

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Creation of a)
Low Power Radio Service) MM Docket No. 99-25
)

COMMENTS OF
PROMETHEUS RADIO PROJECT
NATIONAL HISPANIC MEDIA COALITION
RECLAIM THE MEDIA
COMMON CAUSE
UNITED CHURCH OF CHRIST, OFFICE OF COMMUNICATION, INC.
NATIONAL FEDERATION OF COMMUNITY BROADCASTERS
FREE PRESS
BENTON FOUNDATION
NEW AMERICA FOUNDATION
NATIVE PUBLIC MEDIA
CONSUMERS UNION
FUTURE OF MUSIC COALITION
CCTV CENTER FOR MEDIA & DEMOCRACY
CENTER FOR DIGITAL DEMOCRACY
MEDIA ALLIANCE
COMMON FREQUENCY
MEDIA MOBILIZING PROJECT
KFOK-LP, KFOK COMMUNITY RADIO, GEORGETOWN, CA
KOWS-LP AND THE OCCIDENTAL ARTS AND ECOLOGY CENTER,
OCCIDENTAL, CA
KPYT-LP, PASQUA-YAQUI INDIAN TRIBE, TUSCON, AZ
KYRS-LP, THIN AIR COMMUNITY RADIO, SPOKANE, WA
MEDIA BRIDGES, CINCINNATI, OH
MONTAGUE COMMUNITY TV, MONTAGUE, MA
WCNH-LP, HIGHLANDS COMMUNITY BROADCASTING, CONCORD, NH
WCOM-LP, COMMUNITY RADIO OF CARRBORO, CARRBORO, NC
WEZU-LP, ROANOKE RAPIDS, NC
WCRX-LP, BEXLEY PUBLIC RADIO FOUNDATION, BEXLEY, OH
WPVM-LP, MOUNTAIN AREA INFORMATION NETWORK, ASHEVILLE, NC
WRFN-LP, RADIO FREE NASHVILLE, PASQUO, TN
WSCA-LP, PORTSMOUTH COMMUNITY RADIO, PORTSMOUTH, NH
WXOJ-LP, VALLEY FREE RADIO, NORTHAMPTON, MA

**AUSTIN AIRWAVES, INC., AUSTIN, TX
CHIRP-CHICAGO INDEPENDENT RADIO PROJECT
NEW MEXICO MEDIA LITERACY PROJECT
KDRT-LP, DAVIS COMMUNITY RADIO, DAVIS, CA
KREV-LP, 104.7, UNITED METHODIST CHURCH OF ESTES PARK, CO
KXRG-LP, HONOLULU, HI
WXCS-LP, CAMBRIDGE COMMUNITY RADIO ASSOCIATION,
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MULTICULTURAL ASSOCIATION OF SOUTHERN OREGON,
KSKQ COMMUNITY RADIO
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SUMMARY

In the Commission's *Third Report and Order in Creation of a Low Power Radio Service*, the Commission took positive steps in promoting and preserving the public's interest in localism and diversity. The Commission has recognized the vital role that low power radio stations play in promoting localism and diversity. The Commission now seeks further comment on whether other measures are required to ensure the growth and protection of the vibrant service low power radio provides to its local communities.

While the Commission continues to recognize the priority of full-power stations, the Commission has taken modest steps in protecting local communities from losing their local outlets for expression. In recognizing the unintended effect of the new streamlined procedure in granting community of license changes for full-service stations, the Commission has adopted flexible waiver standards and policies to save LPFM stations from interference and displacement from either the implementation of a full-power new station or modification of a full-power station. Prometheus, *et al.*, urge the Commission to codify these standards and policies.

Low power radio stations are governed and operated by community based organizations with limited resources. Thus, any necessity to resolve interference or even move to a new channel would pose a great hardship on the station. Further, as a result of the move into the community, these full-power stations are greatly increasing the value of the full-power station. It is only fair, then, that full-power stations that choose to move into the low power radio's community must provide technical and financial assistance to assist the low power station in resolving interference or in its move to a new channel. Moreover, no low power station should be required to move unless it is assured that the new channel is equal in quality and coverage to the low power radio's existing channel, thereby

allowing the low power radio station to continue to provide its community with public service.

Finally, the Commission has recognized that new spectrum opportunities for low power radio under the current regulatory scheme could limit the development of low power radio. To resolve this situation, the Commission must allow low power radio to be allocated using a contour-based methodology. Additionally, the Commission must resolve the priority between low power radio and translators to reflect a community's interest in obtaining a local outlet for expression and locally originated programming.

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Prometheus Radio Project (“Prometheus”), *et al.*, respectfully submit these comments in response to the Commission’s *Second Further Notice of Proposed Rulemaking in Creation of a Low Power Radio Service* (“*Second FNPRM*”). Prometheus Radio Project, *et al.*, applaud the Commission’s vision to promote local and diverse voices. The Commission has thus far taken important and positive steps in strengthening and preserving the low power radio service. In the *Second FNPRM*, the Commission seeks comment on whether additional measures must be taken to promote and maintain a viable low power radio service.

In these comments, Prometheus, *et al.*, urge the Commission to continue to adopt measures that will save communities from losing their local outlet for expression. These measures will also allow other communities to obtain an outlet for local expression and locally originated programming. By adopting such measures, the Commission will advance its intention to promote local and diverse voices.

I. INTRODUCTION AND BACKGROUND

To preserve the viability of the low power FM radio (“LPFM”) service and support its growth, the Commission already has taken modest action to ensure local communities have the chance to obtain an LPFM station. For instance, when an LPFM station is displaced from their current channel, and there is no other viable alternative, the Commission will consider granting the affected LPFM station a waiver of the second adjacent channel limitation. The waiver would allow the LPFM station to operate on a second adjacent channel, rather than eliminating the community’s local service. The Commission has also adopted a policy allowing for a waiver of the LPFM/full-power station priority rules.

The Commission now seeks comment on whether it should codify these policies. The Commission also seeks comment on whether full-power stations should provide technical and financial assistance to the affected LPFM station; whether LPFM stations should be licensed pursuant to a contour-based methodology; and whether there should be a readjustment of LPFM/FM translator priorities.

Prometheus, *et al.*, urge the Commission to: (1) codify its displacement policies; (2) require full-power stations to provide technical and financial assistance to affected LPFM stations; (3) allow LPFM stations to be licensed pursuant to a contour-based methodology; and (4) make adjustments to LPFM/FM translator priorities. These measures will enable the Commission to fulfill its statutory mandate to serve the public interest.

II. THE COMMISSION MUST ALLOW FOR SECOND-ADJACENT CHANNEL WAIVERS

In the Third Report and Order, *Creation of a Low Power Radio Service* (“*Third Report and*

Order”), the Commission adopted an interim processing policy which would allow LPFMs to seek a waiver to operate on a second-adjacent channel. This processing policy was put in place to prevent the disruption of a community’s LPFM service as a result of the implementation of a full-power new station or modification. The Commission now seeks comment on whether, and under what conditions, to codify the waiver and processing policies set forth in the *Third Report and Order*.

A. Codification of the Waiver Standard and Policies Will Serve the Public Interest.

Prometheus, *et al.*, urge the Commission to codify the waivers and processing policies set forth in the *Third Report and Order*. Prometheus, *et al.*, appreciate the Commission’s efforts in creating some protections for LPFM stations and the communities they serve. However, the current protections are limited and inadequate to serve the public interest. Codifying a process that will allow an LPFM station to seek a waiver would go a long way in promoting the public interest. Codification of the standard would enable a community to have the benefit of two viable broadcast services by allowing local communities to gain the service of a full-power station, while also preventing the disruption of its local outlet.

Codification of the standard is especially important in maintaining and enhancing the effectiveness of the LPFM to meet the needs of its community. Under the current policies of the Commission, many LPFMs are often unable to make substantial investments because of the difficulty in finding donors. LPFMs often find themselves having to inform potential donors that despite the LPFM’s excellent community work, the station’s very existence is fundamentally precarious. That is, an LPFM station is only allowed to use the frequency so long as no full-power station decides it can come into the community and interfere with or displace the LPFM station. This precarious situation undermines the development of these stations, which in turn limits their capacity for public service.

B. The Conditions Under Which Waivers May Be Granted and LPFMs Are Relocated Must Reflect the Public Interest.

Prometheus, *et al.*, urge the Commission to allow LPFMs to seek waivers under a variety of equitable conditions. The public interest would best be served if the Commission allows for maximum flexibility in determining when an encroached upon LPFM station is eligible to seek a waiver. The Commission must also ensure that in situations where an LPFM station cannot seek a waiver because another channel exists for the station, the LPFM is allowed a test period to ensure that the new channel will provide for equal quality and coverage.

1. *LPFMs must be able to seek waivers in cases of full displacement or in cases of new interference.*

The Commission has already made it clear that if an alternate channel is not available for the LPFM, then full-displacement of an LPFM station warrants consideration of a second-adjacent waiver.¹ The Commission also states that a waiver could be considered in cases where there is “an increase in interference.”² Prometheus, *et al.*, believe that “an increase in interference” signifies any new interference the LPFM station suffers as a result of the new or modified full-power station’s presence in the community. Thus, an LPFM station must be able to seek a waiver if it suffers from any interference that it did not suffer from prior to the full-power station’s entrance into its community.

In addition to second-adjacent channel waivers, the Commission should make clear the waiver standards and polices will extend to third-adjacent channel waivers at such time as Congress has lifted the third adjacent restriction. Also, the Commission should extend the waiver to Intermediate

¹*Creation of a Low Power Radio Service*, Third Report and Order and Second Further Notice of Proposed Rulemaking (“*Third Report and Order*”), 22 FCCRcd 21912, 21942 (2007).

²*Id.*

Frequency (“IF”) channel short spacings.³ Because of advances in receiver technology, IF spacings may no longer be necessary to ensure listeners can receive clear signals from an FM station.⁴

However, Prometheus, *et al.*, recognize that co- and first-adjacent channel interference is real and, generally, there will be no realistic options on co- and first-adjacent channel situations. Nonetheless, in certain unusual cases this co- and first-adjacent channel interference will not actually occur due to terrain shielding and other factors. Thus, the Commission should consider allowing a policy where a co- and first-adjacent channel waiver could be granted only in limited cases where a positive showing of no interference is made.

In granting waivers, Prometheus, *et al.*, support the notion that waivers should be granted when the LPFM station can demonstrate no actual interference exists due to a lack of population, terrain, or other factors. Prometheus, *et al.*, also agree that LPFM stations should continue to resolve *bona fide* actual interference complaints inside the protected contours of full-power stations. However, the Commission should not limit waivers in cases where interference is caused, but should also allow a waiver to be sought in cases where there will be any new interference, whether the

³Most consumer FM broadcast receivers convert incoming signals to an IF in order to more easily amplify and process FM signals. The Commission’s IF spacing requirements represent the distances required to prevent overlap of a particular mV/m contour from a station operating at an FM signal separated by 10.6 or 10.8 mHz.

⁴The Commission last examined IF spacing requirements in the late 1980s. Tests of commercial FM broadcast receivers concluded that although some models were susceptible to IF interference, others were relatively immune. At that time, they concluded a reduction of the IF spacing requirements was appropriate. *Review of Technical Parameters for FM Allocation Rules of Part 73, Subpart B, FM Broadcast Stations*, Third Report and Order, 4 FCCRcd 3557 (1989). *See also*, *Review of Technical Parameters for FM Allocation Rules of Part 73, Subpart B, FM Broadcast Stations*, Further Notice of Proposed Rulemaking, 3 FCCRcd 1661 (1988) (discussing commercial receiver test results). It is likely that in the past 20 years, further advances in receiver technology have continued to reduce IF interference.

interference is caused or received. These measures will allow LPFMs more general technical flexibility in continuing to provide its local communities with broadcast service.

Finally, when faced with the entrance of a full-power station into the community, the affected LPFM station should be allowed a reasonable time period to determine its best cause of action. Prometheus, *et al.*, recommend the affected LPFM station be given 90 days from the day it is notified by the full-power station that the LPFM station will be short spaced, to file an alternate channel application or waiver request. The Commission should also be flexible in allowing a 90 day extension when circumstances warrant.⁵ As discussed in more detail below, the Commission should require the full-power station to provide technical and financial assistance in these situations.⁶

2. *A relocated LPFM station or a relocated transmitter site must have a test period on its new channel before the Commission approves the implementation of the full-power station.*

The Commission has stated that the waiver procedure will only be available if an alternate, fully-spaced, rule complaint channel is not available to the LPFM. However, it is important that in cases where an LPFM station can minimize interference by moving its transmitter site or is able to move to a new, rule compliant channel, the Commission does not automatically grant a new full-power license or change in community of license. Rather, the LPFM should not be forced to change its channel or transmitter site until the LPFM is assured it will have the ability to serve the public interest in the new location.

⁵For instance, in the case of tribal government licensees, additional time maybe necessary for the tribal council to determine its best course. There will be a certain amount of education necessary for the tribal leadership to get up to speed. Moreover, in some instances, the issue may be assigned to a committee, which may also need time to grasp the consequences of the new or modified station before concluding on the best course of action for the LPFM.

⁶*See, infra*, Section IV.

To ensure the affected LPFM will be able to serve its community, the LPFM should move to a new transmitter site or a new channel of equal coverage and quality, and the displaced LPFM should be allowed a period of 30 days to test broadcast operations before any full-service move is finalized. Such a policy would be compatible with the Commission’s recognition that “the public interest may favor continued LPFM second- and third- adjacent channel operations over a subsequently authorized upgrade or new full-service station.”⁷ For example, a channel change or transmitter site change could result in an LPFM station moving away from reaching the Indian Reservation, isolated campus communities, or church congregation it intended to serve. Though predictive software is helpful, it is impossible to be sure, until the transmitter is turned on in the new location, that the new location will be viable under various “real world” factors. Thus, a test period for new LPFM channels will protect the LPFM’s ability to serve its community.

Such a procedure is especially critical to the public interest in cases of community of license changes. In many instances, despite the *Tuck Policy*,⁸ a full-service station’s change in community

⁷*Creation of a Low Power Radio Service*, Further Notice of Proposed Rulemaking, 20 FCCRcd 6763, 6780 (2005).

⁸The *Tuck Policy* is intended to ensure that a broadcaster’s move to a new community of license will not result in service to an already served urbanized area. See *Faye & Richard Tuck, Inc.*, 3 FCCRcd 5374 (1988). In other words, the *Tuck Policy* prevents a rural to urban migration by a broadcaster. Unfortunately, a loose interpretation of the *Tuck* criteria has made the current implementation of this policy unsuccessful. In implementing the *Tuck Policy*, the Commission considers only that a community will be getting a full-power service. However, the analysis often misses the fact that the stated community of license is only a very small percentage of the coverage area of the station. The *Tuck* analysis, for all of its detailed articulation in regards to analyzing the meaningful existence for the named community of license, fails to consider the most critical question - what population will the station reach in its new location, and who will the station actually serve.

of licence is not sought to serve localism, but to increase the value of privately held assets.⁹ In these instances, the full-power station deprives a mid-size community of a radio voice to create “new service” to a smaller community. Ultimately, the smaller community does not receive the benefit of programming that caters to that community. Instead, the smaller community is actually being used to squeeze a new commercial signal into a major, urban market, which the full-power station actually intends to serve. Nothing about this process serves the public interest. However, ensuring that the LPFM station is moved to a channel of equal coverage and quality will allow the smaller community to maintain its local outlet, despite the possibility the full-power station may not intend to serve its new community of license.

Additionally, a test period will encourage encroaching stations to use careful engineering studies to find the best available channel for the displaced LPFMs. Otherwise, it is in the encroaching station’s financial interest to displace LPFMs as quickly as possible, without regard to the quality of coverage or the possible interference an LPFM might experience when it begins operating. In fact, ensuring the best possible result for these encroached upon LPFMs, rather than settling for the simplest solution for encroaching full-service stations, is consistent with Commission policy.¹⁰

⁹These concerns are not superfluous. For example, one station was granted a change in community of license from Anniston, Alabama to College Park, Georgia on the basis that the broadcaster would be providing first local service to College Park. *See* Comments of Charles Crawford at Exhibit 21, *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services* (MM Docket 05-210), filed September 30, 2005. As it turns out, College Park is within the Atlanta listening area. There are numerous, similar examples. *See* Comments of Charles Crawford. Mr. Crawford notes that of the 54 known reported decisions that applied the *Tuck Policy*, all but one of those change in community of license applications were granted on the claim that the broadcaster would be providing the community with first local transmission service. *See* Comments of Charles Crawford at 10-15.

¹⁰*Cf. Shingle Springs and Quincy, California*, 7 FCCRcd 3113, n.4 (1992) (The Commission does not require class downgrades from displaced full service broadcasters, even if it is the simplest

C. Codification of the Waiver Standard and Policy Will Not Impair the Due Process Rights of Full-Power Stations.

Codification of the waiver standard and policies does not suggest that the grant of the waiver is automatic. Rather, it merely allows the Commission to be flexible in ways to help communities keep their LPFM stations that are threatened from displacement or increased interference. Indeed, the Commission's proposed procedures to allow for a waiver of Section 73.807 of the Rules provide full protection for the due process rights of all potentially impacted stations.

Generally, the amount of process due is determined by balancing three factors. "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any of additional or substitute procedural safeguards; and finally, the Government's interest including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail."¹¹

Applying this balancing test to the proposed waiver procedures outlined in the *Third Report and Order*, it becomes clear that the due process rights of the impacted full-power stations are fully protected. The gravity of the full-power stations' private interest affected by the procedures is quite small, especially considering the fact the licensees are occupying public spectrum; in most circumstances, the interference with the station would be limited to an area from just ten to two hundred meters from the location of the LPFM station antenna. However, the governmental interest at stake is significant - without adoption of the waiver procedures, many LPFM stations would be at risk of complete displacement.

way to accommodate channel spacing requirements).

¹¹*Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The important governmental interests that are advanced by the development and sustainment of LPFM radio stations have been well advanced in the record before the Commission. There is also little reason to believe that the adoption of additional procedural steps would provide any greater protection for the full-power stations. The proposed procedures would provide the Commission with a sufficient basis for decision-making while fully protecting the due process rights of all parties.

More specifically, the courts have stated that the Commission does not violate a regulated party's right to due process if the "regulated party acting in good faith is able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform."¹² The proposed procedures in question clearly provide all parties with adequate notice of the standards to which they must conform. In evaluating whether the public interest would be served by a waiver, the Commission has stated that it will balance the potential for interference with a full-service station against the potential loss of an LPFM station. The Commission has further stated that an LPFM applicant's waiver showing would be advantaged by a proposal that would minimize the area of predicted interference.

Due process does not require that a regulated party be able to predict perfectly the results of an agency's decision, but merely requires that the standards which will govern the agency's decision-making be ascertainable. In this instance, the Commission has made it clear that their decision to grant a waiver request will be governed by the public interest standard, with the key variables being predicted interference and threat of displacement to the LPFM station. The proposed procedures not only provide adequate notice to all parties, but also provide any potentially impacted full-service

¹²*ICO Global Communications Ltd. v. FCC*, 428 F.3d 264, 269 (D.C. Cir. 2005) (internal citations omitted).

station with an opportunity to show cause as to why allowing a second-adjacent channel short-spacing would not be in the public interest. As such, the due process rights of all regulated parties would be fully protected by the procedures contained in the *Third Report and Order*.

III. THE COMMISSION MUST RESOLVE DISPLACEMENT CONFLICTS

In its *Third Report and Order*, the Commission made great strides in adopting a policy that will help to resolve issues of complete LPFM station displacements. Prometheus, *et al.*, urge the Commission to amend Section 73.809 of the Commission's rules to establish a licensing presumption that would protect certain operating LPFM stations from subsequently proposed new full-power stations or community of license modifications.

The adoption of a rebuttable presumption is especially necessary in light of fundamental changes since the Commission first considered the issue of the status of LPFMs. Primary versus secondary status is based upon a reductionist assumption that a full-power station with a larger coverage area provides more public service.¹³ In these days of automation and consolidated ownership, bigger is not necessarily better in terms of public service. Thus, status rights should shift accordingly (as the rebuttable presumption allows), since their rationale is based in public service.

In determining whether a broadcast station is providing its community of license public service, Prometheus, *et al.*, believe it is appropriate to base status on whether the station is regularly providing locally originated programming. While Prometheus, *et al.*, support fully the idea of a regular locally originated programming requirement, it has come to Prometheus, *et al.*'s, attention that in some markets, eight hours can be hard to meet due to small populations. This standard becomes especially

¹³*Creation of a Low Power Radio Service*, First Report and Order, 15 FCCRcd 2205, 2229-32 (2000).

difficult in rural areas where even few full-power stations produce anything near this level of locally originated content.

Instead it may be advisable to adopt a point system to determine whether an LPFM has “regularly” satisfied the locally originated programming requirement. A simple point system, similar to the one used for determining priority of LPFM applicants, could be used to determine whether an LPFM station is protected from an encroaching full power station. Prometheus, *et al.*, recommend the Commission adopt the following point system for determining whether an LPFM station has provided its community with local public service.

Stations would receive:

1 point per weekly hour of locally produced music programming;

3 points per weekly hour of locally produced talk, public affairs, educational, or sports programming;

4 points per weekly hour of locally produced news programming.

Stations with coverage inside the 303 Arbitron defined urban radio markets would require a programming schedule reflecting 56 points per week of locally produced programming to have “regularly” satisfied the programming requirement. Stations outside the 303 Arbitron defined radio markets would require 28 points per week of locally produced programming to have “regularly” satisfied the programming requirement.

To determine whether an LPFM station has “regularly” satisfied the programming requirement, the Commission should consider allowing for a time period for maintaining the sorts of records necessary to establish this priority.¹⁴ For instance, moving forward, the Commission could ask LPFM

¹⁴An exact definition may not be currently attainable since this requirement has gone unmonitored.

stations to maintain a station website or a file with a regular weekly schedule of the station's programming. The listed regular weekly schedule would help in determining whether the LPFM station was regularly providing locally originated programming.¹⁵ Prometheus, *et al.*, do not believe this would be unduly burdensome, as many stations already have program schedules on-line and are proud of their locally produced programming.

IV. NEW AND MOVE-IN STATIONS SHOULD PROVIDE AFFECTED LPFM STATIONS WITH TECHNICAL AND FINANCIAL ASSISTANCE

Prometheus, *et al.*, agree with the Commission's tentative conclusion that an applicant for a new or modified station should provide technical and financial assistance. However, such assistance must be in good faith and should ensure that the LPFM is fully compensated for all expenses incurred and lost as a result of the full-power station's proposal to move into the LPFM station's community.

A. The Commission Should Require Full-Power Stations to Provide Technical Assistance to Affected LPFMs.

The encroaching full-service station must be responsible for providing technical assistance to the LPFM station to reduce interference or to locate a new channel. Specifically, as part of its application process, the full-power station must be required to cooperate in good faith with the LPFM station in developing the best technical approach to ameliorate the interference and/or displacement impact of its proposal. Additionally, the full-service station should be required to include the results of its search for an alternate LPFM channel. This search should include evidence that the coverage of the proposed new channel or new transmitter site would be equivalent to or better than the coverage of the original site and include demonstrably reasonable evidence that the new tower site is as viable

¹⁵For instance, the Commission could require the online program schedule to note whether a show is locally produced.

for the LPFM as the old one.¹⁶ Moreover, the full-service station should be required to provide notice of its application filing to the LPFM station. Finally, evidence, such as jointly signed statements of collaboration, of co-operation between the LPFM and full-power station should be an element of the application for a new license or change of community license.

B. The Commission Should Require Full-Power Stations to Reimburse Affected LPFM Stations for All Costs Associated with Changing a Transmitter Site or Changing Channels.

Prometheus, *et al.*, agree with the Commission's suggestion that the encroaching full-power station must assume financial responsibility for all direct expenses associated with resolving all *bona fide* actual interference complaints. However, with respect to an LPFM's relocation expenses, the Commission has suggested that financial assistance should be limited to the physical changes in the LPFM station's transmission system. Limiting expenses to the simple physical change in a transmission system does not account for other expenses associated with the move.

In fact, reimbursement of all costs, such as legal and engineering costs, is consistent with the Commission's current policy for displaced full-power stations. The Commission has recognized that "costs appropriate for reimbursement [to displaced full-power stations] are not necessarily limited to strictly engineering costs since as a practical matter other expenses may be involved."¹⁷ In addition to engineering, the Commission has determined that displaced stations may be reimbursed for:

- (1) new equipment legitimately required for the channel change;
- (2) the printing of new logs and stationary;
- (3) out-of-pocket expenses while the station is off the air;
- (4) advertising for the new frequency; and

¹⁶For instance, the LPFM station should not be going from a site that costs \$50/month to rent to \$500/month.

¹⁷*Bellefontaine, Ohio*, 3 FCC2d 598 (1966).

(5) a small amount of undocumented “miscellaneous expenses.”¹⁸

These costs have been repeatedly found to be appropriate for displaced full-service stations,¹⁹ and should be similarly applicable to non-profit, community based LPFM stations. Although the Commission has acted to limit which expenses qualify for reimbursement, the Commission should encourage liberal reimbursement of encroached LPFMs, particularly for legal and engineering expenses, as well as expenses related to promotional support and lost sponsorship.

Many LPFMs operate with limited budgets and non-expert staff. Yet, LPFM stations will incur expenses beyond those associated with a physical change in a transmission system. For instance, the LPFM station may incur costs for retaining an independent engineer and lawyer to protect their interests in this process.²⁰ Although the Commission may take measures to improve the negotiation process between a full-power station and the LPFM station, the LPFM station will likely still need some professional advice to achieve the best possible result for the LPFM.

LPFM stations also will incur expenses associated with re-branding, such as stationary and promotional items. Annual promotion, such as give-away items, is of vital importance to many LPFMs, such as those in transient college communities. These promotional items not only attract listeners, but volunteers and potential donors as well. For these stations, promotional advertising within the community directly affects their ability to operate. Any LPFM reimbursement policy the

¹⁸*Circleville, Ohio*, 8 FCC2d 159, 163-64 (1967).

¹⁹*See, e.g. Blanca, Colo.*, 22 FCCRcd 15114 (2007); *Tilden, Tex.*, 22 FCCRcd 15108 (2007); *Wilson, Wyo.*, 22 FCCRcd 7473 (2007).

²⁰*Circleville* found that legal fees are appropriate for reimbursement. 8 FCC2d at 163. Furthermore, *Jahnke, Hampton, Iowa*, determined that legal expenses that are unavoidably incurred because of displacement are reimbursable, even if the amount is substantial. 74 FCC2d 265, 273-274 (1979).

Commission develops should not be so limited that it hinders the ability of LPFMs to generate promotional items.²¹

Moreover, the Commission should also require full-power stations to reimburse the displaced LPFM station for actual and anticipated losses in underwriting amounts as a result of the frequency change. LPFMs are non-commercial entities, and underwriting amounts are applied directly to operating expenses and in improving the service these stations provide to their communities. These losses do not affect the private business interests of LPFMs, but rather the LPFM's ability to serve the public interest.²²

The cost of a full-power station paying the full expenses of an LPFM for the full-power station's undertaking a move-in is trivial when compared to the increased value to the full-power license holder of these move-ins. For instance, American Media Services, a leading practitioner of full power move-ins, boasts:

American Media Services is the premier provider of FM and AM coverage upgrades and move-ins to larger markets. AMS leads the country in successfully implementing station upgrades by moving them into larger markets, dramatically increasing their value. AMS has completed such projects for ABC Radio, Beasley, Clear Channel, Cumulus, Cox, Hubbard and others. Since its founding in 1997, AMS has increased the value of 21 stations across the country by \$205.1 million.... In addition, more than \$200 million in proposed rulemakings are currently pending before the Federal Communications Commis-

²¹ See *Superior, Wis.* 48 Fed. Reg. 11452 (1983) (noting that stations which lack the funds to develop and structure broadcast programs are unable to serve the public interest).

²² See *Circleville*, 8 FCC2d at 162 (citing *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940)) ("Economic injury is, of course, a relevant consideration only insofar as it affects the public interest rather than the private interest of the licensee").

sion.²³

In fact, many full-power stations have offered to fully compensate low power stations for all expenses related to the encroachment, if for no other reason than to hasten the completion of their project. However, some are choosing not to pay full expenses, and for this reason the Commission's rules and policies should reflect the appropriate level of support that full-power stations should offer to low power stations.

Prometheus, *et al.*, recognize that *reasonable* limitations on reimbursable costs are necessary. However, the Commission's limitations are much too restrictive for the reality that LPFM stations will have to encounter when dealing with a full-power station moving into its community. The Commission has already recognized that costs appropriate for reimbursement are not necessarily limited to the changes in the LPFM station's transmission system, and LPFM stations simply seek the same approach.

V. THE COMMISSION SHOULD ALSO ALLOCATE LPFM STATIONS PURSUANT TO THE CONTOUR-BASED METHODOLOGY.

The Commission has tentatively concluded to license LPFMs pursuant to a contour-based methodology used to license translators.²⁴ Prometheus, *et al.*, support this conclusion, especially considering that the nature of the remaining spectrum opportunities requires an additional licensing approach to the current distance separation licensing approach. While it is important to leave the distance separation allocations available for those that can take advantage of them, it is equitable to add the contour based method for those who have no other opportunity and are willing to make the

²³American Media Services, LLC, *Developmental Engineering*, available at <http://www.americanmediaservices.com/developmental>.

²⁴*Third Report and Order*, 22 FCCRcd at 21944.

investment and bear the risk. Thus, Prometheus, *et al.*, wholeheartedly agree with the Commission's tentative conclusion and welcome the use of this clearly superior method.²⁵

In allowing LPFMs to be licensed pursuant to a contour based method, it is important that LPFMs be held to the same standards and receive the same flexibility and considerations in the technical realm as translator operators receive. This includes allowing LPFMs to have the same opportunities as translators to make "zero population showings." Given the crowded nature of the spectrum at this point, there would be very few opportunities available to LPFMs if the full array of techniques were not allowed. LPFMs that choose this course will not be doing their own exhibits, but rather hiring engineers to make these applications, so it will be feasible for LPFMs to meet these standards.

LPFMs understand that with the flexibility and opportunity of contour based licensing, there also comes new obligations for those that use this method. While it is important to retain the distance separation allocation for those that can take advantage of them, the Commission would be making great strides in providing the option to use a contour based method for those who have no other opportunity and are willing to make the investment and bear the risk. The rules clearly carry risk for the new license holders, and LPFM advocates will help to educate potential applicants of the possible risks involved with a contour based application. For the record, Prometheus is fully supportive of the Commission's enforcement of the interference abatement rules in connection with those stations

²⁵Prometheus, *et al.*, would like to suggest that the Commission, in a future rulemaking, consider further improvements to the contour overlap method which will improve the accuracy with which the spectrum is allocated. For instance, the contour methodology does not take into account real terrain, but rather averages of radials. It may be advisable to allow a showing that the HAAT and radials results are distorted based on the ten kilometer distance, and a case should be able to be made for adjustments based on a wider or narrower view.

licensed pursuant to the contour method. However, Prometheus, *et al.*, recommend that to avoid confusion, stations licensed pursuant to the contour based method be referred to as local community FM radio (“LCFM”).

The Commission has also tentatively conclude that Section 73.807 of the Rules should be retained if a contour rule is adopted in this proceeding. That is, LPFM stations holding licenses issued pursuant to the current minimum distance rules would not be required to resolve actual interference complaints except in accordance with the provisions of Section 73.809 of the Rules. Prometheus, *et al.*, concur it is important to retain the existing regime of interference enforcement for stations licensed under minimum distance rules.

VI. THE COMMISSION MUST RESOLVE LPFM -TRANSLATOR PRIORITIES

The Commission has repeatedly expressed its commitment to localism and diversity,²⁶ and Prometheus, *et al.*, recognize the Commission has adopted measures to further these goals. Yet, to truly meet this mandate, the Commission must improve the LPFM service’s spectral priority with respect to translators. To do so, Prometheus, *et al.*, modify the proposal initially submitted by Prometheus on November 13, 2007.²⁷ The modified proposal would establish appropriate limits on the number of times a full-power station is repeated and the number of translator stations any one entity can own.

Specifically, no one entity, no matter where it is located, should be able to own more than ten translators with coverage in the top 303 Arbitron rated markets on a basis that is primary to an LPFM station that pledges to provide locally originated programming. Moreover, no originating station, no

²⁶See *e.g.*, *Third Report and Order*, 22 FCCRcd at 21932.

²⁷See *Letter of Prometheus Radio Project to Chairman Kevin Martin*, November 13, 2007.

matter where it is located, should be repeated more than ten times in the top 303 Arbitron rated markets on a basis that is primary to an LPFM station that pledges to provide locally originated programming.

Any translators owned, or repetitions of originating stations, above this national limit would be considered secondary to and subject to displacement by subsequently filed LPFM applications which pledge to provide regular locally produced programming. As discussed above, regular locally originated programming would amount to 56 points per week of locally produced programming for station within the top 303 Arbitron markets. Stations outside the 303 Arbitron defined radio markets would require 28 points per week of locally produced programming.

An additional matter that the Commission has not addressed, but deserves comment, is the conversion of translators to LPFMs and *vice versa*. Prometheus, *et al.*, believe that it may serve the public interest to allow for the sale of and conversion of translator licenses to LPFMs. There is an open rulemaking which seeks comment on whether to allow translators to locally originate programming,²⁸ and a number of commenters have suggested allowing LPFMs and translators to readily convert from one to another. Prometheus, *et al.*, believe translators should be able to be converted to LPFMs, given the fact that many of the best spaces that should be available for LPFMs are already occupied by translators. However, LPFMs should not be able to convert to translators. LPFMs are licensed pursuant to certain regulatory preferences because of their pledge to provide locally originated programming, thus, groups that successfully move through the process of winning an LPFM allocation should not be able to sell or have their station turned into a translator.

²⁸*Amendment of Service and Eligibility Rules for FM Broadcast Translators*, 22 FCCRcd 15890 (2007).

Prometheus, *et al.*, recognize this proposal would allow some individuals who have speculated in translators to profit by their deeds. Nonetheless, allowing the sale of translator licenses to prospective LPFM operators will allow, in certain cases, the spectrum to be used for a greater public service. However, without the incentive of quick profits made at the expense of these prospective buyers seeking to provide an LPFM service, it is doubtful that many translator licensees would consider turning over the license to an LPFM operator.²⁹ This proposal is not an adequate substitute for the other measures Prometheus, *et al.*, have proposed for changing priority between LPFMs and translators. It is merely proposed as a potential supplement to the other suggestions proposed above.

VII. CONCLUSION

Prometheus, *et al.*, urge the Commission to promote and preserve a community's interest in receiving locally originated programming. To do so, the Commission should: (1) codify its displacement policies; (2) require full-power stations to provide technical and financial assistance; (3) allow LPFM stations to be licensed pursuant to a contour-based methodology; and (4) make adjustment to LPFM/FM translator priorities. These measures will enable the Commission to fulfill its statutory mandate to serve the public interest.

²⁹Perhaps some limitations preventing unjust enrichment may be helpful in allowing the option for underutilized translator operators to sell channels to groups seeking to convert them to an LPFM station.

Respectfully submitted,

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