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

In the Matter of	)	
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Creation of A Low Power Radio Service	)	MM Docket No. 99-25
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THIRD REPORT AND ORDER AND
SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: November 27, 2007 **Released: December 11, 2007**

Comment Date: [30 days after date of publication in the Federal Register]
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By the Commission: Chairman Martin; Commissioners Copps, and Adelstein issuing separate statements. Commissioners Tate and McDowell approving in part, dissenting in part, and issuing separate statements.

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I. INTRODUCTION

1. In March 2005, the Commission released a *Second Order on Reconsideration and Further Notice of Proposed Rulemaking* as part of its ongoing efforts to promote the operation and expansion of the low power FM ("LPFM") service.[1] In the *Second Order*, the Commission made minor changes to the LPFM rules. The accompanying *FNPRM* sought comment on a number of issues related to ownership and eligibility restrictions for LPFM licensees, as well as technical matters related to the LPFM service. This *Third Report and Order* resolves the issues raised in the *FNPRM*. In so doing, this Order advances the Commission's goal "to ensure that we maximize the value of LPFM service without harming the interests of full-power FM stations or other Commission licensees."[2] In light of changed circumstances since we last considered the issue of protection rights for LPFM stations from subsequently authorized full-service stations, we also find it necessary to consider certain rule changes to avoid the potential loss of LPFM stations. Accordingly, we issue a *Second Further Notice of Proposed Rulemaking* ("*Second Further Notice*") to seek comment on these changes.

II. BACKGROUND

2. In January 2000, the Commission adopted rules to establish two classes of LPFM facilities: (a) the LP100 class, consisting of stations with a maximum power of 100 Watts effective radiated power ("ERP") at 30 meters antenna height above average terrain ("HAAT"), providing an FM service radius (1 mV/m or 60 dBμ) of approximately 3.5 miles (5.6 kilometers); and (b) the LP10 class,

[1] *Creation of Low Power Radio Service*, MM Docket No. 99-25, Second Order on Reconsideration and Further Notice of Proposed Rulemaking, 20 FCC Rcd 6763 (2005) ("*Second Order*" or "*FNPRM*").

[2] *Id.* at 6763, para. 1.

consisting of stations with a maximum of 10 Watts ERP at 30 meters HAAT, providing an FM service radius of approximately one to two miles (1.6 to 3.2 kilometers).[3] The *Report and Order* announcing those classes imposed separation requirements for LPFM stations to protect full-power FM stations operating on the co-, first-, and second-adjacent channels, as well as stations operating on intermediate frequency ("IF") channels.[4] The *Report and Order* concluded, however, that imposition of a third-adjacent channel separation requirement would restrict unnecessarily the number of LPFM stations that could be authorized, and therefore declined to impose that requirement.[5]

3. The *Report and Order* also established ownership and eligibility rules for the LPFM service. The Commission restricted LPFM service to noncommercial educational ("NCE") operations, restricted licensee eligibility to applicants with no attributable interests in any other broadcast station or other media subject to our ownership rules, and prohibited the assignment or transfer of LPFM stations.[6] The Commission also determined that, during the two years following the first LPFM filing window, no entity would be permitted to own more than one LPFM station and that ownership should be restricted to local entities.[7] To choose among entities filing mutually exclusive applications for LPFM licenses, the *Report and Order* set forth a point system that favors local ownership and locally-originated programming, with ties between competing applicants resolved by either voluntary time-sharing agreements between such applicants or, in the event that they cannot so agree, the imposition of "involuntary time-sharing," with each tied and grantable applicant awarded an equal, successive and non-renewable license term of no less than one year, for a combined total eight-year term.[8] Finally, the *Report and Order* directed the then-Mass Media Bureau to establish filing windows for LP100 applications.[9]

4. The Commission revised and clarified some of its LPFM rules in a September 2000 *Memorandum Opinion and Order on Reconsideration*.[10] The *Reconsideration Order* declined to adopt the more restrictive channel separation requirements urged by certain petitioners. Instead, the

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[3] *See Creation of Low Power Radio Service*, MM Docket No. 99-25, Report and Order, 15 FCC Rcd 2205, 2211-12, paras. 13-14 (2000) ("*Report and Order*"); s*ee also* 47 C.F.R. § 73.811.

[4] *Report and Order,* 15 FCC Rcd at 2233-34, paras. 70-71; 47 C.F.R. § 73.807.

[5] *Id.* at 2246, para. 103.

[6] *Id*. at 2213, 2217, paras. 17, 29.

[7] *Id.* at 2219, 2222, paras. 33, 39; 47 C.F.R. §§ 73.853(b); 73.855(b). The rule permitting only local entities to apply for LPFM licenses sunset in 2002. At present, an entity is allowed to own up to ten LPFM stations and all commonly owned stations must be separated by a distance of at least 12 kilometers. 47 C.F.R. § 73.855(a).

[8] *Report and Order* at 2260, para. 139.

[9] *Id.* at 2256, para 130. In March 2000, the Mass Media Bureau announced five separate filing windows for accepting LP100 application, with each window limited to an application group of ten states and at least one other United States jurisdiction. *See FCC Announces Five-Stage National Filing Window for Low Power FM Broadcast Station Applications*, Public Notice, 15 FCC Rcd 18621 (MMB 2000). The last of those windows closed on June 15, 2001. *Low Power FM Filing Window*, Public Notice, 16 FCC Rcd 7915 (MMB 2001).

[10] *Creation of a Low Power Radio Service*, Memorandum Opinion and Order on Reconsideration, 15 FCC Rcd 19208 (2000) ("*Reconsideration Order*").

Commission adopted complaint and license modification procedures to address unexpected third-channel interference problems caused by LPFM stations.[11] The *Reconsideration Order* modified spacing standards to require LPFM stations to protect radio reading services.[12] Beyond the issue of interference, the Commission increased ownership flexibility for universities, state and local governments, and entities operating public safety or transportation services.[13] Finally, the *Reconsideration Order* addressed a number of technical and ownership issues and clarified the eligibility rules for certain groups.[14]

5. After the Commission declined to impose third-adjacent channel separation requirements in the *Reconsideration Order*, Congress directed the agency to do so in the Making Appropriations for the Government of The District of Columbia for FY 2001 Act ("2001 DC Appropriations Act").[15] In that legislation, Congress instructed the Commission to prescribe third-adjacent channel spacing standards for LPFM stations and to deny LPFM applications of applicants that previously had engaged in the unlicensed operation of a radio station.[16] The 2001 DC Appropriations Act also directed the Commission to evaluate the likelihood of interference to existing FM stations if LPFM stations were not subject to the third-adjacent channel spacing requirement.

6. As a result of the spacing requirement imposed by the 2001 DC Appropriations Act, a number of facilities proposed in otherwise technically grantable applications became short-spaced to existing full-power FM stations or translators, leading to the eventual dismissal of those applications.[17] To evaluate the likelihood of interference in the absence of a third-adjacent channel separation requirement, the Commission selected an independent third party – the Mitre Corporation – to conduct field tests. The Commission then sought public comment on Mitre's reported findings.[18] In February 2004, the Commission submitted its report to Congress, recommending that, based on the Mitre study, Congress "modify the statute to eliminate the third-adjacent channel distan[ce] separation requirements for LPFM stations."[19]

7. In the March 2005 *Second Order*, the Commission reexamined some of the rules governing the LPFM service, noting that the rules might need adjustment in light of the experiences of

[11] *Id.* at 19233-34, paras. 64-68; 47 C.F.R. § 73.809.

[12] *Id.* at 19219, para. 24.

[13] *Id.* at 19240-41, paras. 80-84.

[14] *Id.* at 19238-39, paras. 75-78

[15] Pub L. No. 106-552, § 632, 114 Stat. 2762, 27620A-111 (2000).

[16] *Id.*

[17] *See Creation of a Low Power Radio Service*, MM Docket No. 99-25, Second Report and Order, 16 FCC Rcd 8026, 8028, paras. 5-6 (2001) ("*Second Report and Order*").

[18] *See Comment Sought on the Mitre Corporation's Technical Report, Experimental Measurements of the Third-Adjacent Channel Impacts of Low-Power FM Stations*, Public Notice, 18 FCC Rcd. 14445 (2003).

[19] *Report to Congress on the Low Power FM Interference Testing Program*, Pub. L. No. 10-553 (rel. Feb. 19, 2004).

LPFM applicants and licensees.[20] The Commission also took into account comments made at a February 2005 forum on LPFM that had addressed "achievements by LPFM stations and the challenges faced as the service mark[ed] its fifth year."[21] The *Second Order* clarified that "local program origination," as that term is used in Section 73.872(b)(2) of the Commission's Rules (the "Rules"), does not include the airing of satellite-fed programming. The *Second Order* also modified slightly the definitions of "minor change" and "minor amendment."[22]

8. In the accompanying *FNPRM*, the Commission sought comment on a number of issues with respect to LPFM ownership restrictions and eligibility. The Commission asked whether LPFM licenses should be assignable or transferable and whether the temporary restrictions on multiple ownership of LPFM stations and on non-local ownership should be extended or allowed to sunset.[23] Because "introducing some level of transferability to the LPFM service is critical," the Commission delegated to the Media Bureau the authority to waive the prohibition on the assignment or transfer of a LPFM station contained in Section 73.865 of the Rules on a case-by-case basis and cited examples of circumstances in which the grant of such a waiver might be appropriate:

> a sudden change in the majority of a governing board with no change in the organization's mission; development of a partnership or cooperative effort between local community groups, one of which is the licensee; and transfer to another local entity upon the inability of the current licensee to continue operation. . . .[24]

The Commission noted, however, that "until we have further considered the transferability issue, we do not believe that waiver is appropriate to permit the for-profit sale of an LPFM station to any entity or the transfer of an LPFM station to a non-local entity or an entity that owns another LPFM station."[25]

9. The Commission also proposed certain changes to the Rules governing the formation and duration of voluntary and involuntary time-sharing arrangements among mutually exclusive LPFM applicants.[26] The *FNPRM* also considered a number of changes to the LPFM technical rules. The Commission proposed to extend the construction period for LPFM stations and to allow time-sharing applicants greater flexibility to amend their applications to relocate the transmitter to a central location.[27] The *FNPRM* also sought comment on the relationship between the LPFM and full-power FM services. Noting that thousands of FM translator applications remained pending from the 2003 filing window, the

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[20] *Second Order*, 20 FCC Rcd at 6763, para. 1.

[21] *Id.* at 6766, para. 7.

[22] *See id.* at 6766-69, paras. 8-14.

[23] *Id.* at 6770-73, paras. 17-23. *See* 47 C.F.R. §§ 73.853(b) (restricting applicant pool to local applicants for the first two years after LPFM licenses are made available for application); 73.855(b) (setting forth the phased-in ownership restrictions for LPFM).

[24] *See Second Order* at 6772, para. 20.

[25] *See id.*

[26] *Id.* at 6774, paras. 24-25.

[27] *Id.* at 6775-76, paras. 26-28.

Commission froze the processing of those applications and sought comment on possible adjustments to the co-equal status of LPFM stations and FM translators with regard to interference between them.[28] The Commission also sought comment on whether LPFM stations should be protected from interference from subsequently authorized FM stations.[29] Finally, the Commission denied a request by the Media Access Project ("MAP") to schedule "regular" filing windows for LPFM new station applications and major modification applications.[30]

10. During the seven years since we created the LPFM service, that service has flourished for the most part, but also has encountered unique obstacles. To date, the Media Bureau has received 3236 applications for new LPFM construction permits, of which 1,286 have been granted. Currently, there are 809 LPFM stations operating throughout the country. At the same time, the Media Bureau was compelled to cancel 17 station licenses and 95 construction permits for failure by the holder to satisfy certain procedural and/or technical requirements. In view of this practical experience with LPFM service, we now turn to the issues raised in the *FNPRM*. In resolving those issues, we seek to increase the number of LPFM stations that are on the air and providing service to the public, and to promote the continued operation of LPFM stations already broadcasting, while avoiding interference to existing FM service.

III. DISCUSSION

A. Ownership and Eligibility

1. Alienability of Authorizations

a. Changes in Board Membership

11. Section 73.865 of the Rules provides that "[a]n LPFM authorization may not be transferred or assigned except for a transfer or assignment that involves: (1) Less than a substantial change in ownership or control; or (2) An involuntary assignment of license or transfer of control."[31] The *Reconsideration Order* clarified that the gradual change of a licensee's governing board or membership body is a permissible "insubstantial change," even if the majority of current members joined after the station's authorization was granted.[32] As the *FNPRM* noted, however, "[o]ur rules . . . do not permit a sudden change in the board or membership of an LPFM licensee, which would constitute an impermissible transfer of control."[33] Panelists at the February 2000 LPFM forum and other parties concerned with the viability of LPFM stations remarked that the proscription of sudden changes in

[28] *Id.* at 6778-80, paras. 33-36.

[29] *Id.* at 6780-81, paras. 37-39.

[30] *See* MAP Ex Parte filing, Dec. 8, 2004; *Second Order*, 20 FCC Rcd at 6781, para. 40.

[31] 47 C.F.R. § 73.865(a).

[32] *See Reconsideration Order*, 15 FCC Rcd at 19248, para. 104.

[33] *FNPRM*, 20 FCC Rcd at 6770, para. 17. In a transfer of control, control of the licensee passes to different principles, but the identity of the licensee does not change. By contrast, in an assignment, the authorization passes to a new entity. *See Transfers of Control of Certain Licensed Non-Stock Entities*, Notice of Inquiry, 4 FCC Rcd 3403, n.4 (1989) ("*Non-Stock Transfer NOI*").

governing board membership causes unnecessary complications for LPFM licensees.[34] Responding to that concern, the *FNPRM* proposed to amend our rules to permit sudden changes of more than 50 percent of the membership of governing boards.[35]

12. As commenters have since observed, frequent elections and changes in governing board membership are common among volunteer organizations and other entities that operate LPFM stations.[36] As LPFM station KVLP-LP noted, experience on the board of an LPFM station can confer valuable leadership experience to community members, leading community groups to encourage frequent shuffling of board membership.[37] Unsurprisingly, then, most commenters favor amending our rules to permit transfers of control in the case of a sudden change in a majority of a governing board's membership so long as the overall mission of the organization remains unchanged.[38]

13. We agree. In crafting our LPFM rules, the Commission intended to preserve the integrity of the LPFM service and of the local organizations operating LPFM stations. We did not intend, however, to hamper the customary governance procedures of those organizations or to make LPFM less "accessible to community groups."[39] To the extent that our rules have blocked that access, we now remove that inadvertent barrier and adopt the *FNPRM*'s proposal to allow sudden changes of more than 50 percent of the membership of governing boards. Accordingly, we will amend Section 73.865 of our Rules to clarify that transfers of control involving a sudden change of more than 50 percent of an LPFM licensee's governing board shall not be deemed "a substantial change in ownership and control."[40]

b. Assignments and Transfers

14. The *FNPRM* sought comment on whether the Rules should permit the sale of LPFM authorizations, for some or no consideration, and whether they should impose a holding period by the initial permittee and licensee.[41] Noting that at least 221 construction permits have lapsed due to the permittee's failure to construct facilities, REC Networks ("REC") argues that an LPFM permittee or

[34] *See* Testimony of Sakura Saunders, KDRT-LP, LPFM Forum (Feb. 8, 2005); *see also* MAP Ex Parte (filed Aug. 17, 2004); Comments of Prometheus Radio Project, *et al*., MM Docket No. 99-25 at 22 (filed Oct. 14, 2003) ("Prometheus Mitre Study Comments").

[35] *FNPRM*, 20 FCC Rcd at 6770, para. 17.

[36] *See* Comments of Limestone at 4; *see also* Comments of KVLP-LP. Although the *FNPRM* sought general comments on the structures of governing boards or other organization structures of entities that operate or control LPFM stations, no commenter spoke directly to that question.

[37] Comments of KVLP-LP.

[38] *See*, *e.g.*, Comments of Cromwell Group at 2 ("Changes in board membership should be easily permitted."); *see also* Comments of Eric Howland. *But see* Comments of Cox, Inc. at 6-7 (opposing any change to our rules governing transfers of control on the ground that the current rules "adequately address transfers of less than a controlling interest").

[39] *See* Prometheus Mitre Study Comments at 22.

[40] 47 C.F.R. § 73.865(a)(1).

[41] *FNPRM*, 20 FCC Rcd at 6771, para. 18.

licensee should be able to convey its authorization when doing so would prevent the loss of the permit.[42] Indeed, most commenters support amending the rules to permit sales in at least some circumstances, although they express diverse views with respect to when such transactions should be allowed.[43] At one extreme are those commenters who maintain that LPFM stations should be transferable without restriction because there is little risk of manipulation or take-over in the "market" for LPFM authorizations.[44] At the opposite end of the spectrum are those who contend that transfers of control or assignments should be limited to those situations in which the assignee or transferee "represents the community" and no consideration is involved.[45] Prometheus argues that the Commission should not allow transfers or assignments to be made in exchange for consideration, as such a rule could lead to speculation by those with substantial resources, at the expense of local community groups that lack funding.[46]

15. The for-profit sale of LPFM authorizations to any buyer is fundamentally inconsistent with the Commission's desire to promote local, community based use and ownership of LPFM stations.[47] Transfers of control or assignments for consideration will create a market for LPFM licenses and may facilitate trafficking in licenses by those who have no interest in providing LPFM services to the public. Such a state of affairs would likely interfere with, rather than spur development of, community-based programming and hamper the ability of community-based entities to obtain LPFM authorizations. Therefore, we will not permit the sale of LPFM licenses for consideration exceeding the depreciated fair market value of the physical equipment and facilities of the station,[48] and will not allow under any circumstances the transfer or assignment of construction permits.

16. With respect to the imposition of eligibility restrictions on a transferee or assignee of an LPFM license, some commenters suggest that we permit the sale of an LPFM authorization to any willing buyer.[49] Others suggest that we limit the universe of eligible assignees and transferees to other local nonprofits.[50] We conclude that the appropriate balance is struck by requiring the assignee or transferee of an LPFM license to satisfy ownership and eligibility criteria existing at the time of the assignment or

[42] Comments of REC. *See also* Comments of Daniel Brown.

[43] A minority of commenters, such as the Cromwell Group, argue that LPFM authorizations should not be alienable regardless of whether consideration is involved. Comments of the Cromwell Group at 2.

[44] Comments of Kyle Magrill at 1.

[45] *See* Comments of David Gowler.

[46] Comments of Prometheus Radio Project at 25-26.

[47] *See* Comments of Prometheus Radio Project *et al*. at 26 (arguing that the sales for consideration of LPFM authorizations will "create a market in which only those with substantial resources and money could obtain a LPFM station, effectively preventing local community groups from participating in the LPFM service").

[48] *See* Comments of Prometheus Radio Project, *et al*. at 26-27.

[49] *See* Comments of Eastern Sierra Broadcasting at 5.

[50] *See* Comments of Comments of JT Communications at 1 (suggesting that the transferee or assignee of an LPFM authorization should be required to certify that it is a local entity under the criteria for local entities specified in 47 C.F.R. § 73.853(b)).

transfer.[51] That restriction will prevent entities from using intermediaries to circumvent our LPFM eligibility requirements and will further address our concern about potential trafficking in LPFM authorizations by ensuring that future LPFM licensees meet the Commission's criteria for LPFM service. At the same time, permitting assignments or transfers among qualified parties will allow newly-"merged" local entities, consisting of several eligible organizations, to pool their resources to provide the necessary financial support for quality local programming when, standing alone, those entities would be otherwise incapable of constructing and operating an LPFM station.

17. For all transfers and assignments, we will require a three year holding period from the issuance of license, during which a licensee cannot transfer or assign the license, and must operate the station, as suggested by Prometheus.[52] That restriction will prevent entities from using the LPFM assignment and transfer process to undermine the Commission's LPFM policies and will ensure that the benefits to the public which were the basis for the license grant will be realized.

c. Procedures

18. The *FNPRM* asked what procedures would be appropriate to allow assignments and transfers while ensuring the integrity of the LPFM service. Because many LPFM permittees and licensees are entities that do not issue ownership shares, the Commission drew attention to the *Non-Stock Transfer NOI*[53] for guidance in establishing the procedures for transfers of control of such licensees. The *Non-Stock Transfer NOI* proposed to treat a sudden change of a governing board's majority as an insubstantial transfer for which approval must be sought on an FCC Form 316 ("short form") broadcast application.[54] The *FNPRM* sought comment on adopting a similar approach for changes in the governing boards of LPFM permittees and licensees that are non-stock entities.[55] The *FNPRM* also sought comment on the process by which LPFM stations should seek approval of assignments and transfers of control.[56]

19. Few commenters addressed the issue of the appropriate procedures for transfers of control or assignments of LPFM authorizations. Christian Community Broadcasters proposed using a modified FCC Form 318 LPFM construction permit application to cover all instances of ownership changes or changes in board membership.[57] Limestone Community Radio suggested instead that entities use a modified FCC Form 316 for "typical" changes in station ownership.[58] Still other commenters

[51] Certain rules that limit LPFM eligibility contain sunset provisions resulting in the eventual elimination of those limitations. For a discussion of those provisions, as well as the remaining eligibility restrictions, see Section III.A.2, *infra*.

[52] Comments of Prometheus at 27.

[53] *Transfers of Control of Certain Licensed Non-Stock Entities*, MM Docket No. 89-77, Notice of Inquiry, 4 FCC Rcd 3403 (1989) ("*Non-Stock Transfer NOI*").

[54] *Id.*

[55] *FNPRM*, 20 FCC Rcd at 6772, para. 19.

[56] *Id*.

[57] Comments of Christian Community Broadcasters.

[58] Comments of Limestone Community Radio at 4.

suggest that the Commission should take a more active role in overseeing any LPFM ownership changes to ensure "ethical use" of LPFM licenses.[59]

20. We will use existing FCC forms for the conveyance of LPFM licenses, rather than adopting new forms and filing procedures. We see no reason to depart from the filing procedures that currently are used for other broadcasting services. Accordingly, we direct LPFM licensees to use modified FCC Forms 314 and 315 for assignments and transfers of control, respectively, and FCC Form 316 for *pro forma* changes in ownership. We will apply the *Non-Stock Transfer NOI* to appropriate LPFM licensees, and thus, will interpret a sudden change of a governing board's majority as an insubstantial transfer for which approval must be sought on an FCC Form 316 ("short form") broadcast application.[60] Use of these forms offers many advantages, particularly to smaller entities that have few resources to dedicate to the application process, such as the ability to retrieve and submit the forms electronically.

2. Ownership and Eligibility Limitations

21. As discussed above, the Rules required that, during the two years following the first LPFM filing window, no entity was permitted to own more than one LPFM station, and ownership was restricted to local entities. The Rules gradually relaxed these restrictions. Currently, the Rules limit the number of LPFM stations a single entity may own up to ten stations[61] and the Rule that allows only local entities to apply for LPFM licenses has sunsetted.[62] As we explained in the *FNPRM*, the Commission's intention in gradually increasing the ownership limitation from one to ten stations and in allowing the local entity restriction to sunset "was to make it more likely that local entities would operate this service, but to ensure that if no local entities came forward, the available spectrum would not go unused."[63] In connection with its query of whether to allow the sale of LPFM stations, the *FNPRM* asked if either the ownership limitation or the restriction to local entities should be extended or reinstated.

22. Several organizations urge the Commission to maintain "strict local and multiple ownership requirements," to ensure that LPFM service continues to advance the public's interest in

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[59] Comments of Jason Ander.

[60] *Id.* We will apply the principles addressed in the *Non-Stock Transfer NOI* to both non-stock and stock entities.

[61] *See* 47 C.F.R. § 73.855. Pursuant to 47 C.F.R. § 73.855(b)(3), "[a]fter the three years from the date that the initial filing window opens for LPFM stations [May 30, 2000], a party may hold an attributable interest in no more than ten stations." Our rule barring any party from owning two LPFM stations within 12 kilometers of one another remains in place. *Id.*

[62] *See* 47 C.F.R. § 73.853. Pursuant to 47 C.F.R. § 73.853(b), "[o]nly local applicants will be permitted to submit applications for a period of two years from the date that LP100 and LP10 stations, respectively, are first made available for application." Because the first filing window opened on May 30, 2000, the locality restriction has sunset. *See Low Power FM Filing Window*, Public Notice, 16 FCC Rcd 10057 (2000). Therefore, it is unclear how to evaluate the arguments of parties that urge us to maintain existing eligibility and ownership limits when at least some of those limits no longer exist. *See, e.g.,* Comments of Station Resource Group at 2 (opposing changes to rules regarding overall eligibility or the capacity of organizations to assemble multiple LPFM stations).

[63] *FNPRM*, 20 FCC Rcd at 6773, para 22.

localism and diversity.[64] According to some of these commenters, any relaxation of either the multiple ownership restriction or the locality-based restriction is fundamentally at odds with the "community radio" rationale that justifies the existence of LPFM stations.[65] Prometheus Radio Project argues that, even when no local entity applies for an LPFM authorization, non-local entities should be barred from applying, because "LPFM is not a goal in itself, rather it is a means to promote localism."[66]

23. We agree. As emphasized in our *Report and Order*, our two primary goals in establishing the LPFM service were to "create opportunities for new voices on the airwaves and to allow local groups, including schools, churches, and other community-based organizations, to provide programming responsive to local community needs and interests."[67] The *Report and Order* also stated that the potential benefit of allowing multiple ownership — increased efficiency — was clearly outweighed by "the benefit to a community of multiple community-based voices."[68] By amending the Rules to permanently limit LPFM eligibility, we protect the public interest in localism and foster greater diversity of programming from community sources. Thus, we will reinstate the prohibition on the ownership of more than one LPFM station.

24. In addition, we agree with those parties that suggest that we reinstate the local ownership restrictions.[69] Although growing in both usage and recognition, LPFM service is still in its nascence and doing away with the locality restriction could threaten its predominantly local character, in particular the hallmark of a LPFM station's local character, its local origination of programming. In upholding the local origination selection criterion for mutually exclusive applications, our *Second Order* emphasized that local origination is "intended to encourage licensees to maintain production facilities and a meaningful staff presence within the community served by the station."[70] Even outside the limited context of mutually exclusive applications, we view local origination as a central virtue of the LPFM service and therefore will reinstate the eligibility restriction contained in Section 73.853(b) of the Rules to encourage local origination.[71] We also wish to clarify our definition of local origination. According to Prometheus, a licensee could theoretically create one program, continually repeat it on a tape loop, and still claim it meets the definition of local origination.[72] Prometheus asserts that in order to meet the local origination

[64] Comments of National Public Radio ("NPR") at 5; Comments of Prometheus Radio Project at 20-21. *See also* Comments of Amherst Alliance at 3-4 (arguing that only one LPFM license should be available per licensee in order to prevent a network of LPFM stations and protect local broadcast programming); Comments of College of the Seneca at 3 (supporting ownership restriction of one LPFM station per organization).

[65] Comments of Educational Information Corporation at 8-9.

[66] Comments of Prometheus Radio Project at 22.

[67] *See Report and Order* at 2213, para.17.

[68] *See id.* at 2223, para. 44.

[69] *See*, *e.g.*, Comments of Colquitt Community Radio at 2 (arguing that the restriction of local ownership should remain in place); Comments of Prometheus Radio Project at 22.

[70] *Second Order*, 20 FCC Rcd at 6767, para. 10.

[71] 47 C.F.R. § 73.853(b).

[72] Comments of Prometheus Radio Project at 21.

requirement, programming cannot be automated, including randomized songs or long blocks of locally produced programming run multiple times, and cannot be aired more than two times.[73] We agree that there is room for abuse here, and as such, we clarify that repetitious automated programming does not meet the local origination requirement. We will only allow a program to be broadcast twice in order to meet the local origination requirement. After its initial broadcast a program can be rebroadcast once and still meet our requirement. After that, the program cannot count toward the local origination requirement.

25. Finally, we adopt the suggestion by Prometheus that we extend the local standard for rural markets.[74] Pursuant to Section 73.853(b) of the Rules, an LPFM applicant is deemed local if it is physically headquartered or has a campus within ten miles of the proposed LPFM transmitter site, or if 75 percent of its board members reside within ten miles of the proposed LPFM transmitter site.[75] The ten-mile limit was adopted based on the "station's likely effective reach."[76] Prometheus' comments express concern that this ten-mile local entity standard is difficult to meet for rural applicants, especially in finding board members who reside within ten miles of the proposed transmitter site.[77] Prometheus states that people in rural communities often listen to and participate in stations that are outside of their home coverage area, because they listen to the station while driving to and from work.[78] As such, Prometheus requests modifying the ten-mile requirement to twenty miles for all LPFM applicants for proposed facilities in other than the top fifty urban markets, for both the distance from transmitter and residence of board member standards.[79] We agree with Prometheus that applicants for stations located in rural communities find it particularly challenging to meet the current ten-mile standard. We also agree that the concept of "local" should be more expansive in rural areas. Accordingly, we will revise Section 73.853(b) of the Rules to reflect Prometheus' proposal.

3. Time-Sharing

26. The *Report and Order* established a comparative point system for determining which among mutually exclusive LPFM applicants should receive the authorization that they commonly seek.[80] If such applicants have the same point total, two or more of the tied applicants may propose to share use of the LPFM frequency by submitting a time-share proposal within 30 days of the release of a public notice announcing their tie.[81] If the tie among the applicants is not resolved through a voluntary time-sharing agreement, the tied applicants submitting grantable applications are placed in an involuntary time-sharing arrangement, and granted equal, successive, non-renewable license terms for the applied-for

[73] *Id.*

[74] Comments of Prometheus Radio Project at 23.

[75] 47 C.F.R. § 73.853(b).

[76] *Report and Order*, 2219, para. 33.

[77] Comments of Prometheus Radio Project at 23.

[78] *Id.*

[79] *Id.*

[80] *Report and Order*, 15 FCC Rcd at 2258-60, paras. 136-39.

[81] 47 C.F.R. § 73.872(c).

facility of no less than one year each, for a total combined term of eight years.[82] The *FNPRM* proposed amending the Rules governing mutually exclusive LPFM applications in two key respects. First, in response to a request by MAP, the *FNPRM* proposed to extend, from 30 to 90 days, the period allowed for applicants to submit a voluntary time-sharing agreement.[83] Second, the *FNPRM* proposed to amend the Rules to permit the renewal of licenses granted under the involuntary time-sharing successive licensing procedures.[84] We address those proposals in turn.

a. Deadline for Submission of Voluntary Time-Sharing Agreements

27. In its Petition for Reconsideration of the *Report and Order*, MAP observed that "LPFM applicants are largely comprised of small organizations with few administrative resources," and that few applicants "have access to the expertise of professional engineers."[85] Accordingly, few applicants are able to identify mutually exclusive applications before receiving notice from the Commission that they are tied with others, leaving them only 30 days to contact the other applicants, complete negotiations and execute and file their agreements with the Commission. Because those negotiations likely will be conducted by inexperienced volunteers, MAP argues, reaching a successful compromise within that time frame is very unlikely.[86] Finding MAP's argument persuasive, the *FNPRM* proposed to extend to 90 days the time period within which mutually exclusive LPFM applicants must reach and file a voluntary time-sharing arrangement.[87]

28. All commenters who addressed the issue favor adoption of the proposal to so extend the negotiation and filing period to 90 days. NPR, "recogniz[ing] the fundamental importance of a diversity of programming services and station ownership," observes that allowing LPFM applicants more time to enter into voluntary time-sharing arrangements will promote that diversity.[88] Similarly, REC contends that 30 days is not enough time in which to reach and file a viable time-sharing agreement. REC sought to assist applicants with negotiations of universal settlements, but found that often basic contact information supplied on the applications was inaccurate.[89] Drawing from that experience and similar considerations, REC urges the Commission to extend the period of time in which mutually exclusive applicants may negotiate and file time-sharing agreements.[90]

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[82] 47 C.F.R. § 73.872(d).

[83] *See FNPRM*, 20 FCC Rcd at 6774, para. 24; *see also* Petition for Reconsideration or, in the Alternative, Clarification of UCC-OC, *et al.,* MM Docket No. 99-25 at 4 (filed Jun. 11, 2001) ("UCC 2001 Petition").

[84] *FNPRM*, 20 FCC Rcd at 6774, para. 25.

[85] UCC 2001 Petition at 4.

[86] *Id.*

[87] *FNPRM*, 20 FCC Rcd at 6774, para. 24.

[88] Comments of NPR at 2.

[89] Comments of REC at 9.

[90] *Id*. at 10. *See also* Comments of Kyle E. Magrill at 3 (recommending that the Commission extend the time in which applicants may negotiate and file time-sharing proposals to 90 days).

29. We agree with the views of NPR, REC, and others, and therefore adopt the *FNPRM*'s proposal to extend the negotiating and filing period to 90 days. Mutually exclusive LPFM applicants should be given every opportunity to arrive at a negotiated time-sharing arrangement before the LPFM rules impose a successive-term licensing scheme on the applicants. To the extent that the 30-day time period in Section 73.872 of the Rules[91] has impeded the successful negotiation of time-sharing arrangements, we remove that impediment and hope that this will reduce considerably the likelihood that involuntary time-sharing arrangements with multiple successive license terms will be necessary.

b. License Renewal Procedures for Parties to Time-Sharing Arrangements

30. Section 73.872(d) of the Rules provides that an LPFM authorization issued under involuntary time-sharing arrangements, under which mutually exclusive applicants are granted successive license terms, is not renewable.[92] The *FNPRM* also proposed that we change this provision and make such authorizations renewable.[93] The *FNPRM* sought comment on how the renewal process should operate, given that increased flexibility in the Rules governing assignments and transfers of control may lead licensees under such arrangements to negotiate voluntary time-sharing agreements among themselves.

31. REC is one of the few commenters to respond to our queries about involuntary time-sharing arrangements.[94] In its submission, REC suggests that if licensees under an involuntary time-sharing arrangement "come up with a universal settlement to engage in a conventional time-share arrangement . . . the Commission should grant such an arrangement and remove the non-renewable condition of the permit and/or license."[95] REC further proposes that, at the end of the eight-year term, all licensees in a successive license term group should each be permitted to file a renewal application.

32. The *FNPRM* tentatively proposed to make renewable all viable licenses under both voluntary and involuntary time-sharing arrangements.[96] Making renewable only the authorizations of those organizations that can reach a mutually acceptable agreement with respect to scheduling, however, will provide a powerful incentive to licensees that thus far have been unable to reach such agreement. This will lead to more efficient use of the spectrum. Accordingly, we agree with REC that when

[91] 47 C.F.R. § 73.872(c).

[92] 47 C.F.R. § 73.872(d).

[93] *FNRPM*, 20 FCC Rcd at 6774, para. 25.

[94] Christian Community Broadcasters suggests that we establish frequency sharing for mutually exclusive applicants by requiring such applicants to merge into one organization within six months of the applications being determined to be mutually exclusive. Christian Community Broadcasters Comments at 2. We reject this suggestion as unnecessary and overly burdensome.

[95] REC Comments at 10. REC focuses its remarks on the circumstance in which one organization that participates in an involuntary time-sharing arrangement subsequently cannot do so, due to the surrender, cancellation or termination of its authorization. *Id.* However, the logic of those remarks applies with equal force to the larger questions of whether to grant a renewal expectancy to involuntary time-sharing arrangements, and how best to foster cooperation and compromise among mutually exclusive licensees.

[96] *Second Order*, 20 FCC Rcd at 6774, para. 25.

organizations subject to an involuntary time-sharing arrangement reach a "universal settlement" with respect to the allocation of time on the relevant frequency, the non-renewable condition of their authorizations should be removed.

33. For the same reasons, we also agree with REC that stations subject to involuntary time-sharing under successive license terms that subsequently enter into a voluntary time-sharing agreement should be permitted to file a renewal application. However, we are not persuaded that we should accommodate those licensees with successive license terms that fail to reach a universal voluntary agreement with the ability to renew. By doing this, we would be rewarding such applicants' unwillingness or inability to reach such agreements. We note that, of the more than 1,200 construction permits granted in the LPFM service, currently no stations hold authorizations for involuntary time sharing. In this Order, we have extended the 30-day time period in Section 73.872 of the Rules[97] for applicants to negotiate and file universal voluntary time-share agreements to 90 days.[98] We have also enabled those applicants originally issued involuntary time-share permits that reach such agreements to ultimately acquire renewable licenses. We believe that these measures will greatly reduce the likelihood that involuntary time-sharing arrangements will be necessary. Therefore, we decline to provide a renewal expectancy for involuntary time-share licensees. We strongly encourage any such permittees and licensees and future mutually exclusive applicants to enter into universal voluntary time-share agreements.

34. Making renewable the authorizations of parties who time-share who have reached voluntary time-sharing agreements raises a number of practical questions with respect to how and when those arrangements will supersede involuntary ones. First, we must determine when a voluntary time-sharing agreement should replace the successive-term structure of the involuntary arrangement. As we noted in the *FNPRM*, it is likely that licensees will reach universal time-sharing agreements prior to seeking renewal.[99] We will therefore construe the superseding agreement as a "minor change," allowing the licensees who seek to operate under a universal voluntary time-sharing agreement to file the minor change application as soon as the agreement is reached, rather than having to wait for a filing window.[100] Expediting our approval of voluntary time-sharing arrangements in this manner will encourage prompt negotiations among licensees operating under involuntary time-sharing arrangements and, it is hoped, promote a more efficient use of scarce LPFM spectrum than that under the successive licensing terms that apply to involuntary time-sharing arrangements. Accordingly, we will revise the Rules to facilitate those voluntary agreements. We stress, however, that voluntary time-sharing agreements must be genuinely universal, involving all permittees and licensees of a particular LPFM facility. That is, to give rise to a renewal expectancy, *all* of those in a time-share group must be parties to the time-sharing agreement.

35. To ensure that voluntary time-sharing arrangements will result in the most efficient use of LPFM spectrum, we also must address how to apportion unused airtime among licensees in a time-share group. This circumstance may arise in a number of ways. For example, a permittee in that group could fail to construct its facilities, decide to cease operations, or have its authorization revoked for a

[97] 47 C.F.R. § 73.872(c)

[98] *Id*.

[99] *Id.*

[100] *See* 47 C.F.R. § 73.870(a); *see also Second Order*, 20 FCC Rcd. at 6767, para. 11 (explaining that "[a]n application proposing a 'minor change' to authorized LPFM facilities [unlike major modification applications] may be filed at any time").

serious violation of the Rules. There might also be situations in which no permittee or licensee has come forward requesting to operate during a certain part of the day or week. REC points to an example in Visalia, California, where one licensee, KFSC-LP, broadcasts from 5 to 9 a.m. Monday through Saturday and a second licensee, KQOF-LP, broadcasts from 5 to 9 p.m. Monday through Saturday. No licensee broadcasts other than those times.[101] REC proposes that, prior to the opening of a new filing window, new entrants who can reach a universal settlement with existing stations should be allowed to do so. REC also argues that new entrants should be allowed to apply for periods of unused time once a window for new applications has opened.[102]

36. We agree with REC that, during filing windows for new applications, new parties should be permitted to apply for unused and unwanted time on a particular frequency. We will not entertain such applications outside of an open filing window, however, even when the potential new entrant could successfully negotiate a universal settlement with existing licensees. Aside from the administrative burden that such out-of-window filings could create, allowing a new entrant to act before a formally-announced filing window could prejudice unfairly other potential applicants who, under the comparative criteria set forth in Section 73.872(b) of the Rules,[103] would be entitled to a preference over the would-be new entrant's mutually exclusive application. Restricting applications for unwanted time to new filing windows does raise a potential concern in that the restriction will leave periods of time on a particular frequency vacant until the Commission elects to open a filing window for new applications. To alleviate that concern, and to promote a more efficient use of available LPFM frequency, we will allow existing stations in a voluntary time-share group to apportion among themselves any time that, for any reason, becomes unused. As with the negotiation and execution of voluntary time-sharing agreements by parties in an involuntary time-share arrangement, we will deem amendments to a voluntary time-sharing agreement to account for unused time requests to be minor modifications that may be filed at any time.

B. Technical Rules

1. Construction Period

37. The *Report and Order* established an 18-month construction period for all LPFM facilities, stating that deadlines would be strictly enforced.[104] However, as a temporary measure, the *FNPRM* adopted an interim waiver policy to allow permittees with soon-to-expire permits to request additional time to construct their facilities. Under that policy, the Media Bureau has the authority to consider and grant requests for an additional 18 months to construct facilities, upon a showing that the permittee reasonably can be expected to complete construction within the extended period.[105]

38. As a permanent solution, the *FNPRM* proposed extending the construction period for LPFM stations to 36 months, the construction period afforded to all other broadcast permittees.[106] During

[101] Comments of REC at 11 n.20.

[102] *Id.* at 12.

[103] 47 C.F.R. § 73.872(b).

[104] *Report and Order*, 15 FCC Rcd at 2278-79, paras. 189-90.

[105] *FNPRM*, 20 FCC Rcd at 6775, para. 27.

[106] *See* 47 C.F.R. § 73.3598(a).

the six years since the release of the 2000 *Report and Order*, our assumption that LPFM facilities would require significantly less time to build than that required to construct full-power FM facilities has proven to be overly optimistic. LPFM licensees have encountered varying difficulties in locating suitable transmitter sites, raising sufficient funds for the proposed facilities, and obtaining the necessary zoning permits.[107] The *FNPRM* thus proposed extending the construction period in order "to maximize the likelihood that LPFM permittees will get on the air."[108]

39. Many commenters favor extending the construction period.[109] Some state that the blanket adoption of a 36-month construction period has administrative advantages over a conditional extension or case-by-case review of individual waiver requests.[110] Moreover, extending the construction period to 36 months would put the LPFM and full-power FM services on equal footing and avoid disenfranchising able, willing, but inexperienced, LPFM permittees. Prometheus Radio Project and others contend that the better approach is to grant an 18-month extension to complete construction, but only upon demonstration of good cause.[111] Prometheus argues that such a procedure would give able and willing LPFM permittees a total of 36 months to construct their facilities but prevent unable or unwilling LPFM permittees from warehousing valuable spectrum, without service to the public, for an extended period of time.[112]

40. We seek to encourage permittees to construct their facilities within 18 months, and therefore, decline to adopt a blanket 36-month construction period for LPFM. We agree with Prometheus that this approach will prevent unwilling/unable applicants from sitting on valuable spectrum. We recognize, however, that some permittees may face difficulties in meeting this deadline. Therefore, we will amend the Rules to allow all permittees, including current ones whose construction permits have yet to expire, the opportunity to seek an 18-month extension to complete construction of their facilities upon a showing of good cause. Because any such extension should account adequately for the delays resulting from the potential inexperience of the permittee, as well as for potential obstacles that may arise during the zoning or permitting processes, that extended construction deadline will be strictly enforced, as it is

[107] *See* KVLP Comments at 1 (discussing difficulties in financing construction); *see also Second Order*, 20 FCC Rcd at 6775, para. 26 (recognizing that zoning and permitting processes could delay construction).

[108] *FNPRM*, 20 FCC Rcd at 6775, para. 26.

[109] NPR, REC, Eureka College, Virden Broadcasting Corporation, Kaskaskia Broadcasting, Inc., JT Communications, Kyle E. Magrill, Matthew Lasar, Elizabeth Currans, Meagen Grundberg, and Richard Whitmore favor extending the 18-month requirement to three years; Colquitt Community Radio, Inc., Optima Enrichment Inc., and Martin L. Hensley oppose any extension of the current 18-month requirement.

[110] *See* Comments of Eastern Sierra Broadcasters at 2 (favoring an automatic extension for reasons of administrative ease, but would limit the extension to a total of 24 months).

[111] *See* Comments of Prometheus at 26 (filed Aug. 22, 2005); Reply Comments of Christian Community Broadcasters at 2 (filed Sept. 21, 2005); Comments of Christian Community Broadcasters at 3 (filed Aug. 22, 2005); Comments of Dane Scott Undenburg (filed July 18, 2005).

[112] *See* Comments of Prometheus at 26 (filed Aug. 22, 2005).

with all other radio broadcast stations; we do not expect to entertain, and most likely will not grant, waiver requests or those for further extensions.[113]

2. Technical Amendments

41. Section 73.871 of the Rules limits the ability of applicants to propose site changes by minor amendment to relocations of 3.2 kilometers or less for an LP10 station, and 5.6 kilometers or less for an LP100 station.[114] That Rule prevents time-sharing applicants from relocating their transmitters to a central location unless the site falls within those distance limits. To increase flexibility for time-sharing applicants and thereby promote voluntary time-sharing agreements, the *FNPRM* proposed to allow time-sharing applicants to file minor amendments to relocate their transmitters to a central location, notwithstanding the site relocation limits imposed by Section 73.871 of the Rules.[115]

42. Few commenters have responded to our queries about technical amendments by time-sharing applicants under Section 73.871 of the Rules.[116] In 2001, UCC requested that we amend the Rules to allow applicants that submit a voluntary time-share agreement to relocate the transmitter to a central location, provided that one is available.[117] The Commission has a long-standing policy of providing mutually exclusive applicants with maximum flexibility to enter into time-share agreements in order to facilitate rapid licensing in the service. For instance, in 2003, the Commission by public notice waived Section 73.871 of the Rules for a time to permit all LPFM settling applicants the ability to file major change amendments specifying new FM channels.[118] Permitting parties to file time-share agreements to specify a "central location" beyond the current minor amendment distance limitations would remove one more potential impediment to such agreements. Accordingly, we amend Section 73.871 of the Rules to permit time-sharing applicants to specify a central transmitter location with a minor amendment without regard to the respective 3.2 and 5.6 kilometer limitations on such amendments. These agreements, which permit a number of different organizations to reach local audiences, promote diversity. Providing applicants additional flexibility and the opportunity to avoid the construction of duplicate facilities also serves the public interest. For the same reason, we amend that Rule to allow permittees and licensees that reach a voluntary time-sharing agreement after their permits have been granted to submit such site change applications by minor submission. We anticipate that this rule change will encourage time-share applicants, permittees and licensees to consolidate transmission and studio facilities.

3. LPFM - FM Translator Interference Priorities

43. The *FNPRM* identified several possible ways to modify the LPFM-FM translator interference protection requirements. Currently, stations in these two services operate on a substantially

[113] We note that this expectation does not affect the tolling provisions of 47 C.F.R. § 73.3598(b).

[114] 47 C.F.R. § 73.871(c).

[115] *See FNPRM*, 20 FCC Rcd at 6776, para. 28 (citing UCC 2001 Petition at 7).

[116] 47 C.F.R. § 73.871(c).

[117] UCC Petition at 7.

[118] *See Settlement Period Announced for Closed Groups of Pending Low Power FM Mutually Exclusive Applications,* Public Notices, 18 FCC Rcd 18048, 18 FCC Rcd 19726 (MB 2003).

co-equal basis, with a facility proposed in an application having "priority" over one specified in any subsequently filed application. The *FNPRM* sought comment on whether, and if so, under what circumstances LPFM applications should be treated as having priority status over prior-filed FM translator applications and granted authorizations. In particular, the Commission sought comment on how to overcome the significant preclusive impact of the 2003 Auction No. 83 translator filing window, asking among other things whether all pending applications for new FM translator stations filed during the window should be dismissed. The *FNPRM* explained that the staff already had granted approximately 3,500 new station construction permit applications from the singleton filings, "a number nearly equal to the total number of FM translator stations licensed and operating prior to the filing window," that 7,000 applications remained on file, that very few opportunities for LPFM stations in major markets remained prior to the 2003 translator filing window, and that the Auction No. 83 filing would have a "significant preclusive impact on future LPFM licensing opportunities."[119] The voluminous comments submitted in response to the priority issue focus on two possible theories supporting modification of the current Rule: (1) that LPFM provides a "preferred" radio service to that offered by translators; and (2) that priority status for LPFM applications is necessary to overcome the preclusive impact of the over 13,000 technical proposals filed during the 2003 Auction No. 83 FM translator window.

44. LPFM advocates contend that their service is preferable to translator service.[120] They note that the Rules require LPFM stations to be locally owned and permit local program origination.[121] They note that, in contrast, many translators merely rebroadcast satellite-distributed national programming. Some LPFM advocates request priority status for only those LPFM stations that originate programming.[122] Others request priority status over all "distant" translators, *i.e.,* translators that rebroadcast the signals of non-local stations. [123]

45. NAB, NPR, the various state broadcast associations, and virtually all full-service commercial and NCE broadcasters support retention of the current interference protection rules. They argue that there are no simple ways to distinguish preferred stations or programming.[124] They also claim that there is no such thing as a typical LPFM or FM translator station.[125] They reject as unfounded the contention that program origination or local ownership correlates to more desirable programming.[126] They

[119] *See FNPRM*, 20 FCC Rcd at 6776-78, paras. 29-33.

[120] *See, e.g.,* Comments of KZQP-LP at 1-2.

[121] *See, e.g.,* Comments of KYRS-LP at 1-2.

[122] *See, e.g.,* Reply Comments of Prometheus Radio Project at 28-31; Comments of Highland Community Broadcasting at 1-2.

[123] *See, e.g.,* Comments of The Amherst Alliance at 2; Comments of REC at 16; Reply Comments of REC at 2.

[124] *See, e.g.,* Comments of Edgewater Broadcasting, Inc. at 6-7; Comments of Educational Media Foundation Comments at 6-9; Reply Comments of MBC Grand at 1-3; Reply Comments of NAB at 3-4; Comments of Public Radio Regional Organization at 10-15.

[125] *See, e.g.,* Comments of the National Translator Association at 2-3; Comments of the Public Radio FM Translator Licensees at 3-6.

[126] *See, e.g.,* Comments of Edgewater Broadcasting, Inc at 7; Reply Comments of Edgewater Broadcasting, Inc. at 4; Comments of NAB at 24-26; Reply Comments of NAB at 9-10.

note that LPFM licensees have limited service responsibilities with regard to their communities of license: LPFM stations need not originate programming; many serve the needs of niche interest groups rather than their entire communities of license; they are not required to maintain a main studio or public file; and they are required to operate for only 35 hours per week.[127] Many broadcasters contend that, because the LPFM service is still in its infancy, it is premature to reassess the "co-equal" status of LPFM and FM translator stations.[128] NCE and public radio broadcasters argue that giving LPFMs priority over operating FM translator stations would significantly disrupt established and valued translator service to millions of listeners, particularly those in rural areas[129] and in situations in which broadcasters rely on "chains" of translators to distribute programming.[130] The public radio commenters note that translators are a critical component of the public radio infrastructure.[131] A number of other commenters urge that a "fill-in" translator should be treated as the equivalent of its associated primary full-service station and, therefore, always preferred to an LPFM station.[132]

46. With regard to the potentially preclusive impact of the over 13,000 FM translator applications filed in 2003, some commenters argue that the LPFM service is not entitled to any special consideration because LPFM applicants had the first opportunity during the 2000-2001 national LPFM windows to apply for new stations.[133] Translator advocates note that their last opportunity for non-reserved band FM translators occurred in 1997.[134] Edgewater Broadcasting, Inc. ("Edgewater") submits an extensive analysis of the preclusive impact of the construction permits issued out of the 2003 translator filing window and the more limited impact of the over 1,000 permits issued to it and its commonly-owned Radio Assist Ministries.[135] Edgewater contends that the preclusive impact has been "miniscule," notes that the Commission received no LPFM applications to serve many of the areas specified in its translator filings, and argues that its studies demonstrate that vast areas in the country remain available for new LPFM stations.[136] REC also submits both national and market-specific analyses and identifies several

[127] *See, e.g.,* Comments of Educational Media Foundation at 10-11; Comments of National Translator Association at 3-4; Reply Comments of Station Resource Group at 4.

[128] *See, e.g.*, Comments of Named State Broadcaster Associations ("NSBA") at 3.

[129] *See, e.g.,* Comments of Public Radio FM Translator Licensees at 3-6; Comments of The Public Radio Regional Organizations at 11-15; Comments of Educational Media Foundation at 2-4

[130] *See, e.g.,* Comments of NAB at 26-27.

[131] *See, e.g.,* Comments of NPR at 5-9; Comments of Station Resource Group at 5-8.

[132] *See, e.g.,* Comments of Bayard H. Walters at 2-3; Joint Comments of Galaxy Communications, L.P. and Desert West Air Ranchers Corp. at 6 n.11; Reply Comments of REC at 5-6.

[133] *See, e.g.,* Comments of Edgewater Broadcasting, Inc. at 3-4; Comments of Public Radio Regional Organizations at 19-20.

[134] *See, e.g.,* Comments of Public Radio Regional Organizations at 19-20.

[135] *See, e.g.,* Comments of Edgewater at Exhibits 1-3.

[136] Comments of Edgewater at 4-6.

communities in which 2003 window filings have allegedly precluded or diminished LPFM station licensing opportunities.[137]

47. The Station Resource Group, an alliance of 45 public radio broadcasters that operate 168 radio stations, contends that the chief contributor to LPFM station preclusion is a "maxed out spectrum situation" which prevents any broadcasters, NCE or commercial, translators or LPFM stations, from obtaining new licenses in virtually all major markets and many medium-sized markets.[138] Several commenters argue that the statutory third-adjacent channel LPFM protection requirement blocks many otherwise-licensable LPFM opportunities.[139]

48. A number of commenters argue that the Commission's concern is misdirected. They urge the Commission to instead move vigorously against alleged FM translator filing abuses, speculators, and deficient application filings.[140] They suggest imposing numerical application filing limits, either on a prospective basis or with regard to the still-pending translator applications.[141] Several contend that the high demand for new FM translators is unsurprising, given the extended freeze on non-reserved band licensing.[142]

49. As demonstrated by the comments filed on this issue, the LPFM and FM translator services are each valuable components of the nation's radio infrastructure. We agree with the advocates for each of these services regarding the important programming that these stations can provide to their local communities. We do not reach the merits of the priority rules between these two services here. Instead, we seek further comment in the attached *Second Further Notice of Proposed Rulemaking* to develop a better record on whether and how our current rule affects our core goals of localism, diversity and competition. The current rules will remain in effect until the Commission resolves the issue in that proceeding.

50. We also must consider the question of whether Auction No. 83 filing activity has adversely impacted our goal to provide to both LPFM and translator applicants reasonable access to limited FM spectrum in a manner which promotes the "fair, efficient, and equitable distribution of radio service . . . ."[143] This issue has taken on much greater significance over the past few years as demand for new radio stations has increased dramatically while the spectrum for such stations has become increasingly scarce, particularly in many mid-sized communities and in virtually all urbanized areas. Station Resource Group is correct – the primary licensing impediment is the nation's "maxed out"

[137] Reply Comments of REC at 3; *See also* Reply Comments of Prometheus Radio Project at Appendix A and Appendix B.

[138] Comments of Station Resource Group at 5.

[139] *See, e.g.* Comments of REC at Appendix D.

[140] *See, e.g.,* Comments of Station Resource Group at 8; Comments of the Public Radio Regional Organizations at 19-22.

[141] Comments of Station Resource Group at 8-9; Comments of the Public Radio Regional Organizations at 19-20; Comments of the National Translator Association at 7-8; Reply Comments of REC at 5-6.

[142] *See, e.g.,* Comments of Saga Communications at 7; Comments of Named State Broadcaster Associations at 9.

[143] 47 U.S.C. § 307(b).

spectrum situation. New Jersey LPFM licensing activity is illustrative of the limited new station opportunities in spectrum-congested areas. Only 29 New Jersey LPFM applications were filed during that state's June 2001 window. Of those submissions, the Media Bureau has issued only eleven construction permits and only one additional authorization possibly may be granted. Only seven LPFM stations are currently operating in the state. We find these statistics more probative of the LPFM service's growth potential than the studies completed by Edgewater because LPFM stations, due to their limited service area potential, generally require higher population densities to be viable. It seems unlikely that the availability of spectrum in the vast rural portions of the nation will generate significant levels of LPFM station licensing.

51. Demand for radio spectrum is, if anything, increasing. The number of applications filed during the AM new and major change windows jumped from 258 in 2000 to more than 1,300 in 2004. Competitive bidding activity for FM new station construction permits has been robust since the commencement of open FM auctions in 2004. The 2003 FM translator window provides further evidence of this trend, especially when compared to historic licensing levels for this service. As of September 30, 1990, a total of 1,847 licensed FM translators and (co-channel) boosters operated throughout the nation. As of December 31, 1997, shortly after the date on which the Commission imposed a freeze on new non-reserved band translator filings (but not on new boosters or new reserved band stations), a total of 2,881 FM translators operated nationally. The number of licensed stations continued to grow modestly over the next six years, chiefly as a result of ongoing reserved band filing activity. A total of 3,818 licensed stations were in operation in March 2003 when the Commission opened the FM translator window, a total of 3,897 licensed stations when the Commission imposed the Auction No. 83 construction permit freeze in March 2005.

52. Measured against this historical licensing record, Auction No. 83 window filing activity was significant. Proposals exceeded authorized stations by a factor of three in a service in which little licensing was done before the 1980s. The 2003 window already has nearly doubled the total number of authorized stations. To date, three times more translator stations have been authorized out of this one window than LPFM stations authorized through the initial LPFM window filing process. Approximately 7,000 translator applications remain pending. The Commission faces two chief difficulties in trying to balance spectrum allocations for LPFM stations and translators. First, FM translators are licensed under substantially more flexible technical rules. Thus, some of the Auction No. 83 filing activity involves spectrum which is unavailable for LPFM use. By the same token, LPFM station proponents have far fewer licensing opportunities in spectrum-congested markets because LPFM technical rules are substantially less flexible. Second, it is impossible to accurately predict future demand for LPFM station licenses. While engineering studies can identify areas in which additional licensing is technically permissible, the interest of local organizations to apply for, construct, and operate new LPFM stations can only be determined at the time a window is opened.

53. Although precise preclusionary calculations are not possible, we believe that processing all of the approximately remaining 7,000 translator applications would frustrate the development of the LPFM service and our efforts to promote localism. Several factors support the adoption of some remedial measures. The sheer volume of Auction No. 83 filings, when compared to historic translator and LPFM licensing levels, is a significant concern. We recognize that LPFM proponents had the "first" opportunity to file for the spectrum which Auction No. 83 filers now propose to use. However, it is apparent that the translator filings have precluded or diminished LPFM filing opportunities in many communities. For example, a REC national study found that 16 percent of all census designated communities that otherwise

would have LPFM channels available in their communities have been precluded by the translator filings and that the greatest preclusionary impact has been in the largest such communities.[144] Moreover, the Media Bureau has found that its efforts to identify alternative channels for LPFM stations either causing or receiving interference have been significantly limited in numerous cases by the requirement to protect pending FM translator applications and authorizations granted out of the 2003 window. The licensing asymmetries between these two services also support this finding. Translator filings can materially impact LPFM new station options which are far more limited than FM translator filing opportunities. In contrast, it is unlikely that LPFM filings will materially affect translator licensing options. FM translator contour-based station licensing is substantially more flexible than the strict distance separation requirements which LPFM stations must satisfy. This difference is tied in part to the fact that unlike an LPFM station, an FM translator station must cease broadcast operations if it is causing "actual interference" to any authorized broadcast station.[145] In short, any translator station construction is at the risk of the permittee. The level of Auction No. 83 filing activity and the fact that many applications were filed for facilities in the top 100 markets both illuminate the significant difference in the licensing opportunities between these two services. The next LPFM window may provide the last meaningful opportunity to expand the LPFM service in spectrum-congested areas. In contrast, we expect significant filing activity in many future translator windows.

54. Certain equitable considerations also tilt in favor of adopting remedial measures to limit the preclusive impact of Auction No. 83 filings. Each applicant filing in Auction No. 83 submitted one Form 175 Application to Participate in an FCC Auction and a separate Form 349 "Tech Box" for each translator proposal. 861 filers submitted 13,377 such proposals in the window. Applicant filing activity divided between the hundreds of applicants who filed a limited number of applications and a very small number of applicants who filed for hundreds or thousands of construction permits. For example, approximately half the filers submitted one or two proposals. Approximately 80 percent of filers submitted 10 or fewer proposals. 97 percent filed 50 or fewer proposals. In contrast, the two most active filers, commonly-owned Radio Assist Ministries and Edgewater (collectively, "RAM"), filed 4,219 proposals, constituting almost one-third of all Auction No. 83 filings. The fifteen most active filers were responsible for one-half of all Tech Box submissions.

55. We are concerned that the heavily skewed filing activity in Auction No. 83 raises concerns about the integrity of our FM translator licensing procedures. Even if lawful, it is fair to question whether the acquisition of unprecedented numbers of FM translator authorizations by a handful of entities through our window filing application procedures promotes either diversity or localism. The rapid flipping of hundreds of permits acquired through the window process for substantial consideration does suggest that our current procedures may be insufficient to deter speculative conduct. Some commenters have been critical of RAM's business strategy. "The [National Translator Association] considers those applicants who intend to obtain construction permits and then sell those permits to be simply speculators for profit."[146] Most fundamentally, it appears that our assumption that our competitive bidding procedures would deter speculative filings has proven to be unfounded in the Auction No. 83 context. RAM, alone, has sought to assign more than 50 percent of the 1,046 construction permits it has been awarded through the window and has consummated assignments for over 400 of all such permits.

[144] *See* Reply Comments of Prometheus at 17-18.

[145] *See* 47 C.F.R. § 74.1203(a)(1).

[146] Comments of National Translator Association at 7.

56. In order to further our twin goals of increasing the number of LPFM stations and promoting localism, we find it necessary to take action. Accordingly, we will limit further processing of applications submitted during the Auction No. 83 filing window to ten proposals per applicant. Applicants with more than ten proposals pending will be provided an opportunity to identify those applications which they wish to have processed and those for which they seek voluntary dismissal. The Media Bureau is directed to complete its processing of the approximately 100 pending but frozen singleton long-form applications without regard to the ten application limit. However, construction permits granted from this group will count toward the limit for future Auction No. 83 licensing purposes. This cap will only apply to short-form applications, and will not impact the ability of Auction No. 83 filers with granted construction permits or pending long-form applications to obtain licenses to cover. This limit will not have an adverse impact on the more than 80 percent of those who filed ten or fewer proposals in the Auction No. 83 filing window. It will require certain filers to identify priority proposals. This cut-off will limit the preclusive impact of Auction No. 83 filings on LPFM licensing opportunities by barring the processing of thousands of applications filed by a very small number of applicants, without impacting the approximately 80 percent of filers who filed ten or fewer applications. Although we recognize the equitable interests of the remaining 20 percent of filers in the processing of all of their short-form applications, on balance we conclude that the public interest requires a bar on the processing of more than ten applications per filer. We are hopeful that as a result of this cap the Media Bureau will be able to shorten the period between windows for both new LPFM and FM translator stations. We direct the Media Bureau to issue a public notice announcing the opening of the settlement window required by Sections 73.5002 (c) and (d) of the Rules.[147] Applicants must select the ten applications they wish to preserve before the settlement window opens. With the imposition of this cap, we direct the Media Bureau to resume the processing of Auction No. 83 filings. Specifically, the Media Bureau is to expeditiously process the applications of any applicant that is now in compliance or brings itself into compliance with the ten proposal cap.

57. We are mindful of the expenses that translator applicants have incurred in preparing their non-feeable Form 175 short-form applications and Form 349 Tech Box submissions but believe that the imposition of this cap treats all applicants equitably. We have attempted to accommodate applicants to the greatest extent possible, consistent with statutory requirements and competing Commission goals. All applicants will benefit from expedited processing and the Media Bureau's ability to open future windows more quickly. Thus, this action is entirely consistent with Commission Rules and precedent for the dismissal of pending applications as a necessary adjunct of efficient and effective rulemaking.[148] Finally, we note that there is ample precedent for the mass dismissal of applications based on a rule or policy change.[149] This procedural change is a reasonable exercise of the Commission's administrative discretion. Accordingly, we conclude that the imposition of a cap in these circumstances is lawful.

[147] 47 C.F.R. §§ 73.5002 (c) and (d).

[148] *See, e.g.*, *Elleron Oil Company WVI Partners, Inc.*, Order, 13 FCC Rcd 17250 (WTB 1998); *Chadmoore Comm'ns, Inc. v. FCC*, 113 F.3d 235 (D.C. Cir. 1997); *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963).

[149] *See, e.g., Revision of Part 22 and Part 90 of the Commission's Rules*, Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 2732, 2739-40 (1997) (dismissing all pending paging applications and all applications filed after a certain date to facilitate transition to new geographic-area licensing system); *Elleron Oil Company WVI Partners, Inc.,* 13 FCC Rcd at 17252.

4. Interference Protection from Subsequently Authorized Full-Service FM Stations

58. *Background.* The *Report and Order* establishing the LPFM service set minimum distance separation requirements to ensure that LPFM stations protect existing commercial and NCE full-service FM stations, as well as FM translator and booster stations.[150] The *Report and Order* also concluded that existing full-service stations would not be required to protect proposed LPFM facilities. Moreover, "operating LPFM stations will not be protected against interference from subsequently authorized full-service facility modifications, upgrades, or new FM stations."[151] Conversely, an LPFM station is not permitted to cause interference within the 3.16 mV/m (70 dBμ) contour of a full-service FM station.[152] An LPFM station generally may continue to operate within that contour so long as it can demonstrate that actual interference is unlikely to occur. Section 73.809 of the Rules sets forth detailed complaint procedures to resolve disputes over the likelihood of actual interference and the sufficiency of actions taken by LPFM stations to eliminate that interference.[153]

59. In September 2000, the Commission dismissed a motion to reconsider the regulatory status of LPFM stations.[154] In the *FNPRM*, however, the Commission stated that "it would be useful to consider whether to limit the Section 73.809 interference procedures to situations involving co- and first-adjacent channel predicted interference, where the predicted interference areas are substantially greater than for second and third-adjacent channel interference."[155] The Commission also asked whether an LPFM station should be permitted to remain on the air if the full-power FM station did not serve the area of predicted interference prior to the facilities modification (in the case of an existing station) or the grant of the construction permit (in the case of a new station). Similarly, the Commission sought comment on whether an LPFM station should be permitted to remain on the air if the full-service station's community of license would not be subject to interference. Finally, the Commission asked whether an amendment to Section 73.809 of the Rules would be consistent with Congress' directive mandating third-adjacent channel interference protection from LPFM stations.[156]

60. Although, to date, only one LPFM station has been forced off the air pursuant to the requirements of Section 73.809 of the Rules, some commenters believe that numerous LPFM stations are under a significant threat of such "encroachment."[157] In 2005, REC released a study claiming that 134

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[150] *Report and Order*, 15 FCC Rcd at 2230, para. 63.

[151] *Id.* at 2231, para. 65.

[152] *Id.* at 2232, para. 66.

[153] 47 C.F.R. § 73.809.

[154] *Reconsideration Order*, 15 FCC Rcd at 19220, para. 29.

[155] *See FNPRM*, 20 FCC Rcd at 6780, para. 38 (noting that "the public interest may favor continued LPFM second- and third-adjacent channel operations over a subsequently authorized upgrade or new full-service station").

[156] *Id.* at 6781, para. 39.

[157] *See*, *e.g.*, Prometheus Reply Comments at 2. On March 5, 2007**,** the Commission received a petition for rulemaking requesting: (1) immediate issuance of a moratorium on the displacement of licensed LPFM stations and (continued….)

LPFM construction permits and licenses were then at risk of being cancelled due to pending full-power station modification applications for vacant allotments.[158] The study also claimed that hundreds of LPFM stations faced less significant levels of increased interference.[159] REC has updated this analysis to assess the impact of applications filed under the recently-adopted rules that established streamlined community of license modification procedures. This study claims that 257 LPFM stations could suffer at least some signal degradation as a result of these facility changes and that 38 of these LPFM stations might be required to cease operations. Prometheus and other commenters call for the Commission to grant LPFM stations co-equal protection status with full-power stations. Alternatively, they suggest that a full-power station proposing to eliminate or seriously degrade the listening area of an LPFM station be required to receive full Commission approval for such a modification. At a minimum, these commenters request that impacted LPFM stations be provided with the ability to make major engineering changes to preserve service.[160]

61. Conversely, many other commenters believe that no changes to Section 73.809 of the Rules are warranted.[161] Instead, NAB proposes that flexible procedures be put in place to encourage LPFM stations to relocate.[162] NPR contends that the Commission should maintain the current interference protections between FM and LPFM stations. Indeed, NPR and others suggest that the Commission lacks statutory authority to eliminate second and third-adjacent channel protections.[163] Educational Media Foundation states that relaxing Section 73.809 of the Rules would be harmful to listener-supported NCE stations.[164] Finally, NSBA contends that there is a strong likelihood of harmful interference to full-service FM stations if the Rule is changed and that harm outweighs any speculative benefit to the public interest that would result from a rule change.[165]

62. *Discussion.* In the *Report and Order*, we declined to provide LPFM stations with an interference protection right that could prevent a full-service station from seeking to modify its transmission facilities or could foreclose future new full-service radio station licensing opportunities.[166]

(Continued from previous page)
Class D Educational stations by new, relocating and/or upgrading full-power radio stations, and (2) a proposed rule permanently prohibiting or otherwise restricting such displacement. *See* Petition for Rulemaking of the Amherst Alliance, Talk Radio of Pahrump, Midwest Christian Media, Providence Community Radio and Nickolaus E. Leggett N3NL at 1. In light of the discussion herein, we dismiss this petition.

[158] *See* www.recnet.com/lpfminfo/encr0205.pdf.

[159] *Id.*

[160] *See* Prometheus, *et. al*., comments at 12-17.

[161] *See* Comments of NAB; Cox Radio, Inc.; Educational Media Foundation; Galaxy Communications, L.P.; Desert West; Air Ranchers Corp.; and NSBA.

[162] *See* NAB Reply Comments at 16-17; see also Comments of Cox Radio, Inc., and Galaxy Communications, L.P.

[163] *See* NAB Comments at 14; see also NSBA Reply Comments at 12-13.

[164] *See* Educational Media Foundation Reply Comments at 7.

[165] *See* NSBA Reply Comments at 10.

[166] *See Report and Order*, 15 FCC Rcd at 2231. *See also* n.16 and accompanying text.

Our experience to date confirms our belief that in most instances the interests of both full-service and LPFM stations can be accommodated. We applaud those full-service stations that have provided technical and/or financial assistance to LPFM stations that have been required to undertake facility modifications to remain on the air. We are particularly appreciative of those broadcasters that have consented to short-spacings to avoid LPFM station displacements.[167] We urge licensees seeking community of license modifications or other changes that could lead to LPFM displacement or signal degradation to continue these cooperative efforts on a going-forward basis. The Media Bureau also has played an important role in crafting technical solutions to preserve LPFM stations potentially at risk from new station and facility modification proposals. It already has taken action on dozens of LPFM modification applications that were filed to eliminate or reduce caused interference to or received interference from a full-service FM station. We direct the Media Bureau to continue to attempt to resolve conflicts between full-service and LPFM stations in ways that accommodate the interests of both services.

a. Section 73.809 Interference Procedures

63. Circumstances have changed considerably since we last considered the issue of protection rights for LPFM stations from subsequently authorized full-service stations. Most importantly, the January 2007 lifting of the freeze on the filing of FM community of license modification proposals combined with the implementation of new streamlined licensing procedures resulted in a one-time flurry of filing activity, with approximately 100 FM community of license modification proposals submitted in the first week of the new Rules. In all, over 200 community of license modification applications have been filed under the new rules. Increased filings under the new Rules and the arguments of LPFM advocates persuade us that the Commission should put policies in place to address current and future LPFM station displacement threats. The Media Bureau has identified approximately 40 LPFM stations that could be forced to cease operations. In these circumstances, we find that the Rules should be amended to limit Section 73.809 interference procedures to situations involving co- and first-adjacent channel interference.[168] Thus, Section 73.809 will no longer apply to situations involving predicted second-adjacent channel interference. We encourage full-service and LPFM stations to work cooperatively to minimize or eliminate the impact of the full-service station proposal on both stations. In this regard, we encourage each "encroaching" full-service station to provide technical and financial assistance to any LPFM station at risk from a full-service station facility proposal and to identify and facilitate the implementation of measures to ameliorate any potential increase in received interference by the LPFM station. As described in more detail below, second-adjacent channel interference to a full service station is generally predicted to occur only in the immediate vicinity of the LPFM station transmitter site. Predicted interference to listeners can be substantially reduced or eliminated in these situations by various techniques, e.g., increasing LPFM antenna height, relocating LPFM transmission facilities away from populated areas, etc.

[167] *Letter to John Snyder from Peter H. Doyle, Chief, Audio Division, Media Bureau*, 21 FCC Rcd 11,945 (MB 2006).

[168] We note that, contrary to the suggestion in the FNPRM, Section 73.809 does not require LPFM stations to resolve complaints of actual interference to subsequently authorized third-adjacent channel full service stations. Thus, this Rule change does not "eliminate or reduce" third-adjacent channel protection requirements and therefore comports with statutory requirements. *See* 2001 DC Appropriations Act.

b. Section 73.807 Second-Adjacent Channel Waiver Standard

64. The Media Bureau has identified for many of the stations now at risk of displacement alternate channels that would require waivers of Section 73.807 of the Rules[169] because operations on the new channels would be short-spaced to full service stations operating on second-adjacent channels. Based on the potential harm to this small but not insignificant number of LPFM stations, we believe that it would be beneficial to establish a procedural framework for the consideration of showings from LPFM stations that may seek such waivers to avoid displacement, as well as to avoid unnecessary disruption of LPFM service to the public during such consideration. This procedure will apply to both pending applications and those filed, but not disposed of, prior to the effective date of any Rule changes proposed in the *Second Further Notice.* The clarification of our second-adjacent channel LPFM waiver standards set forth below is intended to avoid the unwarranted loss of many LPFM stations while the Commission considers certain Rule changes set forth in a *Second Further Notice* that we also adopt today. The interim procedural protections we establish in connection with such waiver standards are designed to safeguard the interests of all affected parties and to aid the Commission in identifying those situations in which strict compliance with our Rules would not serve the public interest. We also provide guidance below regarding processing standards that the Commission will apply to full-service station modification applications where the modification would place an LPFM station at risk of displacement and no alternate channel is available. In such circumstances, we will consider waiving the Commission's Rule making LPFM stations secondary to subsequently-authorized full-service stations and denying the modification application to protect an LPFM station that is demonstrably serving the need of the public from being required to cease operations.

65. In evaluating whether the public interest would be served by grant of a waiver of Section 73.807 of the Rules for a second-adjacent channel short-spacing to an LPFM station at risk of displacement, the Commission must balance the potential for new interference to the full-service station against the potential loss of an LPFM station. An LPFM station operating within the 60 dBμ contour of a second-adjacent channel full-service station would cause interference to the full-service station in the immediate vicinity of the LPFM transmitter site. Based on desired-to-undesired ("D/U") signal strength ratio calculations, in most circumstances interference would be predicted to extend from ten to two hundred meters from the LPFM station antenna. Clearly, it will be advantageous to an LPFM applicant's waiver showing to propose modifications that minimize the area of predicted interference, *e.g.*, by proposing maximum possible antenna heights above average terrain, and by selecting transmitter sites not located near densely populated areas. We encourage the encroaching full-service station licensee to provide technical assistance to LPFM stations to develop modification proposals that would avoid impacting current radio listening patterns.[170]

66. The following procedures will be limited to those situations in which implementation of the full-service new station or modification, including community of license, proposal would result in the full-service and LPFM stations operating at less than the minimum distance separations set forth in Section 73.807 of the Rules. In addition, implementation of the full-service proposal must result in either an increase in interference caused to the LPFM station or result in the displacement, *i.e.*, the suspension or

[169] 47 C.F.R. § 73.807.

[170] Based on this very limited potential for second-adjacent channel interference, the *FNPRM* sought comment on a closely related proposal to limit LPFM displacement – whether to limit complaint procedures under Section 73.809 of the Rules to situations involving only co- or first-adjacent channel predicted interference. *FNPRM*, 20 FCC Rcd at 6780, para 38.

termination of LPFM station operations pursuant to Section 73.809 of the Rules, of the LPFM station. These procedures will not be available where an alternate, fully-spaced, and rule-compliant channel is available for the LPFM licensee or permittee. Finally, Special Temporary Authorizations ("STA") will be available pursuant to these procedures only if the LPFM station is proposing a waiver (or waivers) of LPFM second-adjacent channel spacing requirements.[171]

67. We direct the Media Bureau to contact LPFM stations that are currently, or in the future may become, eligible to seek facility modifications under these procedures. To receive consideration, an LPFM station must file promptly an application on Form 318 and include a Section 73.807 of the Rules waiver request and showing. If the Media Bureau determines that the request falls within the scope of these procedures, it will issue an order to show cause[172] to the potentially impacted full-service station(s) as to why the modification of such station license(s) to allow a second-adjacent channel short-spacing would not be in the public interest. In the event that the Media Bureau concludes that the public interest would be better served by waiving Section 73.807 of the Rules, it will retain the LPFM station's application in pending status and issue an STA for the proposed LPFM station modifications. STAs issued pursuant to these procedures will be subject to any action taken by the Commission in the *Second Further Notice.* The Commission will withhold final determination of the waiver request until action on the *Second Further Notice* proposals. We encourage each "encroaching" full-service station to provide technical and financial assistance to any LPFM station which avails itself of these procedures. We also direct the Media Bureau to include a condition, as appropriate, in the "encroaching" full-service station's construction permit requiring such station to provide technical assistance and assume financial responsibility for all direct expenses associated with resolving actual interference complaints, *e.g.*, the purchase of radio filters, etc.

c. LPFM Station Displacement

68. In certain circumstances no alternative channel will be available for an LPFM station at risk of displacement. With regard to full-service modification applications filed after the release of this *Order*, we provide the following guidance on the standards that the Commission will use to determine whether grant of such applications are in the public interest. Generally, the Commission will favor grant of the full-service station modification application. However, we believe that it is appropriate to apply a presumption that the public interest would be better served by a waiver of the Commission Rule making LPFM stations secondary to subsequently authorized full-service stations and the dismissal of an "encroaching" community of license reallotment application when the threatened LPFM station can demonstrate that it has regularly provided at least eight hours per day of locally originated programming, as that term is defined for the LPFM service.[173] This presumption will apply only when implementation of a community of license modification would result in the displacement of an LPFM station or result in such a significant increase in caused interference to the LPFM station such that continued operations are

[171] The Commission appears to be without authority to waive third-adjacent channel spacing requirements. *See* 2001 DC Appropriations Act. There is a significant potential for interference from short-spaced co- and first-adjacent channel LPFM station operations. Accordingly, the waiver procedures set forth herein will not apply in these contexts.

[172] *See* 47 U.S.C. § 316.

[173] *See* 47 C.F.R. § 73.872(b)(3); *see also infra* at ¶ 24.

infeasible, *i.e.*, when the LPFM transmitter site is located within the interfering contour[174] of a co- or first-adjacent channel community of license modification proposal. This presumption will also be limited to those situations in which no "suitable" alternate channel is available for the LPFM station.[175] This presumption will not apply where opportunities are available for the impacted LPFM station to alter operations in order to avoid conflict with a full-service station.

69. Our evaluation of these competing demands for scarce spectrum will take into account the benefits of the move-in proposal under Section 307(b) of the Communications Act of 1934, as amended, the amount of locally originated programming by the LPFM station, the extent to which other LPFM stations are licensed to and/or provide service to the area currently served by the threatened LPFM station, the extent to which other noncommercial educational ("NCE") radio stations are providing locally originated programming to listeners in the LPFM station's service area, the number of LPFM stations at risk of displacement from the proposed community of license modification proposal, and any other public interest factors raised by the full-service and LPFM station applicants or other parties. LPFM stations that wish to make a showing under this waiver standard must file an informal objection to the "encroaching" community of license modification application within sixty days of the Federal Register notice of such application filing. Oppositions and replies may be filed in accordance with Section 1.45 of the Rules. This presumption is rebuttable and does not bind the Commission to a particular result. We caution parties that even if the required showing is made, the Commission in the exercise of its discretion may conclude that denial of the full-service station application and grant of the waiver would not serve the public interest.

70. We intend to narrowly limit this policy to the class of LPFM stations that are demonstrably serving the needs of local listeners. Moreover, this policy will not apply in a situation in which a full-service station proposes a facility change to improve service to its current community of license. We emphasize that we will dismiss a community of license modification proposal only when no technically reasonably accommodation is available and the LPFM station makes the requisite waiver showing. We conclude that this processing policy appropriately balances the interests of full-service and LPFM stations, and recognizes the role that each service plays in promoting diversity and localism. The Commission is seeking comment on the presumption in the attached *Second Further Notice* and may modify it based on the comments received in response thereto.

71. We believe that Section 73.807 of the Rules and LPFM displacement standards will effectively balance the interests of LPFM and full-service broadcasters while the Commission considers the *Second Further Notice* proposals. While REC has identified many LPFM stations that ultimately may be required to modify their facilities as a result of encroachment, we do not see this as a threat to the viability of the LPFM service, especially with the additional protections and procedures we adopt herein. REC's claim that many LPFM stations face interference merely describes a basic feature of the service in today's congested FM broadcast radio spectrum. Opportunities exist for many LPFM stations to change locations, reduce power, or change channels, in the event that a conflict arises with a full-service station. Furthermore, the majority of the stations identified as "less significant risks" by REC solely exist today

[174] *See* 47 C.F.R. §§ 73.215 and 73.509.

[175] An alternate channel is "suitable" if the distance between the LPFM transmitter site and the protected authorization or application satisfies the "required" distance separation minimums set forth in 47 C.F.R. § 73.807. The spacing need not meet the co- and first-adjacent channel minimum separations "for no interference received from maximum class facilities," as set forth in this Rule.

because of the flexible nature of the spacing rules under Section 73.807 of the Rules.[176] Section 73.807 clearly identifies the distance separations necessary for LPFM stations to avoid received interference but does not require LPFM stations to meet this stringent standard. This Rule fully protects nearby full-power FM stations while also allowing interference to LPFM stations in some instances. Therefore, LPFM stations at distances less than those specified in Section 73.807 of the Rules in the column labeled "for no interference received from max. class facility" can expect to receive interference.[177]

IV. SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

72. Today, the Commission adopts a series of wide-ranging rule changes to strengthen and promote the long-term viability of the LPFM service, and the localism and diversity goals that this service is intended to advance. We also recommend to Congress that it remove the requirement that LPFM stations protect full-power stations operating on third adjacent channels. We intend to resolve the following issues within six months. The next filing window for a non-tabled aural broadcast service will be for new LFPM stations. We plan to open this window after the Commission has resolved the issues raised in this *Second Further Notice,* and has resolved other issues that could significantly impact the availability of future spectrum for LPFM applicants, including the disposal of substantially all of the applications filed in the recent NCE FM window.

73. Based on numerous meetings with LPFM service proponents, filings, and presentations at various forums and hearings convened by the Commission over the past two years, we believe that it is appropriate to consider whether additional LPFM service and technical rule changes are warranted. We seek comment on the several issues set forth below.

A. Section 73.807 Second-Adjacent Channel Waiver Standard

74. The *Third Report and Order* details an interim processing policy that the Commission will use to consider Section 73.807 of the Rules waiver requests from certain LPFM stations. As set forth more fully therein, when implementation of a full-service station community of license modification would result in an increase in interference caused to the LPFM station or its displacement, the LPFM station may seek a second-adjacent channel short spacing waiver in connection with an application proposing operations on a new channel. We seek comment generally on whether to codify the waiver and processing policies set forth in the *Third Report and Order*. Would modifications to these policies better balance the interests of LPFM and full-service stations? Should the procedures be narrowed to apply only when the LPFM station is subject to displacement pursuant to Section 73.809 of the Rules? Should the Rules provide a deadline for the filing of the LPFM alternate channel application and waiver request and, if so, what should the deadline be? Should waivers be limited to second-adjacent channel short-spacings?[178] Should waivers be granted only when the LPFM station can demonstrate no actual interference due to lack of population, terrain, or other factors, as we allow in the FM translator service?[179] Should continued LPFM operations be subject to the resolution of all *bona fide* actual

[176] 47 C.F.R. § 73.807.

[177] *See* 47 C.F.R. §§ 73.807(a)(1)-(2).

[178] Third-adjacent channel waiver short-spacings appear to be explicitly barred under the 2001 DC Appropriations Act.

[179] *See* 47 C.F.R. § 74.1204(d).

interference complaints? Should the "encroaching" full-service station be responsible for providing technical assistance and assuming financial responsibility for all direct expenses associated with resolving all *bona fide* actual interference complaints, *e.g.*, the purchase of radio filters, etc.? Do the orders to show cause procedures fully protect impacted stations' due process rights? Would additional procedures help ensure that the Commission has a full record on which to evaluate waiver requests? Should these procedures be expanded to include co- and first-adjacent channel situations? Finally, we seek comment on whether rule changes are warranted to provide additional flexibility to propose LPFM station modifications.

B. LPFM Station Displacement

75. As detailed more fully in the *Third Report and Order*, the Commission is adopting a processing policy to evaluate on a going forward basis each community of license modification proposal that would result in the displacement of an LPFM station or stations. We seek comment generally on whether the Commission should amend Section 73.809 of the Rules to establish a licensing presumption that would protect certain operating LPFM stations from subsequently proposed community of license modifications. We also seek comment on each aspect of the current processing policy. Specifically, should the presumption be limited to those LPFM stations that have regularly provided eight hours of locally originated programming daily? What criteria should the Commission use to determine whether an LPFM station has "regularly" satisfied the eight-hour programming requirement? Should the presumption be extended to protect LPFM stations against subsequently filed petitions for rulemaking for new FM allotments and/or modification applications not proposing community of license changes? Finally, we seek comment on other approaches to resolve LPFM station displacement conflicts and the reasons why such alternative approaches would more appropriately balance the interests of these services.

C. Obligations of Full-Service New Station and Modification Applicants to Potentially Impacted LPFM Stations

76. Currently, a full-service station applicant has no obligation to assist an LPFM station potentially impacted by implementation of its new station or modification proposal. We believe that this policy is inconsistent with the comity and respect to which LPFM stations are entitled and with certain reimbursement policies which the Commission has established for full-service stations which are involuntarily required to change channels.[180] As proposed in part by the Station Resource Group,[181] we tentatively conclude that an applicant for a new or modified station should be required to assume certain technical, financial, and notice obligations if implementation of the proposal could impact an LPFM station. Specifically we tentatively conclude that in these circumstances, the full-service station should be required to provide notice of its application filing to the LPFM station. As part of its application filing, the full-service station should be required to include the results of its search for an alternate LPFM channel. It should also be required to cooperate in good faith with the LPFM station in developing the best technical approach, including a possible LPFM site relocation, to ameliorate the interference and/or displacement impact of its proposal. In addition, the "encroaching" full-service station should be responsible for certain expenses relating to any LPFM station channel change and/or transmitter site

[180] *See Circleville, OH*, Second Report and Order, 8 FCC 2d 159 (1967); *Harold A. Jahnke*, 46 RR 2d 659 (1979).

[181] *See* Station Resource Group Reply Comments at 5.

change necessitated by the full-service station proposal. We tentatively conclude such expenses should be limited to the physical changes in the LPFM station's transmission system. We seek comment on each of these tentative conclusions and on other measures to ensure the equitable treatment of LPFM stations.

77. We believe that these procedures should apply if the LPFM authorization was issued or a pending LPFM facility application was filed prior to the filing of a full-service station application for construction permit or license, including one that proposes a community of license modification. We tentatively conclude that these procedures should be limited to those situations in which implementation of the full-service proposal would result in the full-service and LPFM stations operating at less than the minimum distance separations set forth in Section 73.807 of the Rules and could result in either an increase in interference caused to the LPFM station or the permanent displacement of the LPFM station. We seek comment on these proposed limitations on the scope and extent of these remedial procedures.

D. Contour Protection-Based Licensing Standards for LPFM Stations

78. An LPFM new station or modification application must protect all existing stations and prior filed applications on the basis of distance separations set forth in Section 73.807 of the Rules.[182] This methodology, used in connection with virtually all FM non-reserved band full-service station licensing, provides a straight-forward standard for determining technical acceptability. As a result of this methodology's simplicity, the Commission was able to provide an on-line "channel finder" utility prior to the first series of LPFM filing windows. This tool enabled unsophisticated potential applicants to identify without expense available FM spectrum in their local communities.

79. Prometheus and other LPFM advocates argue that the Commission should adopt a more flexible "contour" methodology for the licensing of LPFM stations.[183] Although full-service NCE FM stations are licensed pursuant to a contour methodology,[184] it appears that these parties are urging the Commission to permit LPFM station licensing pursuant to the FM translator protection rule, Section 74.1204 of the Rules. As demonstrated by the filing of over 13,000 applications in the 2003 window for new non-reserved band FM translator construction permits, adoption of this standard would vastly expand LPFM licensing opportunities throughout the nation and create the possibility of locating new LPFM stations in a number of major and spectrum-congested markets.

80. The flexibility of FM translator licensing is based on four key factors. Translators, like LPFM stations, may only operate with limited power. This necessarily limits distances from the proposed station's transmitter site to its co- and adjacent-channel interfering contours. Secondly, a protection methodology based on contours is, itself, a more flexible licensing approach. Although contour and distance separation requirements are derived from common principles, the contour methodology requires applicants to protect actual – rather than class maximum – facilities. Thus, modifying our Rules to permit LPFM applicants to "engineer in" new proposals on the basis of contour protection standards would result in new licensing opportunities.

81. The two other factors are closely tied to the fact that FM translators are licensed on a secondary basis. As a secondary service, translators are licensed without regard to the extent of received

[182] 47 C.F.R. § 73.807.

[183] *See, e.g.,* Prometheus Radio Project Letter to Chairman Kevin Martin (Nov. 13, 2007).

[184] 47 C.F.R. § 73.509.

interference they would receive.[185] LPFM stations also receive the benefit of this flexibility.[186] The fourth factor is the Section 74.1204(d) exception to the Section 74.1204(a) of the Rules contour methodology. Under paragraph (d) of that section, the general FM translator contour overlap provisions will not apply "if it can be demonstrated that no actual interference will occur due to intervening terrain, *lack of population* or such other factors as may be applicable."[187] For many years, the Commission has permitted FM translator applications to use the D/U signal strength ratio methodology to establish the area of predicted interference and to demonstrate the "lack of population" within this area to satisfy the requirements under Section 74.1204(d) of the Rules.[188]

82. However, the FM translator technical rules include a second and essential requirement: the inflexible obligation to resolve all *bona fide* actual interference complaints pursuant to Section 74.1203(a) of the Rules. A translator station that cannot resolve all complaints must suspend operations.[189] The two Rules operate in tandem. The flexibility of Section 74.1204(d) of the Rules is backstopped by the permanent Section 74.1203(a) secondary service obligation to resolve actual interference complaints.

83. We tentatively conclude that the licensing of LPFM stations pursuant to the standards of Section 74.1204 of the Rules or some other "contour-based" methodology is in the public interest. We tentatively conclude that an LPFM station licensed under this standard would be required to resolve all actual interference complaints or cease operations. We seek comment on this tentative conclusion. We also tentatively conclude not to allow the use of alternative propagation methodologies, such as Longley Rice, to show lack of interference. These showings impose enormous staff processing burdens and are typically subject to opposition. Additionally, as demonstrated by the significant number of FM translator proposals submitted in the 2003 filing window, we believe that permitting D/U ratio showings to establish "lack of population" subject to interference provides ample licensing flexibility. We seek comment specifically on whether it is appropriate to license LPFM stations to community groups, which often have limited resources and technical expertise, under a standard that subjects such stations to the constant risk of being forced off the air if they cannot resolve interference complaints promptly. We also seek comment on whether it is appropriate to adopt an LPFM technical licensing regime that would require the use of consulting engineers. We tentatively conclude that Section 73.807 of the Rules should be retained if a "contour" rule is adopted in this proceeding. Stations holding licenses issued pursuant to the current Rule would not be required to resolve actual interference complaints except in accordance with the provisions of Section 73.809 of the Rules. We seek comment on this approach which would provide differing levels of protection to operating LPFM stations based on each station's choice of technical processing standards.

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[185] NCE FM Class D stations, which operate on a secondary basis, are also licensed without regard to the extent of interference that the proposed facilities would receive. *See* 47 C.F.R. § 73.512(d).

[186] The magnitude of "received interference" LPFM licensing flexibility with regard to authorized FM stations is the difference between the separations set forth in the rule "for no interference received from maximum class facility" and the lesser "required" separation. *See* 47 C.F.R. § 73.807(a).

[187] 47 C.F.R. § 74.1204(d) (emphasis added).

[188] *See Living Way Ministries*, Memorandum Opinion and Order, 17 FCC Rcd 17054, 17055-60 (2002) *petitions for recon. pending.*

[189] 47 C.F.R. § 73.1203(b).

E. LPFM – FM Translator Protection Priorities

84. The *Third Report and Order* does not reach a conclusion on the "co-equal" status between LPFM stations and FM translator stations. Under the Rules for these services, a first-filed LPFM or FM translator application must be protected by all subsequently filed LPFM and FM translator applications. Localism, diversity and competition remain our key radio broadcasting goals. We find that it would be useful to develop a better record on whether and how these goals would be advanced by altering the priorities between these two services. We seek comment on this issue. In particular, we seek comment on whether we should distinguish between translators that are fed by satellite and those that received and retransmit programming delivered terrestrially. We also seek comment on the extent to which providing priority to LFPM stations could impact established listening patterns or disrupt established translator signal delivery systems that NCE broadcasters rely on extensively to disseminate programming. We also seek comment on the Prometheus proposal to limit the number of translator stations that would have priority over subsequently applied for LPFM facilities.[190] Prometheus proposes to limit priority status to 25 translator stations for each originating station but would not consider "full power repeaters" as originating stations. We seek comment both on this proposed cap and Prometheus' proposed definition of "originating station," for the purpose of applying this cap. We also seek comment on whether such an approach is administratively feasible given the fact that an FM translator may without prior consent or notice to the Commission change its primary station.

V. CONCLUSION

85. The rules and policies adopted herein will promote the continued operation and expansion of LPFM service. Our actions today further the public interest and ensure that we maximize the value of LPFM service without harming the interests of full-power FM stations or other Commission licensees. To further these goals, we also recommend to Congress that it remove the requirement that LPFM stations protect full-power stations operating on third adjacent channels.

VI. ADMINISTRATIVE MATTERS

A. Filing Requirements

86. *Ex Parte Rules*. The *Second Further Notice of Proposed Rulemaking* in this proceeding will be treated as a "permit-but-disclose" subject to the "permit-but-disclose" requirements under Section 1.1206(b) of the Rules.[191] *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.[192] Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

[190] *See November 13, 2007, Prometheus Radio Project Letter to Chairman Kevin Martin* at unnumbered page 2.

[191] *See* 47 C.F.R. § 1.1206(b), as revised.

[192] *See id.* § 1.1206(b)(2).

87. *Comments and Reply Comments*. Pursuant to sections 1.415 and 1.419 of the Rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.[193]

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments.

  - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

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

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

  - The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

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

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

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

[193] *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

88. *Availability of Documents*. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0267 (voice), (202) 418-7365 (TTY), or bill.cline@fcc.gov. These documents also will be available from the Commission's Electronic Comment Filing System. Documents are available electronically in ASCII, Word 97, and Adobe Acrobat. Copies of filings in this proceeding may be obtained from Best Copy and Printing, Inc., Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C., 20554; they can also be reached by telephone, at (202) 488-5300 or (800) 378-3160; by e-mail at fcc@bcpiweb.com; or via their website at http://www.bcpiweb.com. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418-0531 (voice), (202) 418-7365 (TTY).

B. Regulatory Flexibility Analysis

89. *Initial* and *Final Regulatory Flexibility Analysis.* The Regulatory Flexibility Act of 1980, as amended ("RFA"),[194] requires that a regulatory flexibility analysis be prepared for notice and comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[195] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[196] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[197] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[198] By the issuance of this *Second Further Notice of Proposed Rulemaking*, we seek comment on the impact our suggested proposals would have on small business entities. The complete initial regulatory flexibility analysis is attached as Appendix C.

90. As required by the Regulatory Flexibility Act,[199] the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") relating to this *Third Report and Order*. The FRFA is set forth in Appendix D.

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

[195] 5 U.S.C. § 605(b).

[196] *Id*. § 601(6).

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

[198] 15 U.S.C. § 632.

[199] *See* 5 U.S.C. § 604.

C. Paperwork Reduction Act Analysis

91. This *Third Report and Order* contains new and modified information collection requirements which were proposed in the *FNPRM*, 20 FCC Rcd 6763 (2005), 70 FR 39217 (July 7, 2005), and are subject to the Paperwork Reduction Act of 1995 ("PRA").[200]

92. We have assessed the effects of requiring documentation in relation to: (1) the proposed changes to Forms 314, 315 and 316 for the transfer and/or assignment of LPFM licenses;[201] and (2) the proposed changes to Form 318 for the relocation of transmitter sites for voluntary time-share applicants.[202] We find that to the extent that this *Third Report and Order* imposes any burdens on small entities, the resulting impact on small entities is favorable because the rules expand opportunities for LPFM applicants, permittees, and licensees to transfer and assign licenses, relocate transmitter sites, and extend construction deadlines. These information collection requirements were submitted to the Office of Management and Budget ("OMB") for review under Section 3507(d) of the PRA. In addition, the general public and other Federal agencies were invited to comment on these information collection requirements in the *NPRM*.[203] We further note that pursuant to the Small Business Paperwork Relief Act of 2002,[204] we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees." We received no comments concerning these information collection requirements. On August 25 and 30, 2005, the Commission obtained OMB approval for these information collection requirements, encompassed by OMB Control Nos. 3060-0031 (Forms 314-315), 3060-0009 (Form 316) and 3060-0920 (Form 318). This *Third Report and Order* adopts portions of the above information collection requirements, as proposed. Additional changes are necessary to Forms 314, 315, 316 and 318, and will be submitted to OMB for approval.

93. This document also contains additional proposed information collection requirements for which we have not yet assessed the effect. In this *Third Report and Order*, we require documentation in relation to: (1) an optional 18-month extension of a construction permit upon a showing of good cause; (2) the voluntary withdrawal of Form 349 tech box proposals in order to come into compliance with the cap of 10 proposals; (3) the voluntary filing of a request, on Form 318, for waiver of Section 73.807 of the Rules for a second-adjacent short-spacing to an LPFM station at risk of displacement by a full-service station; and (4) the voluntary filing of waiver of the Commission Rule making LPFM stations secondary to subsequently authorized full-service stations, where an LPFM station at risk of displacement by a full-service station can demonstrate that it provides at least eight hours a day of locally originated programming and that no suitable alternate channel is available. As discussed above, additional changes are necessary to Forms 314, 315, 316 and 318, and will be submitted to OMB for approval. In addition, the *Second Further Notice* may require a full-service station to provide: (1) notice of its application filing to any LPFM station potentially impacted by its proposal, and (2) the results of its search for an alternate

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[200] The Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat 163 (1995) (*codified in* Chapter 35 of Title 44 U.S.C.).

[201] *See Creation of a Low Power Radio Service*, MM Docket No. 99-25, 70 FR 39217, 39218 (2005).

[202] *See id*.

[203] *NPRM*, 20 FCC Rcd 6763; 70 FR 39217 (July 7, 2005).

[204] The Small Business Paperwork Relief Act of 2002 ("SBPRA"), Pub. L. No. 107-198, 116 Stat 729 (2002) (codified in Chapter 35 of title 44 U.S.C.); *see* 44 U.S.C. § 3506(c)(4).

LPFM channel to the Commission in its application filing, which may require changes to Forms 301 and 302. The *Second Further Notice* also: (3) proposes codification of the waiver requests proposed in the *Third Report and Order*, which would require a change to Form 318, and (4) proposes adoption of a "contour" methodology showing by LPFM applicants who wish to use this standard, which would require a change to Form 318. The new information collection requirements will be submitted to OMB for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding.

D. Congressional Review Act

94. The Commission will send a copy of this *Third Report and Order and Second Further Notice of Proposed Rulemaking* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

E. Additional Information

95. For additional information on this proceeding, please contact Peter Doyle, Audio Division, Media Bureau, at (202) 418-2700, or Holly Saurer, Policy Division, Media Bureau, at (202) 418-7283.

VII. ORDERING CLAUSES

96. IT IS ORDERED that, pursuant to the authority contained in Sections 1, 2, 4(i), 303, 403 and 405 of the Communications Act of 1934, 47 U.S.C §§ 151, 152, 154(i), 303,, 403, and 405, this *Third Report and Order and Second Further Notice of Proposed Rulemaking* IS ADOPTED.

97. IT IS FURTHER ORDERED that pursuant to the authority contained in Sections 1, 2, 4(i), 303, 303(a), 303(b), and 307 of the Communications Act of 1934, 47 U.S.C. §§ 151, 152, 154(i), 303, 303(a), 303(b), and 307, the Commission's Rules ARE HEREBY AMENDED as set forth in Appendix B. It is our intention in adopting these rule changes that, if any provision of the rules is held invalid by any court of competent jurisdiction, the remaining provisions shall remain in effect to the fullest extent permitted by law.

98. IT IS FURTHER ORDERED that the Rules as revised in Appendix B SHALL BE EFFECTIVE 60 days after publication of the *Third Report and Order and Second Further Notice of Proposed Rulemaking* in the Federal Register. Changes to FCC Forms 314, 315, 316 and 318 will be effective 60 days after Federal Register publication of OMB approval of the forms. With respect to renewal applications, we will evaluate compliance with these requirements in applications filed in the next renewal cycle. Licensee performance during any portion of the renewal term that predates the effective date of the rules in the *Third Report and Order* will be evaluated under current rules, and licensee performance that post-dates the effective date of the revised rules will be judged under the new provisions.

99. IT IS FURTHER ORDERED that, pursuant to Sections 0.201-.204 of the Commission's Rules, 47 C.F.R. § 0.201-.204, and Section 5(c)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(1), the Chief, Media Bureau, IS DELEGATED AUTHORITY to act as described in paragraphs 40, 56, 62 and 67 herein.

100. IT IS FURTHER ORDERED that the Petition for Rulemaking filed by the Amherst Alliance, Talk Radio of Pahrump, Midwest Christian Media, Providence Community Radio, and Nickolaus E. Leggett N3NL IS HEREBY DISMISSED.

101. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Third Report and Order and Second Further Notice of Proposed Rulemaking* , including the Initial Regulatory Flexibility Analysis and the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

102. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this *Third Report and Order and Second Further Notice of Proposed Rulemaking* in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

List of Commenters and Reply Commenters

Abundant Family Life Center
Allen England
Amherst Alliance
Arn Stolp
Auburn Chinese Ministry Association
Beth Wolfe
Big Bend Broadcasting
Bob Gardner
Brent Newland
Brett Reese
Bruce Quinn
Charles Cookson
Christian Community Broadcasters
Colquitt Community Radio, Inc.
Columbus Community Radio (WHUM-LP)
Cox Radio, Inc.
Crisis Pregnancy Help Center of Slidell, Inc.
Cromwell Radio Group and Affiliates
Dale Hardman
Dane Scott Udenberg
Daniel Brown
David A. Gowler
DuBois Area Broadcasting, Inc.
Eastern Sierra Broadcasting
Edgewater Broadcasting/Radio Assist Ministry
Educational Information Corporation (WCPE)
Educational Media Foundation
Edward Schober
Elizabeth Currans
Eric Howland
Erik Anderson
Eureka College
Fisher Radio Regional Group
Galaxy Communications/Desert West Air Ranchers
Georgia-Carolina Radiocasting Companies
Highland Community Broadcasting (Harold Kozlowski)
Hugh Cushing
Jason Ander
Jason Turgeon
Joseph D'Alessandro
JT Communications
Kaskaskia Broadcasting, Inc.
Kevin M. Fitzgerald
KL Ward

KVLP-LP Visalia Local Power
Kyle Magrill
KYRS-LP
KZQX-LP
Limestone Community Radio
Mark Snow
Martin L. Hensley
Matthew Lasar
MBC Grand Broadcasting, Inc.
Meagen Grundberg
Michigan Music is World Class!, *et al*.
Midwest Christian Media
Mountain Area Information Network
Named State Broadcasters Associations
National Association of Broadcasters
National Public Radio
National Translator Association
New Jersey Broadcasters Association
New Jersey Public Broadcasting Authority
Nickolaus Leggett
NRC Broadcasting, Inc.
Optima Enrichment, Inc.
Pacifica Foundation
Paul Griffin
Paul McCarthy
Point Broadcasting Company, *et al*.
Press Communications, LLC
Progressive Broadcasting System/Christian Friends
Prometheus Radio Project, *et al*.
Public Radio FM Translator Licensees
Public Radio Regional Organizations
Radio Training Network, Inc.
REC Networks
RGS Communications, Inc.
Richard VanZandt
Richard Whitmore
Rick Vogel
Rocky Mountain Corporation for Public Broadcasting
Sacred Heart University
Sadie Vela
Saga Communications, Inc.
Samuel Reese
Simmons Stations of North Dakota
Station Resource Group
Summit Media Broadcasting, LLC
Taylor University Broadcasting, Inc.
Ted M. Coopman
Temple University Public Radio
The Colleges of the Seneca

The Walt Disney Company
Thomas C. Smith
University of Southern California
Virden Broadcasting Corp.
Virginia Center for Public Press
WAY-FM Media Group
West Michigan Community Help Network
Western North Carolina Public Radio, Inc.
Wil Hadley
WFCR Amherst, MA
WRBG-LP
WSLR-LP

APPENDIX B

Part 73 of the Code of Federal Regulations is amended as follows:

PART 73 – RADIO BROADCAST SERVICES

1. The citation authority for part 73 to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336, and 339.

1. Section 73.809 is amended by revising paragraphs (a) and (b) to read as follows:

§ 73.809 Interference protection to full service FM stations.

(a) If a full service commercial or NCE FM facility application is filed subsequent to the filing of an LPFM station facility application, such full service station is protected against any condition of interference to the direct reception of its signal caused by such LPFM station that operates on the same channel, first-adjacent channel or intermediate frequency (IF) channel as or to such full service station, provided that the interference is predicted to occur and actually occurs within:

(1) The 3.16 mV/m (70 dBu) contour of such full service station;

(2) The community of license of such full service station; or

(3) Any area of the community of license of such full service station that is predicted to receive at least a 1 mV/m (60 dBu) signal. Predicted interference shall be calculated in accordance with the ratios set forth in §§ 73.215(a)(1) and 73.215(a)(2). Intermediate Frequency (IF) channel interference overlap will be determined based upon overlap of the 91 dBu F(50,50) contours of the FM and LPFM stations. Actual interference will be considered to occur whenever reception of a regularly used signal is impaired by the signal radiated by the LPFM station.

(b) An LPFM station will be provided an opportunity to demonstrate in connection with the processing of the commercial or NCE FM application that interference as described in paragraph (a) of this section is unlikely. If the LPFM station fails to so demonstrate, it will be required to cease operations upon the commencement of program tests by the commercial or NCE FM station.

3. Section 73.853 is amended by revising paragraph (b) to read as follows:

§ 73.853 Licensing requirements and service.

* * * * *

(b) Only local applicants will be permitted to submit applications. For the purposes of this paragraph, an applicant will be deemed local if it can certify that:

(1) The applicant, its local chapter or branch is physically headquartered or has a campus within 16.1 km (10 miles) of the proposed site for the transmitting antenna for applicants in the top 50 urban markets, and 32.1 km (20 miles) for applicants outside of the top 50 urban markets;

(2) It has 75% of its board members residing within 16.1 km (10 miles) of the proposed site for the transmitting antenna for applicants in the top 50 urban markets, and 32.1 km (20 miles) for applicants outside of the top 50 urban markets; or

(3) In the case of any applicant proposing a public safety radio service, the applicant has jurisdiction within the service area of the proposed LPFM station.

4. Section 73.855 is revised to read as follows:

§ 73.855 Ownership limits.

(a) No authorization for an LPFM station shall be granted to any party if the grant of that authorization will result in any such party holding an attributable interest in two or more LPFM stations.

(b) Not-for-profit organizations and governmental entities with a public safety purpose may be granted multiple licenses if:

(1) One of the multiple applications is submitted as a priority application; and

(2) the remaining non-priority applications do not face a mutually exclusive challenge.

5. Section 73.865 is amended by revising section (a) and adding sections (c), (d) and (e) to read as follows:

§ 73.865 Assignment and transfer of LPFM licenses.

(a) Assignment/Transfer: No party may assign or transfer an LPFM license if:

(1) Consideration promised or received exceeds the depreciated fair market value of the physical equipment and facilities; and/or

(2) The transferee or assignee is incapable of satisfying all eligibility criteria that apply to a LPFM licensee.

(b) A change in the name of an LPFM licensee where no change in ownership or control is involved may be accomplished by written notification by the licensee to the Commission.

(c) *Holding Period*: A license cannot be transferred or assigned for three years from the date of issue, and the licensee must operate the station during the three year holding period.

(d) No party may assign or transfer an LPFM construction permit at any time.

(e) Transfers of control involving a sudden change of more than 50 percent of an LPFM's governing board shall not be deemed a substantial change in ownership or control, subject to the filing of an FCC Form 316.

6. Section 73.870 is amended by revising paragraph (a) and adding paragraph (f) to read as follows:

§ 73.870 Processing of LPFM broadcast station applications.

(a) A minor change for an LP100 station authorized under this subpart is limited to transmitter site relocations of 5.6 kilometers or less. A minor change for an LP10 station authorized under this subpart is limited to transmitter site relocations of 3.2 kilometers or less. These distance limitations do not apply to amendments or applications proposing transmitter site relocation to a common location filed by applicants that are parties to a voluntary time-sharing agreement with regard to their stations pursuant to Sections 73.872(c) and (e). Minor changes of LPFM stations may include:

(1) changes in frequency to adjacent or IF frequencies or, upon a technical showing of reduced interference, to any frequency; and

(2) amendments to time-sharing agreements, including universal agreements that supersede involuntary arrangements.

* * * * *

(f) New entrants seeking to apply for unused or unwanted time on a time-sharing frequency will only be accepted during an open filing window, specified pursuant to paragraph (b) of this section.

7. Section 73.871 is amended by revising paragraph (c) as follows:

§73.871 Amendment of LPFM broadcast station applications.

* * * * *

(c) Only minor amendments to new and major change applications will be accepted after the close of the pertinent filing window. Subject to the provisions of this section, such amendments may be filed as a matter of right by the date specified in the FCC's Public Notice announcing the acceptance of such applications. For the purposes of this section, minor amendments are limited to:

(1) Filings subject to subsection (c)(5), site relocations of 3.2 kilometers or less for LP10 stations;

(2) Filings subject to subsection (c)(5), site relocations of 5.6 kilometers or less for LP100 stations

(3) Changes in ownership where the original party or parties to an application retain more than a 50 percent ownership interest in the application as originally filed;

(4) Universal voluntary time-sharing agreements to apportion vacant time among the licensees;

(5) Other changes in general and/or legal information; and

(6) Filings proposing transmitter site relocation to a common location submitted by applicants that are parties to a voluntary time-sharing agreement with regard to their stations pursuant to Sections 73.872(c) and (e).

8. Section 73.872 is amended by revising paragraphs (c) and (e) to read as follows:

§ 73.872 Selection procedure for mutually exclusive LPFM applications.

* * * * *

(c) *Voluntary time-sharing*. If mutually exclusive applications have the same point total, any two or more of the tied applicants may propose to share use of the frequency by submitting, within 90 days of the release of a public notice announcing the tie, a time-share proposal. Such proposals shall be treated as minor amendments to the time-share proponents' applications, and shall become part of the terms of the station authorization. Where such proposals include all of the tied applications, all of the tied applications will be treated as tentative selectees; otherwise, time-share proponents' points will be aggregated to determine the tentative selectees.

(1) Time-share proposals shall be in writing and signed by each time-share proponent, and shall satisfy the following requirements:

(i) The proposal must specify the proposed hours of operation of each time-share proponent;

(ii) The proposal must not include simultaneous operation of the time-share proponents; and

(iii) Each time-share proponent must propose to operate for at least 10 hours per week.

(2) Where a station is authorized pursuant to a time-sharing proposal, a change of the regular schedule set forth therein will be permitted only where a written agreement signed by each time-sharing permittee or licensee and complying with requirements in paragraphs (c)(1)(i) through (iii) of this section is filed with the Commission, Attention: Audio Division, Media Bureau, prior to the date of the change.

(3) Where a station is authorized pursuant to a voluntary time-sharing proposal, the parties to the time-sharing agreement may apportion among themselves any air time that, for any reason, becomes vacant.

(4) Successive license terms granted under subsection (d) may be converted into voluntary time-sharing arrangements renewable pursuant to Section 73.3539 by submitting a universal time-sharing proposal.

(d) Successive license terms.

(1) If a tie among mutually exclusive applications is not resolved through voluntary time-sharing in accordance with paragraph (c) of this section, the tied applications will be reviewed for acceptability and applicants with tied, grantable applications will be eligible for equal, successive, non-renewable license terms of no less than one year each for a total combined term of eight years, in accordance with § 73.873. Eligible applications will be granted simultaneously, and the sequence of the applicants' license terms will be determined by the sequence in which they file applications for licenses to cover their construction permits based on the day of filing, except that eligible applicants proposing same-site facilities will be required, within 30 days of written notification by the Commission staff, to submit a written settlement agreement as to construction and license term sequence. Failure to submit such an agreement will result in the dismissal of the applications proposing same-site facilities and the grant of the remaining, eligible applications.

* * * * *

3) If successive license terms granted under this subsection are converted into universal voluntary time-sharing arrangements pursuant to section (c)(4), the permit or license is renewable pursuant to sections 73.801 and 73.3539.

* * * * *

(e) Mutually exclusive applicants may propose a settlement at any time during the selection process after the release of a public notice announcing the mutually exclusive groups. Settlement proposals must include all of the applicants in a group and must comply with the Commission's rules and policies regarding settlements, including the requirements of Sections73.3525, 73.3588, and 73.3589. Settlement proposals may include time-share agreements that comply with the requirements of paragraph (c) of this section, provided that such agreements may not be filed for the purpose of point aggregation outside of the 90 day period set forth in paragraph (c) of this section.

8. Section 73.3598 is amended by revising paragraph (a) to read as follows:

§ 73.3598 Period of Construction.

(a) Each original construction permit for the construction of a new TV, AM, FM or International Broadcast; low power TV; TV translator; TV booster; FM translator; FM booster station; or to make changes in such existing stations, shall specify a period of three years from the date of issuance of the original construction permit within which construction shall be completed and application for license filed. Each original construction permit for the construction of a new LPFM station shall specify a period of eighteen months from the date of issuance of the construction permit within which construction shall be completed and application for license filed. A LPFM permittee unable to complete construction within the time frame specified in the original construction permit may apply for an eighteen month extension

upon a showing of good cause. The LPFM permittee must file for an extension on or before the expiration of the construction deadline specified in the original construction permit.

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APPENDIX C

Initial Regulatory Flexibility Act Analysis

As required by the Regulatory Flexibility Act of 1980, as amended,[1] the Commission has prepared this Initial Regulatory Flexibility Analysis of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the *Second Further Notice of Proposed Rulemaking ("Second Further Notice")*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Second Further Notice* provided in paragraph 87. The Commission will send a copy of this entire *Second Further Notice,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[2] In addition, the *Second Further Notice* and the IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Need For, and Objectives of, the Proposed Rules.

The *Second Further Notice* has been initiated to obtain comments concerning proposed low power FM ("LPFM") service and technical rule changes to address the potential interference to, or displacement of, certain LPFM stations caused by subsequently implemented full-service station community of license modifications. Specifically the *Second Further Notice* recommends that Congress remove the requirement that LPFM stations protect full service stations operating on third-adjacent channels. It seeks comment on whether to modify the LPFM technical rules to codify the second-adjacent channel waiver and displacement policies adopted in the *Third Report and Order.* It also tentatively concludes that when implementation of a full-service station facility proposal would impact an LPFM station, the full-service station would be required to provide the LPFM station notice of its application filing, provide technical assistance in identifying alternative channels, and reimbursement for any resulting LPFM facility modifications.

The *Second Further Notice* tentatively concludes that the LPFM technical rules should be modified to permit the licensing of LPFM stations by using a contour, as opposed to a distance separation, methodology in order to expand LPFM station licensing opportunities. It also tentatively concludes that the Commission should retain as an alternate licensing scheme the current LPFM distance separation rule in the event that a contour rule is adopted.

Finally, the *Second Further Notice* seeks additional comment on the issue whether the Commission should retain the current "co-equal" status between the LPFM and FM translator services.

he Commission believes that adoption of these proposed rule changes will strengthen and promote the long-term viability of the LPFM service, and the localism and diversity goals that this service is intended to advance by streamlining and clarifying the process by which LPFM stations can resolve potential interference issues with full-power stations.

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

[2] *See* 5 U.S.C. § 603(a).

[3] *See* 5 U.S.C. § 603(a).

B. Legal Basis.

The authority for this *Second Further Notice* is contained in Sections 1, 2, 4(i), 303, 403 and 405 of the Communications Act of 1934, 47 U.S.C §§ 151, 152, 154(i), 303, and 403.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply.

The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules.[4] The RFA generally defines the term "small entity" as encompassing the terms "small business," "small organization," and "small governmental entity."[5] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[6] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[7]

LPFM Radio Stations. The proposed Rules and policies potentially will apply to all low power FM radio broadcasting licensees and potential licensees. The SBA defines a radio broadcasting station that has $6.5 million or less in annual receipts as a small business.[8] A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.[9] Included in this industry are commercial, religious, educational, and other radio stations.[10] Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.[11] As of the date of release of this *Second Further Notice,* the Commission's records indicate that more than 1,286 LPFM construction permits have been granted. Of those permits, approximately 809 stations are on the air, serving mostly mid-sized and smaller markets. It is not known how many entities ultimately may seek to obtain low power radio licenses. Nor do we know how many of these entities will be small entities. We expect, however, that due to the small size of low power FM stations, small entities would generally have a greater interest than large ones in acquiring them.

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[4] 5 U.S.C. § 603(b)(3).

[5] 5 U.S.C. § 601(6).

[6] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[7] 15 U.S.C. § 632.

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

[9] *Id*.

[10] *Id*.

[11] *Id*.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements.

None.

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered.

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[12]

In this *Second Further Notice,* the Commission (1) recommends that Congress remove the requirement that LPFM stations protect full service stations operating on third-adjacent channels; (2) seeks comment on whether to modify the LPFM technical rules to codify the second-adjacent channel waiver and displacement policies adopted in the *Third Report and Order;* (3) tentatively concludes that when implementation of a full-service station facility proposal would impact an LPFM station, the full-service station would be required to provide the LPFM station notice of its application filing, provide technical assistance in identifying alternative channels, and reimbursement for any resulting LPFM facility modifications; (4) tentatively concludes that the LPFM technical rules should be modified to permit the licensing of LPFM stations by using a contour, as opposed to a distance separation, methodology in order to expand LPFM station licensing opportunities, and (5) tentatively concludes that the Commission should retain as an alternate licensing scheme the current LPFM distance separation rule in the event that a contour rule is adopted.

In light of changed circumstances[13] since the Commission last considered the issue of protection rights for LPFM stations from subsequently authorized full-service stations, the Commission found it necessary to consider these rule changes to avoid the potential loss of LPFM stations. The Commission considered maintaining the *status quo*, but rejected this idea because it would create an inappropriate burden on LPFM stations by allowing the issue of interference caused by encroaching full-service stations to go unresolved. By contrast, the *Second Further Notice* proposes a codified approach to resolving interference issues with encroaching full-service stations, which will, in turn, allow more LPFM stations to remain on-the-air.

LPFM service has created and will continue to create significant opportunities for new small businesses by allowing small businesses to develop LPFM service in their communities. In addition, the Commission generally has taken steps to minimize the impact on existing small broadcasters. To the

[12] 5 U.S.C. § 603(b).

[13] Specifically, the January 2007 lifting of the freeze on the filing of FM community of license modification proposals combined with the implementation of new streamlined licensing procedures resulted in a one-time flurry of filing activity, with approximately 100 FM community of license modification proposals submitted in the first week of the new Rules. In all, over 200 community of license modification applications have been filed under the new Rules.

extent that the *Second Further Notice* imposes any burdens on small entities, these burdens are only incidental to the benefits conferred by the creation of a set of Rules that would allow LPFM stations to resolve potential interference and/or displacement conflicts with encroaching full-service FM stations by making the requisite showings under the proposed Rules.

F. Federal Rules Which Duplicate, Overlap, or Conflict With, the Commission's Proposals.

None.

APPENDIX D

Final Regulatory Flexibility Act Analysis

As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[1] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Further Notice of Proposed Rule Making* in this proceeding.[2] The Commission sought written public comment on the proposals in the *FNPRM*, including comment on the IRFA. This Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[3]

A. Need For, and Objectives of, the Third Report and Order.

The policies and rules set forth herein are required to ensure that the Commission advances the goal of maximizing the value of LPFM service without harming the interests of full-power FM stations or other Commission licensees. In this *Third Report and Order*, the Commission (1) eases the paperwork burdens on LPFM licensees, by clarifying that transfers of control involving a sudden change of more than 50 percent of an LPFM licensee's governing board shall not be deemed "a substantial change in ownership and control", as LPFM boards can be subject to substantial turnover; (2) allows for the transfer and assignment of LPFM stations subject to certain conditions, such as: a cap on the sale price to the depreciated fair market value of the physical assets of the facility; (3) the imposition of a three year holding period during which the initial licensee must operate the station, a requirement that the assignee or transferee of an LPFM license is required to satisfy the ownership and eligibility criteria existing at the time of the assignment or transfer, and a prohibition on the assignment or transfer of construction permits; (4) reinstates the LPFM local ownership eligibility restriction;[4] (5) allows an 18 month extension for good cause of the LPFM construction period; and (6) provides for additional technical amendments, such as allowing time-sharing applications to seek authority to place their transmitter at a central location, limiting the processing of applications submitted during the Auction No. 83 filing window to ten proposals per applicant,[5] amending the Rules to limit Section 73.809 interference procedures to situations involving co- and first-adjacent channel interference, and a procedural framework for the consideration of showings from LPFM stations that may seek waivers of Section 73.807 of the Rules to avoid displacement, as well as to avoid unnecessary disruption of LPFM service to the public.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA.

None.

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

[2] *FNPRM*, 20 FCC Rcd at 6790.

[3] *See* 5 U.S.C. § 604.

[4] See *Third Report and Order* at para. 23.

[5] *Id.* at paras. 56-57.

C. Description and Estimate of the Number of Small Entities to Which the Adopted Rules Will Apply.

The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein.[6] The RFA generally defines the term "small entity" as encompassing the terms "small business," "small organization," and "small governmental entity."[7] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[8] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[9]

LPFM Radio Stations. The proposed rules and policies potentially will apply to all low power FM radio broadcasting licensees and potential licensees. The SBA defines a radio broadcasting station that has $6.5 million or less in annual receipts as a small business.[10] A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.[11] I ncluded in this industry are commercial, religious, educational, and other radio stations.[12] Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.[13] As of the date of release of this *Third Report and Order,* the Commission's records indicate that more than 1,225 LPFM construction permits have been granted. Of those permits, approximately 820 stations are on the air, serving mostly mid-sized and smaller markets. It is not known how many entities ultimately may seek to obtain low power radio licenses. Nor do we know how many of these entities will be small entities. We expect, however, that due to the small size of low power FM stations, small entities would generally have a greater interest than large ones in acquiring them.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements.

The rules adopted in this *Third Report and Order* will impose different reporting or recordkeeping requirements on existing LPFM stations. First, the clarification that transfers of control involving a sudden change of more than 50 percent of an LPFM licensee's governing board shall not be

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[6] 5 U.S.C. § 603(b)(3).

[7] 5 U.S.C. § 601(6).

[8] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[9] 15 U.S.C. § 632.

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

[11] *Id*.

[12] *Id*.

[13] *Id*.

deemed "a substantial change in ownership and control," will ease paperwork burdens upon licensees. The *Third Order* will also involve additional paperwork burdens. First, as this *Third Order* will allow for the transfer and assignment of LPFM licenses, the Commission will require the collection of information necessary for the purposes of processing such applications.[14] Second, this *Third Order* clarifies the renewal process for time-sharing entities, and the process for the administration of such applications. Third, Auction 83 applicants that filed more than 10 applications must select the ten applications they wish to preserve, versus those that will be automatically dismissed, after the Media Bureau issues a Public Notice on this subject. There is no disproportionate impact on small entities as these additional reporting and recordkeeping requirements since these requirements are imposed equally on large and small entities.

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered.

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[15]

Consideration of alternatives methods to reduce the impact on small entities is unnecessary. The *Third Report and Order* decreases existing burdens on small entities and increases their flexibility. . First, the clarification that transfers of control involving a sudden change of more than 50 percent of an LPFM licensee's governing board shall not be deemed "a substantial change in ownership and control," will ease paperwork burdens upon LPFM station, many of which are small entities. Further, the changes in the ownership rules will allow greater flexibility for LFPM licensees. Finally, the changes in the technical rules will allow more small entity LPFM stations to exist. In addition, the *Third Report and Order* does not impose different burdens on large and small entities. The record keeping requirements will help facilitate the transfer and assignment of licenses and clarifies the renewal process for time-sharing entities, including the administration of such applications.

LPFM service has created and will continue to create significant opportunities for new small businesses by allowing small businesses to develop LPFM service in their communities. In addition, the Commission generally has taken steps to minimize any burdensome regulation on existing small broadcasters. To the extent that the *Third Report and Order* imposes any burdens on small entities, these burdens are only incident to the benefits conferred: greater flexibility of LPFM stations in transferring, assigning and renewing LPFM stations.

[14] *See* FCC Forms 314, 315 and 316, available at http://www.fcc.gov/formpage.html.

[15] 5 U.S.C. § 603(b).

F. Report to Congress.

The Commission will send a copy of the *Third Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[16] In addition, the Commission will send a copy of the *Third Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Third Report and Order,* and FRFA (or summaries thereof) will also be published in the Federal Register.[17]

[16] *See* 5 U.S.C. § 801(a)(1)(A).

[17] *See* 5 U.S.C. § 604(b).

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN

Re: In the Matter of Creation of A Low Power Radio Service, Third Report and Order And Second Further Notice of Proposed Rulemaking

Low Power FM provides a lower cost opportunity for additional new voices to get into the local radio market. Today's item facilitates LPFM stations' access to limited radio spectrum by significantly reforming our LPFM rules.

In order to ensure that the American people have the benefit of a competitive and diverse media marketplace that serves their local communities, we need to create more opportunities for different, new and independent voices to be heard. We need to address the concern that there are too few local outlets available to minorities and new entrants.

The limited number of channels in the radio spectrum bands and the high start-up cost of building a station are significant barriers to entry in broadcasting. It can be very difficult for anyone—in particular a new voice—to find an available channel and gather enough capital to build a new broadcast station.

Today the Commission takes several important steps to improve our Low Power FM rules to better promote entry and ensure local responsiveness without harming the interests of full-power FM stations or other Commission licensees. To preserve opportunities for new LPFM stations, the Order restricts the number of FM translator applications we will grant from the 2003 window. In addition, the Order streamlines and clarifies the process by which LPFM stations can resolve potential interference issues with full-power stations. The Order also establishes a going-forward processing policy to help those LPFMs that have regularly provided eight hours of locally originated programming daily in order to preserve this local service.

Our work in this area is important for localism. I look forward to working with my fellow Commissioners to adopt additional rules that continue to ensure a competitive and diverse media marketplace that serves local communities.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: *In the Matter of Creation of a Low Power Radio Service*

It often seems like those of us troubled by media consolidation are relegated to playing defense. The big media companies are nothing if not persistent: lobbying for the elimination or relaxation of ownership limits, seeking waivers of existing rules, proposing merger upon merger and daring regulators to draw the line. In radio, the results have been particularly distressing. Runaway consolidation since the 1996 Act has left us with homogenized content, national play lists, outsourced news, a dumbed-down civic dialogue, and shameful levels of minority and female ownership.

That's why low power radio is such a breath of fresh air. It is a positive response to what ails us. These are truly local stations run by local organizations. They provide an outlet for local voices and local talent. They cover issues of importance to local and very often under-served communities. Low power is truly radio of the people, by the people, and for the people. We cannot let it perish from the earth.

This item makes good progress in putting LPFM on a firmer foundation. In particular, I welcome the decisions on ownership and eligibility that will ensure that LPFM retains its local character; the initial steps we take to limit the preclusive effect of existing translator applications on LPFM; and the initial steps we take to protect LPFM from full-power station encroachment. But we have a lot of work ahead of us. In this regard, I am pleased that my colleagues have committed to further addressing some of the key issues within the next six months, including the priority between LPFM and translator stations, full-power encroachment, and a proposal to permit LPFM stations to use a more flexible contour-based methodology for locating available channels. These proposals—especially if Congress adopts the important recommendation in this item to remove the third adjacency restrictions—could vastly expand licensing opportunities for LPFM stations. Our united goal should be to clear away obstacles to low power and to open a window to license many more such stations as soon as we can.

As important as LPFM is, however, let's never allow ourselves to see it as a complete substitute for full power service. Nor should we ever be lulled into a mind-set that says, "Well, let low power cover that stuff and let the full power stations continue on their happy way." The American people still rely on full power stations for much of their news, information and entertainment. And those full power stations are on the air because they pledged to serve the public interest in return for being allowed to make what is still a very good living. The emergence and strengthening of LPFM does not affect our duty, in any shape, manner or form, to ensure that ***all*** broadcasters serve the core public interest goals of localism, competition and diversity.

I am pleased to support this as a good step forward, I thank my colleagues and the Bureau for their work. And I want to commend all those many dedicated members of the low power community who have worked so hard and accomplished so much in an environment that has been far less friendly towards them than it should have been.

SEPARATE STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN

Re: In the Matter of Creation of a Low Power Radio Service, Third Report and Order And Second Further Notice of Proposed Rulemaking

When the FCC created low-power FM (LPFM) service in 2000, some argued that there was no viable business model for such a localized medium, while others argued that LPFM stations would undermine the economic stability of existing full-power FM stations. Time, however, has revealed that neither prediction was accurate. There continues to be great public demand for radio spectrum, especially LPFM stations. Full-power FM stations continue to be scarce, and they remain as valuable financial assets. In spite of initial and considerable skepticism, LPFM stations have proven to be a great success story of communications policy. Creating LPFM is one of the few steps that the Commission has taken in recent history to democratize the public airwaves.

Today, the Commission takes steps to reaffirm the non-commercial, local nature and orientation of LPFM stations, and to enhance opportunities for new voices to be heard on the radio dial. Additionally, the Commission finally recognizes the value of LPFM stations as a service that is worthy of some, albeit very limited, channel protection from full-power stations. The clear goals of the rules we adopt today are "to increase the number of LPFM stations that are on the air and providing service to the public; and promote the continued operation of LPFM stations already broadcasting, while avoiding interference to existing FM service." I believe through this Order we have taken several important steps toward these goals. The item reflects a fair and measured approach, but it unmistakably advances the growth and sustainability of LPFM service for years to come.

In this *Order*, we appropriately strike the balance of providing LPFM stations with some regulatory flexibility, while preserving the local integrity of the service. We reduce the administrative and management burden on community organizations operating LPFM stations, making it possible for them to operate under a voluntary time-sharing agreement and to change the composition of their governing boards without having to wait for a designated filing window. We also provide LPFM construction permit holders, with a showing of good cause, the opportunity for a one-time 18-month extension to current and future construction permits.

In addition to these reforms, we preserve the non-commercial, local nature of LPFM stations by prohibiting most sales of licenses and outright ban any transfer or assignment of construction permits. Preventing the creation of a market for the sale of LPFM licenses and construction permits will help protect the true local quality and community service orientation of LPFM stations that have made them thrive.

Perhaps more than any measure in this item, I am especially pleased that we have tightened LPFM ownership rules. Simply put, we cannot allow what has happened to commercial radio to happen to LPFM. Accordingly, I strongly support the fact that we reinstate the restrictions on local LPFM ownership. In doing so, we explicitly recognize that "doing away with the locality restriction could threaten its predominantly local character, in particular the hallmark of the LPFM's station's local character, its local origination of programming." And, equally important, we clarify that repetitious, automated programming does not meet our local origination requirement.

While this item goes a long way to implement thoughtful reform measures to improve the stability of LPFM service, I am very concerned about the impact FM translators, particularly the

applications filed in the 2003 Auction No. 23 translator filing window, will have on LPFM. I am deeply concerned about the preclusive impact of the over 13,000 FM translator applications filed in 2003 will have on the future of LPFM service. Some have argued that these translators could potentially foreclose opportunities for LPFM in the top 50 media markets. This troubles me, as the Commission finds that "processing all of the remaining 8,000 translator applications would frustrate the development of LPFM service and our efforts to promote localism." Many of these translator applications were filed by speculators who do not have any connection to the local community whatsoever.

I am, therefore, pleased that my colleagues have agreed to limit the number of permissible translator applications filed by an entity to ten. It is my understanding that this limitation will not affect 80 percent of pending applications. Moreover, translator applicants will now have to select their 10 applications before we open a settlement window to resolve mutually exclusive applications.

I am equally concerned about the displacement and interference of licensed LPFM stations caused by newly authorized full-power FM stations or city of license modifications. While the Commission should not give LPFM interference protection that could prevent a full-power station from modifying its signal or foreclose future full-power FM service or compromise the integrity of the FM spectrum, LPFMs need some stability in order to be successful. In today's *Order*, we address this problem by affirming that LPFMs will remain secondary to full-power FM stations, but we will consider waivers on a case-by-case basis when there is not a suitable alternate channel for the LPFM. The Order implements this as a policy change, and the Further Notice seeks comment on it as a permanent rule.

Finally, to address some of the imbalances between translators and LPFM, we seek comment on permitting LFPM licensees to use contour protection based licensing standards and limiting the number of translators for each originating station that would have priority over an LPFM. These proposals would enhance opportunities for new voices and thereby promote a diversity of viewpoints over the public airwaves. They are worth pursuing, and I look forward to the public comments.

One of the central goals of the Commission is to promote a fair and equitable use of the broadcast spectrum and to expand opportunities to new voices, such as community-based schools, churches and civic organizations. Establishing LPFM stations, particularly as a noncommercial educational service, to allow these local groups to provide programming that is responsive to local community needs and interests, is one of the most effective ways this Commission can promote such goals. As the record shows, LPFM stations are serving very localized communities and underrepresented groups within communities. Today's reforms should permit LPFM to continue to live up to this dream.

Accordingly, it is my pleasure to support this item because it provides the American people an opportunity to enjoy one of this nation's greatest resources – the public airwaves.

STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE
APPROVING IN PART, DISSENTING IN PART

Re: Creation of a Low Power Radio Service, Third Report and Order

I appreciate that the hallmarks of LPFM radio stations are its local character and locally originated programming. In fact, I had the opportunity to visit RadioFree Nashville last spring and talk with many of the original founders as well as the staff and radio show hosts. They provide a variety of informational and educational programming, talk shows and unique music formats to West Nashville. In fact, a former colleague, George Haley has a regular show regarding issues affecting individuals facing mental and behavioral health issues and it is precisely this type of forum that LPFM can provide listeners.

I support much of what is in the further notice. In fact, that is a more appropriate place for the majority of the action we take in this item today. I believe that we need to have more input and further comment before taking some of these broad and expansive actions regarding the status and protections of both LPFM and primary or licensed full-power stations and therefore I approve in part and dissent in part.

At present, there are several bills pending before Congress and it would seem appropriate to wait on their instruction before moving forward, especially before moving beyond what is included in the legislation regarding 3rd adjacent channel interference. I also think that we should have a rational basis for setting the standards for Low Power FM, perhaps using the minimum operating guidelines for the required number of hours of operation. Regarding the applications for additional translators, again, I would have preferred a more measured approach, rather than an 80% cut: from 50 to 10. Finally, enhancing the status of Low Power FM licensees as compared to full power FM stations, or creating new status and protections, is beyond the scope of the NPRM and is more appropriately addressed in the Further Notice we are issuing today. Such a sweeping change by an agency should require further notice, consideration, and comment.

Therefore, I dissent from this Order's finding of a ten application limit on translators, from the finding regarding second-adjacent channel waivers, and from the portion of this Order that places Low Power FM in a superior position to full power. I find no justification in the record for such a complete shift in well-established policy. Low Power FM licensees provide a great service to their communities, but they accept their license knowing that they are a secondary service, and accept both the risks and rewards that status entails.

STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL
APPROVING IN PART, DISSENTING IN PART

Re: *Creation of a Low Power Radio Service,* Third Report and Order and Second Further Notice of Proposed Rulemaking

As we've traveled across the country for the Commission's field hearings on media ownership, we have heard from many citizens about the benefits low power radio stations bring to their local communities by enhancing viewpoint diversity. In establishing the LPFM service, the Commission sought to "create opportunities for new voices on the airwaves and to allow local groups, including schools, churches and other community-based organizations, to provide programming responsive to local community needs and interests." I am pleased to hear that these new voices are succeeding in accomplishing that goal and are drawing loyal audiences within their communities.

In today's Order, we adopt several rule changes regarding ownership, eligibility, time-sharing and construction deadlines. We hope that these actions will strengthen and promote the long-term viability of the LPFM service, and the localism and diversity goals that this service is intended to advance.

Also, in a Further Notice of Proposed Rulemaking, we seek comment on whether additional technical rule changes are warranted. Specifically, we consider the following: (1) whether an LPFM station may seek a second-adjacent channel short spacing waiver where implementing a city of license modification for a full-service station would result in interference to or displacement of the LPFM station to an alternate channel, and whether such a procedure can be expanded to include co- and first-adjacent channel situations; (2) whether to impose certain obligations on full service stations with respect to LPFM stations affected by a new station or modification proposal; (3) whether to adopt a flexible contour methodology for the licensing of LPFM stations; and (4) whether to retain the co-equal status between LPFM stations and FM translator stations. These may be viable proposals for finding additional channels on the crowded radio band for low power stations. They raise important questions regarding the relationship between primary and secondary radio services, however, and require careful consideration. We have committed to resolve the issues in the Further Notice expeditiously, within six months. I look forward to the comments we receive on these issues.

However, I dissent in part on three specific issues involving both process and substance. First, the Order adopted by the majority jumps ahead of the rulemaking proceeding by adopting interim processing policies for the second-adjacent channel waivers immediately. This waiver policy would apply retroactively to LPFM stations that must move to an alternative channel because of a pending full-power station's community of license modification. This processing policy is premature. In this context, certainly, we should not make rules through waiver policies or processing policies. Rather, we should abide by our duties under the Administrative Procedure Act to seek and consider public comment before crafting and implementing rules.

Secondly, the majority amends our rules to establish a licensing presumption to protect certain operating LPFM stations from subsequently proposed city of license modifications where there would be no alternate channel available to the LPFM station. Adopting this rule at this juncture is a radical departure from prior Commission precedent made without sufficient public notice. In the 2005 Further Notice of Proposed Rulemaking that led to this Order, we considered a request to adopt a processing policy that would permit the denial of a full service FM station's modification application if a LPFM

station would be displaced entirely by the full-power station's move. We did not seek comment on this issue. Instead, in 2005, we concluded:

> [W]e disagree with the basic thrust of this proposal, which effectively would provide primary status to LPFM stations with respect to subsequently filed applications for new or modified full service station facilities. As we stated in the *Report and Order*, "[w]e do not believe that an LPFM station should be given an interference protection right that would prevent a full-service station from seeking to modify its transmission facilities or upgrade to a higher service class. Nor should LPFM stations foreclose opportunities to seek new full-service radio stations."[1]

Clearly, the 2005 Commission recognized and upheld our long-standing policy to treat full-power radio stations as primary to secondary services such as LPFM and FM translators. The majority should not have reversed this precedent without at least seeking further public comment.

Lastly, we limit further processing of FM translator applications submitted during our Auction 83 filing window to 10 proposals per applicant. This number is much too low. It is lower even than the numbers suggested by LPFM advocacy groups in the record. The result is that the service provided by FM translators in many unserved areas may suffer interference.

Accordingly, I dissent in part to this Order. Nonetheless, I support the remainder of the Order. And I thank the Media Bureau for their hard work on these important issues.

[1] *Creation of a Low Power Radio Service*, 20 FCC Rcd 6763, ¶ 38 (2005).