Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY 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, CAMBRIDGE SPRINGS, PA
WCRS-LP, SIMPLY LIVING, COLUMBUS, OH
WRYR-LP, WRYR COMMUNITY RADIO, SHERWOOD, MD
WXBH-LP, LOUISVILLE COMMUNITY RADIO, LOUISVILLE, KY
KPCN-LP, PINEROS Y CAMPESINOS UNIDOS DEL NOROESTE, WOODBURN, OR
MULTICULTURAL ASSOCIATION OF SOUTHERN OREGON, KSKQ COMMUNITY RADIO
WIDE-LP MADISON, WI
FOREST HILLS SCHOOL DISTRICT, CINCINNATI, OH
KKDS-LP, BLUE OX YOUTH AND COMMUNITY RADIO, EUREKA, CA

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SUMMARY

In the Commission's *Second Further Notice,* the Commission has proposed reasoned steps to protect and promote community organizations broadcasting and wishing to broadcast over LPFM stations. Like Prometheus, *et al.*, many of the comments submitted recognize that the public interest is best served when a local community can accommodate the interests of both the LPFM station and the full-power station. Despite the criticism of the incumbent broadcasters, the Commission's proposed rules are an appropriate and legitimate balance of these interests.

The Commission's proposed waivers and translator limitations are an effort to serve the public interest by providing communities with their own broadcast voice, and whenever possible, providing a community with both an LPFM and full-power service. The Commission's proposed rules seek to preserve the viability and promote the growth of the low-power radio service with minimal inconvenience to full-power operators. Yet, many incumbent broadcasters proclaim these proposals to be an injustice to themselves, with little or no regard to what will best serve the public interest.

The Commission's proposed waiver rule is an appropriate measure taken to address the very real problem of LPFM operators threatened by encroachment. These waivers seek to accommodate all parties and are consistent with the Commission's authority. Additionally, the Commission's proposals to protect LPFM stations effectively promote the public interest. The Commission is also appropriately re-considering the priority between LPFMs and translators as a means to foster the LPFM service and afford communities the opportunity to obtain their own broadcast outlet for self-expression.

The Commission's proposed rules recognize the importance of locally originated programming, and the rules seek to carefully and thoughtfully incorporate locally originated service into the radio

landscape. In an era of massive consolidation and cookie-cutter programming, it is appropriate for the Commission to maintain a preference towards locally originated programming. To do otherwise would be a disservice to local communities.

Accordingly, Prometheus, *et al.*, fully support adoption of the proposed rules. These rules are necessary for the preservation and growth of the LPFM service. More importantly, the proposed rules would help to ensure that communities are provided with a broadcast service that caters to the communities needs and interests.

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Prometheus Radio Project ("Prometheus"), *et al.*, respectfully submit these reply comments in response to the comments filed pursuant to the Commission's *Second Further Notice of Proposed Rulemaking* in *Creation of a Low Power Radio Service* ("*Second FNPRM*"). These Reply Comments address arguments that question: (1) the Commission's authority to adopt its proposed rules; (2) the necessity to adopt the rules and whether they would be in the public interest; and (3) the vitality of the LPFM service. Prometheus, *et al.*, also provides comments on other proposals submitted in the record.

I. INTRODUCTION

Many diverse commenters support all or most of the Commission's attempts in the *Second FNPRM* to protect and promote the LPFM service. *See, e.g.*, Comments of Christian Community Broadcasters ("CCB"); Comments of Stephen Gajdosik (President of Catholic Radio Association ("CRA")); Comments of WIUX-LP, Bloomington, IN; Comments of Wade Brown (Director of Broadcasting Services, Pepperdine University); Comments of KZQX-LP; and Comments of St.

Michael Radio, Inc. These commenters recognize the role that LPFMs play in local communities, often times providing localized service that full-power stations do not. These commenters also recognize the preclusive impact translators could have on the development of the LPFM service. *See, e.g.,* Comments of CCB; Comments of Stephen Gajdosik; Comments of National Translator Association ("NTA"); Comments of KZQX-LP; and Comments of St. Michael Radio, Inc. Like Prometheus, *et al.*, these commenters recognize that the public interest is best served when a local community can accommodate both the LPFM and full-power station and when a local community has the opportunity to obtain an LPFM license.

Nonetheless, rather than recognize the Commission's proposed rules as a means to serve the public interest by providing communities with their own broadcast voice for local expression, and in many cases, providing a community with both a full-power and low-power service, some full-power broadcasters, instead, proclaim an injustice to themselves. Instead of looking out for the public interest, these broadcasters appear to be looking out for their own self-interest. As a result, much of their comments regarding the waiver rules focus on the alleged inability of full-power stations to move into a new community or the inability of an entity to secure a new full-power station. Others, most of which own a large number of translators, assume the better use of the FM band is to allow a single distant station to be repeated an overwhelming number of times, rather than allow for a community to apply for its own local outlet for expression. However, the Commission's proposals, combined with the additional measures in comments by low power advocates, provide a far more appropriate means for serving the public interest.

II. THE COMMISSION'S ACTION IS CONSISTENT WITH ADMINISTRATIVE, STATUTORY, AND CONSTITUTIONAL AUTHORITY

Some parties state that the Commission cannot adopt the proposed rules because it would allegedly be a drastic change in Commission policy, and it can only do so with a detailed and reasoned analysis. *See, e.g.,* Comments of Cox Radio, Inc. ("Cox") at 5; Comments of America Media Services, LLC ("AMS") at 6; and Comments of National Public Radio ("NPR") at 5-6. These parties suggest the Commission has not provided sufficient justification for seeking to codify the waiver policies. *See, e.g.,* Comments of Cox at 6; Comments of AMS at 6; and Comments of NPR at 5-6.

Some parties suggest that Congress has prohibited the Commission from adopting the waiver standards, *see, e.g.,* Comments of NAB at 6; Comments of Cox at 8; and Comments of AMS at 7-8, and the Commission's interpretation of Congress's statutory language is absurd. *See, e.g.,* Comments of NAB at 10 and Comments of Cox at 8. Some commenters also raise constitutional concerns regarding a reliance on local origination to determine priority. *See, e.g.,* Comments of AMS at 4 and Comments of Educational Media Foundation ("EMF") at 15. None of these arguments have any merit.

A. The Commission's Proposed Waivers Are Not a Departure From Commission Policy.

Despite the contentions of some commenters, the proposed second-adjacent channel waiver does not depart from the Commission's previous policy. The Commission's proposal regarding the second-channel adjacent waiver is not a new consideration, a complete change in policy, or a repudiation of previous observations. In fact, initially, the Commission noted that it expected very little interference on the second-adjacent channel. *See* Notice of Proposed Rulemaking, *Creation of*

a Low Power Radio Service (*"LPFM NPRM")*, 14 FCC Rcd 2471, 248-90 (1999).[1] Also, the Commission noted previously that "the public interest may favor continued LPFM second-...adjacent channel operations over a subsequently authorized upgrade or new full-service station." Third Report and Order, *Creation of a Low Power Radio Service* (*"Third Report and Order")*, 22 FCCRcd 21912, 21936, n.155, *citing* Further Notice of Proposed Rulemaking, *Creation of a Low Power Radio Service,* 20 FCCRcd 6763, 6780 (2005). Thus, the Commission has previously sought comment on this issue, and in light of the recent circumstances discussed below,[2] seeks further comment with respecting to adopting the second-adjacent channel waiver. Moreover, the Commission's proposal reflects a procedure already consented to by "in the field" full-power stations. *See Letter to John Snyder from Peter H. Doyle, Chief, Audio Division, Media Bureau*, 21 FCCRcd 11945 (2006) (where KEWU-FM and KHQ-TV both agreed to a short-spaced waiver for KYRS-LP to continue operating on a different channel, provided actual interference complaints were resolved).[3]

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[1]Indeed, as the Mitre Report eventually corroborated, the Commission had also determined that there would be essentially no interference on third-adjacent channels. *LPFM NPRM*, 14 FCC Rcd at 2488-89.

[2]*See infra,* Section IIB.

[3]Codification of the waiver is especially critical when a full-power station is uncooperative and needlessly obstructs the resolution of the technical issue. For example, in the case of KYRS, which was threatened with encroachment, the Commission advised KYRS that a waiver of the second-adjacent channel restriction would be granted so long as KYRS provided a letter from the potentially affected second-adjacent station acknowledging the minimal chances of actual interference. Unfortunately, the first station that was approached, a Clear Channel affiliate, refused to give a letter of support despite an extensive engineering showing that there was no possible second-adjacent channel interference (the KYRS tower happens to be in a very rural area with no population near by). The proposal to locate on the second-adjacent channel to the Clear Channel affiliate was a much simpler and more straightforward engineering solution than the one which was ultimately adopted. The proposal ultimately adopted was successful because of the cooperation of a television station and public radio station on both sides of the new KYRS frequency. In light of situations like this, it is inappropriate to give incumbent stations voluntary discretion over the most efficient and appropriate

Furthermore, the Commission's proposed priority waiver is not a complete departure from the Commission's priority rules. The Commission's proposal does not grant the LPFM service priority (or *de facto* priority) over the full-power service. What also has not changed is that the decision on whether to grant an application is made pursuant to the public interest standard. Thus, while maintaining the priority rules, the Commission 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 of license, and no suitable channel can be found for the affected LPFM) to ensure that the public interest is best served.[4] 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 *Third Report and Order* warns LPFM stations, "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...would not serve the public interest." 22 FCCRcd at 21941. 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 Commission

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use of the spectrum. While the Commission's proposal allows the full-power station an opportunity to dispute the engineering findings, it prevents a full-power station from unilaterally refusing the technical amendment without good reason.

[4]As discussed in more detail in Section IIIA, the presumption is also consistent with a Section 307(b) analysis.

can grant a waiver of the rule, which is much different than overhauling the priority between LPFMs and full-power stations. In fact, generally, nothing prevents the Commission from exercising its authority to grant waivers of a rule if it serves the public interest.[5]

Finally, Prometheus, *et al.*, do not recommend that LPFM stations receive priority status over full-power stations at any time, in any circumstance. For instance, Prometheus, *et al.*, do not seek, as NPR suggests, that LPFMs be granted priority over full-power "repeater" stations, which rebroadcast the signal of another stations. *See, e.g.,* Comments of NPR at 14.[6]

B. The Commission Is Free to Modify its Rules and Policies.

Not only are the Commission's proposed rules consistent with its prior policies and observations, but the Commission 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 Commission "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 an agency 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 Commission may implement the waiver standard based on a determination as to whether the guideline will serve the public interest.

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[5]*See, infra,* Section IIIA.

[6]However, Prometheus, *et al.*, do believe that the Commission must be more judicious in granting main studio waivers and establish a stricter standard for qualifying for such waivers. That issue is not related to this proceeding and does not affect the priority status between LPFMs and full-power stations.

See Washington Association for Television and Children v. FCC, 665 F.2d 1264, 1268 (D.C. Cir. 1981). In the *Third Report and Order*, the Commission explicitly demonstrates a reasoned basis for proposing the waiver standards.

In the *Third Report and Order*, the Commission addresses a number of "unique obstacles" that have faced the LPFM service since its creation. 22 FCCRcd at 21917. Among these are the "significant preclusive impact of the 2003 Auction No. 83 translator filing window," *id*. at 21929, the dismissal of a number of proposed facilities as a result of the spacing requirements imposed by the Radio Broadcast Preservation Act, *id*. at 21915, and the January 2007 adoption of a streamlined licensing procedure for community of license modification proposals. *Id*. at 21938. Moreover, the Commission relies on its own analysis, incorporating the Commission's own findings, along with studies by REC Network and numerous other commenters. *See, e.g., Third Report and Order*, 22 FCCRcd at 21936-37. In acknowledging the threats that LPFMs face and in an effort to protect the LPFM service, the Commission seeks comment on proposals that will help to protect the LPFM service. The proposals set forth by the Commission in the *Second FNPRM* are reasoned responses to these unique obstacles and the record before the Commission, and well within the "ample latitude" standard set forth by the Supreme Court.[7]

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[7]It erroneous for any party to rely on *ACT v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987) as precedent for the Commission's supposed failure to state a reasoned basis for its proposals in the *Second FNPRM*. In *ACT*, the change in policy was found to be unsubstantiated because the Commission supplied just "two sentences (and two moderately pertinent footnotes), explaining in the most cursory fashion" the rationale for altering its policy. In fact, the D.C. Circuit has declined to follow *ACT* when "the FCC has adequately articulated a ***reasoned*** analysis based on studies and comments submitted during the rulemaking process," and "whether or not these conclusions reflect unassailable analysis on the part of the Commission." *Association of Public Safety Comm. Officials Int'l, Inc. v. FCC*, 76 F.3d 395, 400 (D.C.Cir. 1996) (emphasis in original). In the *Third Report and Order*, the extensive record and analysis, incorporating the Commission's own findings, along with studies by REC Networks and numerous comments, clearly distinguishes the present proposals from

Finally, the Commission has an obligation to maximize use of the spectrum and maximize service to the public. As a result, the Commission has based its rationale for the proposed rules on public service and localism, which is an appropriate reason to adopt the proposals. As Prometheus, *et al*., demonstrated in the initial comments, there is increasing evidence that the current implementation of Section 307(b) is a perversion of its intention of providing reasonable distribution of broadcast services between rural and urban areas. The notion that full-power stations provide greater public service merely because they are bigger simply does not support the facts on the ground, and the proposed rules seek to ensure that communities are in fact being served by broadcasters.

C. The Radio Broadcast Preservation Act Does Not Prevent Commission Action.

The Commission's proposal for a second-adjacent channel waiver is also consistent with the Radio Broadcast Preservation Act. Section 632(a)(1)(A) requires the Commission to "prescribe minimum 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). Despite some parties' interpretation, this language does not prevent the Commission from adopting a waiver standard for the second-adjacent channel (or the co-channel and first-adjacent channel).

When considering the context of the entire rulemaking, Congress' inclusion of the "as well as" language merely reflects Congress' knowledge that the Commission had initially adopted restrictions only for the co-channel and first- and second-adjacent channels. Congress was simply directing the Commission to include the third-adjacent channel in that group. Congress then directed the Commission from taking any action from eliminating or reducing the third-adjacent channel

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that discussed in *ACT*.

protections required. While Congress could have done so, it did not impose a similar prohibition with respect to second-adjacent channel separation requirements. In light of Congress's 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). Thus, Section 632 bars the Commission only from granting waivers to allow LPFMs to operate on a third-adjacent channel. Indeed, 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).

In fact, the Commission has always interpreted the statutory language in this manner. In its *Second Report and Order*, after five years of experience with the LPFM service, the Commission asked for further comment on this same issue: the Commission asked "would an amendment to Section 73.809 be consistent with Congress's directive barring the reduction of third-adjacent channel distance separations for" LPFMs. 20 FCCRcd. at 6781. In other words, the Commission did not view the statutory language as preventing changes to the allocation policies in other channel relationships.

Moreover, the commenters' proposed interpretation of Section 632 implies that, by enacting Section 632, Congress effectively froze the Commission'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 Commission, the D.C. Court of Appeals has found that "in the absence of any indication by Congress" that the statute locked a particular interpretation in place or froze the Commission's discretion, the Commission is free to rely on its own interpretation. *Office of Communication, Inc. of the United Church of Christ, et al.* v. FCC, 327 F.3d 1222, 1225 (D.C. Cir. 2003). Finally, several courts have found that to freeze agency discretion or interpretation, Congress must clearly indicate its intention to do so. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, et al.*, 457 U.S. 834, 843 (1984) (citing *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 Commission's discretion. Rather, the statute specifically recognizes the value of the Commission's interpretation, since it requires an analysis and recommendation from the Commission. *See* Pub. L. No. 106-553, §632(b). By requiring testing and recommendations from the Commission, 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 Commission's recommendation to eliminate minimum distance separations.

Even the legislative history recognizes the Commission'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 Federal Communications Commission 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 Commission act to serve the public interest. Here, the Commission's proposals do exactly that; they seek to ensure that local communities are provided with service that meets the community's needs.

Finally, the statutory language did not take away the Commission's authority to issue waivers. The Commission 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 Commission 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*,

932 F.2d 189, 192 (D.C. Cir. 1987). In fact, the Commission has already granted similar waivers under the "good cause" standard. *See, e.g,, Letter to John Snyder from Peter H. Doyle, Chief, Audio Division, Media Bureau,* 21 FCCRcd 11,945 (2006). The Commission's proposed rules effectively reflect the "good cause" standard.

D. The Commission's Action is Constitutional.

Some parties urge that the rebuttable presumption or priority criteria between LPFMs and translators based on a local origination requirement is a violation of the First Amendment because it mandates certain types of programming. *See, e.g.,* Comments of EMF at 12. Some parties also claim that this preference for local origination is not logical. *See, e.g.,* Comments of NAB at 30-31 and Comments of AMS at 3-5.[8]

The Commission is entitled to require programming that serves the public interest, thus, a broadcaster's freedom in programming decisions is not absolute. Indeed, the Commission has previously mandated certain times and types of programming, which the Courts have found to be consistent with the First Amendment. For instance, the Commission's prime time access rules ("PTAR") limited to three hours the amount of network programming that local television stations owned by or affiliated with a network may air during the evening prime time hours and returned one-half hour of programming to affiliates. However, feature films, news and public affairs, and family programs qualified as exemptions from the rule, thus the Commission clearly favored certain types of programming. Despite First Amendment challenges, the PTAR were upheld on First Amendment grounds. *See NAITPD v. FCC,* 516 F.2d 526 (2nd Cir. 1975); *Mt. Mansfield Television, Inc. v. FCC,*

[8]AMS also believes that the presumption is a violation of a full-power broadcaster's due process rights. Prometheus, *et al.,* explain fully in their initial comments that the presumption is not a violation of a full-power broadcaster's due process rights.

442 F.2d 470 (2nd Cir. 1970). The Court in *NAITPD v. FCC* observed that "[f]ree speech in [broadcasting] is a balance between encouragement of access to the medium and the prevention of non-access to the medium." 516 F.2d at 533. Similarly, a local origination preference is a means to balance access to the limited amounts of available spectrum.

Further, it is well within the Commission's authority to favor locally originated programming as a means to promote localism.[9] The Commission is the agency charged with granting broadcast licenses when the grant is in the public interest and can establish what is in the public interest. In the Commission's seminal *Enbanc Programming Inquiry*, the Commission 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, *Enbanc Programming Inquiry*, 44 FCC Rep. 2303, 2311 (1960). Thus, the Commission 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 Commission's local origination requirement ensures the broadcaster is acting in the public interest without resorting to management of day-to-day programming decisions. *See*,

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[9]The Commission'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, et al. v. FCC*, 373 F.3d 372 (2004), *stay modified on rehearing*, No. 03-3388 (3d Cir. Sep. 3, 2004), *cert. denied*, 73 U.S.L.W. 3466 (U.S. June 13, 2005) (Nos. 04-1020, 04-1033, 04-1045, 04-1868 and 04-1177). In recent years, the Commission has strengthened its commitment to localism in a number of ways. For example, the Commission sought to increase localism in broadcasting by establishing community advisory boards to assist broadcasters in "determining matters of local interest for broadcast." *Report on Broadcast Localism and Notice of Proposed Rulemaking*, 23 FCC Rcd.1324 (2008).

e.g., *Policies and Rules Concerning Children's Television Programming*, 11 FCCRcd 10660 (1996) (requiring broadcasters to serve the educational needs of children). The Commission's preference for local origination does not seek to mandate any type of programming. Indeed, the Commission 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 Commission has the authority to "inquire of licensees what they have done to determine the needs of the community they propose to serve.").

In recognizing the importance of local origination, the goal of LPFM service was to "create a class of radio stations designed to serve very localized communities or underrepresented groups within communities." *Report and Order*, *Creation of Low Power Radio Service*, 15 FCCRcd 2205, 2208, (2000). LPFM stations serve small neighborhoods, isolated rural areas, or possibly small subsets of urban cities themselves. To this end, locally originated programming can serve the needs of these distinct communities. Even the legislative history of the Radio Broadcast Preservation Act recognizes that while many New Jersey residents have dozens of stations serving New York City or Philadelphia, they have no outlet for local news, traffic, or school closings. 146 Cong. Rec. H 2304-05 (Apr. 13, 2000). Locally originated programming could serve these goals.

The conclusion that locally produced programming is more responsive to local needs is "consistent with reality" and has been confirmed by recent studies. For instance, the Government Accountability Office concluded "media outlets located in a market are more likely to provide local news, public affairs, and political programming addressing the needs of residents in that market, such as coverage of local political campaigns, compared to nationwide and adjacent markets." *Government Accountability Office, Report to the Chairman, Subcommittee on Telecommunications and the*

Internet, Committee on Energy and Commerce, House of Representatives, Media Ownership, Economic Factors Influence the Number of Media Outlets in Local Markets, While Ownership by Minorities and Women Appears Limited and is Difficult to Assess (March, 2008). Thus, there is no reason to conclude that a local origination preference is somehow unconstitutional or illogical.

III. COMMISSION ACTION IS NECESSARY AND IN THE PUBLIC INTEREST

Some parties suggest that the Commission's effort to protect the LPFM service by adopting waivers is not necessary to promote the public interest or an efficient use of the spectrum, and Section 307(b) prevents the Commission from adopting the waivers allowing LPFM stations to remain on the air. *See, e.g.,* Comments of NAB at 13 and Comments of AMS at 2-4. These parties also argue that a codification of the waivers will result in greater interference. *See, e.g.,* Comments of NAB at 10. Other parties believe that action is not necessary because there has not been a massive displacement of LPFM stations. *See, e.g.,* Comments of NAB at 12.

A. The Rebuttable Presumption Waiver is consistent with Section 307(b).

Some parties contend that a waiver of the Commission's priority rules is inconsistent with the public interest and Section 307(b) because it would be an inefficient use of the spectrum. 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 Commission 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."

Generally, the Commission's public interest analysis pursuant to Section 307(b) focuses on 4 separate priorities:

(1) First full-time aural reception service;
(2) Second full-time aural reception service;
(3) First local transmission service; and
(4) Additional services.

In re: Applications of Richard and Faye Tuck, Inc., 3 FCC Rcd 5374, 5376 (Aug. 24, 1988). The second and third priorities are given equal weight. *Id.* The fourth priority, which has been held to include other public interest factors, "encompasses any other factors that the Commission may take into consideration." *In re Quorum Radio Partners of Va., Inc.*, 23 FCC Rcd 857, 860 (2008). In light of these factors, the proposed rebuttable presumption is consistent with the goals of Section 307(b).

In the majority of instances, a change in community of license (or new license) is not being sought to provide a community with first or second full-time aural reception service. Prometheus, *et al*., has demonstrated already in initial comments that the large majority of community of license changes is based on first local transmission service. The Commission has not articulated a well-defined standard for what the Commission considers "first local transmission service." Thus, in a case of encroachment, it could very well be that the LPFM station is already providing that community of license with its first local transmission service.

Moreover, pursuant to the fourth factor, the Commission can consider whether the encroaching station will provide locally originated programming to determine whether, pursuant to Section 307(b), the community would benefit from the full-power service. While there currently may not be any express requirement that a station applying for a change in its community of license or a new license demonstrate that it provides such programming, in the case of an encroachment, the rebuttable presumption simply seeks for a full-power station to provide this information to ensure the public

interest is being served. To suggest that a requirement to serve the local community by providing local programming is somehow not fair, efficient, and equitable fails to recognize that Congress's decision to license frequencies to local communities was to ensure that each community was provided a broadcast outlet for local expression. The Commission's presumption assures that communities will not be stripped of a service that caters to the community.

B. The Commission's Action Will Not Lead to "Harmful" Interference.

Some parties are obsessed with the alleged interference the Commission's proposed second-adjacent channel waiver will supposedly allow. *See, e.g.*, Comments of NAB at 16. As has been the case throughout these proceedings, these parties claim interference only in an attempt to derail the LPFM service. However, these claims of interference are self-serving.

The Commission has often allowed full-power broadcasters to operate on second- and third-adjacent channels, despite very small amounts of interference. Full-power broadcasters regularly receive waivers on the basis of "zero population" in the area of predicted interference for translators that they are trying to place. Naturally, the NAB would prefer that only its own members are able to avail themselves of modern engineering tools to resolve technical situations. Yet, while the NAB complains bitterly about potential interference from the allocation of 100 watt stations on third-adjacent channels, NAB members have availed themselves of translators of up to 250 watts on second- and third-adjacent channels and made numerous "zero population" showings to win urban channels before low power stations would get an opportunity to apply. Moreover, in the noncommercial service, the Commission 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 FCC Rcd 2207 (1991).

This claim of interference is especially disingenuous since 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 Commission 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-Paced FM Stations* (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 Commission's action in allowing second-adjacent waivers for LPFMs that are encroached upon is not a broad reconfiguration of interference standards on the FM band. The current proceeding provides a standard for granting waivers, in an unusual circumstance, similar to the situation the NAB found itself in the grandfathered short-spaced proceeding. In fact, the universe described by the Commission in these waivers to date is a mere 40 stations, as opposed to the close to 312 grandfathered short space stations referenced in the grandfathered short-spaced proceeding.[10] Therefore, the Commission's proposed second-adjacent channel waivers would be used in a similar context that the NAB suggested allowing for waivers for grandfathered short-spaced stations - to create a net decrease in the interference - this time as the result of the full-power station's move.

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[10]Prometheus, *et al.*, supports extending this class to all stations facing loss of coverage due to a move-in.

Finally, NAB's contention that receiver testing shows that second-adjacent channel stations are, on average, more susceptible to interference than third-adjacent channel stations is wholly immaterial given that the Commission has already analyzed that study, in conjunction with several others. The susceptibility of stations to interference on a lab bench can help in setting the parameters by which to predict when interference can occur, but the lab result is meaningless by itself unless it is connected to predicted field strengths at varying distances from the transmitter site. If a certain signal strength can be predicted to cause interference up to a given distance from the transmitter site, and there are no receivers attempting to get service inside that distance, then the Commission can confidently license stations on any channel that they know will not cause harmful interference to listeners.[11]

C. Commission's Action Is Necessary and Will Not Harm Diversity.

Some parties believe that action is not necessary because there has not been a massive displacement of LPFM stations. *See, e.g.,* Comments of NAB at 12. Unless full-power broadcasters are making a commitment not to seek modifications that affect LPFMs, then this rationale is without merit. The Commission should not have to take measures to protect LPFMs from encroaching stations only when there has been a "massive" displacement. LPFMs play a unique role in the Commission's commitment to localism and the public interest, and the Commission must continue to take measures that ensure the public is being served.

Some parties suggest that the rebuttable presumption will harm diversity. *See, e.g.,* Comments of AMS at 8. The theory is that the presumption will somehow prevent minority owned stations from

[11]Indeed, the Commission has no physical reason to limit the licensing of LPFM stations on the third-adjacent channel, except for the statutory restriction imposed by Congress.

moving into a major metropolitan area, which hinders diversity. This theory completely misses the point of the importance in *increasing* diversity. The Commission recognized the LPFM service as a way to *increase* the diversity of voices. While changing a community of license may allow a minority-owned station to increase its revenue, it does not increase the overall ownership of minority owned-stations.

Moreover, although, on occasion, individual minority owners have been able to change their community of license to move their stations into urban markets, there is no evidence this is representative of the majority of owners seeking community of license changes or that there was not a minority population in the original community of license who was being served. Overall, the current implementation of community of license changes undermines the true purpose of Section 307(b) because it allows for rural to urban migration of stations. Rather, it is more likely that minority groups will benefit more by a fair allocation system for licenses that allows more new entrants to obtain low power licenses for free than by joining the industry practice of using engineering tricks to buy stations in rural communities and then take them out of the original community of license and move them to urban centers.

IV. FINANCIAL AND TECHNICAL ASSISTANCE SHOULD NOT BE MERELY VOLUNTARY.

Some parties have suggested that technical and financial assistance should only be voluntary. *See, e.g.*, Comments of NAB at 3 and Comments if NPR at 8. While in some cases full-power broadcasters have offered to assist the affected LPFM station, there will certainly be situations where the full-power station will refuse to provide any assistance. Mandating assistance will ensure that the LPFM station will be able to stay on the air and the local community will not lose its LPFM station.

Prometheus, *et al.*, oppose providing any incentives to full-power stations to assist LPFMs. The Commission has not provided any incentives to full-power stations displacing other full-power stations, and there is no legitimate policy reason to do so in the case of LPFMs.

V. CHANGING THE PRIORITY BETWEEN TRANSLATORS AND LPFM STATIONS

Some parties state the Commission cannot disrupt existing service, the public has an expectation that existing service will continue, and the Commission must find room for displaced stations. *See, e.g.,* Comments of EMF at 2. Some parties also allege that a local origination preference raises First Amendment concerns.[12] *See, e.g.,* Comments of EMF at 12.

Prometheus, *et al.*, has proposed a limit of 10 translators within coverage inside the top 303 Arbitron markets. There is no legitimate reason for any one entity to own more than 10 translators within these markets or for any one originating station to be repeated more than 10 times in these 303 markets. Anything more would seem to be an inefficient use of the spectrum and an inequitable distribution of the spectrum. Legitimate uses by a statewide network should be able to accomplish statewide network coverage through the use of 10 translator channels. Similarly, no single station should need to be re-broadcast more than 10 times. The public interest is not being service when the same programming is heard on many parts of the FM band or when the few frequencies reserved for local use are usurped by satellite distributed programming. It is well within the scope of the Commission's authority to set reasonable limits on the licensing of scarce available frequencies and to assure that there is the widest possible local distribution of these opportunities to broadcast.

Indeed, numerous other commenters acknowledge that some sort of re-prioritization is necessary. For example, the National Translator Association notes that "[i]f in a particular community

[12]The First Amendment argument has been addressed *infra*, Section ID.

there are no local radio voices an LPFM station might have a greater public benefit...." Comments of NTA at page 2 (unnumbered). CCB suggests that "[a]ll LPFMs should be given priority status over all "satellators"...." Comments of CCB at 2 (unnumbered). The Catholic Radio Association states:

> Respectfully, a little disruption of existing patterns would be very good for promoting localism and diversity after a period in which ownership consolidation in the commercial spectrum, as well as the extensive use of translators to build broadcasting empires in the noncommercial band, have only served to harm localism and diversity....It is highly unlikely that an entity has or even could have more than 10 translators providing service that could be considered local to the entity. Furthermore, breaking a daisy chain of translators to provide locally-originated programming, on balance, would serve the public interest.

Comments of Stephen Gajdosik at 4.[13] Thus, numerous parties recognize the important role LPFMs can play in a community and the need to provide communities with a chance to obtain an LPFM station.

EMF contends that a re-prioritization is somehow unfair because it would disrupt their service and investments have already been made. Comments of EMF at 4-5. However, entities acquiring translators knew they were secondary services when they made the initial investment and could have been taken off the air as a result of a full-power station. Prometheus, *et al.*, do agree with EMF that translators should be provided with flexibility for making changes to preserve service.

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[13]Prometheus, *et al.*, concur with Stephen Gajdosik and the Catholic Radio Association. Prometheus' initial proposal of 25 was submitted simply in the spirit of compromise. However, as the record shows, Prometheus, *et al.*, generally support the most stringent appropriate limit for the number of translators that can be owned and operated. Prometheus has recommended limits of ten in the past and would support a lower limit. These numbers were based upon a study of the pool of all translator applications.

VI. LPFM STATIONS PROVIDE EMERGENCY AND OTHER VALUABLE SERVICE

As a final attack on the LPFM service, some parties claim that LPFMs are not fit to provide emergency information. *See, e.g.*, Comments of NAB at 15; Comments of Cox at 3. Other parties tout the local broadcast and community service of broadcasters as a reason to discourage the adoption of the Commission's policies. *See, e.g.*, Comments of NAB at 19-33. These parties appear to be insinuating that LPFMs do not provide valuable service.

While it is wonderful that some broadcasters engage in community service, such as sitting on the boards of organizations or donating money to local organizations, these activities are irrelevant when it comes to the station's actual broadcast service. The fact is, stations are provided exclusive licenses to provide broadcast service to the local community, and their service must be judged on whether their broadcast service to meeting the needs of the local community.

Moreover, the notion that LPFMs cannot provide emergency service or that their service is not as relevant is baseless. Some examples of the valuable service provided by LPFM stations include:

> **WQRZ-LP**, Bay St. Louis, Mississippi: The story of Brice Phillips exemplifies the incredible resiliency of both individuals and LPFM radio during times of disaster. Phillips is a disabled broadcaster in Bay St. Louis, Mississippi, who started the LPFM station with the idea of establishing a broadcast service to provide emergency information to the community in the event of a disaster. Shortly before Hurricane Katrina made landfall, Phillips and his partner, Christine Stach, packed their equipment and relocated to higher ground, where they began transmitting information to the community. Using emergency generators and car batteries to power the station, Phillips continued to broadcast survival and rescue information throughout the storm, going off the air for only a few hours while he moved batteries and other equipment to higher elevation. Of the 41 broadcast stations throughout New Orleans and the Mississippi Gulf Coast, WQRZ was one of only four that survived the storm; it was also the only voice the Hancock County Emergency Operations Centercould use to direct survivors to relief supplies, food, water, ice, Red Cross, medical and rescue

sources. With the help of volunteers, WQRZ also stayed on the air through Hurricane Rita and its aftermath.

Radio HOPE and Radio Mercy, Radio HOPE was established thanks to the efforts of the Blessings for Obedience ministry after it determined that setting up an LPFM station in the disaster area would be an effective way to help relief and recovery coordination efforts. The ministry was able to secure 1,000 single-frequency, solar-powered radios for distribution, and was loaned a 250-watt FM transmitter for broadcasting. After receiving Special Temporary Authority from the FCC to transmit on the 107.9 frequency, the group set up operations on a ship that had been dispatched by Friendships Ministry to help relief efforts in New Orleans. With a broadcast radius of 15 miles, the station provided emergency information, news, messages from public officials, encouraging music, interviews with volunteers, and messages of hope. When Hurricane Rita hit a few weeks later, the ministry received another STA LPFM license to operate a second station from another ship, located in Lake Charles, Louisiana, which also provided relief information

WCTI-LP, In 2003, the farmworkers at the Coalition of Immokalee Workers built their own low power FM community radio station. While most local workers have little access to the Internet, newspapers, or television, Radio Consciencia gives Immokalee a voice and provides a community of diverse voices – families speak Spanish, as well as dozens of indigenous languages like Mam and Zapotec – with the information they need. Women's rights programs, youth public affairs, and lots of news and views from the local region to hometowns in Guatemala and Mexico make the station relevant to thousands. Because Radio Consciencia was the station of choice for thousands of farmworkers in 2005, they listened to WCTI-LP as Hurricane Wilma approached that summer

WKUF-LP, licensed to Kettering University. One deejay, Jack Frost2, broadcasts a popular local culture and hip-hop show every day, from 2-4 pm. Local prisoners living in the county jail often listen to his show, request music, and offer their support. One young woman came right to the station after being released from jail to thank Jack for the hope and support his local music show offered to her while she was preparing to re-enter society. WKUF-LP works closely with local musicians and artists, and has received incredible coverage of its work from local press and alternative weeklies.

WRFN-LP, in Pasquo, Tennessee, features a true diversity of community programs releavant to the diverse people of the greater Nashville area. From emergency preparedness information broadcast by Mike Bennett, AKA Deejay Dr. Future of "Future Quake", to the voices of students from two area high schools taking the microphone for the first time, WRFN represents thousands of Nashville residents with its 80+ volunteer programmers.

WBFC-LP, Boynton, Georgia's 103.7 FM, broadcasts Southern Gospel music and local Christian talk in a North Georgia community grateful for its local service. When the station first went on the air, it received dozens of calls from local listeners overjoyed to find Southern Gospel on their local airwaves. WBFC's Christian message was recently appreciated by local Republican Congressman and Telecommunications Subcommittee member Nathan Deal, who said he'd support protecting and expanding low power FM radio, and signed on to the Local Community Radio Act, which would all ow the FCC to grant thousands more low power FM radio licenses nationwide. WBFC-LP is under threat of encroachment from a Citicasters station in Walden, TN – WTRZ-FM.

KOCZ-LP in Opelousas, La., run by the civil-rights group Southern Development Foundation, has helped revive the area's famed Zydeco music scene by promoting local artists and provided a dedicated forum for community news. "If we did not have this type of media democracy, people would not have the opportunity to educate themselves and move themselves up," says John Freeman, one of the station's founders. "[Full-power media] only wanted to control what these people could hear. It was a disgrace."

KGGV-LP is licensed to the Guernville Community Church, and is designed to "bringing high quality music, news, and discussion to the lower Russian River area. Public interaction with KGGV, from simple call-in discussion or music request to full commitment to host a radio show is what this station is all about," according to their website. They feature shows for seniors, psychology and childrens' programming interviews around town, shows about life on the river mouth, legal education, and a variety of music, from classical to Hawaiian to cabaret.

VII. COMMENTS ON OTHER PROPOSALS

Prometheus, *et al.*, support the numerous suggestions regarding technical flexibility made by

various other commenters in this proceeding. However, Prometheus, *et al.*, do not support some of the proposals regarding the priority of LPFMs and translators.

1. Technical Flexibility

Prometheus, *et al.*, support REC Network's rule changes that would increased the technical flexibility for LPFMs to respond to proposed full-power station modifications. One such change is the elimination of intermediate frequency ("IF") protection requirements. IF channels are those channels that are 53 and 54 channels added or reduced (+/- 10.6 and 10.8 MHz) from the subject channel. Current rules in the FM translator service do not require translators to protect a full power station's IF channels if the translator is operating less than 100 watts ERP3. With these rules in place, the Commission has acknowledged that any interference caused by a translator to a full power station's IF channel is insignificant when the translator is operating at such low powers. The LPFM service should also be able to enjoy such an exception.

Another rule change concerns "Channel 200" (87.9 MHz), which could be used as a transition channel for LPFM stations, similar to Class-D (secondary) stations and translators retreating to this channel in the past. Prometheus, *et al.*, agree that especially following the conclusion of the DTV transition, there may be some displacement opportunities for operation on Channel 200 where such operation is currently permitted; this would give LPFM stations similar advantages as translators.

Prometheus, *et al.*, also support a rule change regarding FPFM downgrades from Class C to C0. In the case of a displacement, an LPFM station should be able to petition the Commission for an order to show cause. The order to show cause would be issued towards a Class-C FPFM facility if it operates at or below power level or height equivalent to a Class C0. This change could accommo-date the reallocation of the LPFM station.

Also in accordance with the comments made by REC Networks, Prometheus, *et al.*, believe that second-adjacent channel waivers should be extended to LPTV and Class A TV stations operating on Channel 6 when the LPFM station is proposing operation in the reserved band (Channels 201-220). The current rule substantially overprotects LPTV and Class A stations as the rule assumes that all such stations operate at maximum facilities. Prometheus, *et al.*, ask that LPFM stations be permitted to use a contour overlap model, including population waivers, and be able to protect LPTV and Class A stations based on their actual facilities.

Additionally, as REC Networks suggests, the Commission should consider eliminating the rules that require LPFM stations to protect translators on their second-adjacent channel. Currently, translators are not required to protect LPFM stations on their second-adjacent channels. This change help level the playing field between LPFM stations and translators.

Further, with the new contour overlap allowing flexible power levels, there is no longer a need for the LP-10 service. Prometheus, *et al.*, therefore support REC Network's proposal to eliminate the LP-10 service using a distance spacing model. There has not been an LP-10 filing window and based on studies over the years, the LP-10 distance spacing model will not achieve a significant number of new LPFM stations in urban areas when compared with similar facilities engineered with a contour based model and variable power levels (including under 10 watts). This will also eliminate various rules where LP-10 stations are sub-secondary to LP-100 stations. The stations operating pursuant to a contour-based method should not be in any way considered sub-secondary to LP-100 distance spacing model stations and to translators, as the current LP-10 rules are written.

One difference that Prometheus, *et al.*, have with the REC Network proposal is that the power levels for LCFM stations (a name Prometheus, *et al.*, have recommended for low power stations

allocated with the rights and responsibilities of translators) should not be higher than the 250 watts if contour protections allow, whereas REC proposes limiting power under all circumstances to 100 watts. While there is some support for higher-powered LPFM stations even above 250 watts, especially those in rural areas, this proceeding would not be the appropriate place to address this.[14]

Finally, Prometheus, *et al.*, also support KZQX's recommendation to extend to remaining class D educational stations whatever new options and or/ protections are established, or alternatively, allow and invite Class D educational stations to convert to LPFM status if they chose. This conversion should be a minor change and could be an addition to the rule on Class D non-commercial educational conversion. Section 73.512 of the Commission's rules could be amended to include the criteria for conversion to a LPFM or LCFM.

2. Priority between LPFMs and translators

Prometheus, *et al.*, do not support Public Radio Regional Organization's ("PRRO") suggestions that any limitation on translator repetitions must specify that it does not apply to non-co-owned translators. A cap on translator repetitions must include non-co-owned translators. The point of a cap on repetitions is to prevent empire builders from forming a string of shell companies to circumvent the ownership rules. These two rules working in tandem allow for ownership and repetition of signals where appropriate, but combine to prevent empire building through both direct ownership and through straw entities.

Prometheus, *et al.*, also do not support PRRO's suggestion that the implementation of any limitation can not fairly be applied retroactively, and thus the Commission must grandfather in pre-existing FM translator stations. However, as discussed above, translators are already aware they

[14]Prometheus, *et al.*, supports the idea that LPFMs should be able to convert into LCFMs.

are a secondary, so are already subject to displacement by stations deemed to do greater public service. Nonetheless, if the Commission were to grandfather existing translators, it should not grandfather applications or construction permits, only fully licensed facilities. Additionally, if the Commission does not subject existing translator licensees to these limitations, then the Commission must lower the cap proposed by Prometheus, *et al.*, such as allowing 3 translators in the top 303 markets to be designated as primary to subsequently filed LPFM stations.

VIII. CONCLUSION

Prometheus, *et al.*, urge the Commission to preserve community voices on the FM band and promote localism and diversity. To that end, Prometheus, *et al.*, urge the Commission to adopt the proposed displacement and priority rules, which will serve to enhance the experience of FM listeners. The rules proposed by the Commission and Prometheus, *et al.*, are both fair and appropriate, and will continue to promote the viability of both LPFM and full-service operators alike.

Respectfully submitted,

/s/

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