

MULLANEY ENGINEERING, INC.

9049 SHADY GROVE COURT
GAITHERSBURG, MD 20877

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of:)
)
Creation of a Low Power FM Service) MM Docket No. 99-25
)
Amendment of Service and Eligibility Rules) MB Docket No. 07-172
for FM Broadcast Translators Stations) RM-11338 / FCC 11-105



To the Commission:

COMMENTS

Mullaney Engineering, Inc. (“MEI”), hereby submits its comments in response to the Public Notice released by the Commission on July 12, 2011, in the Third Further Notice of Proposed Rule Making (FNPRM), MB Docket 07-172, FCC 11-105, which solicits comments concerning the enactment of the Local Community Radio Act of 2010 (LCRA) on procedures previously adopted to process the approximately 6,500 applications which remain pending from the 2003 FM translator filing window.

The FCC has purportedly analyzed the top 150 arbitron Radio Markets to determine the availability of both existing & future new Low-Power FM facilities (LPFM). In markets where the FCC believes that there are **“insufficient opportunities”** to meet the pent up demand for LPFM facilities they are now proposing to dismiss in mass, all of the pending short form applications for new FM translators within those markets.

As background, in response to a public notice (DA 03-359) released, February 6, 2003, some 13,241 applications were filed for new FM translator

facilities. Some 8 years later, the FCC has yet to process some 6,500 of those applications which were determined to be Mutually Exclusive (MX) to at least one other simultaneously filed application. The FCC analysis has determined that some 3,323 of those 6,500 applications are located within the top 150 Arbitron Markets that were analyzed. It was further determined that some 1,852 of those applications (55.7%) are located in markets which have an **“insufficient” number of LPFM facilities available**. Thus, the FCC is now proposing a mass dismissal of those pending & previously cut-off FM translator applications in an attempt to maximize the potential for new LPFM facilities in those markets.

Section 5 LCRA vs Cut-Off Procedures

The FCC believes it is now necessary & prudent to dismiss these 1,852 pending translator applications in order to comply with the Congressional mandate that the FCC “when licensing **new** FM translator stations, FM booster stations and low-power FM stations, shall ensure ... **such decisions are made based upon the needs of the local community**”. However, this mandate **is nothing “new”**.

Section 307(b) of the Communications Act requires the FCC to ensure a “fair, efficient and equitable” distribution of radio services to the various states and communities in the country. In order to comply with this mandate the FCC has relied upon various rules and policies to promote an orderly implementation of these services.

One such procedure that has been around since the **Dinosaurs** first started roaming the halls of the 8th Floor of the FCC **is the concept of a “cut-off” date** which establishes that last time by which a competing application can be filed or by which opposing / supportive comments can be filed in a rule making procedure. Such a **“date certain”** is necessary to permit the FCC to begin its evaluation process and not have to continually stop and re-start that evaluation to consider late filed applications or comments.

All 1,852 of the applications being considered for dismissal were **“cut-off”** as of March 14, 2003. That is the date established by the Public Notice (DA 03-359) released February 6, 2003, at which time all competing FM translator applications had to be filed. The LCRA clearly states that all three of these secondary services (translator, booster & LPFM) **“remain equal in status”** so how can one service invalidate the protection rights of previously filed applications in another service. Furthermore, the LCRA also referred to the licensing of **“new”** translator, booster & LPFM stations. Given that all of the short form applications filed during the 2003 filing window have been **“cut-off”** they are no longer **“new”** in the true sense of the word since being **“cut-off”** states that the **licensing procedure has already started** by the very nature that no subsequently filed translator application can be accepted that does not provide full protection to that previously **“cut-off”** application.

If Cut-Off No Longer Means Protected - Why Stop There

If the FCC believes the LCRA requires it to invalidate the concept of “cut-off” **then why stop there**. Why not simply revoke the grant of all un-built FM translators or revoke the licenses of all operating FM translator facility in these under-served Arbitron Markets to promote the construction of a “new” LPFM facility (which is equal in status ??). Better yet, why doesn't the FCC use Section 307(b) of the Act to revoke the licenses of many of the existing full service facilities **to promote diversification of ownership & localism**. The fact that the grant of an individual license many years ago, **was once determined** to promote the “fair, efficient and equitable” distribution of radio service **does not mean years later** that the original grant is still considered to be a “fair, efficient and equitable” distribution. Why not make the grant subject to the political affiliation of the licensee – just like the makeup of the FCC Commissioners changes when political control switches from one party to another. This would represent the ultimate **“re-distribution of wealth”** that is so widely promoted today.

The most obvious reason is that no individual or bank will invest the necessary money to construct and operate any business, including broadcast facilities, if the right to operate that business is not guaranteed for at least a reasonable number of years and its continuance is subject to the whims of bureaucrats. The FCC uses the current concept that every licensee is entitled to the expectancy

of renewal and it is up to that licensee to lose that right of expectancy.

Section 1.934 establishes rules concerning Defective Applications and Dismissal of applications. No where does it state it is permissible to dismiss a previously cut-off application in order to make way for a new service of equal status.

Section 74.1233(d)(2)(I) & (ii) establishes rules for the processing of FM translator and Booster stations. Applications filed after the deadline will be dismissed as untimely. The initial short form application will not be studied for technical acceptability, but will be protected from subsequently filed applications as of the close of the window filing period.

Section 74.1233(e)(1) states that priority will be given to FM translator applications proposing to provide fill-in service (within the station's protected contour). The mass dismissal of pending applications fails to consider this factor.

Analysis of the Top Arbitron Radio Markets

The FCC provided an analysis of the LPFM availability in the top 150 Arbitron radio markets to determine which had an insufficient availability. Based upon this analysis the FCC has proposed the dismissal of 1,852 of the 3,323 applications pending in those markets (55.7% of the pending apps). However, **no where** did that FCC analysis demonstrate that any specific pending translator application prevented the grant of a future LPFM facility. They simply propose to dismiss **all** pending FM translator applications in that market notwithstanding how many new, if any, LPFM facilities can be **potentially** created. Because LPFM's are not allotted it is up to a future applicant to analyze a specific market to determine exactly which locations will comply with the FCC rules spacing. **Thus, "potentially available" represents a big "IF"**. If a future but yet unidentified "entity" finds the compliant location in an area where it is wishing to build its LPFM facility and if that area is close enough to where the "entity" already has an established presence and that entity actually files a compliant application in a timely manner.

FM Translator & LPFM Technical Rules Must Be Consistent

FM translators are evaluated based upon compliance with contour protection rules with vertical elevation patterns being considered for 2nd and 3rd adjacent channel protections. Translators are also allowed to include the additional protection afforded by utilization of a directional antenna. Notwithstanding the paper showing, any actual interference caused by an FM translator must be eliminated.

LPFM facilities are evaluated strictly on compliance with a spacing table for co-channel and 1st / 2nd adjacent channel protections. The LCRA has just recently eliminated the requirement to protect 3rd adjacent situations in most cases. The use of directional antennas is not permitted to provide protection. The spacing table includes a 20 km buffer beyond the absolute minimum separation needed to protect a full service facility. This buffer was intended to off-set the fact that causing actual interference did not mandate the LPFM eliminate such interference.

If the LPFM rules, especially 2nd adjacent were modeled after the translator rules, more LPFM could be considered for grant. The present plan to grant liberal waivers has many potential problems - mainly that of consistency & fairness. If two LPFM applications are MX and one needs a 2nd adjacent waiver how will the winner be determined. The advantage of the buffer zone is not to be taken lightly since it limits where objectionable interference can be considered to exist.

Arbitron Market vs Community of License

The FCC appears to be conflicted. The Act talks about a “fair, efficient and equitable” distribution of radio services to **the various states and communities** in the country. Where exactly does the Act define the concept of Arbitron Radio Market.

Decisions Can Not Be Made In A Vacuum

The decisions concerning the use of spectrum within the United States **can not be made in a vacuum**. The FCC has many open dockets before it which promote diversity of ownership and localism as well as spectrum efficiency. However, the FCC is failing to consider the **cumulative sum of those proposals** when making its decisions. One such proposal involves the **re-purposing of TV Channels 5 & 6** from Digital TV to Digital Radio. There is more than sufficient spectrum to promote diversity by move many, if not most, of the existing AM broadcast facilities (where most minority ownership is concentrated) to this new digital radio band while also creating a subset of frequencies **where LPFM facilities can be protected and encouraged to grow**. The current LPFM rules are designed to **prevent** interference to full service FM facilities. Those rules have little to do with the establishment of a **protected service area** for LPFM facilities. Without such a protected service area LPFM will find it difficult, if not impossible, to establish an area where it can truly live up to the public service of localism it is intended to provide.

The expanding implementation of IBOC will result in even more massive interference to LPFMs operating on a first adjacent channel at the minimum specified spacings.

SUMMARY

The present proposal by the FCC to dismiss previously filed & cut-off FM translator applications is either - terribly flawed or does not go far enough to promote the “fair, efficient and equitable” distribution of radio services to the various states and communities in the country. It does not promote diversity or localism. The analysis to date is insufficient to justify the current course of action.

Respectfully submitted,

MULLANEY ENGINEERING, INC.

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