial completion of LPFM application processing, the Commission would open a translator-only window.[47] Under this approach, the Commission could immediately resume the processing of the thousands of translator applications which propose service in markets where ample spectrum remains for both services. Thus, it appears that this approach, if adopted, would provide the most expeditious path to expanded translator and LPFM station licensing and would permit the opening of an LPFM window by the summer of 2012. In this regard, we request that any commenter who proposes an alternative licensing approach to explain how such approach would better implement Section 5 and to address the timing, resource and legal issues that any such approach would pose.

30. The foregoing Section 5 analysis, LPFM spectrum availability analysis, and proposed translator application processing plan rely heavily on Arbitron market definitions. In this regard we note that the D.C. Circuit has upheld the Commission's broad authority to define "community" differently in different contexts.[48] We believe that Arbitron market-based assessments as used herein are reasonable for purposes of implementing Section 5 of the LCRA. A more granular approach would appear to be extremely burdensome and unworkable. Given the fact that the demand for LPFM licenses at particular locations and the availability of transmitter sites near such locations are unknowable prior to the opening of a window, a market-based analysis would appear to provide a reasonable "global" assessment of LPFM spectrum availability in particular areas. We seek comment on this issue and alternative definitions to implement the Section 5 directives. In particular, we seek comment on whether defining the Section 5(2) term "local community" in terms of markets is reasonable and whether it is appropriate to use the same definition for LPFM and translator purposes.

31. Finally, we find that certain temporary restrictions on the modification of translator stations authorized out of the Auction No. 83 filings are necessary to preserve LPFM licensing opportunities in identified spectrum-limited markets. We are concerned that translator modifications during the pendency of the rulemaking could undermine the statutory mandate to ensure future LPFM licensing opportunities in these markets. Accordingly, we direct the Bureau to suspend the processing of any translator modification application that proposes a transmitter site for the first time within any market which has fewer LPFM channels available than the proposed channel floor.[49] We propose to dismiss any such application should the Commission adopt the market by market licensing approach proposed in this *Third Further Notice*. We seek comment on this proposal. We also impose an immediate freeze on the filing of translator "move-in" modification applications and direct the Bureau to dismiss any such application filed after the adoption of this *Third Further Notice*. This freeze shall continue until the close

[47] A number of issues must be addressed before the next translator window is opened. The 2003 window clearly revealed certain weaknesses in the translator licensing rules. *See* Section III.C., *infra*. In addition, we must separately consider whether certain additional or modified procedures are necessary to promote Section 5 directives on a going-forward basis, e.g., establishing continuing limitations on translator licensing in spectrum-limited markets where there are substantially more translator stations than LPFM stations.

[48] *Winter Park Communications, Inc. v. Federal Communications Commission*, 873 F.2d 347, 352 (D.C. Cir. 1989) ("[N]othing in the Communications Act prevents the FCC from defining the term "community" differently in different contexts, or from adopting an interpretation that strays considerably from political boundaries.") (citation omitted). *See also Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rule Making, 26 FCC Rcd 2556, 2568 (2011) (FCC 11-28) (¶ 20) (establishing a presumption for Section 307(b) radio licensing purposes that an application specifying a community in or near to an Urbanized Area is intended to serve such area rather than the specified community of license).

[49] An application proposing to relocate a transmitter closer to a larger market is commonly referred to as a "move in" modification application.

of the upcoming LPFM filing window. This processing freeze will not apply to any translator modification application which proposes to move its transmitter site from one location to another within the same spectrum-limited market.

C. Prevention of Trafficking in Translator Station Construction Permits and Licenses

32. Having tentatively concluded that the Commission must process the remaining translator applications differently, we must consider whether a market-specific spectrum-based dismissal policy is sufficient to safeguard the integrity of the translator licensing process. The *Third Report and Order* raised concerns about the integrity of our translator licensing procedures. We focused on the skewed applicant filing behavior in Auction No. 83. Based on our analysis of the then-pending applications, we found that 80 percent of the 861 filers held ten or fewer proposals. In contrast, the top 15 filers held one-half of the 13,377 applications. We also noted that several applicants had engaged in the active marketing and sale of hundreds of translator construction permits, including efforts by RAM to assign more than one-half of the 1,046 construction permits it had been awarded from the 2003 window filings. The Commission concluded "that our assumption that our competitive bidding procedures would deter speculative filings has proven to be unfounded in the Auction No. 83 context."[50] The ten-application cap was intended, in part, to address these concerns.

33. We tentatively conclude that our proposed translator application processing policy would not be sufficient to deter speculative licensing conduct because we face essentially identical licensing concerns with the remaining translator filings. RAM alone holds 1,563 of the remaining 6,475 applications. Each of the top 20 applicants continues to hold more than 20 applications and, cumulatively, more than one-half of all applications. In contrast, the vast majority of applicants continue to hold only a few applications. For example, 501 of the 646 (78%) remaining applicants hold five or fewer applications. Similar filing imbalances occur in particular markets and regions. One applicant holds 25 of the 27 translator applications proposing locations within 20 kilometers of Houston's center city coordinates and 75 applications in Texas. Two applicants hold 66 of the 74 applications proposing service to the New York City market.

34. A number of factors may create an environment which promotes the acquisition of translator authorizations solely for the purpose of selling them. It is likely that a substantial portion of the remaining grants will be made pursuant to our settlement, that is, non-auction, procedures. Translator construction permits may be sold on a "for profit" basis. Permittees are not required to construct or operate newly authorized facilities. Absent translator licensing rule changes, it appears that limiting the number of permits that any applicant receives from the processing of the remaining applications is the only effective tool to deter speculative activity. We tentatively conclude that nothing in the LCRA limits the Commission's ability to address the potential for licensing abuses by any applicant in Auction No. 83. We seek comment on this issue. We also seek comment on processing policies to deter the potential for speculative abuses among the remaining translator applicants. For example, we seek comment on whether to establish an application cap for the applications that would remain pending in non-spectrum limited markets and unrated markets. Would a cap of 50 or 75 applications in a window force high filers to concentrate on those proposals and markets where they have *bona fide* service aspirations? In addition or alternatively, should applicants be limited to one or a few applications in any particular market? A limitation of this sort could limit substantially the opportunity to warehouse and traffic in translator authorizations while promoting diversity goals. We also seek comment on alternative approaches to protect against abuses in the translator licensing process.

[50] *Id.* at 21934.

D. Restrictions on the Use of FM Translators to Rebroadcast the Signals of AM Stations

35. In 2009, the Commission authorized the use of FM translators with licenses or permits in effect as of May 1, 2009, to rebroadcast the signal of a local AM station.[51] The limitation of cross-service translator usage to already-authorized FM translators was adopted with the intention of preserving opportunities for future LPFM licensing.[52] Two parties filed petitions for partial reconsideration of this aspect of the *2009 Translator Order*. Both petitions argue that the limitation of cross-service translators to already-authorized translators does not serve the public interest and is unfair to both AM stations and FM translator applicants.[53] These petitions remain pending in MB Docket No. 07-172.

36. As a result of the likely significant impact of the LCRA on the processing of the translator applications, we believe it is also appropriate to consider whether to remove this limit on cross-service translators with respect to the pending FM translator applications. Notwithstanding our decision to defer other LCRA implementation issues, we conclude that it is appropriate to address this issue now. The authorization of AM rebroadcasting in 2009, long after the filing of the pending applications, created an enormous new demand for FM translators, leading to numerous application modification waiver requests and other filings. We believe that resolving this issue before processing of the pending translator applications will align FM translator licensing outcomes more closely with demand by enabling applicants to take the rebroadcasting option into account in the translator settlement and licensing processes, thereby advancing the goals of Section 5(2). Elimination of the date limitation at least with respect to the pending translator applications would appear consistent with the other actions which the Commission must take to ensure LPFM licensing opportunities, the same goal that the going-forward AM/FM translator rebroadcasting exclusion was intended to achieve. In addition, the new AM/FM translator service rule has proven to be a very successful deregulatory policy. Approximately 500 AM stations currently use FM translators, providing hundreds of these stations with their first nighttime authority and the opportunity to operate viably at night. Anecdotal reports from many AM licensees repeatedly emphasize their vastly increased ability to cover local community, governmental and school events, and, generally, to better serve the needs of their communities.

37. Accordingly, we request comments on the issue of whether cross-service translators should remain limited to those authorized as of May 1, 2009 or whether the limit should be extended to include those applications which were on file as of May 1, 2009.[54] Specifically, would the proposed changes in the FM translator application processing rules provide sufficient future LPFM application opportunities to support such a revision in the limitation on cross-service translators? Would the proposed changes in the FM translator application processing rules accomplish more effectively the goals

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[51] *See Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Report and Order, 24 FCC Rcd 9642 (2009) ("*2009 Translator Order*"). Specifically, no portion of the 60 dBu contour of the FM translator station may extend beyond the smaller of: (a) a 25-mile radius from the AM transmitter site; or (b) the 2 mV/m daytime contour of the AM station. *See* 47 C.F.R. § 74.1201(g).

[52] *See 2009 Translator Order*, 24 FCC Rcd at 9650: "[W]e do believe that creating greater demand for future FM translator authorizations by allowing them to be used by AM as well as FM stations could adversely affect opportunities for new LPFM stations. Accordingly, we will limit the rule change being adopted here to currently authorized FM translators." This restriction is codified at 47 C.F.R. § 74.1232(d).

[53] Petition for Reconsideration by Robert A. Lynch, filed July 28, 2009; Petition for Reconsideration by Edward A. Schober, filed July 28, 2009.

[54] We seek comment on modifying the cross-service prohibition with regard to only those applications that remain pending from the 2003 translator window. As noted above, the issue of whether to eliminate the date restriction on cross-service translators is before the Commission in petitions for reconsideration of the *2009 Translator Order*.

that the Commission sought to accomplish with the original application cap and the limitation on cross-service translators? Should the Commission modify this exclusion to enable translator and AM station licensees to better meet the needs of their communities? We seek comment on these issues.

IV. ADMINISTRATIVE MATTERS

A. Filing Requirements.

38. *Ex Parte Rules.* This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under Section 1.1206(b) of the Commission's rules.[55] *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.[56] Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

39. *Comments and Reply Comments.* Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/ecfs2/.

- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

  Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

  - All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

  - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

[55] *Id.* § 1.1206(b), as revised.

[56] *See id.* at § 1.1206(b)(2).

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

B. Initial Regulatory Flexibility Analysis.

40. The Regulatory Flexibility Act of 1980, as amended ("RFA"), requires that a regulatory flexibility analysis be prepared for notice and comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

41. With respect to this Notice, an Initial Regulatory Flexibility Analysis ("IRFA") under the Regulatory Flexibility Act[57] is contained in Appendix B. Written public comments are requested in the IFRA, and must be filed in accordance with the same filing deadlines as comments on the *Notice*, with a distinct heading designating them as responses to the IRFA. The Commission will send a copy of this *Notice*, including the IRFA, in a report to Congress pursuant to the Congressional Review Act. In addition, a copy of this *Notice* and the IRFA will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the *Federal Register*.

C. Paperwork Reduction Act Analysis.

42. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

V. ORDERING CLAUSES

43. Accordingly, IT IS ORDERED, pursuant to the authority contained in Sections 1, 2, 4(i), 303, 307, and 309(j) of the Communications Act of 1934, 47 U.S.C §§ 151, 152, 154(i), 303, 307, and 309(j), that this *Notice of Proposed Rulemaking* IS ADOPTED.

44. IT IS FURTHER ORDERED that no application to modify the facilities of an authorized FM translator to move its transmitter site for the first time into a market with fewer LPFM channels available than the service floor for that market proposed herein, as set forth in Appendix A, shall be accepted for filing until the close of the upcoming LPFM filing window proposed for summer 2012.

[57] *See* 5 U.S.C. § 603.

45. IT IS FURTHER ORDERED that the Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, and shall cause it to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary

APPENDIX A

LPFM Spectrum Availability Studies

In order to assess LPFM spectrum availability, the Bureau centered a thirty-minute latitude by thirty-minute longitude grid over the center-city coordinates of each listed market. Each grid consists of 931 points – 31 points running east/west by 31 points running north/south. Grid points are located at one-minute intervals of latitude and longitude. The Bureau analyzed each of the 100 FM channels (88.1 MHz – 107.9 MHz) at each grid point to determine whether any channels remain available for future LPFM stations at that location. Only channels that fully satisfy co-, first- and second adjacent channel LPFM spacing requirements to all authorizations and applications, including pending translator applications, are treated as available. The area encompassed by the grid is approximately 35 miles (north/south) by 26 miles (east/west). The grid is not intended to approximate radio market boundaries. Rather, this methodology is designed to identify "core" market locations that could serve significant populations. Coordinates located over major bodies of water were excluded. No attempt was made to otherwise ascertain site viability.

Detailed Column Information

Arb#/Rank – Arbitron market ranking. Data compiled from BIA/Kelsey – MEDIA Access Pro, Version 4.5, Fall 2010 database ("BIA Fall 2010")
CF#/Rank – Common Frequency Arbitron market ranking. See September 27, 2010 Letter from Jeff Shaw, President, Common Frequency, Inc., Appendix A ("Common Frequency 2010 Study"). Data compiled from Appendix A of Common Frequency 2010 Study. This study uses an earlier Arbitron rating period. Column lists market rankings as they appear in this study. This market ranking data is relevant only for data listed in "**Pending/FX apps**" column.
Fall 2010 Arbitron Rankings – Arbitron market name. Data compiled from BIA Fall 2010.
Total Licensed Stations/FM trans. – Number of licensed FM translator stations in market. Data compiled from BIA Fall 2010.
Total Licensed Stations/LPFM – Number of licensed LPFM stations in market. Data compiled from BIA Fall 2010.
Total Licensed Stations/NCE FMs – Number of licensed NCE FM stations in market. Data compiled from BIA Fall 2010.
LPFM Avail. in grid/Locations – Maximum number of LPFM licensing opportunities in a market on the identified available vacant channels. In some cases, several LPFM stations in the same market could use the same channel while satisfying the minimum co-channel LPFM-LPFM distance separation requirements. This "Locations" number assumes an advantageous geographic distribution of LPFM transmitter site locations within the market and includes all vacant channels identified as available in the market. See above for methodology.
LPFM Avail. in grid/Channel – Total number of LPFM channels available for licensing opportunities in a market. This "Channel" total counts the number of unique channels that can be used for LPFM licensing within the grid. See above for methodology.
LPFM Avail. In grid/Licensed – Total number of LPFM stations licensed in a market at locations within the grid. In-market LPFM stations with transmitter sites located outside the grid are excluded from this total.
Pending/FX apps – Total number of pending FM translator applications from the 2003 window. Data compiled from Common Frequency 2010 Study. Common Frequency included pending translator application from seven embedded markets in the respective parent market totals. An embedded market is a unique marketing area for the buying and selling of radio air time. It is contained, either in whole or part, within the boundaries of the larger, "parent," market. These embedded (parent) markets are: Middlesex-Somerset-Union (New York); Monmouth-Ocean (New York); Morristown, NJ (New York),

Nassau-Suffolk (New York), San Jose, CA (San Francisco); Santa Rosa, CA (San Francisco) and Stamford-Norwalk, CT (New York).

Result – "Dismiss all FX" denotes a market where the number of available LPFM channels and licensed LPFM stations within the grid is less than the proposed LPFM Channel Floor in the particular market. "Process all FX" denotes a market where the number of available LPFM channels and licensed LPFM stations within the grid is equal to or greater than the proposed LPFM Channel Floor in the particular market. "N/A" denotes a market with zero pending translator applications.

(See Appendix A excel chart attached to this document).

APPENDIX B

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA")[58] the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the *Notice of Proposed Rulemaking*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice of Proposed Rulemaking* ("*NPRM*") provided in paragraph 39. The Commission will send a copy of this entire *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[59] In addition, the *NPRM* and the IRFA (or summaries thereof) will be published in the Federal Register.[60]

2. **Need For, and Objectives of, the Proposed Rules.** This rulemaking proceeding is initiated to seek comment on how the enactment of Section 5 of the Local Community Radio Act of 2010 ("LCRA")[61] impacts the procedures previously adopted to process the approximately 6,500 applications which remain from the 2003 FM translator window. The Commission previously established a processing cap of ten pending short-form applications per applicant from FM translator Auction No. 83. The *NPRM* tentatively concludes that that this cap is inconsistent with the LCRA licensing criteria. The *NPRM* concludes that it is important that the translator processing policy to be adopted will ensure that there is sufficient spectrum to establish a robust, dynamic and permanent LPFM service in larger markets. It tentatively concludes that a market-specific, spectrum availability-based translator application dismissal policy most faithfully implements Section 5 of the LCRA. Specifically, the *NPRM* proposes to dismiss all pending applications for new FM translators in markets in which the number of available LPFM channels, as set forth in a Bureau study, are below these channel floors. The item notes that this approach would both ensure additional spectrum for LPFM stations in markets in which it is most limited while also ensuring the immediate licensing of translator stations in communities in which ample spectrum remains for both services, including many major markets.

3. The *NPRM* also seeks comment on whether the Commission should modify certain recently adopted FM translator service rule changes as a result of the enactment of the LCRA. Specifically, the NPRM seeks comment on the issue of whether cross-service translators should remain limited to those authorized as of May 1, 2009.

4. **Legal Basis.** The authority for this proposed rulemaking is contained in Sections 1, 2, 4(i), 303, 307, and 309(j) of the Communications Act of 1934, 47 U.S.C §§ 151, 152, 154(i), 303, 307, and 309(j).

5. **Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply.** The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules.[62] The RFA generally

[58] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[59] *See* 5 U.S.C. § 603(a).

[60] *See id.* § 603(a).

[61] Pub. L. No. 111-371, 124 Stat. 4072.

[62] *Id.* § 603(b)(3).

defines the term "small entity" as encompassing the terms "small business," "small organization," and "small governmental entity."[63] In addition, the term "small Business" has the same meaning as the term "small business concern" under the Small Business Act.[64] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[65]

6. *Radio Broadcasting.* The proposed policies could apply to radio broadcast licensees, and potential licensees of radio service. The SBA defines a radio broadcast station as a small business if such station has no more than $7 million in annual receipts.[66] Business concerns included in this industry are those primarily engaged in broadcasting aural programs by radio to the public.[67] According to Commission staff review of the BIA Publications, Inc. Master Access Radio Analyzer Database on as of January 31, 2011, about 10,820 (97 percent) of 11,100 commercial radio stations) have revenues of $7 million or less and thus qualify as small entities under the SBA definition. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[68] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

7. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any radio station from the definition of a small business on this basis and therefore may be over-inclusive to that extent. Also as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

8. *FM translator stations and low power FM stations.* The proposed policies could affect licensees of FM translator and booster stations and low power FM (LPFM) stations, as well as to potential licensees in these radio services. The same SBA definition that applies to radio broadcast licensees would apply to these stations. The SBA defines a radio broadcast station as a small business if such station has no more than $7 million in annual receipts.[69] Given the nature of these services, we will presume that all of these licensees qualify as small entities under the SBA definition. Currently, there are approximately 6131 licensed FM translator stations and 860 licensed LPFM stations.[70] In addition, there are approximately 646 applicants with pending applications filed in the 2003 translator filing window. Given

[63] *Id.* § 601(6).

[64] *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[65] 15 U.S.C. § 632.

[66] *See* 13 C.F.R. § 121.201, NAICS Code 515112.

[67] *Id.*

[68] "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both." 13 C.F.R. § 121.103(a)(1).

[69] *See* 13 C.F.R. § 121.201, NAICS Code 515112.

[70] *See News Release*, "Broadcast Station Totals as of December 31, 2006" (rel. Jan. 26, 2007) (http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269784A1.doc).

the nature of these services, we will presume that all of these licensees and applicants qualify as small entities under the SBA definition.

9. **Description of Projected Reporting, Recordkeeping and Other Compliance Requirements.** The NPRM provides for no changes in the reporting, recordkeeping and other compliance requirements for FM translator or LPFM licensees or applicants.

10. **Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered.** The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[71]

11. The *NPRM* proposes to establish a market-specific, spectrum availability-based approach to the processing of remaining translator applications. As discussed in more detail below, alternatives considered included dismissal of all pending translator applications and the opening of a joint LPFM/translator window, or the deferral of translator application processing until the close of the next LPFM application filing window.

12. Joint Window. One option considered was to dismiss all pending FM translator applications from the 2003 window and make plans for a joint window for both LPFM and FM translator applications. In theory, such an option could advance the three Section 5 mandates. However, the *NPRM* concludes that there would be overwhelming practical and legal difficulties in attempting to implement such a novel licensing process. Specifically, the *NPRM* notes that an alternate method for selecting among "mixed" groups of competing NCE and commercial applications would need to be devised, and concludes that it would be extremely difficult to develop such a selection method that fits within Section 5's framework as to both services, and that any method chosen would likely be subject to extensive, time-consuming challenges.

13. LPFM Priority. Another option considered was to defer consideration of all translator applications until after the next LPFM window. Only those translator applications in conflict with LPFM filings would ultimately be dismissed under this approach. The *NPRM* questions the lawfulness of this licensing procedure, and also concludes that this approach would necessarily delay further the processing of translator applications, filed in the 2003 window and now frozen for six years, until after the close of the next LPFM window. It further notes that this approach would increase the disparity between the number of LPFM and translator licenses in larger markets where spectrum exists for both services and where the number of pending translator applications is likely to substantially outnumber LPFM licensing opportunities.

[71] 5 U.S.C. § 603(b).

14. We do not believe that either of these approaches would have offered any significant benefits to small entities than the proposed market-based processing policy. Moreover, as discussed above, the market-based approach ensures additional spectrum for LPFM stations in markets in which it is most limited while also ensuring the immediate licensing of translator stations in communities in which ample spectrum remains for both services, including many major markets. Both of these outcomes benefit small entities. However, we are open to comments that might propose alternatives to any of the approaches considered above.

15. **Federal Rules Which Duplicate, Overlap, or Conflict With, the Commission's Proposals.** None.

STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI

Re: *Creation of A Low Power Radio Service (MM Docket No. 99-25) and Amendment of Service and Eligibility rules for FM Broadcast Translator Stations (MB Docket No. 07-172)*

Today, we act to break a spectrum logjam, clearing the way for development of a more robust local community radio service and processing of thousands of pending FM translator applications. This is a win for communities across the nation. It is another step forward on our spectrum agenda. It promotes efficient use of spectrum, an increasingly vital public resource. And it provides new benefits to consumers everywhere.

Proponents of the LPFM and translator services have long vied for space on the crowded radio dial. Several months ago, Congress passed the Local Community Radio Act (LCRA), and I would like to acknowledge the members of Congress who worked hard on this important legislation, including the legislation's sponsors Representatives Mike Doyle and Lee Terry, as well as Senators Cantwell and McCain. I was pleased that the Commission served as a resource to Congress during consideration of the law, and I'm pleased that today the Commission takes important steps toward implementing the law.

In 2007, we imposed a 10-application limit on FM translator applicants in order to preserve licensing opportunities for LPFM. Today's *Further Notice* takes a fresh look at the ten-application limit in light of the LCRA and tentatively concludes that it is not consistent with the new law's directives. Based on a detailed engineering analysis of the top 150 radio markets, we've crafted a locally tailored, market-based processing proposal that will yield benefits for both translator and LPFM service: it will allow the licensing of many more translators than under the previous approach, while at the same time doing a better job of preserving opportunities for LPFM in spectrum-limited markets.

The biggest winner will be the American public – in both urban and rural areas. Radio continues to provide a very valuable service. Indeed, notwithstanding the growth of the Internet and other platforms, broadcast over-the-air radio listening has been increasing, with 93% of Americans 12 and older tuning in to radio each week.

The recently released Information Needs of Communities report stressed the importance of local voices and local news. It noted that the LPFM service was specifically created to provide new voices on the airwaves and allow local groups, including schools, churches, and other community-based organizations, to provide programming responsive to local community needs and interests. And LPFM has done just that. LPFM stations have done a strong job reaching underserved communities such as non-English speakers, seniors, and migrant workers, providing news and information regarding local issues and civic affairs, and serving as emergency responders.

By expanding LPFM opportunities, voices of many more new entrants and independent programmers will be heard on the radio and they will reach more communities, all over the country, in both rural and urban areas.

This will strengthen both our democracy and our economy. It will advance traditional goals of localism and diversity in this important medium that reaches almost all Americans, and create new opportunities for business and job creation.

We are also proposing to immediately restart the licensing of FM translator stations in most smaller markets and rural areas to meet the needs of communities that have been waiting too long for these stations. And after we implement other provisions of the LCRA, I am hopeful that we will be able

to open an LPFM-only window in the coming year. We have our work cut out for us, but this is important and we are moving forward.

Finally, I am pleased that the *Third Further Notice* seeks comment on expanding opportunities to use FM translator stations to rebroadcast AM stations. Our initial 2009 action, a deregulatory initiative which permitted cross-service rebroadcasts for the first time, has been an unqualified success. Nearly 500 AM stations now use translators to provide expanded nighttime service to their communities. In many cases, the added translator service has transformed marginal AM stations into competitive full-time media outlets that now provide expanded coverage of local news and events. Promoting these arrangements is consistent with our policy to make the most intensive use of valuable spectrum resources and to boost investment and job creation in local communities, and is yet another win for the American public.

I thank the Media Bureau, especially Peter Doyle, and my Senior Counsel and Legal Advisor Sherrese Smith for their excellent work on this item.