ORAL ARGUMENT NOT YET SCHEDULED

No. 08-1117

In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF BROADCASTERS,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR INTERVENOR PROMETHEUS RADIO PROJECT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties, intervenors, and amici appearing in this Court are listed in the Brief for Petitioner National Association of Broadcasters.

B. Rulings Under Review

References to the rulings at issue appears in the Brief for Petitioner National Association of Broadcasters and the Brief for Respondent Federal Communications Commission.

C. Related Cases

This order on review has not previously been before this Court. Counsel is not aware of any related cases pending in this Court or any other Court.

CORPORATE DISCLOSURE STATEMENT OF PROMETHEUS RADIO PROJECT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Prometheus Radio Project respectfully submits this Corporate Disclosure Statement.

Prometheus Radio Project is a nonprofit corporation which does not issue stock. It is not a subsidiary or an affiliate of any publicly owned corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

*Authorities upon which we chiefly rely are marked with asterisks.

FEDERAL REGULATIONS AND STATUTES

ADMINISTRATIVE RULINGS

LEGISLATIVE HISTORY

ADMINISTRATIVE FILINGS

PERIODICALS

ADDENDUM OF CONGRESSIONAL LETTERS

GLOSSARY

1999 Order: Notice of Proposed Rulemaking, *Creation of a Low Power Radio Service* 14 FCC Rcd 2471, 248-90 (1999).

2005 Order: Third Report and Order, *Creation of a Low Power Radio Service*, 22 FCCRcd 21912, 21936, n.155, *citing* Further Notice of Proposed Rulemaking, *Creation of a Low Power Radio Service*, 20 FCCRcd 6763, 6780 (2005).

2007 Order: Third Report and Order and Second Further Notice of Proposed Rulemaking, *Creation of a Low Power Radio Service*, 22 FCCRcd 21912 (2007)

FCC: Federal Communications Commission.

LPFM: Low Power FM Radio.

NAB: National Association of Broadcasters.

Prometheus: Prometheus Radio Project.

RBPA: Radio Broadcasting Preservation Act of 2000, Pub.L.No. 106-533, §632, 114 Stat. 2762, 2762A-111 (2000).

STATUTES AND REGULATIONS

All applicable statues and regulations are contained in the Brief for Respondent FCC.

STATEMENT OF THE ISSUES

1. Whether the NAB's claims are ripe for review?
2. Whether the FCC's actions violated the Radio Broadcast Preservation Act and are consistent with the FCC's duty to ensure the public interest is being served?
3. Whether the FCC's actions are arbitrary and capricious?
4. Whether the FCC's actions give primary status to low power radio stations?

STATEMENT OF THE CASE

Intervenor Prometheus Radio Project adopts the Counter Statement of Respondent FCC as supplemented in this brief.

Prometheus is an organization that includes a collective of radio activists and listeners who have been committed to expanding opportunities for the public to build, operate, and hear low power stations. Members of Prometheus assist in the creation and preservation of LPFM stations. Members of Prometheus are also listeners of the LPFM stations that are subject to the *2007 Order*.

LPFM stations are low-wattage, community-based, noncommercial radio stations that broadcast to neighborhoods and small towns. *See* Letter from Reps. Mike Doyle and Lee Terry, Members of Congress, to Members of Congress (June 26, 2007, Addendum at A1); *see also*, Letter from Reps. Mike Doyle and Lee Terry, Members of Congress, to Members of Congress (June 26, 2007, Addendum at A2-A3). As uniquely local outlets, which complement the full-power service, LPFM stations serve the FCC's goals of diversity, localism, and competition by directly serving their local communities. *See* Letter from Timothy J. Kautza, Executive Director, National Catholic Rural Life

Conference, to Members of Congress (July 13, 2007, Addendum at A4). LPFM licenses open the possibility of a radio station for churches, schools, civil and other community groups that best understand the needs of their local communities. LPFM stations give local politicians, clergy, and civil rights and community leaders a forum to discuss local issues and provide essential emergency services for local communities during times of crisis. *See* Letter from George H. Niederauer, Archbishop of San Francisco, United States Conference of Catholic Bishops, to Members of Congress (June 27, 2007, Addendum at A5-6); *see also*, Letter from Richard Cizik, Vice President, National Association of Evangelicals, to Members of Congress (Addendum at A7).

While continuing to recognize the priority of full-power stations over LPFM stations, the FCC has taken modest steps in protecting local communities from losing their local outlets for expression. In recognizing that there may be unintended consequences arising from a new streamlined procedure, which grants community of license changes for full-service stations, the FCC has adopted flexible rules and policies to save LPFM stations from displacement by full-power stations who seek to change their communities of license. To limit the number of LPFM stations that would be displaced, the FCC adopted a new, modified interference standard and adopted processing policies that would allow LPFM stations flexibility in staying on the air in limited circumstances.

Any action to vacate, enjoin, or set aside the *2007 Order* would have a significant impact on those LPFM stations that are being threatened from being taken off the air because NAB's *Petition for Review* relates to the policies governing the survival of those LPFMs that are at risk of losing their signal. Further, since Prometheus' members are also listeners of LPFM programming, any action taken by this Court would affect the type of programming members would be entitled to receive immediately and in the future through LPFM stations. This Court's action could also limit the members' constitu-

tional access to information for a diversity of sources. *See Prometheus Radio Project v. FCC*, 373 F.3d 372 (2004); *see also, Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (viewers have First Amendment right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences....").

STATEMENT OF THE FACTS

Prometheus adopts the Counter Statement of the Facts of the FCC as supplemented in this brief.

The FCC adopted the modifications based on a valid concern that LPFM stations were being threatened by community of license changes by full-power stations; these changes were threatening some LPFM stations to go off the air. For example, in 2005, a local, religious LPFM station was faced with a full-power station changing its community of license, which would have forced the LPFM station off the air. *See* Josh Sanburn, *Community Radio Lobbies to Stay Alive,* THE FINANCIAL EXPRESS, http://www.financialexpress.com/news/Community-radio-lobbies-to-stay-alive/141590/0 (June 13, 2005).[1]

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[1]Josh Sanburn reported that:

> For most of his working life, Jim Price has been helping others establish community radio stations in every state of the country. But now, as president of his own station in Ringgold, Ga., he could soon be out of a job.
>
> Price runs WBFC-LP in northern Georgia, a low-powered radio station that serves his community through broadcasting local Southern gospel music and public service announcements.
>
> But about 60 miles north of Ringgold in McMinnville, Tenn., Clear Channel Communications, which owns hundreds of radio stations across the country, is waiting for an application to go through the Federal Communications Commission that would allow it to begin broadcasting on Price's frequency.

This issue was exacerbated when the FCC adopted a streamlined procedure for change in community of license applications. *See Report and Order*, In the Matter of Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services, 21 FCCRcd 14212 (2006). In light of the new streamlined procedure, Prometheus provided the FCC with a list of threatened stations. *See* Prometheus Radio Project Letter, MM Docket No. 99-25 (April 26, 2007) [JA__]; Prometheus Radio Project, Notice of Oral *Ex Parte* Presentations, MM Docket No. 99-25 (March 5, March 8, May 18, June 1, June 14 and June 19, 2007) [JA __]. Prometheus urged the FCC to fulfill its statutory obligation to promote localism and diversity by preserving and protecting LPFM stations which are inherently local in nature. *Id*. Further, the FCC itself noted that it had identified approximately 40 LPFM stations that could be displaced. *2007 Order*, 22 FCCRcd at 21938 [JA__]. Thus, in response to the FCC's commitment to localism and diversity, and its concern that LPFM stations could face displacement, the FCC appropriately modified the interference rule and adopted waiver policies to promote and preserve the public interest.

SUMMARY OF ARGUMENT

In the *2007 Order*, the FCC took modest steps in protecting local communities from losing their local outlets for expression. In recognizing the unintended effect of the new streamlined procedure

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> "They moved in on the channel that I chose back in 2000," Price said. "Two of us can't operate on the same channel. That is the threat, and I've got nowhere to go." For Price to continue broadcasting, he would have to reapply for an LPFM frequency and possibly move his station elsewhere.
>
> Price, who established his LPFM station in March 2004, is among many local radio presidents, broadcasters and producers who are feeling the heat of conglomerates like Clear Channel.

in granting community of license changes for full-service stations, the FCC adopted flexible rules and policies to save LPFM stations from displacement. To limit the number of LPFM stations that would be displaced, the Commission modified its interference standards and adopted processing policies that would allow LPFMs flexibility in staying on air.

Despite the modest steps taken by the FCC, the NAB nonetheless expresses concern over the alleged interference its member stations will face as a result of the FCC's action. However, the NAB fails to demonstrate any actual harm of interference actually suffered by its stations. Without suffering any harm, the NAB's claims are not ripe for review. The NAB's claims are also premature since the FCC has not taken final action on the waiver policies, but has sought further comment on the waiver policies at issue, and the FCC has not yet decided on a *Petition for Reconsideration* that raises similar issues raised by the NAB in its appeal.

Further, the FCC's actions are consistent with the RBPA. Both the plain language and the legislative history indicate that Congress' action was limited to protection of the third-adjacent channel. Moreover, courts, including this Court, have consistently held that, unless specifically indicated by Congress, the FCC has the discretion to interpret statutory language. In this case, Congress did not limit the FCC's discretion, and the FCC appropriately and rationally interpreted the statutory language in adopting rules and policies that would ensure the public interest was being served. Additionally, Congress did not take away the FCC's authority to grant waivers. The FCC's waiver process is one that would be used in limited circumstances, when there is a substantial showing that a waiver would serve the public interest.

Finally, the FCC's priority waiver is not a departure from the established concept that full-power broadcasters have priority over low power services. Full-power broadcasters are not automatically

granted a change in community of license; they must make a public interest showing, to ensure the needs of the community's listeners are being met. The priority waiver simply ensures that the community will have an outlet that meets its needs.

In all, the Commission's actions were taken pursuant to sound legal authority. Its action is supported by the record and consistent with Commission precedent.

ARGUMENT

I. NAB'S CLAIMS ARE NOT RIPE FOR REVIEW.

The NAB's appeal of both the modified interference rule and the waiver policies is not ripe for review. A party does not suffer a hardship when agency action does not "grant, withhold, or modify any formal legal license, power, or authority." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). In addition, review of an administrative process is generally unfit for judicial decision when "judicial intervention would inappropriately interfere with further administrative action." *Id.*

In *Ohio Forestry*, the Sierra Club challenged a plan by the Ohio Forestry Association that set quotas for logging, marked the areas suitable for logging, and established proper methods for logging, but as yet issued no logging licenses. *Id.* There was a licensing process for any actor who wished to engage in logging, but none had yet gone forth. *Id.* The Court held that the plan did not qualify as a substantial hardship to Sierra Club, because there was no "significant practical harm upon the interests that the Sierra Club advances." *Id.* at 733. Rather, the Court held, the licensing process offered Sierra Club "ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain." *Id.*

The Court did not hold that Sierra Club could not challenge the plan, but rather "[a]ny such later challenge might also include a challenge to the lawfulness of the present Plan if (but only if) the present Plan then matters, *i.e.*, if the Plan plays a causal role with respect to the future, then-imminent, harm from logging." *Id.* at 734. The Court relied on a history of case law holding that a party has not suffered a hardship "until an administrative decision has been formalized and its effects felt in a concrete way by challenging parties." *Id.* citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967); *Continental Air Lines, Inc. v. C.A.B.*, 522 F.2d 107, 124 (D.C. Cir. 1974).

The facts at hand are quite similar to *Ohio Forestry*. Though the FCC has adopted a new interference rule, the NAB has not provided any evidence that the new rule has caused harm to any of its members. Without such harm, it is premature for the NAB to seek review.

In *Ohio Forestry*, the Court also held that the matter was unripe for judicial review because it was an appeal from an as-yet unfinished administrative action. The Court held the issues were unfit for review because it was likely that the agency would "refine its policies: (a) through revision of the Plan, *e.g.*, in response to an appropriate proposed site-specific action that is inconsistent with the Plan…, or (b) through application of the Plan in practice." *Id.* at 735. Though the plan had been completed, the Court recognized significant opportunity for administrative change – especially because the plan had not yet been implemented for any actual logging. *Id.*

To this end, the facts at hand are clearly indicative of an agency action that is not final. First, while the FCC has adopted waiver policies to be considered in limited circumstances, it has invited further comment on these proposed new policies and has not yet enacted any final measures. It is more than conjecture that the FCC may change the proposals; it has already taken steps to do so through standard administrative procedure. Further, the FCC is still considering a *Petition for Reconsidera-*

tion, which seeks review of the *2007 Order* with respect to the FCC's revision of 47 C.F.R. §73.809 and adoption of a waiver policy with respect to 47 C.F.R. §73.807. *See* Ace, *et al.*, *Petition for Reconsideration*, MB Docket No. 99-25 (February 19, 2008) [JA __].[2] Thus, clearly, there are continuing administrative processes that threaten to render the appeal moot, and it would be a plain waste of judicial energy to rule on the as-yet unfinished proposals.

Overall, despite concerns over alleged interference to its stations, the NAB has demonstrated no hardship it yet suffers from the new interference rule and waiver policies; only the potential for some future harm. Moreover, the waiver policies for which NAB seeks judicial review have not been formalized into rules, and the FCC has ongoing efforts to review and alter these policies before they are implemented. Additionally, the FCC has not acted on a *Petition for Reconsideration* that essentially raises similar issues the NAB raises. This appeal is unripe, and should be denied.

II. THE FCC'S ACTIONS DID NOT VIOLATE THE RADIO BROADCAST PRESERVATION ACT.

The FCC's actions are supported by the RBPA's plain language and legislative history. Moreover, the FCC has broad discretion in interpreting the RBPA. Additionally, the RBPA does not negate the FCC's general authority to grant waivers.

A. The Plain Language and Legislative History of the RBPA Do Not Prohibit the FCC's Actions.

The FCC has fully presented in its brief the standard of review for statutory construction and explained that its actions do not violate the RBPA. FCC Brief at 16-17. Prometheus further points out the FCC's actions are consistent with the RBPA, which requires the FCC to "prescribe minimum

[2]The *Petition for Reconsideration* argues that the Commission's actions are procedurally flawed and contrary to law.

distance separations for third-adjacent channels (as well as for co-channel and first-and second-adjacent channels)," District of Columbia Appropriations Act, FY 2001, Pub.L.No. 106-533, §632 (2000), when considering the context of the entire rulemaking. In light of that context, Congress' inclusion of the "as well as" language merely reflects Congress' knowledge that the FCC had initially adopted restrictions only for the co-channel and first- and second-adjacent channels. Congress was simply directing the FCC to include the third-adjacent channel in that group. Congress then directed the FCC from taking any action from eliminating or reducing only the third-adjacent channel protections required.

While Congress could have done so, it did not impose a similar prohibition with respect to second-adjacent channel (or co-channel and first-adjacent channel) separation requirements. In light of Congress' failure to impose a similar prohibition, "it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change." *United States v. Fausto*, 484 U.S. 439, 453 (1988). In fact, repeal by implication is especially disfavored in the case of an appropriations bill, "since it is presumed that appropriations laws do not normally change substantive law." *TVA v. Hill*, 437 U.S. 153, 190 (1978). Thus, Section 632 bars the FCC only from allowing an LPFM station to operate on a third-adjacent channel.

Even the legislative history recognizes the FCC's discretion in implementing the statutory language to ensure the public interest was being served. According to Congressman Dingell:

> The issue under debate here is simply whether the FCC's order would cause an unacceptable level interference and thereby disenfranchise large numbers of existing radio stations and, more importantly, their listeners. Because it is the listeners that we protect.
>
> Put simply, we want to make sure that the FCC has done its homework and that it will do its homework and that no harmful interference will

> result from these new stations. The result, I think, is one that is in the public interest.

146 CONG. REC. H 2302 (April 13, 2000). Congressman Markey recognized that "[t]his is not rocket science. This is just radio. It has been around for 80 years and the [FCC] has been doing a good job in sorting out these issues, these interference issues. The [FCC's] job is to supplement, not supplant competition. That is what they are trying to do here, supplement it." 146 CONG. REC. H 2304 (April 13, 2000). The legislative history indicates Congress's intent was to ensure that the FCC act to serve the public interest. Here, the FCC's actions do exactly that; they seek to ensure that local communities are provided with service that meets the community's needs.

B. The FCC Retains the Discretion to Interpret the RBPA.

Moreover, NAB's proposed interpretation of Section 632 implies that, by enacting Section 632, Congress effectively froze the FCC's discretion in interpreting the statutory language. However, the U.S. Supreme Court has often recognized that an agency's discretion is not automatically frozen when Congress enacts legislation. *Lukhard v. Reed*, 481 U.S. 368, 379 (1987) ("It is of course not true that whenever Congress enacts legislation using a word that has a given administrative interpretation it means to freeze that administrative interpretation in place"); *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 100-101 (1939) (Preventing an administrative agency from amending its interpretation because of Congressional action would "drastically curtail the scope and materially impair the flexibility of administrative action."). Specifically in relation to the FCC, this Court has found that "in the absence of any indication by Congress" that the statute locked a particular interpretation in place or froze the FCC's discretion, the FCC is free to rely on its own interpretation. *Office of Communication, Inc. of the United Church of Christ v. FCC*, 327 F.3d 1222, 1225 (D.C. Cir. 2003).

Additionally, several courts have found that to freeze agency discretion or interpretation, Congress must clearly indicate its intention to do so. *See Morton v. Ruiz*, 415 U.S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created...program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."); *American Federation of Labor and Congress of Industrial Organizations v. Brock*, 835 F.2d 912, 916 & n.6 (D.C. Cir. 1987) ("To freeze an agency interpretation, Congress must give a strong affirmative indication that it wishes the present interpretation to remain in place"); *Micron Technology, Inc. v. United States*, 243 F.3d 1301, 1312 (Fed. Cir. 2001) ("Any assumption that Congress intended to freeze an administrative interpretation of a statute, which was unknown to Congress, would be entirely contrary to the concept of *Chevron*--which assumes and approves the ability of administrative agencies to change their interpretation").

Here, the language of Section 632 does *not* indicate a Congressional intention to freeze the FCC's discretion. Rather, the statute specifically recognizes the value of the FCC's interpretation, since it requires an analysis and recommendation from the FCC. *See* Pub. L. No. 106-553, §632(b). By requiring testing and recommendations from the FCC, Section 632 was simply a temporary solution to study the alleged LPFM interference. With the completion of testing and eight years of experience with LPFM, the weight of Section 632 has diminished, primarily because of the results of the Mitre study and the FCC's recommendation to eliminate minimum distance separations.

C. The FCC Retains the Authority to Grant Waivers of its Rules.

Finally, the statutory language did not take away the FCC's authority to issue waivers. The FCC has the authority to issue waivers based on the "good cause" standard. *See, e.g., WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1968). Under this standard, the FCC will grant a waiver when the

party pleads with particularity the facts and circumstances that warrant the waiver, and the granting of a waiver is in the public interest. *See Columbia Communication Corp. v. FCC*, 832 F.2d 189, 192 (D.C. Cir. 1987). The FCC's interim policies effectively reflects the "good cause" standard.

For instance, to seek a waiver of 47 C.F.R §73.807, an LPFM station must make several particular showings to ensure that the waiver is in the public interest. It must show: (1) a new or encroaching full-service station "would result in the full-service and LPFM stations operating at less than the minimum distance separations set forth in Section 73.807" and (2) "implementation of the full-service proposal must result in either an increase in interference caused to the LPFM station or result in the displacement...." *2007 Order*, 22 FCCRcd at 21939 [JA __]. Additionally, the FCC recommends "it will be advantageous to an LPFM applicant's waiver showing to propose modifications that minimize the area of predicted interference...." *Id.* Furthermore, the FCC "must balance the new interference to the full-service station against the potential loss of an LPFM station." *Id.* Thus, the FCC will only grant a waiver if the LPFM station can demonstrate the circumstances warrant a waiver. Moreover, the FCC continues to have the discretion to deny such a waiver request if it is not in the public interest.

Similarly, the FCC has made clear that the waiver of the LPFM/full-power station priority rules can only be granted if the facts demonstrate the waiver would be in the public interest. An LPFM station must make a showing that "a community of license modification would result in the displacement of the LPFM station or result in such a significant increase in caused interference to the LPFM station such that continued operations are infeasible." *Id.* Furthermore, the LPFM must show "that it has regularly provided at least eight hours per day of locally originated programming." *Id.* These requirements provide the basis for an LPFM station to make a showing with particularity the facts

and circumstances that can justify a "good cause" waiver. The policy also ensures the public interest is being served because it requires the LPFM station to show it is providing substantial local programming. Thus, the FCC's policies are simply an extension of FCC's current authority to grant waivers and serve the public interest.

III. THE FCC'S ACTION IS NOT ARBITRARY AND CAPRICIOUS BUT RATHER IS IN THE PUBLIC INTEREST.

The Commission's actions are supported by the record and consistent with FCC precedent. The FCC's actions are also consistent with its obligation to ensure that use of the public airwaves is in the public interest.

A. The FCC's Action Is Consistent with the Record and Its Prior Policies.

The NAB claims that the FCC "offered only a single cryptic sentence to justify its complete reversal of course." NAB Brief at 39. Admittedly, the FCC's explanation may appear cryptic to those who are unfamiliar with the everyday common practices used in engineering the FM band. In actuality, the use of D/U ratios (a ratio of desired to undesired signal strengths between a station and a potential adjacent channel interfering channel) is used by many radio stations to make various forms of showings before the FCC.[3]

Thus, the FCC's actions with respect to second-adjacent channels is not a new consideration, a complete change in policy, or a repudiation of previous observations. In fact, initially, the FCC noted that it expected very little interference on the second-adjacent channel. *See 1999 Order*, 14 FCC Rcd

[3]In fact, hundreds of the NAB's member stations, in the course of making applications for analogous radio services such as FM translator or repeater stations, use these engineering methods to determine the small areas of interference in the immediate vicinities of their transmitters. They also present showings of this nature in their applications to the FCC when requesting new licenses or applying to modify their facilities, making the claim that if the interference area is small, it can be considered *de minimus* and the license or facility modification can be granted.

2471, 248-90 (1999) [JA __]. Also, the FCC recognized previously that the public interest would be better served by allowing an LPFM to operate on a second-adjacent channel over a subsequently authorized upgrade or new full-service station. *2005 Order,* 20 FCCRcd 6763, 6780 (2005) [JA __].

Moreover, the FCC has often allowed full-power stations to operate with minimal levels of interference when doing so would serve the public interest. For example, in the noncommercial service, the FCC has allowed small amounts of potential second- and third-adjacent channel interference where such interference is counterbalanced by substantial service gains. *See Educational Information Corporation*, 6 FCCRcd 2207 (1991).

Further, full-power broadcasters have themselves previously sought technical flexibility for their own stations. For instance, when the NAB was attempting to help its member stations receive waivers to improve facilities for "grandfathered short-spaced stations," the NAB encouraged the FCC to loosen its rules and allow greater technical flexibility for its members. Reply Comments of the National Association of Broadcasters at 4, *In the Matter of Grandfathered Short-Spaced FM Stations*, MM Docket No. 96-120 (October 4, 1996). The NAB argued that "though [it] would support improvements/modifications of facilities that might result in *some* increased short spacing to second and third adjacent channel stations, it [was the NAB's] expectation that such increases would be minimal-- and that many modifications would actually result in a net decrease of interference caused to these other stations." *Id.* Thus, contrary to the NAB's implication, the FCC's actions are not a broad reconfiguration of interference standards on the FM band.

B. The FCC's Actions Are Consistent with the Public Interest.

Not only are the FCC's actions consistent with its prior policies and observations, but the FCC is free to change its policies to reflect the public interest. It has long been recognized that so long as

there is a reasoned explanation, the FCC "is entitled to reconsider and revise its views as to the public interest and the means needed to protect that." *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 411 (D.C. Cir. 1983). Moreover, the Supreme Court has noted that agencies must be given "ample latitude to adapt their rules and policies to the demands of changing circumstances." *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983) (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968) (internal quotation omitted). In other words, the FCC may implement the rule change and the waiver standards based on a determination as to whether the guideline will serve the public interest. *See Washington Association for Television and Children v. FCC*, 665 F.2d 1264, 1268 (D.C. Cir. 1981). The FCC explicitly demonstrated the rule change and waiver standards are a reasoned means to serve the public interest.

In the *2007 Order*, the FCC addresses a number of "unique obstacles" that have faced the LPFM service since its creation. 22 FCCRcd at 21917 [JA __]. Among these are the significant preclusive impact of the 2003 translator filing window, *id*. at 21929 [JA __], the dismissal of a number of proposed facilities as a result of the spacing requirements imposed by the RBPA, *id*. at 21915 [JA __], and the January 2007 adoption of a streamlined licensing procedure for community of license modification proposals. *Id*. at 21938 [JA __]. Moreover, the FCC relies on its own analysis, incorporating the FCC's own findings, along with studies by REC Network and numerous other commenters. *See, e.g., 2007 Order*, 22 FCCRcd at 21936-37 [JA __].

The actions taken by the FCC in the *2007 Order* are reasoned responses to these unique obstacles and the record before the FCC, and well within the "ample latitude" standard set forth by the Supreme Court.

IV. THE FCC HAS NOT CHANGED THE PRIORITY RULES.

The FCC's proposed priority waiver - which adopts a rebuttable presumption - is not a complete departure from its priority rules. Notably, what has not changed is that the decision on whether to grant a change of community application is made pursuant to the public interest standard. Also, the FCC's rebuttable presumption does not grant the LPFM service priority (or *de facto* priority) over the full-power service.

Full-service stations do not automatically receive a change of community of license when requested. Indeed, the FCC has established priorities when considering allowing a full-service station to change its community of license. *Memorandum Opinion & Order*, Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, 5 FCCRcd 7094, 7097 (1990). Most importantly, "a proposal which would reduce the number of communities enjoying local service is presumptively contrary to the public interest." *Id.* That is, the "public has a legitimate expectation that existing service will continue, and this expectation is a fact we must weigh independently against the service benefits that may result from reallotting a channel from one community to another...." *Id.* In other words, full-service stations are already obligated to make a public interest showing pursuant to 47 U.S.C. §307(b),[4] and the FCC's waiver policy merely ensures that such a showing does in fact reflect a benefit to the public.

Further, while maintaining the priority rules, the FCC has adopted a ***rebuttable*** presumption (that an LPFM should not be ordered off the air if a full power station seeks to change its community

[4]47 U.S.C. §307(b) provides that "[i]n considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the FCC shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

of license, and no suitable channel can be found for the affected LPFM) to ensure that the public interest is best served. In other words, a full-power station should not expect to be granted a change in community of license or a new license simply because it requested one and has the ability to serve a larger geographic area; a grant of a new or modified license must be based on whether the public interest will be served. The rebuttable presumption ensures that as long as the full-power station can make a truthful public interest showing, then the full-power station is not prevented from moving into the community.

Additionally, the *2007 Order* warns LPFM stations, "that even if the required showing is made, the FCC in the exercise of its discretion may conclude that denial of the full-service station application...would not serve the public interest." 22 FCCRcd at 21941 [JA__]. Thus, full-power stations continue to have a priority right over LPFMs, except in those cases where the full-power station is unable to serve the public interest. In those cases where it cannot, the FCC can grant a waiver of the rule, which is much different than overhauling the priority between LPFMs and full-power stations. In fact, as already discussed, nothing prevents the FCC from exercising its authority to grant waivers of a rule if it serves the public interest.

Further, despite NAB's assertion, the FCC's preference for locally originated programming is not an attempt to regulate content. Indeed, it is well within the FCC's authority to favor locally originated programming as a means to promote localism.[5] The FCC is the agency charged with

[5]The FCC's commitment to localism is "rooted in Congressional directives . . . and has been affirmed as a valid regulatory objective many times by the courts." *2002 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCCRcd 13620, 13711-47 (2003), *aff'd in part and remanded in part, Prometheus Radio Project v. FCC*, 373 F.3d 372 (2004). In recent years, the FCC has strengthened its commitment to localism in a number of ways. For example, the FCC sought to increase localism in broadcasting by establishing community advisory boards to assist

granting broadcast licenses when the grant is in the public interest and can establish what is in the public interest. In the FCC's seminal *En Banc Programming Inquiry*, the FCC asserted that the objective of a local transmission service is "increased radio transmission, and, in this connection, appropriate attention to local live programming is required." Report and Statement, *En Banc Programming Inquiry*, 44 FCC 2303, 2311 (1960). Thus, the FCC has a long-standing interest in ensuring that the public has access to local sources of programming, including programming generated by the community groups operating LPFM stations, and has determined that localism can be achieved through locally originated programming.

Moreover, the FCC's local origination requirement ensures the broadcaster is acting in the public interest without resorting to management of day-to-day programming decisions. *See, e.g.*, *Policies and Rules Concerning Children's Television Programming*, 11 FCCRcd 10660 (1996) (requiring broadcasters to serve the educational needs of children). The FCC's preference for local origination does not seek to mandate any type of programming. Indeed, the FCC has every right to assess whether the encroaching full-power broadcaster intends to serve the interests of the community. *Cf. Turner Broadcasting v. FCC*, 512 U.S. 622, 650 (1994) (where the Court made clear that the FCC has the authority to "inquire of licensees what they have done to determine the needs of the community they propose to serve.").

CONCLUSION

For all these reasons, the Court must deny the Petition for Review.

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broadcasters in "determining matters of local interest for broadcast." *Report on Broadcast Localism and Notice of Proposed Rulemaking*, 23 FCCRcd.1324 (2008).

Respectfully submitted,

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