

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

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

FOURTH REPORT AND ORDER AND THIRD ORDER ON RECONSIDERATION

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By the Commission:

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## I. INTRODUCTION

1. On July 12, 2011, the Commission released a *Third Further Notice of Proposed Rule Making* (“*Third Further Notice*”)<sup>1</sup> in this proceeding, seeking comment on the impact of the enactment of the Local Community Radio Act of 2010 (“LCRA”)<sup>2</sup> on the procedures previously adopted to process the approximately 6,500 applications that remain pending from the 2003 FM translator window. There, the Commission tentatively concluded that the previously adopted translator licensing procedures, which would limit each applicant to ten pending applications, would be inconsistent with the LCRA’s goals.<sup>3</sup> It proposed to modify those procedures and instead adopt a market-specific translator application dismissal process, dismissing pending translator applications in identified spectrum-limited markets in order to preserve adequate low power FM (“LPFM”) licensing opportunities. It also sought 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.

2. In this *Fourth Report and Order*, we adopt the market-specific translator application processing and dismissal policies proposed in the *Third Further Notice*, incorporating certain modifications proposed by commenters. These policies are designed to fully and faithfully effectuate the licensing directives set forth at Section 5 of the LCRA while also taking into account the constraints of limited spectrum and technical licensing requirements. We are founding these procedures on our extensive spectrum availability studies set forth in Appendices A and B, which establish that limited LPFM licensing opportunities remain in many markets. We have determined, based on these studies, that the next LPFM window presents a critical, and indeed possibly a last, opportunity to nurture and promote a community radio service that can respond to unmet listener needs and underserved communities in many urban areas. As explained herein, we find that it is necessary to dismiss significant numbers of translator applications in spectrum limited markets to fulfill that opportunity. Nevertheless, these procedures are also designed to facilitate to the maximum extent possible the grant of the pending translator applications in all markets – whether spectrum is limited or abundant. In adopting these procedures, we note that neither the Commission nor any commenter has identified a fundamentally different approach that would both satisfy Section 5’s mandate and permit the rapid and efficient licensing of both LPFM and translator stations. With regard to the 6,500 applications that remain pending from the 2003 FM translator window, we also adopt a national cap of 50 applications and a market-based cap of one application per applicant per market for the 156 markets identified in Appendix A to minimize the potential for speculative licensing conduct. Finally, we modify the May 1, 2009, date restriction to allow pending FM translator applications that are granted to be used as cross-service translators.

3. In the *Third Order on Reconsideration*, we also dismiss petitions for reconsideration of the *Third Report and Order* as they relate to the now-abandoned ten-application cap processing policy.

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<sup>1</sup> *Creation of a Low Power Radio Service and Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Third Further Notice of Proposed Rulemaking, 26 FCC Rcd 9986 (2011).

<sup>2</sup> Pub. L. No. 111-371, 124 Stat. 4072 (2011).

<sup>3</sup> The ten-application cap was adopted in *Creation of a Low Power Radio Service*, Third Report and Order and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 21912 (2007) (“*Third Report and Order*”).

## II. DISCUSSION

### A. Section 5 of the LCRA: Broad Interpretive Principles

#### 1. Background

4. The LCRA, signed into law by President Obama on January 4, 2011, expands LPFM licensing opportunities by repealing the requirement that LPFM stations be certain minimum distances from nearby stations operating on “third-adjacent” channels.<sup>4</sup> Section 5 of the LCRA also 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

Federal Communications Commission, when licensing new FM translator stations, FM booster stations, and low-power FM stations, shall ensure that –

- (1) licenses are available to FM translator stations, FM booster stations, 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.

5. In the *Third Further Notice*, we proposed to interpret Section 5 to establish the following broad principles:

- Section 5(1) requires the Commission to adopt licensing procedures that ensure some minimum number of licensing opportunities for both LPFM and translator services across the nation;<sup>5</sup>
- Read together with Section 5(2), Section 5(1) requires the Commission to provide licensing opportunities for both services in as many local communities as possible;<sup>6</sup> and

<sup>4</sup> 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. Although the Commission initially declined to impose third-adjacent channel spacing requirements on LPFM stations, Congress mandated such requirements in 2000. See *Creation of a Low Power Radio Service*, Second Report and Order, 16 FCC Rcd 8026 (2001). See also Fifth Report and Order, Further Notice of Proposed Rulemaking and Third Order on Reconsideration, MM Docket No. 99-25, FCC 12-28 (rel. Mar. 19, 2012) (implementing Section (3)(a) and other provisions of the LCRA).

<sup>5</sup> 26 FCC Rcd at 9989. As explained in the *Third Further Notice*, we are not addressing FM booster stations in this proceeding because licensing of FM booster stations has no impact on LPFM or FM translator licensing, and vice versa. See *Third Further Notice*, 26 FCC Rcd at 9989 note 17.

<sup>6</sup> *Id.* at 9989.

- We tentatively concluded that our primary focus under Section 5(1) must be to ensure that translator licensing procedures do not foreclose or unduly limit future LPFM licensing, because the more flexible translator licensing standards will make it much easier to license new translator stations in spectrum-limited markets than new LPFM stations.<sup>7</sup>

6. In addition, we sought comment on whether to consider existing stations in making a “licenses are available” finding under Section 5(1), pointing out that because of the large number of existing translators within the top 200 Arbitron-rated markets, “taking into account existing translators ... would militate in favor of the dismissal of [pending] 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.”<sup>8</sup> We tentatively concluded that the suspended national cap of ten translator applications per applicant in the Auction No. 83 pool of pending translator applications is inconsistent with the statutory mandate to ensure some minimum number of LPFM licensing opportunities in as many local communities as possible.<sup>9</sup> Instead, we proposed a market-specific process of dismissing all pending translator applications in certain spectrum-limited markets in order to preserve a certain number of LPFM licensing opportunities, while allowing processing of translator applications outside those markets.<sup>10</sup>

## 2. Comments

7. Among all the parties submitting comments in response to the *Third Further Notice*, there is broad support for eliminating the cap of ten translator applications<sup>11</sup> and using market-specific spectrum availability metrics to *implement* Section 5 requirements. However, on the issue of *interpreting* Section 5, divergent arguments were presented by translator supporters, on the one hand, and LPFM supporters, on the other. Their positions are summarized in the following sections, addressing interpretive issues presented by Sections 5(1)-(3) of the LCRA. We also note that Senators Cantwell and McCain and Representatives Doyle and Terry, the original sponsors of the LCRA, submitted a letter<sup>12</sup> expressing their support for our interpretation of Section 5 of the LCRA and for our proposed approach to effectuating the statute.

### a. Section 5(1) – Ensuring that licenses are available

8. LPFM advocates support our view that Section 5(1) of the LCRA requires the Commission to ensure that the processing of translator applications does not preclude future opportunities

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<sup>7</sup> *Id.* at 9992.

<sup>8</sup> *Id.* at 9991.

<sup>9</sup> *Id.* at 9990-91. *See also id.* at 9987 note 10 (explaining that the Media Bureau suspended the dismissal process to give the Commission an opportunity to consider petitions for reconsideration of the national cap).

<sup>10</sup> *Id.* at 9996-98. We also tentatively concluded that the LCRA does not limit our ability to address potential licensing abuses by imposing appropriate per-market and/or national application caps for parties with pending translator applications from Auction No. 83. *Id.* at 9999.

<sup>11</sup> Prometheus Radio Project (“Prometheus”) suggests we maintain the 10 application cap (with the proviso that already-granted applications from Auction 83 count against the cap), along with additional safeguards to prevent trafficking. Comments of Prometheus Radio, Future of Music Coalition, and the United Church of Christ, OC Inc. (“Joint LPFM Advocates”) at 30.

<sup>12</sup> Letter from Sen. Maria Cantwell (D-WA), Sen. John McCain (R-AZ), Rep. Mike Doyle (D-PA) and Rep. Lee Terry (R-NE) to FCC Chairman Julius Genachowski (July 12, 2011) (“Sponsors’ Letter”).

for new LPFM licenses.<sup>13</sup> Prometheus cites to the Congressional history of the LCRA and the Sponsors' Letter to support this position.<sup>14</sup> LPFM supporters contend that Congress intended that the Commission take existing licenses into account when assessing whether its licensing procedures would ensure that licenses are available rather than establish a "going forward" only standard that ignores legacy licensing.<sup>15</sup> LPFM advocates also argue that Section 5(1) requires the Commission to preserve a significant number of licensing opportunities for *new* LPFM stations in *all* markets where this is possible.<sup>16</sup>

9. Translator supporters disagree with these positions. These commenters oppose an interpretation of Section 5(1) that, in their view, would favor LPFM stations over translators and urge the Commission not to devise licensing procedures to redress perceived imbalances in past licensing.<sup>17</sup> NPR argues that our proposal unduly favors future LPFM service at the expense of the pending FM translator applicants by taking into account the number of existing LPFM and translator stations.<sup>18</sup> NPR also argues that "ensuring that licenses are available" includes current *and* future FM translator station applicants.<sup>19</sup> Similarly, EMF notes that the LCRA never "directly" references applications from Auction No. 83, and emphasizes Congress' use of "new" at the beginning of Section 5 to argue that Section 5(1) "requires that 'new' licenses for both translators and LPFM stations be made available."<sup>20</sup> NAB argues that a policy of dismissing translator applications where translators but not LPFM stations could be located would counter Section 5(1)'s mandate that licenses be available for translator stations.<sup>21</sup>

**b. Section 5(2) – Assessing the “needs of the local community”**

10. Commenters are divided also in interpreting Section 5(2) of the LCRA. LPFM advocates suggest that Section 5(2) should be interpreted as a mandate favoring localism, and in particular LPFM stations, which they argue provide the greatest localism benefit of any broadcast service.<sup>22</sup> Indeed, commenters note that the LPFM service was established in part to address the perceived loss of local programming during a period of significant radio consolidation.<sup>23</sup> Some parties argue that translators, which do not originate programming, fail to serve local community needs<sup>24</sup> and are not truly local,<sup>25</sup> while LPFM stations better serve the goals of localism.<sup>26</sup> LPFM proponents also suggest that, when making

<sup>13</sup> Comments of Prometheus, REC Networks, and Common Frequency at 9.

<sup>14</sup> Comments of Joint LPFM Advocates at 7-8.

<sup>15</sup> Comments of Prometheus, REC Networks, and Common Frequency at 9.

<sup>16</sup> Reply Comments of Connecticut Citizens for Independent Media at 2.

<sup>17</sup> Comments of WFCR at 2; Comments of Catholic Radio Association ("CRA") at 4.

<sup>18</sup> Comments of National Public Radio ("NPR") at 2, 8.

<sup>19</sup> Comments of NPR at 5.

<sup>20</sup> Comments of Educational Media Foundation ("EMF") at 8; *see also* Charles Keiler Comments at 4 and Northeast Broadcasting Co. ("NEBCO") at 3-4.

<sup>21</sup> Comments of National Association of Broadcasters ("NAB") at 17.

<sup>22</sup> Comments of Joint LPFM Advocates at 13-15.

<sup>23</sup> Comments of Cynthia Conti at 1; Comments of Joint LPFM Advocates at 22.

<sup>24</sup> Comments of Western Oregon Radio Club at 2-4.

<sup>25</sup> Comments of Joint LPFM Advocates at 20.

<sup>26</sup> Comments of Joint LPFM Advocates at 13-14.

licensing decisions, the Commission could address the needs of local communities by considering demographic data. Specifically, they argue that urban communities, well served by commercial and noncommercial services, have less need for translator services and more need for local community-level programming, while rural communities, poorly served by full-service facilities, have need for both translators and LPFM stations.<sup>27</sup>

11. On the other hand, translator advocates argue that translators can serve the needs of the local community and note that the Commission and Congress have found that to be the case.<sup>28</sup> For example, translators can provide emergency information,<sup>29</sup> as well as regional and state news.<sup>30</sup> Translators can also serve the local community by providing a format not currently available in that area.<sup>31</sup> Thus, they argue it is wrong to assume that LPFM stations better serve local community needs than do translators.<sup>32</sup> NPR criticizes our analysis of Section 5(2) on the ground that we focused on the differences between translators and LPFM stations, rather than focusing on how both services serve the needs of the local community by expanding the programming choices available to listeners.<sup>33</sup> NPR also argues that some communities might actually have a greater need for a translator than for an LPFM station because a translator may be filling a coverage gap for a significant full-power station.<sup>34</sup> Common Frequency replies that urban communities served by multiple translators have more need for a first LPFM station.<sup>35</sup>

**c. Section 5(3) – “Equal in status”**

12. The *Third Further Notice* noted that Section 5(3) refers specifically to “stations” rather than to “applications,” suggesting that it could be applied only to existing stations and that future LPFM applications could have priority over pending FM translator applications.<sup>36</sup> However, the *Third Further Notice* also recognized that the Commission had used the terms “stations” and “applications” interchangeably in discussing the “co-equal status” of LPFM stations and FM translator stations and that the Commission had framed this issue in terms of whether to follow or waive the current “cut-off” rules which protect prior-filed Auction No. 83 translator applications from subsequently-filed LPFM station

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<sup>27</sup> Comments of Common Frequency at 9. In addition to participating in the Comments of Joint LPFM Advocates, Prometheus also submitted comments with REC Networks and Common Frequency proposing specific modifications to the Commission’s proposed implementation of Section 5 of the LCRA. See Joint Proposal of Prometheus Radio Project, REC Networks and Common Frequency on the Assessment of LPFM Availability (“Joint Proposal”). Prometheus argues that the Joint Proposal would better serve the needs of urban populations. Reply Comments of Prometheus at 4.

<sup>28</sup> Comments of CRA at 4; Comments of Charles Keiler at 5; Comments of WFCR at 3; Comments of NEBCO at 3; Reply Comments of EMF at 10.

<sup>29</sup> Comments of NAB at 7.

<sup>30</sup> Comments of WFCR at 3.

<sup>31</sup> Comments of EMF at 9.

<sup>32</sup> Comments of NAB at 6-7.

<sup>33</sup> Comments of NPR at 9-10.

<sup>34</sup> Comments of NPR at 10.

<sup>35</sup> Reply Comments of Common Frequency at 10-11.

<sup>36</sup> *Third Further Notice*, 26 FCC Rcd at 9994.

applications.<sup>37</sup> The *Third Further Notice* stated that it seems reasonable to assume that Congress intended the same meaning when it used the word “station” in the LCRA.<sup>38</sup>

13. Translator proponents argue that, for regulatory purposes, the terms “stations” and “applications” are interchangeable.<sup>39</sup> Translator proponents argue that either changing the Commission’s market-based approach<sup>40</sup> or waiving the cut-off rules in favor of future-filed LPFM applications would not be consistent with Section 5(3).<sup>41</sup> Mullaney Engineering argues that the services are not “equal in status” if LPFM applicants are allowed to invalidate the cut-off protection rights of previously-filed translator applications.<sup>42</sup> NPR likewise believes that waiving cut-off rules to give preference to later-filed LPFM applications would violate the “equal in status” mandate.<sup>43</sup> Other translator supporters express concern that this approach would disproportionately favor the licensing of future LPFM stations and thereby violate Section 5(3)’s equal in status mandate.<sup>44</sup> They claim that trying to make LPFM and translators equal in numbers would suppress translator licensing and artificially encourage unwanted LPFMs.<sup>45</sup>

14. LPFM supporters disagree, arguing that, while the grant of a station license conveys certain vested and statutorily protected interests to a licensee, those interests do not attach to a pending application.<sup>46</sup> Prometheus argues that Section 5(3) does not refer to the cut-off rule, but instead merely requires that translators and LPFM stations be secondary to full-service stations and equal to each other.<sup>47</sup> Prometheus further asserts that Section 5(3) does not prohibit the Commission from giving LPFM applicants priority over translator applicants, particularly when read in the context of Section 5(2)’s requirement that licensing serve the needs of local communities and Section 307(b)’s requirement that the Commission distribute radio service in the public interest.<sup>48</sup> Prometheus states that the Commission should balance the two services by aiding in the development of LPFM.<sup>49</sup>

15. Other LPFM advocates argue that the cut-off protection rule is a regulatory custom that the Commission can waive if it serves the public interest.<sup>50</sup> Some commenters argue for giving LPFM

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Comments of Edgewater Broadcasting, Inc., & Radio Ministry (“Ministries”) at 2; NPR Comments at 8; WFCR Comments at 4.

<sup>40</sup> Reply Comments of NAB at 2

<sup>41</sup> Comments of NEBCO at 5.

<sup>42</sup> Comments of Mullaney Engineering, Inc. at 3.

<sup>43</sup> Comments of NPR at 8; Reply Comments of NPR at 6.

<sup>44</sup> Comments of NPR at 8, Comments of EMF at 10.

<sup>45</sup> Comments of Ministries at 5.

<sup>46</sup> See Reply Comments of Don Schellhardt at 2. Prometheus likewise believes that parties do not acquire any rights by virtue of filing an application. Comments of Joint LPFM Advocates at 26.

<sup>47</sup> Comments of Joint LPFM Advocates at 24-25.

<sup>48</sup> Comments of Joint LPFM Advocates at 27.

<sup>49</sup> Comments of Joint LPFM Advocates at 27.

<sup>50</sup> Reply Comments of Don Schellhardt at 2.

stations priority because translators consume valuable radio spectrum while failing to provide original local programming.<sup>51</sup> LPFM advocates also argue that the Commission must compensate for the “head start” that the translator service has to the comparatively new LPFM service.<sup>52</sup> Commenters further argue that the current rules favor translators.<sup>53</sup> Some suggest that, in order to achieve a true equality between the LPFM service and translators, the technical rules governing the LPFM service should be changed to match those of translators.<sup>54</sup> Common Frequency contends that Section 5(3) calls for a goal of *equal spectrum* for each service.<sup>55</sup>

### 3. Analysis

16. We adopt the interpretations of the three Section 5 licensing standards proposed in the *Third Further Notice*. In its broadest terms, Section 5(1) clearly requires the Commission to ensure that some minimum number of FM translator and LPFM “licenses are available” throughout the nation when licensing new FM translator and LPFM stations. We also find that Section 5 is most reasonably interpreted to require consideration of existing licenses. As we observed in the *Third Further Notice*, 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 in ensuring that “licenses are available” for both services. In addition, our interpretation is consistent with the title of Section 5, “Ensuring Availability of Spectrum for Low-Power FM Stations,” as well as the Commission’s longstanding license allocation policies under Section 307(b) of the Communications Act of 1934, as amended (“Act”),<sup>56</sup> which directs the Commission to ensure “a fair, efficient, and equitable distribution of radio service” “among the several States and communities.” In contrast, interpreting Section 5 to require us to license new translator and LPFM stations without regard to the number of operating stations in each service, as EMF advocates, would be inconsistent with ensuring the availability of *spectrum* for both services, as well as Section 307(b)’s direction. We also find support for our interpretation in the comments of LPFM advocates discussed above.<sup>57</sup> Accordingly, we conclude that the mandate of Section 5(1) to ensure that “licenses are available” is reasonably interpreted to require consideration of both existing and future licenses in the translator and LPFM services when licensing new stations in those services.

17. We reject arguments that interpreting Section 5(1) to require consideration of existing licenses is unreasonable because such an interpretation would “favor” LPFM licensing.<sup>58</sup> The LCRA necessarily requires the Commission to make choices between licensing new LPFM and translator stations in some cases, given that the two services compete for the same limited spectrum. Making such choices based on the overall spectrum available to each service does not “favor” one service over the other. On the contrary, the fact that our interpretation of Section 5(1) enables us to account for the present disparities between the two services in terms of the number of licensed stations supports its

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<sup>51</sup> Comments of Western Oregon Radio Club at 5.

<sup>52</sup> Comments of Media Alliance at 1.

<sup>53</sup> Comments of REC Networks at 2-4, Comments of Ministries at 4; Comments of Common Frequency at 6.

<sup>54</sup> Comments of Charles Keiler at 5; Comments of WFCR at 4; Comments of REC Networks at 4.

<sup>55</sup> Comments of Common Frequency at 8.

<sup>56</sup> 47 U.S.C. § 307(b).

<sup>57</sup> See *supra*, ¶ 8.

<sup>58</sup> Comments of WFC at 2; Comments of CRA at 4; Comments of NPR at 2, 8.

reasonableness.<sup>59</sup> We also reject EMF's argument that the LCRA "says nothing" about the processing of the applications which remain pending from the 2003 translator window because it does not expressly address them.<sup>60</sup> These applications are unquestionably subject to Section 5 requirements which apply "when licensing new FM translator stations . . . ." Rather, we agree with NPR that the language of Section 5(1) encompasses pending as well as future applications.

18. We also adopt our proposed interpretation of Sections 5(1) and (2) together to require that LPFM and translator licenses be available in as many "local communit[ies]" as possible, according to their needs.<sup>61</sup> We recognize that translators and LPFM stations both serve the needs of communities, albeit in different ways, and conclude that we must take these factors into consideration in implementing Section 5(2). In particular, translators, which are inexpensive to construct and operate, can effectively bring service to rural and under-served areas. LPFM stations, on the other hand, which typically utilize volunteer staffs, operate under great budget constraints, and serve smaller geographic areas, may be less effective in meeting the needs of small communities and areas of low population density.<sup>62</sup> Translators also are essential components of local and regional transmission systems that efficiently deliver valued programming to listeners. Nevertheless, as we explained in the *Third Further Notice*, the Commission has historically accorded no weight to translators in assessing the comparative needs of a community for radio service under its Section 307(b) licensing policies.<sup>63</sup> In contrast, the LPFM service was created "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."<sup>64</sup> Numerous LPFM service and comparative licensing criteria are designed to promote these goals. These criteria include a requirement that licensees be local, a licensing preference for those applicants with an established community presence, and a licensing preference for those applicants that pledge to locally originate at least eight hours of programming per day. In addition, ownership restrictions and time-share rules necessarily result in expanded ownership diversity.<sup>65</sup> Based on these factors, we find that LPFM stations are uniquely positioned to meet local needs, particularly in areas of higher population density where LPFM service is practical and sustainable.<sup>66</sup>

19. We also adopt our tentative conclusion that our primary focus under Section 5 must be to ensure that translator licensing procedures do not foreclose or unduly limit future LPFM licensing, because the more flexible translator licensing standards will make it much easier to license new translator

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<sup>59</sup> See *Third Further Notice*, 26 FCC Rcd at ¶ 12.

<sup>60</sup> Comments of EMF at 8.

<sup>61</sup> LCRA Sec. 5. See *Third Further Notice*, 26 FCC Rcd at 9989.

<sup>62</sup> See *Economic Impact of Low-Power FM Stations on Commercial FM Radio: Report to Congress Pursuant to Section 8 of the Local Community Radio Act of 2010*, Report, MB Docket No. 11-83, DA 12-2, ¶ 7 (MB 2012); see also 47 C.F.R. §§ 74.1235(b)(1) (permitting power/height combinations for non-fill-in translators located east of the Mississippi River or Zone I-A sufficient to extend station's 60 dBu contour up to 7.3 kilometers from transmitter site) and (b)(2) (permitting power/height combinations for non-fill-in FM translators located in other areas to extend station's 60 dBu contour up to 13.3 kilometers from transmitter site).

<sup>63</sup> See *Third Further Notice*, 26 FCC Rcd at 9993.

<sup>64</sup> See *First Report and Order*, 15 FCC Rcd at 2213.

<sup>65</sup> See *Third Report and Order*, 15 FCC Rcd at 9993.

<sup>66</sup> See also *infra*, ¶ 39.

stations in spectrum-limited markets than new LPFM stations.<sup>67</sup> Our market-specific analyses, which are set forth in Appendices A and B, establish that few LPFM licenses have been issued and limited LPFM licensing opportunities remain in many markets due to the relatively inflexible LPFM technical rules and high spectrum utilization. In contrast, given the more flexible translator licensing standards and the limited LPFM licensing opportunities in many markets, the next round of LPFM licensing will have only a modest impact on licensing opportunities for future translator stations. Thus, our principal challenge in effectuating the mandates of Sections 5(1) and 5(2) is to identify and preserve LPFM licensing opportunities where few or no LPFM stations currently operate. We note that this goal is fully consistent with Congress's decisions to eliminate third adjacent channel distance separation requirements and to permit second adjacent channel spacing waivers, and thereby, expand the LPFM service.<sup>68</sup>

20. Our interpretation of Section 5 has clear implications for the translator processing and dismissal procedures we adopt in this proceeding. These procedures must be responsive to two different situations. The first concerns markets where, taking into account both licensed stations and the potential for additional stations, ample LPFM licensing opportunities are present. Procedures in these markets must *balance* translator and LPFM licensing in a manner that “ensures” a level of future LPFM licensing that the Commission determines is sufficient to satisfy statutory requirements. Secondly, in markets where insufficient spectrum remains to satisfy these requirements, the translator processing and dismissal procedures, including amendment and settlement procedures, should preserve *all* identified LPFM licensing opportunities, *i.e.*, should facilitate the grant of *only* those translator applications that would not diminish or “block” future LPFM licensing in these markets.

21. On the other hand, we agree with NAB that, consistent with our statutory interpretation, our policies should seek to avoid the dismissal of translator applications where LPFM stations “cannot” be licensed.<sup>69</sup> We note that, however, that capacity to identify such situations is limited. The FM database is dynamic, with LPFM filing opportunities being created, eliminated or modified daily due to FM application and allotment filings. Moreover, revised LPFM technical licensing rules that are now under consideration will materially affect licensing opportunities. Given the limited LPFM licensing opportunities in many markets, the modest impact that LPFM licensing will have on future translator licensing in those markets and the difficulties in establishing with certainty that a translator application “cannot” preclude an LPFM filing, we conclude that adoption of a conservative processing regime that fully protects scarce spectrum for future LPFM stations would be consistent with Section 5, read as a whole.

22. We adopt our tentative conclusion that the nationwide ten translator application-cap dismissal policy we established prior to the LCRA's enactment is inconsistent with Section 5 because it would not provide a certain and effective way to ensure that LPFM “licenses are available” for local communities in many markets.<sup>70</sup> Under that policy, translator applications that prevent or “block” LPFM licensing opportunities would likely be eligible for processing in markets where the need for LPFM licensing opportunities is greatest and spectrum most limited. Based on the market-specific analyses set forth in Appendices A and B, we also conclude that no or limited useful spectrum for LPFM stations is likely to remain in numerous specific radio markets where typically few or no LPFM stations now operate

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<sup>67</sup> *Id.* at 9992.

<sup>68</sup> See LCRA, Sec. 3(a) (eliminating LPFM third adjacent channel distance separation requirements) and 3(b)(2) (authorizing the Commission to waive second adjacent channel distance separation requirements).

<sup>69</sup> Comments of NAB at 16.

<sup>70</sup> See *Third Further Notice*, 26 FCC Rcd at 9990-91.

unless translator dismissal procedures reliably result in the dismissal of all “blocking” translator applications.

23. With regard to Section 5(3), we asked in the *Third Further Notice* whether the requirement that translator and LPFM stations remain “equal in status” prohibits waivers of the LPFM cut-off rule, which prioritizes pending FM translator applications over later-filed LPFM applications,<sup>71</sup> explaining that such an interpretation would require the Commission to dismiss any pending FM translator applications that it determines must make way for LPFM licensing opportunities, rather than deferring action on such applications and later processing any that remain pending after the completion of dismissal and settlement procedures adopted to implement Section 5.<sup>72</sup> We identified several factors that support such an interpretation. The cut-off rules are a principal characteristic of the two services, establishing their “equal” status as to each other. While acknowledging that Section 5(3) refers to “stations,” we noted in the *Third Further Notice* that the Commission has used “stations” and “applications” interchangeably in considering whether to give priority to applications filed in the upcoming LPFM window, a central issue in this proceeding since 2005. Thus, we explained, Section 5(3) could be reasonably interpreted to prohibit waivers of the LPFM cut-off rule.

24. Prometheus disagrees with this reasoning, pointing out that the “plain language” of Section 5(3) does not refer to the Commission’s cut-off rules.<sup>73</sup> It contends that Section 5(3) merely “authorizes the existing arrangements between licensed LPFM and translator stations as they relate to full-service stations.”<sup>74</sup> Both can be displaced by primary stations but neither can displace the other; and in this sense these stations should remain equal.<sup>75</sup> Prometheus concludes that Section 5(3) is not a bar to giving priority to LPFM applications filed in the upcoming window.<sup>76</sup> Based on this interpretation, Prometheus advocates a processing policy under which action on certain translator applications would be deferred.<sup>77</sup> Those applications that remain pending would be subject to dismissal if a conflicting LPFM application is filed. Prometheus, however, also recognizes that the translator dismissal procedures proposed in the *Third Further Notice* would be permissible under Prometheus’s differing Section 5(3) interpretation.<sup>78</sup>

25. We are not persuaded that Prometheus’s narrow interpretation of Section 5(3) is reasonable. For the reasons discussed above, we believe that the equality mandated by Section 5(3) for FM translator stations vis-à-vis LPFM stations is most reasonably interpreted to encompass applications as well as authorized stations in order to be meaningful.<sup>79</sup> That view is consistent with the Commission’s treatment of the issue of the relative status of LPFM and translator stations prior to the LCRA’s

<sup>71</sup> See 47 C.F.R. § 73.807(d) (requiring LPFM applications to meet minimum distance separation requirements with respect to “authorized FM translator stations, cutoff FM translator applications, and FM translator applications filed prior to the release of the Public Notice announcing the LPFM window”).

<sup>72</sup> *Third Further Notice*, 26 FCC Rcd at 9994.

<sup>73</sup> Comments of Joint LPFM Advocates at 24-25

<sup>74</sup> *Id.* at 24-25.

<sup>75</sup> *Id.* at 24-25.

<sup>76</sup> *Id.* at 27.

<sup>77</sup> *Id.* at 29.

<sup>78</sup> *Id.* at 27.

<sup>79</sup> See *supra*, ¶ 23.

enactment, and nothing in the legislative history supports a contrary interpretation. Our interpretation also is consistent with the fact that the Section 5 mandates apply “when licensing new FM translator stations, FM booster stations and low-power FM stations.” That is, Section 5 as a whole concerns the processing of *applications*. Thus, we believe that Prometheus’s interpretation is inconsistent with Section 5(3) when it is considered in the context of Section 5 as a whole.

26. Although we find that the “equal in status” requirement of Section 5(3) is most reasonably interpreted to bar LPFM cut-off rule waivers, we need not resolve this issue. Assuming *arguendo* that we could give priority to LPFM applications filed in the upcoming window over pending translator applications, we nevertheless conclude that the processing regime we adopt herein more rapidly and efficiently effectuates the LCRA’s goals than would Prometheus’s alternate approach. Most importantly, it avoids the translator licensing delays that would result from a deferral approach. Under such an approach, all translator application processing would remain frozen until all LPFM applications are on file and have been analyzed. Only at that point could the Commission attempt to process “non-conflicting” translator and LPFM applications simultaneously. In addition to these delays, translator grants under Prometheus’s approach would have to be conditioned on subsequent LPFM licensing decisions, with the risk of displacement potentially discouraging or delaying construction efforts. Alternatively, the Commission could delay translator application processing until initial licensing actions from the LPFM window are substantially completed, a process that would likely take a number of years. In contrast, as set forth in detail below, our tailored market-specific processing scheme is likely to allow the rapid licensing of at least one 1000 additional translator stations. Thus, we agree with the sponsors of the LCRA that the approach we adopt herein “takes into account the needs of translator applicants” as well as potential LPFM applicants.<sup>80</sup>

27. We also conclude that the approach Prometheus advocates would be administratively burdensome and resource intensive. Prometheus’s approach would require the Commission to identify with certainty the potential preclusive impact of pending LPFM window filings in order to determine which deferred FM translator applications may be acted on, yet the potential for LPFM application amendments and settlements would make it difficult to identify with certainty the breadth of the potential preclusive impact of pending LPFM window filings. Moreover, Prometheus’s approach could lead to inequitable treatment of FM translator applications filed in the same window, with the opportunity for technical amendments resulting in certain translator applications that are deemed ready for processing before others receiving preferential access to limited spectrum.<sup>81</sup> Thus, we conclude for policy reasons that the problems associated with deferring action on pending FM translator applications that otherwise would be subject to dismissal under the policies we adopt herein substantially outweigh any benefits.

## **B. Implementing Section 5 of the LCRA: Proposed Market-Based Processing Policy**

### **1. Background**

28. Having tentatively concluded that the ten-application cap dismissal policy would run contrary to the LCRA’s mandate, the Commission considered three alternative processing regimes and tentatively concluded that a market-specific, spectrum availability-based translator application dismissal policy would most faithfully implement Section 5 of the LCRA.<sup>82</sup> To determine LPFM opportunities in

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<sup>80</sup> Sponsor’s Letter at 1-2.

<sup>81</sup> This problem could be particularly acute in the case of a “non-conflicting” translator application that is part of a larger group of mutually exclusive applications that includes applications in conflict with LPFM filings.

<sup>82</sup> *Third Further Notice*, 26 FCC Rcd at 9995-96.

major markets, the Bureau undertook a nationwide LPFM spectrum availability analysis.<sup>83</sup> The Bureau studied all top 150 radio markets, as defined by Arbitron, and smaller markets where more than four translator applications are pending. It centered a thirty-minute latitude by thirty-minute longitude grid over the center-city coordinates of each studied market. Each grid consisted of 961 points – 31 points running east/west by 31 points running north/south. The Bureau analyzed each of the 100 FM channels (88.1 MHz – 107.9 MHz) at each grid point to determine whether any channels remained available for future LPFM stations at that location. Only channels that fully satisfied co-, first- and second adjacent channel LPFM spacing requirements to all authorizations and applications, including pending translator applications, were treated as available. The area encompassed by the grid was designed to approximate “core” market locations that could serve significant populations. The results of that analysis were presented in the *Third Further Notice*, and identified the number of channels (“LPFM Channels”) currently available for LPFM use in each studied market.<sup>84</sup> In calculating “available” LPFM channels, it included both the identified vacant channels and those channels currently licensed to LPFM stations which are authorized to operate at locations within each market’s thirty-minute latitude by thirty-minute longitude grid.<sup>85</sup>

29. The Commission proposed to dismiss all pending applications for new FM translators in any market in which the number of available LPFM Channels was below a specified LPFM channel floor (a “dismiss all” market), and to process all pending applications for new translators in markets in which the number of available LPFM channels met or exceeded the applicable LPFM channel floor (a “process all” market).<sup>86</sup> In proposing the channel floors, the Commission was guided by the number of top 150-market NCE FM full power stations, noting that this service was most comparable to the LPFM service.<sup>87</sup>

- Markets 1 – 20: 8 LPFM Channels
- 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

30. The Commission sought comment on the methodology of its study, and whether a market-tier approach was a reasonable means for effectuating both Section 5(1) and 5(2) directives.<sup>88</sup> It also sought comment on whether use of Arbitron market-based assessments as used therein was reasonable for purposes of implementing Section 5 of the LCRA, and tentatively concluded that a market-based analysis would provide a reasonable “global” assessment of LPFM spectrum availability in

<sup>83</sup> *Id.* at 9990. See also *id.* at Appendix A.

<sup>84</sup> *Third Further Notice*, 26 FCC Rcd at 9996. We have since updated this study and have attached the results at Appendix A.

<sup>85</sup> *Id.* at 9997.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 9996.

<sup>88</sup> *Id.*

particular areas.<sup>89</sup> It sought comment on whether defining the Section 5(2) term “local community” in terms of markets was reasonable and whether it was appropriate to use the same definition for LPFM and translator purposes.<sup>90</sup>

31. The Commission also sought comment on whether it should impose restrictions on the translator settlement process in the “process all” markets to ensure that engineering solutions to resolve application conflicts would not reduce the number of channels available for LPFM stations in these markets.<sup>91</sup> Finally, in order to preserve the status quo during the pendency of this proceeding, it proposed to suspend the processing of any translator modification application that proposes a transmitter site for the first time within any market that has fewer LPFM channels available than the proposed channel floor.<sup>92</sup> It also imposed an immediate freeze on the filing of translator “move-in” modification applications and directed the Bureau to dismiss any such application filed after the adoption of the *Third Further Notice*.<sup>93</sup> It noted that the freeze would continue until the close of the upcoming LPFM filing window, but would 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.<sup>94</sup> It sought comment on these proposals.

## 2. Comments

32. With a few exceptions,<sup>95</sup> most commenters generally agreed that some form of the Commission’s market-based approach was an acceptable methodology to carry out the mandate of Section 5.<sup>96</sup> However, many commenters suggested modifications to the proposal. Some commenters

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<sup>89</sup> *Id.* at 9998.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 9997. See 47 C.F.R. 73.5002 (c) and (d).

<sup>92</sup> *Third Further Notice*, 26 FCC Rcd at 9998. An application proposing to relocate a transmitter closer to a larger market is commonly referred to as a “move in” modification application.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 9998-99.

<sup>95</sup> Some commenters still support the notion of a cap. See, e.g., Comments of NPR at 5 (supporting an application cap); Comments of WUSB at 5 (same); Comments of CSN International (“CSN”) at 3-4 (same). Others suggest alternatives that would either run contrary to the LCRA and our Rules, or would be administratively unfeasible or impractical. For example, Charles Keiler suggests that we run the market study allowing LPFMs to use contour protection methodology. See Comments of Charles Keiler at 7. We find that a contour overlap interference protection approach is statutorily barred by Section 3(b)(1) of the LCRA, which prohibits the Commission from modifying the current co-channel and first- and second-adjacent channel distance separation requirements. LCRA, § 3(b)(1). Hope Christian Church of Marleton, Inc., suggests that we open a translator settlement window before assessing LPFM availability, while NAB suggests that suggests that the Commission should refresh the record of pending translator applications before moving forward with any processing policy. See Comments of Hope Christian Church of Marleton, Inc. at 4, Comments of NAB at 23. We find that these approaches would unreasonably delay our efforts to expeditiously open an LPFM filing window. Furthermore, the processing policies adopted in this item will provide opportunities for many translator applicants that would have previously been dismissed in specific markets under the originally proposed process, to pursue those applications, as originally filed or as amended, and settlement opportunities that do not preclude the use of LPFM channel/locations within the grid for that market.

<sup>96</sup> Some comments addressed issues outside the scope of this proceeding and, therefore, we decline to address them here. See, e.g., Reply Comments of REC Networks at 8-17 (requesting a petition for rulemaking to amend various LPFM rules); Comments of Communications Technologies, Inc. at 3-4 (arguing that LPFMs should be allowed to use Channels 5 and 6); Comments of REC Networks at 17 (suggesting that the Commission set translator ownership (continued....))

suggest changes that would potentially foster more opportunities for LPFM stations (which could result in the dismissal of more pending FM translator applications), while others favor processing more translator applications from the 2003 window (which also could result in fewer LPFM opportunities). We discuss them in turn below.

**a. Defining the Market and Channel Floors**

33. Prometheus and other LPFM proponents suggest that the Commission analyze the top markets using a smaller grid (21x21), arguing that the 31x31 grid studies an area “far too large to adequately evaluate spectrum availability in most urban areas.”<sup>97</sup> Prometheus and REC each note that many available LPFM opportunities are located in sparsely populated (or unpopulated) areas on the fringe of the 31x31 grid.<sup>98</sup> LPFM advocates likewise urge the Commission to separately evaluate named cities in hyphenated Arbitron markets,<sup>99</sup> to set higher channel floors,<sup>100</sup> to count only channels (and not locations) as counting toward a channel floor,<sup>101</sup> and to only count new licensing opportunities when assessing LPFM channel availability.<sup>102</sup>

34. Translator advocates largely disagree with these suggestions. NPR and NAB assert that a 21x21 grid “provides a skewed analysis of market conditions”<sup>103</sup> and would violate the LCRA mandate that the two services remain equal in status because it would result in the dismissal of more translator applications.<sup>104</sup> Indeed, they maintain that even the Commission’s proposed 31x31 grid is too small,<sup>105</sup> and argue that use of Arbitron market boundaries would provide a more accurate measure of current LPFM and FM translator station locations and potential LPFM licensing opportunities. EMF and other

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limits); Comments of Jerry Isenhardt at 2 (suggesting that translators be allowed to operate as LPFMs, and vice versa); Comments of National Translator Association at 3 (same). Some commenters make a case for the LP-10 service. See Comments of Kyle Magrill at 3-4 (voicing support for LP-10 service). The viability of the LP-10 service and certain proposed LPFM rule changes will be addressed in a companion *Fourth Further Notice* being released today.

<sup>97</sup> Joint Proposal at 3.

<sup>98</sup> *Id.* at 4 (asserting that 75 percent of the available LPFM channels are located within the 31x31 grids but not within the 21x21 grids); Comments of REC Networks at 7-8 (noting that “70 study areas have 25% or less of the population in the study area living in the outer zone,” while ten of these markets “have 10% or less of the population within the outer zone,” and identifying 171 channels at study points where there is no population, representing nearly 12 percent of all potentially available LPFM channels).

<sup>99</sup> See Reply Comments of REC Networks at 2.

<sup>100</sup> Joint Proposal at 8. REC advocates for an increase in channel floors to compensate for flaws it identified in the Commission’s methodology, arguing that the Commission’s study did not properly exclude search points that were in Mexico, did not account for vacant Mexican allotments, or areas that had no population. See *e.g.*, Comments of REC Networks at 6, 8.

<sup>101</sup> See Reply Comments of Common Frequency at 9-10. Multiple stations may be able to share a particular channel within a market if they are located far enough apart to satisfy the LPFM spacing requirements of Section 73.807 of the Rules. See 47 C.F.R. § 73.807.

<sup>102</sup> Joint Proposal at 10.

<sup>103</sup> Reply Comments of NPR at 7.

<sup>104</sup> Reply Comments of NAB at 8.

<sup>105</sup> Comments of NAB at 10-15.

translator proponents likewise disagree with Prometheus's view that only channels should apply to the channel floors, maintaining that potential "locations" for LPFM stations should also count.<sup>106</sup> By looking solely at channels, EMF maintains that the Commission is understating the number of potential LPFM stations that could actually be constructed in the market.<sup>107</sup> It argues that if LPFM is truly a localized service to small populations, channel re-use within a market is "to be expected."<sup>108</sup>

**b. Translator Amendment and Settlement Procedures**

35. *In "Dismiss All" Markets.* NAB and others assert that we should process translator applications where an application grant would not obstruct a particular LPFM opportunity<sup>109</sup> or where a dismissal would not create an additional LPFM opportunity.<sup>110</sup> LPFM advocates oppose these suggestions. With respect to the former, they argue that this proposal in practice would likely result in the loss of significant LPFM licensing opportunities.<sup>111</sup> With respect to the latter, they argue that the second-adjacent waiver process will create many LPFM opportunities in markets that otherwise appear to have no available LPFM channels (such as New York and Chicago).<sup>112</sup> Common Frequency further urges the Commission to take into account LP-10 availability and the potential for intermediate frequency ("I.F.") and second adjacent channel waivers in determining whether a particular translator application could preclude an LPFM licensing opportunity.<sup>113</sup>

36. *In "Process All" Markets.* NPR and others argue that the Commission should not restrict the ability of pending translator applicants to make minor amendments to their applications, arguing that circumstances may have changed considerably since their applications were filed in 2003.<sup>114</sup> NAB argues that the Commission should allow applicants to choose other channels as part of the settlement process, so long as the availability of LPFM opportunities is not reduced below the LPFM channel floor for that market.<sup>115</sup> It does not, however, propose procedures to select among competing translator applicants

<sup>106</sup> See Comments of EMF at 7; Comments of NAB at 17-19; Reply Comments of NPR at 9; Comments of Radio Power Inc. at 2.

<sup>107</sup> Comments of EMF at 7.

<sup>108</sup> Comments of EMF at 7.

<sup>109</sup> See Comments of Sacred Heart University at 1 (stating that dismissal of their translator applications in Danbury is unnecessary because their grant will not preclude any LPFM opportunities); Comments of CSN at Exhibit A (submitting engineering exhibits which purportedly demonstrate that its pending translator applications do not obstruct identified LPFM opportunities in various spectrum-limited Arbitron markets); Comments of WFCR, Amherst, MA at 7 (noting that many translator applications now proposed for automatic dismissal might not interfere with identified LPFM slots); Reply Comments of NPR at 5 (Commission should not dismiss pending translator applications that, if granted, would not obstruct future LPFM opportunities).

<sup>110</sup> Comments of NAB at 16; Comments of CSN ("it would constitute an unfair hardship on CSN to dismiss [its Chicago applications] ... when no tangible LPFM public service interest exists"); Comments of NEBCO at 2 (notes that dismissal of translator applications won't create any new LPFM opportunities in Boston); Comments of William C. Doerner at 1 (should process translators if their dismissal would not create additional LPFM opportunities).

<sup>111</sup> Reply Comments of Prometheus at 9.

<sup>112</sup> Reply Comments of REC Networks at 5; Reply Comments of Common Frequency at 8.

<sup>113</sup> See Letter from Common Frequency (filed Dec. 27, 2011).

<sup>114</sup> Comments of NPR at 9; Comments of Edgewater Broadcasting & Radio Assist Ministry at 12.

<sup>115</sup> Comments of NAB at 20.

while also safeguarding the pertinent LPFM channel floor. It notes that in many “process all” markets, the number of available LPFM channels far exceeds the channel floor.<sup>116</sup>

37. LPFM advocates disagree, arguing that the “availability of settlements negates the FCC’s systemic approach to defining clear channel floors.”<sup>117</sup> Common Frequency maintains that the availability of settlements “provides for an open-ended scenario where translator applicants could effectively cherry-pick the best channels, leaving the channels at the edges of the grid-area for LPFM applicants.”<sup>118</sup>

### 3. Analysis - Revised Translator Application Processing and Dismissal Policies

38. Despite the divergence of views about interpreting the LCRA, there is relatively broad agreement with respect to our proposal to effectuate Section 5 with market-specific spectrum availability metrics. Significantly, no commenter provided a comprehensive statutory interpretation pointing to a fundamentally different approach. Accordingly, we adopt, with certain modifications, the market-specific processing approach outlined in the *Third Further Notice*. As discussed above, our principal challenge in effectuating Section 5(1) of the LCRA is to identify and preserve those LPFM licensing opportunities where few or no LPFM stations currently operate.<sup>119</sup> The processing approach we adopt today furthers this goal by ensuring that LPFM licensing opportunities in spectrum-limited markets remain “available.” At the same time, we adopt translator application and amendment procedures that will permit the immediate licensing of certain pending translator applications in both “dismiss all” and “process all” markets, consistent with Section 5(1) and 5(2) directives and the procedures set forth below.<sup>120</sup> To conform our terminology to the revised processing standards, we will use the names “spectrum limited” and “spectrum available” markets to refer to what were previously characterized as “dismiss all” and “process all” markets, respectively.

39. We believe certain modifications are necessary to better ensure that our licensing decisions are based on community needs, as required by Section 5 of the LCRA. As we noted in the *Third Further Notice* and as discussed above, LPFM stations are best suited to serve more densely populated markets.<sup>121</sup> We have reviewed our grid studies and have determined that in some smaller “spectrum available” markets, many of the channels identified as available for LPFM are on the fringe of the 31x31 grid in unpopulated or very lightly populated areas.<sup>122</sup> Indeed, in some cases, the population of

<sup>116</sup> Comments of NAB at 20-21 (citing various markets where available LPFM opportunities exceed the channel floor by wide margin). *See also* Comments of EMF at 11 (given the likelihood of changed circumstances since the 2003 filing window, translator applicants must be given some degree of flexibility to change transmitter sites) and 12 (channel amendments should be permitted if the translator applicant can demonstrate that move to alternative channel will have no impact on LPFM availability).

<sup>117</sup> Reply Comments of Common Frequency at 10.

<sup>118</sup> Reply Comments of Common Frequency at 10.

<sup>119</sup> *See supra*, ¶ 19.

<sup>120</sup> *See supra*, ¶ 20.

<sup>121</sup> *Third Further Notice*, 26 FCC Rcd at 9996. *See also* ¶ 18, *supra* (noting that, standing alone, LPFM stations have constraints that make it difficult for them to meet the needs of communities with low population densities).

<sup>122</sup> *See* Joint Proposal at 5 (noting that in the Flagstaff market, 100 percent of the population in the 31x31 grid is within the smaller 21x21 grid). *See also* Comments of Common Frequency at Appendix (showing that the “core” area of the Commission’s 31x31 grid - 38 percent of the area - encompasses 99 percent of the area’s population in the Sacramento market).

the 21x21 grid represents more than 90 percent of the population of the 31x31 grid. We believe that LPFM stations can best serve the needs of local communities in areas with significant populations where LPFM service is practical and sustainable. Accordingly, we find that adoption of a smaller grid is appropriate in certain markets to compensate for low population levels on the outer fringes of the grid. We believe that use of a smaller grid in these markets will more faithfully implement Section 5(2) of the LCRA than our original proposal because it identifies and preserves LPFM opportunities in core city areas, where the LPFM service can best serve community needs. We likewise find that this revised approach is more faithful to our interpretation of Sections 5(1) and 5(2) of the LCRA. As set forth above, these sections, when read together, require us to ensure a certain level of future LPFM licensing in “spectrum available” markets. However, we believe that licensing opportunities identified as “available” in these smaller markets should be limited to those locations that are likely to be able to support viable LPFM stations. Our adoption of a 21x21 grid in certain markets will enable us to more accurately identify such opportunities.<sup>123</sup>

40. Different considerations apply to the largest markets. Our analysis establishes that there are few or no LPFM licensing opportunities within the core areas of most of the top 50 markets, especially when compared to the number of licensed translator stations and the number of pending translator applications in these markets. Using the methodology set forth in paragraph 41 below, we have determined that only seven of the top 50 markets which are classified as “spectrum limited” exhibit the high population concentrations within the grid that occur in a number of smaller markets. That is, based on both raw population numbers and population distributions, the largest markets are more likely to include population centers outside core market locations that LPFM stations could serve. Thus, we find that our translator processing procedures must not preclude LPFM licensing opportunities beyond the studied 31x31 grids in the top 50 spectrum limited markets.

41. We have modified the LPFM spectrum availability study set forth in the *Third Further Notice* as follows.<sup>124</sup> As before, we identified the number of available LPFM channels and licensed stations within the 31x31 grid and compared this number to each market’s channel floor. These results are set forth in Appendix A. We then analyzed “spectrum available” markets to identify those where 75 percent or more of the total population in the 31x31 grid is located in the 21x21 grid. In these markets, the smaller grid contains the concentrated core population and, for the reasons explained in paragraph 39 above, we used the smaller grid to determine both the number of licensed stations and the number of channels available for future LPFM stations. Thus, “spectrum available” markets are those markets in which the number of LPFM channels within the applicable grid meets or exceeds the market’s channel floor. The results of our market studies using the 21x21 grid, where applicable, are presented in

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<sup>123</sup> Accordingly, we reject NAB’s suggestion to use Arbitron market boundaries as a measure of assessing LPFM availability. Arbitron ratings are used to measure full-service station market activities. Full-service stations cover much larger service areas than LPFM stations. Thus, Arbitron market boundaries would not be an appropriate metric here. As noted by Prometheus, the goal of the Commission is to implement the LCRA, which was primarily concerned with a lack of LPFM stations in the most spectrum-congested areas of the country. See Reply Comments of Prometheus at 5. See also para. 18, *supra* (“Thus, our principal challenge in effectuating Section 5(1) is to identify and preserve those LPFM licensing opportunities where few or no LPFM stations currently operate.”). Using Arbitron markets as a metric would shift the focus away from the few remaining LPFM opportunities in these high density population areas. We also reject NAB’s argument that adoption of a smaller grid would violate the LCRA’s mandate that the translator and LPFM services remain “equal in status” because it would result in the dismissal of additional translator applications. As noted above, given that the two services compete for the same spectrum, the LCRA requires the Commission to make choices between licensing new LPFM and translator stations in certain areas. See *supra*, ¶ 17.

<sup>124</sup> As described below, we note that the analyses in Appendices A and B are based on updated BIA data.

Appendix B. We did not subject the 31x31 “spectrum limited” markets to the 21x21 population threshold test for several reasons. First, any such market would necessarily remain a “spectrum limited” market on the basis of a 21x21 grid analysis. More importantly, the 31x31 grid analysis in each of these markets establishes that few opportunities remain within the larger grid for new LPFM stations. Thus, we find that it is necessary that our “spectrum limited” market translator application processing rules, as described below, protect all of the limited LPFM licensing opportunities within the larger grid in such markets. In addition, for the reasons stated above, we also will require a translator applicant in any top 50 spectrum limited market to demonstrate that its out-of-grid proposal would not preclude the only LPFM station licensing opportunity at that location (“Top 50 Market Preclusion Showing”) by making the showing described below. We note that the analyses in Appendices A and B are based on updated BIA data, resulting in several changes from the analysis attached to the *Third Further Notice*, including the addition of three radio markets listed in the appendices and the removal of two markets previously listed in Appendix A.

42. We next consider other proposed “tweaks” to our methodology. Prometheus and REC first urge us to set higher channel floors, arguing that, given the “overstatement of LPFM availability in the Commission’s methodology, the proposed floors are too low to achieve the envisioned LPFM license availability.”<sup>125</sup> They assert that there are a number of unknown factors in determining LPFM availability, including suitability and availability of the site, population levels, and demand for LPFM at these locations.<sup>126</sup>

43. We believe that our adoption of the smaller grid in those markets with a core concentrated population largely addresses these concerns because it excludes from our analysis LPFM opportunities in areas with little or no population. It is also the case that our studies demonstrate that multiple grid points are available for many of the identified channels and that more than one LPFM station can operate on identified channels in some markets. We find that these factors adequately counter-balance uncertainties regarding site availability, site suitability and local demand for LPFM licenses. We will also continue to count both identified vacant channels and those channels currently licensed to LPFM stations as “available.” Excluding currently licensed LPFM channels from our “available LPFM channels” findings, as proposed by Prometheus and REC,<sup>127</sup> would be inconsistent with our interpretation of Section 5(1) to require consideration of existing licenses as part of the “licenses are

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<sup>125</sup> Joint Proposal at 7.

<sup>126</sup> Joint Proposal at 7. REC and Prometheus likewise note certain anomalies in our methodology as further support for the assertion that the Commission’s studies have overestimated LPFM channel availability. For example, Prometheus notes that the Commission failed to use computer water data files, so-called water files, for the purposes of assessing available locations for LPFM in El Paso, Texas, and Santa Barbara, California. See Joint Proposal at 6. We agree that the number of available channels in El Paso should have been 15 instead of 17 at the time of our original analysis, but we now show that number to be 18. However, this does not change that market’s “spectrum available” designation. For Santa Barbara (and in other cases), Commission staff manually accounted for bodies of water rather than relying on water files. REC Networks maintains that the Commission’s study did not properly exclude search points that were in Mexico, and did not account for vacant Mexican allotments. See Comments of REC Networks at 7, fn. 24. Again, Commission staff manually excluded points in Mexico. Finally, some commenters questioned the Commission’s data for the Syracuse and Danbury markets. See Comments of Alan W. Jurison at 2 (asserting that, contrary to Commission study, there are 19, rather than 2, licensed translators in the Syracuse market), and Comments of Communications Technologies, Inc. at 2 (asserting that, contrary to Commission study, there are 11, not 5, translators in Danbury). We acknowledge the discrepancies noted by these commenters and have revised our analysis of these markets accordingly.

<sup>127</sup> See Joint Proposal at 10.

available” metric.<sup>128</sup> Moreover, eliminating licensed channels from consideration would not create many (if any) new LPFM opportunities because it would not convert any top 50 “spectrum available” market into a “spectrum limited” market.<sup>129</sup> Finally, we decline to break out hyphenated Arbitron markets into separate submarkets, as suggested by REC and others, because we believe that ample LPFM opportunities remain in most submarkets.<sup>130</sup> Also, without clear delineation within the markets, there would be no reasonable way of determining which translators would be processed, should two cities within a market have different spectrum available/spectrum limited outcomes.

44. NAB does not oppose the channel floors, *per se*, but urges us to count both channels and locations toward the channel floors.<sup>131</sup> We reject this suggestion. As Prometheus notes, the Commission cannot determine whether there is demand for a future LPFM station at any identified location.<sup>132</sup> Moreover, as we have emphasized previously, this may be the last opportunity to meaningfully expand opportunities to provide LPFM service due to the combined impacts of limited spectrum and the strict technical licensing standards mandated by the LCRA. In contrast, and as we also explained in the *Third Further Notice*, flexible translator licensing rules ensure that abundant translator licensing opportunities will remain after the forthcoming LPFM window. Thus, consistent with the broad interpretive principles set forth above, we find that it is appropriate to use conservative techniques to assess LPFM availability in a given market, including counting available LPFM channels, not locations.

45. In the *Third Further Notice*, we proposed “LPFM Channel Floors” of potential LPFM licensing opportunities in the 150 largest markets, as well as smaller markets where more than four translator applications are pending. These channel floors range from 8 potential LPFM channels in the top 20 markets to 5 potential LPFM channels below the top 100 markets.<sup>133</sup> We based these figures on a rough approximation of the number of noncommercial educational (“NCE”) stations in the top 150 markets. We selected the NCE FM service as a point of reference because that service is the radio service most similar to the LPFM service and, therefore, the best gauge of local community needs for such service.<sup>134</sup> Commenters who addressed our proposed channel floors disputed neither our reasoning nor the specific ranges of channel floors or markets selected for those ranges. Thus, based on our examination of the record, we conclude that the proposed channel floors are a reasonable standard. We find that these floors adequately further the development of the LPFM service in spectrum-limited markets, as intended by Section 5(1) of the LCRA, and strike an effective balance by ensuring that licenses for both LPFM and translator services are available in as many communities as possible, as required by our collective reading of Sections 5(1) and 5(2) of the LCRA. Accordingly, we adopt the channel floors as proposed in the *Third Further Notice*.

46. We will, however, revise our processing approach with regard to certain translator applications in both “spectrum limited” and “spectrum available” markets. As an initial matter, we

<sup>128</sup> See *supra*, ¶ 16.

<sup>129</sup> For example, Orlando is currently a “spectrum available” market because the number of “available” LPFM channels meets or exceeds its LPFM channel floor of 7, with 9 LPFM channels available, and one licensed LPFM station. Eliminating the one licensed channel from consideration would not change the “spectrum available” designation because the channel floor would still be met.

<sup>130</sup> Reply Comments of REC Networks at 3-4.

<sup>131</sup> See Comments of NAB at 17-19.

<sup>132</sup> Reply Comments of Prometheus, at 10; Joint Proposal at 7.

<sup>133</sup> *Third Further Notice*, 26 FCC Rcd at 9996-97.

<sup>134</sup> *Id.*, 26 FCC Rcd at 9996.

recognize that our use of the 21x21 grid in certain markets has turned some “spectrum available” markets into “spectrum limited” markets. For the reasons discussed above, we find that translators serve community needs, especially those in rural or underserved areas.<sup>135</sup> As such, we agree with NAB that translator applicants in “spectrum limited” markets should be given an opportunity to demonstrate that their applications, if granted, would not preclude any LPFM opportunities.<sup>136</sup> We also will permit minor amendments to meet this “no preclusion” test. Translator applicants proposing “move-in” modifications and modification applications that propose to move into a “spectrum limited” market will also be allowed to make such a showing. This approach is also consistent with our combined reading of Sections 5(1) and 5(2) because it furthers the statutory goal of ensuring that the Commission provide licensing opportunities for both services in as many communities as possible. Prometheus and others fail to explain how this narrow exception to allow continued translator processing in a “spectrum limited” market will preclude LPFM opportunities,<sup>137</sup> given that, as described in more detail below, we will require translator applicants to protect all channel/point combinations with the assumption that all LPFM applicants in these markets will be eligible for second-adjacent channel waivers. We likewise agree that translator applicants in “spectrum available” markets should be afforded some opportunity to amend their applications. As noted by many translator advocates, circumstances have changed since 2003, and transmitter sites may no longer be available. As described in more detail below, we will provide applicants with a limited opportunity to amend their applications so long as their proposals do not eliminate any LPFM channel/point combination in any of the 156 market grids and, where applicable, satisfy the Top 50 Market Preclusion Showing. We do not believe that allowing translator applicants these limited opportunities to amend their applications will impede our ability to guarantee licensing opportunities equivalent to the LPFM channel floors we adopt herein.<sup>138</sup>

47. Accordingly, we direct the Bureau to issue a public notice requiring all applicants affected by the national application cap and/or the one application per applicant per market limitation (discussed below) to identify applications for continued processing, consistent with these limits.<sup>139</sup> The auctions anti-collusion rule will remain in effect during this process.<sup>140</sup> Upon completion of this selection/dismissal process, the Bureau will process the remaining applications in “spectrum available” markets, starting with the singletons. Mutually exclusive applications from this group will then be placed on public notice and afforded a 60-90 day window to resolve their application conflicts via settlement or amendment. Any amendment of an application that precludes any LPFM channel/point combination identified in the grid studies will result in application dismissal. Amendments will be processed on a first-come, first-served basis, with all unamended applications having cut-off protection against amendments filed during the settlement period.

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<sup>135</sup> See *supra*, ¶ 18.

<sup>136</sup> See *supra*, ¶ 21 (arguing that translator applicants should be allowed to continue prosecution in “dismiss all” market in certain circumstances).

<sup>137</sup> See *supra*, ¶ 35. As discussed herein, translators will be required to demonstrate that their applications will not preclude any identified LPFM opportunities. Accordingly, the translator settlement procedures we adopt herein will not impede LPFM spectrum availability. We disagree with LPFM advocates’ contention that the availability of settlements would create an “open-ended” scenario that would allow translators to pick the best channels. See ¶37, *supra*. We have placed tight restrictions on the translator amendment process, including a time deadline. See *infra*, ¶ 47.

<sup>138</sup> See *supra*, ¶ 37.

<sup>139</sup> See *infra*, ¶ 61.

<sup>140</sup> See 47 C.F.R. § 1.2105(c).

48. Applicants with proposals in “spectrum limited” markets will be given one opportunity to modify their proposals to eliminate all preclusive impacts on protected LPFM channel/point combinations. An applicant in a top 50 “spectrum limited” market proposing facilities outside the studied 31x31 grid also will need to demonstrate either that no LPFM station could be licensed at the proposed transmitter site or, if an LPFM station could be licensed at the site, that an additional channel remains available for a future LPFM station at the same site. Applications that conflict with protected channel/point combinations or fail to make such a Top 50 Market Preclusion Showing and that are not amended to come into compliance with these requirements will be dismissed. As explained above, applications in 31x31 grid “spectrum limited” markets must protect all channel/point combinations within this grid. Applicants in 21x21 grid “spectrum limited” markets must protect all channel/point combinations only within this grid. We limit “spectrum limited” grid protection requirements in these markets because, as noted above, we believe that this standard will protect those areas where LPFM stations can best serve the needs of local communities and, therefore, will most faithfully implement Sections 5(1) and 5(2). From this point, all remaining applications will generally proceed down the same singleton/MX/settlement/auction/long form path. Amendments will be processed on a first-come, first-served basis, including for the purpose of determining whether an additional LPFM channel remains available at a specific location outside the grid.<sup>141</sup> We terminate the freeze on the grant of pending Auction No. 83 translator applications<sup>142</sup> and direct the Bureau to resume application processing in accordance with these procedures.

49. We provide the following guidance on translator application processing. “Protected” LPFM channel/point combinations will be determined differently in “spectrum available” and “spectrum limited” markets. In a “spectrum available” market, a channel/point combination must be protected only if LPFM operations at the site would be fully spaced to all pending translator applications on co-, first- and second-adjacent channels (and, of course, would satisfy all other spacing requirements). Thus, a translator applicant in a “spectrum available” market that does not modify its technical proposal would always qualify for further processing because the proposed translator facility cannot conflict, by definition, with any protected channel/point combinations. “Spectrum available” market amendments, however, may not conflict with protected LPFM channel/point combinations. “Spectrum limited” calculations, including Top 50 Market Preclusion Showing calculations, will assume the dismissal of all translator applications in the market. This differing treatment of pending translator applications is based on our determination that sufficient channels are/are not available *if all translator applications remain pending*. Moreover, the “spectrum limited” channel/point and Top 50 Market Preclusion Showing calculations, will not take into account second-adjacent channel spacings to authorized stations and other pending applications, *i.e.*, will assume that an LPFM applicant could make a sufficient showing to obtain a second-adjacent channel spacing waiver. Finally, “spectrum limited” calculations will not take into account I.F. spacing requirements. We find that these more restrictive “spectrum limited” market

<sup>141</sup> It may be the case that one out-of-grid translator application assumes the dismissal of a second application to show that an additional LPFM channel remains available at the applicant’s transmitter site and the second application remains pending after the completion of the translator amendment/dismissal process. Application cut-off rights will be used initially to resolve the conflict. Cut-off rights will be determined by the filing date of each applicant’s complete and acceptable Top 50 Market Preclusion Showing. If the conflict(s) cannot be resolved on this basis, the staff will notify the affected applicant(s) of the conflict(s). The affected applicant(s) must resolve the conflict(s) during the settlement period. Failure to do so will result in the dismissal of any application that assumes the dismissal of a second but still pending application. In cases involving multiple applications that have related conflicts between proposed translator station channels and those specified for future LPFM licensing, failure to resolve all conflicts will result in the dismissal of all related applications.

<sup>142</sup> See *Creation of a Low Power Radio Service*, Second Order on Reconsideration and Further Notice of Proposed Rule Making, 20 FCC Rcd 6763, 6778 (2005).

processing standards are necessary to safeguard LPFM licensing opportunities in these markets. As noted, the protection scheme for “spectrum available” markets 1-50 and for all other studied markets are limited to the particular grid used in each market. LPFM licensing opportunities outside the grid in these markets are not protected in either “spectrum limited” or “spectrum available” markets. Thus, a translator application specifying a site at a distance equal to or greater than the minimum LPFM-translator distance separation requirements and otherwise in compliance with licensing rules would be grantable under these processing standards in all “spectrum limited” markets 51 and smaller and all “spectrum available” markets.

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

### 1. Background

50. The *Third Further Notice* tentatively concluded that our proposed market-based translator application processing policy would not be sufficient to deter speculative licensing conduct because the remaining translator filings present significant issues of abuse of our licensing process.<sup>143</sup> It tentatively concluded that nothing in the LCRA limits the Commission’s ability to address the potential for licensing abuses by any applicant in Auction No. 83, and sought comment on processing policies to deter the potential for speculative abuses among the remaining translator applicants.<sup>144</sup> Specifically, it sought comment on whether to establish an application cap for the applications that would remain pending in non-spectrum limited markets and unrated markets, and asked whether a cap of 50 or 75 applications in a window would force filers with a large number of applications to concentrate on those proposals and markets where they have *bona fide* service aspirations.<sup>145</sup> The *Third Further Notice* also asked whether applicants should be limited to one or a few applications in any particular market, noting that a limitation of this sort could limit substantially the opportunity to warehouse and traffic in translator authorizations while promoting diversity goals.<sup>146</sup> It also sought comment on alternative approaches to protect against abuses in the translator licensing process.<sup>147</sup>

### 2. Comments

51. Many commenters support some form of cap,<sup>148</sup> with several supporting a cap of 50 or 75 per applicant nationally, as proposed in the *Third Further Notice*.<sup>149</sup> Alan W. Jurison suggests that such a high cap should be coupled with new translator ownership rules and a waiver system to allow *bona fide* applicants to file numerous applications nationally.<sup>150</sup> Others support our suggestion of having a cap on

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<sup>143</sup> 26 FCC Rcd at 9999.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Comments of Common Frequency, Inc., at 11; Comments of WFCR at 9; Comments of NPR at 5. NPR feels, however, that such a cap is still inadequate to prevent translator trafficking. Comments of NPR at 12.

<sup>149</sup> 26 FCC Rcd at 9999; See Comments of Charles Keiler at 10; Comments of CSN at 3; Comments of Jerry Isenhardt at 2. CSN states that a cap is preferable to dismissing all applications in a given market as a blanket dismissal could punish translator applicants that were not engaged in speculative practices. Comments of CSN at 3. REC Networks proposes a nationwide *ownership* cap of 30 translators. Comments of REC Networks at 17.

<sup>150</sup> Comment of Alan W. Jurison at 3.

the number of applications per market.<sup>151</sup> Kyle Magrill suggests a tiered, market-based cap whereby the more applications an applicant files nationally, the further the number of applications per market must decrease.<sup>152</sup>

52. However, EMF opposes any cap at all,<sup>153</sup> believing it will reduce translator services to smaller markets.<sup>154</sup> Other commenters argue that caps fail to distinguish serious applicants from speculators<sup>155</sup> and suppress competition.<sup>156</sup> Some commenters simply disagree with the concerns over speculative filings described in the *Third Further Notice*.<sup>157</sup> For example, Kyle Magrill suggests that non-commercial applicants may have filed large numbers of translator applications because they believed that it was the best way to ensure they would obtain a permit,<sup>158</sup> and even those permits that were sold have resulted in new facilities on the air serving the public interest.<sup>159</sup> Edgewater Broadcasting, Inc., and Radio Assist Ministry, Inc., also note that applicants accused of trafficking have not in fact violated any of the Commission's Rules.<sup>160</sup>

53. Several commenters propose alternatives to caps or additional safeguards against trafficking: placing limitations on the number of outstanding translator construction permits an applicant can have;<sup>161</sup> restricting sales of permits to allow applicants to only recover costs;<sup>162</sup> or preventing outright the sale of unbuilt construction permits.<sup>163</sup> NPR suggests establishing a holding period obligating future translator permittees to construct and operate newly authorized translators.<sup>164</sup>

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<sup>151</sup> Comments of Kevin M. Fitzgerald at 2; Comments of Edgewater Broadcasting & Radio Assist Ministry at 8; Comments of Jerry Isenhardt at 2; Comments of Joint LPFM Advocates at 30-31. Edgewater Broadcasting and Radio Assist Ministry support market caps, such as a cap of three applications per market, but oppose a national cap. Comments of Edgewater Broadcasting & Radio Assist Ministry at 8.

<sup>152</sup> Reply Comments of Kyle Magrill at 2.

<sup>153</sup> Comments of EMF at 13.

<sup>154</sup> Comments of EMF at 13.

<sup>155</sup> Comments of CRA at 6.

<sup>156</sup> Comments of Edgewater Broadcasting, Inc., and Radio Assist Ministry, Inc., at 8.

<sup>157</sup> 26 FCC Rcd at 9999; Comments of EMF at 13; Reply Comments of EMF at 11-12.; Comments of Kyle Magrill at 7.

<sup>158</sup> Similarly, WFCR explains its opposition to a low cap on the grounds that, because applicants cannot know whether their applications will be mutually exclusive with other applications, they will want to file multiple applications to improve their chances of obtaining a permit. Comments of WFCR at 9.

<sup>159</sup> Comments of Kyle Magrill at 7.

<sup>160</sup> Comments of Edgewater Broadcasting, Inc., and Radio Assist Ministry, Inc., at 10.

<sup>161</sup> Comments of Charles Keiler at 10-11.

<sup>162</sup> Comments of NPR at 12; Comments of EMF at 13; Reply Comments of Prometheus at 17.

<sup>163</sup> Comments of Stuart C. Hansen at 1; Comments of EMF at 13; Comments of Joint LPFM Advocates at 31. NAB believes that the proposal to restrict the use or sale of translators exceeds the scope of the *Third Further Notice*. Reply Comments of NAB at 12.

<sup>164</sup> Comments of NPR at 12.

### 3. Analysis

54. We conclude that both a national cap and a market-based cap for the markets identified in Appendix A are appropriate to limit speculative licensing conduct and necessary to bolster the integrity of the remaining Auction 83 licensing. Without such caps, we believe that the translator licensing process we adopt herein could result in the prosecution of thousands of applications for the primary purpose of for-profit assignments of the issued translator authorizations. If the permits were issued in an auction, then we would be much less concerned about such speculation in permits. However, as we noted in the *Third Further Notice*, we expect that a substantial portion of the remaining grants will be made pursuant to our settlement procedures rather than through auctions.<sup>165</sup>

55. We first must address whether the adoption of national and per-market caps on the processing of pending translator applications to protect the integrity of the translator licensing process is consistent with Section 5 of the LCRA. Although that provision mandates that the Commission consider the availability of translator licenses to serve the needs of local communities in licensing new translators, it does not limit the Commission's authority under the Act to adopt measures to protect the integrity of its licensing processes. Accordingly, we conclude that adoption of the caps to safeguard the integrity of our licensing processes is consistent with Section 5's requirement to ensure that licenses are available to both LPFM and translator services.

56. We next address the public interest benefits of translator application caps. As set forth above,<sup>166</sup> the initiation of new translator service resulting from a grant of some of those applications may benefit the public interest. At the same time, we believe strongly that remedial limits are needed to protect the integrity of our licensing process. Non-feeable application procedures and flexible auction and translator settlement rules clearly have facilitated and encouraged the filing of speculative proposals. Our CDBS database shows that successful Auction 83 applicants have sold more than 700 translator authorizations and let almost 1000 permits expire without completing construction. In some markets, certain applicants have filed dozens of applications, even though it is inconceivable that one entity would construct and operate all of the proposed stations.<sup>167</sup> The filers that will be affected by our national cap and by our per-market cap account for much of this licensing activity. While we recognize that high-volume filers did not violate our rules, these types of speculative filings are fundamentally at odds with the core Commission broadcast licensing policies and contrary to the public interest.<sup>168</sup>

57. Although we have considered a number of alternatives, we find that imposing a cap on applications is the most administratively feasible solution for processing this large group of long-pending applications. As some comments suggest, a longer term solution may require structural changes to the translator licensing process, *e.g.*, holding period and/or construction requirements, no-profit restrictions on the assignment of authorizations, a cap on application filings, etc.<sup>169</sup> However, we believe that the

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<sup>165</sup> 26 FCC Rcd at 9999.

<sup>166</sup> See *supra*, ¶ 18.

<sup>167</sup> See *Third Further Notice*, 26 FCC Rcd at 9999.

<sup>168</sup> *E.g.*, *Pathfinder Communications Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 9272, 9279 (2003) (“[I]mplicit in the filing of *any* facility application is that the applicant stands ‘ready, willing and able’ to construct and operate as proposed.”) (emphasis added); *Meredith Corporation*, Memorandum Opinion and Order, 5 FCC Rcd 7015, 7016 (1990) (party maintaining an application on file is effectively representing its intention to construct and operate the proposed station).

<sup>169</sup> See *supra*, ¶ 53.

caps we adopt today will both deter trafficking and provide the fastest path to additional translator and LPFM licensing in areas where the need for additional service is greatest. We emphasize that the cap procedures we adopt will give applicants the opportunity to elect which applications will be processed toward a grant. We expect that applicants will choose applications that will maximize new service to the public. Even with the dismissal of many of the pending translator applications pursuant to the application caps and our market-based processing policy, we are confident that the same or comparable licensing opportunities will remain available in a future translator filing window under our flexible translator licensing standards. In short, these dismissals will only delay, not deny, licenses to applicants whose translator applications are dismissed but who remain interested in effectuating their proposals.

58. We believe that a national cap of 50 applications per applicant from the pending Auction 83 applications is an appropriate limit. Because translators are relatively cheap to construct and operate, we believe it is feasible for the organizations that filed the highest volume of applications to construct and operate 50 additional stations. Accordingly, in balancing the competing goals of deterring speculation and expanding translator service to local communities, we conclude that a national cap of 50 applications is appropriate. We note that this cap is high enough to permit all but twenty applicants to prosecute all of their pending applications.<sup>170</sup> We also note that even some translator advocates commented in support of a cap of 50 applications.<sup>171</sup>

59. In addition to the national cap of 50 applications, we believe that a per-market cap of one application in the markets identified in Appendix A is appropriate. Our translator rules contemplate that a party may receive an authorization for a second or third FM translator serving substantially the same area as the first only after making a “showing of technical need for such additional stations.”<sup>172</sup> This is a spectrum efficiency rule based on our experience that parties rarely need such multiple translators. Yet in some cases, applicants in Auction 83 submitted dozens of applications for a particular market.<sup>173</sup> These applications were clearly filed for speculative reasons or to skew our auction procedures, as it is inconceivable that a single entity would construct so many stations in a single market. Given the volume of pending applications, it is not administratively feasible to conduct a case-by-case assessment of technical need for such multiple applications within the markets identified in Appendix A. Accordingly, we will apply a cap of one translator application per applicant in the markets identified in Appendix A. For applications outside those markets, where the duplication issue is more manageable, we will apply our technical need rule on a case-by-case basis.<sup>174</sup>

60. For translator applicants, our revised processing policies provide a straightforward licensing path that will likely result in more than 1000 new construction permits, thereby increasing the

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<sup>170</sup> The twenty affected applicants represent only 3 percent of the pool of Auction 83 applicants. In contrast, the cap of ten applications would have affected approximately 12 percent of the Auction 83 applicants. See *Third Further Notice*, 26 FCC Rcd at 9987, n.11. We also note that almost all of the largest filers have already received a significant number of Auction 83 translator construction permits. Of the eight applicants with the greatest number of pending short-form applications, seven have received between 32 and 586 permits.

<sup>171</sup> See Comments of Charles Keiler at 10; Comments of CSN at 3.

<sup>172</sup> 47 C.F.R. § 74.1232(b).

<sup>173</sup> See *Third Further Notice*, 26 FCC Rcd at 9999 (one applicant holds 25 of the 27 translator applications proposing locations within 20 kilometers of Houston’s city center coordinates; two applicants hold 66 of the 74 applications proposing service to the New York City market).

<sup>174</sup> Given the impact of the national cap of 50 applications, we expect that there will be little or no duplication of applications in markets that are not identified in Appendix A.