Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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
	)	

To: The Commission

REPLY COMMENTS OF
NATIONAL PUBLIC RADIO, INC.

Introduction

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

NPR's initial Comments advocated refining the Commission's preferred approach to better balance the processing of pending FM translator station applications with future opportunities for both LPFM and FM translator filing windows. NPR urged the Commission to first address the backlog of FM translator station applications to identify those currently viable applications proposing bona fide FM translator service.[2] Specifically, we proposed imposing a reasonable cap

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[1] In the Matter of Creation of A Low Power Radio Service; Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations, Third Further Notice of Proposed Rulemaking, 2011 FCC LEXIS 2858 (July 12, 2011) ("Third Further NPRM"). Unless otherwise indicated, all citations to comments are to comments filed in this proceeding in response to the Third Further NPRM.

[2] Comments of National Public Radio at 2-7 [hereinafter "NPR Comments"].

on the number of pending FM translator applications any one entity might pursue and requiring applicants to identify the currently viable applications they intend to pursue.[3] Reducing the backlog would better enable the Commission, applicants, and other interested parties to resolve pending mutually exclusive FM translator applications and assess the potential impact of such applications on future LPFM station opportunities based on actual conditions.

NPR also proposed a number of modifications to the Commission's preferred market-based approach that would permit the licensing of more FM translator stations while preserving significant opportunities for future LPFM stations. Implementing these measures, we submit, would better comport with Section 5 of the Local Community Radio Act of 2010 ("LCRA")[4] and its underlying legislative intent to assure the licensing of both FM translator and LPFM stations, now and in the future.

I. The Record Supports Establishing An Initial Process To Identify The Currently Viable, Bona Fide FM Translator Station Applications

The initial comments in this proceeding validate the Commission's assessment that many of the applications filed during the 2003 FM translator filing window were not filed with the intention of constructing and operating the station.[5] There is also recognition that, because of the substantial passage of time, many still pending applications may no longer be viable.[6] As a result, the record supports both an application filing limit, for the limited purpose of reducing the number of pending

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[3] Because a substantial number of applications were filed by only a few applicants, Third Further NPRM, 2011 FCC LEXIS 2858, at ¶¶32-33, the cap could be much higher than the 10 application limit the Commission previously adopted, and as many as 40 or 50.

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

[5] See Third Further NPRM, 2011 FCC LEXIS 2858, at ¶33. See Comments of CSN International at 1-2. The comments of one of one of the most prolific filers admit as much. See Comments of Edgewater Broadcasting, Inc. and Radio Assist Ministry, Inc. at 10.

[6] See Comments of the National Association of Broadcasters at 23-24.

applications, and a requirement that pending applicants notify the Commission of their present intentions with respect to their outstanding applications.

Opposition to these common sense measures came from only a few commenters, and, tellingly, those entities hold significant numbers of still pending applications.[7] Even more noteworthy is the apparent defense of mass filing specifically for purposes of assigning the resulting construction permits rather than actually constructing broadcast stations.[8] The commonly-owned Edgewater Broadcasting/Radio Assist Ministry, which the Commission specifically cited,[9] sought to justify its behavior on several dubious grounds.[10]

Nothing in the Commission's Rules sanctions the filing of an application for a broadcast station construction permit for the purpose of assigning the permit to another for profit. To the contrary, to participate in Auction No. 83, all entities were required to submit FCC Form 349 ("Application for Authority to Construct or Make Changes in an FM Translator or FM Booster Station") during the specified filing window.[11] Form 349, in turn, poses detailed questions and

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[7] See Comments of Educational Media Foundation at 13 (entity with "hundreds of pending applications," opposing imposition of an application processing limit); Comments of Edgewater Broadcasting, Inc. and Radio Assist Ministry, Inc. at 8 (entity with almost 25% of the remaining applications opposed to limiting the number of applications per applicant).

[8] See Comments of Educational Media Foundation at 13 & n.14 ("It would seem that the Commission should be more concerned by applicants who apply for construction permits and don't build at all, rather than those who provide the means for others to construct and operate stations in a timely manner.").

[9] See Third Further NPRM, 2011 FCC LEXIS 2858, at ¶32.

[10] Comments of Edgewater Broadcasting, Inc. and Radio Assist Ministry, Inc. at 9-11 (citing its status as a not-for-profit corporation, that its activities further its corporate purpose, and that the Commission can review the qualifications of the entities that actually construct and operate stations).

[11] Public Notice, FM Translator Auction Filing Window and Application Freeze, DA 03-359 (Feb. 6, 2003).

requires numerous certifications for purposes of demonstrating the applicant's fitness to construct and operate the proposed station.[12] While the Commission did, in fact, eliminate the rule barring the sale of construction permits for profit,[13] it did so not to permit the warehousing of spectrum but because it believed that competitive bidding procedures would deter speculative filings.[14] As the Third Further NPRM now concedes, that assumption "has proven to be unfounded in the Auction No. 83 context."[15]

There is simply no justification for rewarding entities that engaged in speculation by treating all pending FM translator station applications alike. Addressing the backlog of FM translator applications as a threshold matter is also more than a matter of upholding the integrity of the Commission's administrative process. Identifying the currently viable, bona fide FM translator applications will enable the Commission and the remaining applicants to pursue engineering solutions resulting in the licensing of more FM translators without necessarily obstructing future LPFM opportunities. It will also preserve spectrum for future FM translator station use. Accordingly, addressing speculation first better comports with the command of

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[12] See, e.g., FCC Form 349, Section II, Question 5 (requiring the applicant to certify that it has obtained written authority to retransmit the programs of a primary station from the licensee of that station); id., Question 6 ("Character Issues"); id., Question 9 (requiring certification that the applicant "is cognizant of and will comply with its obligations as a Commission licensee to present a program service response to the issues of public concern facing the station's community of license and service area."). See also Amendment of Section 73.3597 of the Commission's Rules (Applications for Voluntary Assignments or Transfers of Control), 52 R.R.2d 1081, 1089 (1982) ("the permittee who . . . commences broadcasting has fulfilled its basic commitment to the Commission").

[13] See Comments of Educational Media Foundation at 14 n.17.

[14] See In the Matter of Streamlining of Mass Media Applications, 13 FCC Rcd. 23056, at 23068-70 (1998).

[15] See Third Further NPRM, 2011 FCC LEXIS 2858, at ¶32.

Section 5 of the LCRA to "ensure that licenses are available to FM translator stations, FM booster stations, and low-power FM stations" now and in the future.[16]

II. The Record Supports Modifying The Commission's Preferred Approach To Better Balance The Siting of Pending FM Translator Stations And Future LPFM Stations

NPR's Comments identified a number of modifications to the Commission's preferred market-by-market approach that would result in additional FM translator station service without impairing future LPFM station opportunities and that better comport with Section 5 of the LCRA. Other commenters recommended some of the same modifications as well as modifications with which NPR agrees. It is clear, therefore, that further modification of the Commission's market-by-market approach is warranted.

First, the Commission should not dismiss pending FM translator applications that, if granted, would not obstruct future LPFM opportunities.[17] Applicants, such as Clark Atlanta University, that have waited years and whose proposed facilities would not obstruct potential LPFM station licensing opportunities, should not now have their applications dismissed.[18] Other commenters agree with this common sense change.[19] NPR also supports the complementary suggestion that the Commission not dismiss pending FM translator station applications in markets where there would be no LPFM station opportunities.[20]

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[16] LCRA § 5(2), 124 Stat. at 4073.

[17] NPR Comments at 6.

[18] Id. at 7.

[19] See Comments of CSN International at 4. C.f. Comments of the National Association of Broadcasters at 15-17 (proposing the retention of FM translator station applications in markets where there would be no future LPFM station opportunities).

[20] Comments of the National Association of Broadcasters at 15-17.

Second, the Commission should permit pending FM translator station applicants to submit minor amendment applications.[21] A number of commenters also recognized the patent unfairness of barring applicants from addressing changes in circumstances since the FM translator station applications were filed more than eight years ago.[22] In many cases, a minor amendment of an applicant's proposed facilities may have no effect on future LPFM station licensing opportunities.[23]

Third, the Commission should not waive cut-off rules to give later-filed LPFM station applications priority over pending FM translator station applications.[24] Such an extraordinary change in longstanding Commission rules and practice is not justified, let along reconcilable with a statutory command to accord both FM translator and LPFM stations "equal status."[25]

NPR also agrees with several suggestions offered by other parties. In particular, we agree with defining the "market" by reference to Arbitron markets for purposes of the Commission's preferred market-by-market approach.[26] As noted by others, the Commission generally uses the Arbitron benchmark to define radio markets for purposes of Commission

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[21] NPR Comments at 9.

[22] See Comments of Educational Media Foundation at 11-12; Comments of the University of Massachusetts, Amherst, licensee of WFCR(FM), at 5-7.

[23] See Comments of the University of Massachusetts, Amherst, licensee of WFCR(FM), at 6.

[24] NPR Comments at 8.

[25] See LCRA § 5(3), 124 Stat. at 4073. See also Comments of the University of Massachusetts, Amherst, licensee of WFCR(FM), at 4-5 ("An interpretation of the section that would allow the Commission to waive its own rules to advance the interests of one service over the other would conflict with the very equality the section requires.")

[26] See Comments of the National Association of Broadcasters at 9-15; Comments of the Educational Media Foundation at 7.

rules.[27] Such a change would also provide a more accurate portrayal of current LPFM and FM translator station locations and potential LPFM station licensing opportunities.[28] There is no policy justification for adopting a different approach specifically for purposes of processing the FM translator stations remaining from the 2003 filing window.

On this issue, NPR disagrees with the proposal by certain LPFM interests to define the "market" for purposes of the market-by-market analysis by reference to a much smaller 21 x 21 grid centered on the geographic core of a given market.[29] The apparent justification for excluding other relevant LPFM stations and future potential LPFM station opportunities from the analysis of individual markets is the desire to site future LPFM stations in the urban market centers.[30] Such an approach provides a skewed analysis of current market conditions and future LPFM station licensing opportunities and should be rejected.

It also distorts the purpose for which the LPFM service was established, which was to "create a class of radio stations designed to serve very localized communities or underrepresented groups within communities."[31] There was no intent to site LPFM stations exclusively or even primarily in city centers.[32] In addition, the Commission established the LPFM service on a noncommercial basis in significant part because "noncommercial licensees . .

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[27] See Comments of the National Association of Broadcasters at 11-13.

[28] See id. at 12-15.

[29] See Comments of Prometheus Radio Project, REC Networks, Common Frequency at 1-5.

[30] See id. at 4-5.

[31] See In the Matter of Creation of A Low Power Radio Service, Report and Order, 15 FCC Rcd. 2205, 2208 (2000) ["LPFM Report and Order"].

[32] See, e.g., In the Matter of Creation of A Low Power Radio Service, Notice of Proposed Rulemaking, 14 FCC Rcd. 2471, 2483 (1999) ("The 100-watt class would be intended to meet the demand of people who would like to broadcast affordably to communities of moderate size (whether standing alone in rural areas or as part of a larger urban area.")

. are not subject to commercial imperatives to maximize audience size [and] are more likely than commercial licensees to serve small, local groups with particular shared needs and interests, such as linguistic and cultural minorities or groups with shared civic or educational interests . . . ."[33] Such diverse communities of interest are not endemic to city centers.

It is also important to consider the specific purpose of this proceeding, which is to address the impact of Section 5 of the LCRA on the procedures previously adopted to process the applications that remain pending from the 2003 FM translator window.[34] The technical study underlying the 21 x 21 proposal attempts to measure the impact of reducing the "market" size on future LPFM station licensing opportunities but it takes no account of the impact on pending FM translator stations.[35] Given the extent of spectrum congestion generally, as the Commission has acknowledged,[36] many pending FM translator station applications are likely also located outside the center city core of the top markets. As a result, the proposed alternative market definition would likely have little impact on the processing of pending FM translator station applications

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[33] LPFM Report and Order, 15 FCC Rcd. at 2213.

[34] Third Further NPRM, 2011 FCC LEXIS 2858, at ¶1.

[35] Comments of Prometheus Radio Project, REC Networks, Common Frequency at 3-5. The technical analysis produced a number of discrepancies, in comparison with the Commission's own results. In particular, the number of potential LPFM channels attributed to the Commission's technical study differs in some cases from the number actually found in the Commission's study. Compare, e.g., Comments of Prometheus Radio Project, REC Networks, Common Frequency, Appendix A (Market 18 (Nassau-Suffolk), attributing 7 available LPFM channels to the Commission's study) with Third Further NPRM, 2011 FCC LEXIS 2858, Appendix A (Market 18 (Nassau-Suffolk), showing 2 available LPFM channels).

[36] In the Matter of Creation of A Low Power Radio Service, Third Report And Order And Second Further Notice Of Proposed Rulemaking, 22 FCC Rcd 21912, 21932 (2007).

other than to reduce their number throughout many additional markets. For purposes of this proceeding, therefore, the 21 x 21 market definition proposal offers little of value.[37]

Finally, NPR agrees with the clarification proposed by several parties that the Commission consider potential LPFM locations rather than channels in determining future LPFM station licensing opportunities.[38] Because multiple LPFM stations may be able to share a particular channel in a given market because of their relatively small coverage areas, the number of available LPFM channels in a market is less reflective of the potential LPFM station licensing opportunities.

Conversely, proposals to increase the LPFM channel floor and to disregard existing LPFM stations are as transparently self-serving as they are substantively flawed. Increasing the channel floors, while obviously intended to increase future LPFM licensing opportunities, would appear to have little effect on the processing of pending FM translator station applications in larger markets.[39] Likewise, disregarding existing LPFM stations for purposes of calculating an LPFM "floor" might increase the number of future LPFM translator station opportunities, but doing so hardly comports with the "equal status" mandate of Section 5 of the LCRA unless the Commission also disregards current FM translator stations in establishing the floors.

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[37] Some of these commenters of the mistaken impression that LPFM stations are inherently superior to FM translator stations in serving local needs. See Comments of Prometheus Radio Project, Future of Music Coalition, United Church of Christ, Office of Communications Inc. at 18-22. As NPR demonstrated in its Comments, the claim is as false as it is irrelevant to the task of implementing Section 5 of the LCRA. See Comments of National Public Radio at 9-10.

[38] See Comments of the National Association of Broadcasters at 17-20.

[39] For example, raising the floor for the top 20 markets from 8 channels, as the Commission proposed, to 10 channels, as the commenters proposed, has no effect on the processing of the pending FM translator applications. Comments of Prometheus Radio Project, REC Networks, Common Frequency, Appendix A

Conclusion

For the foregoing reasons and as set forth above and in NPR's Comments, NPR urges the Commission to (1) address the backlog of pending FM translator applications as proposed, (2) modify its proposed implementation of Section 5 of the LCRA, (3) adopt meaningful requirements to address the speculative filing of FM translator applications, and (4) maintain the existing limitation on AM station use of FM translators unless the Commission first addresses the filing of speculative FM translator applications.

Respectfully submitted,

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