

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

THIRD REPORT AND ORDER AND
SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

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IV. SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

72. Today, the Commission adopts a series of wide-ranging rule

a. changes to strengthen and promote the long-term viability of the LPFM service, and the localism and diversity goals that this service is intended to advance. We also recommend to Congress that it

b. remove the requirement that LPFM stations protect full-power stations operating on third adjacent channels. We intend to resolve the following issues within six months. The next filing window for a non-tabled aural broadcast service will be for new LPFM stations. We plan to open this window after the Commission has resolved the issues raised in this *Second Further Notice*, and has resolved other issues that could significantly impact the availability of future spectrum for LPFM applicants, including the disposal of substantially all of the applications filed in the recent NCE FM window.

73. Based on numerous meetings with LPFM service proponents, filings, and presentations at various forums and hearings convened by the Commission over the past two years, we believe that it is appropriate to

a. consider whether additional LPFM service and technical rule changes are warranted. We seek comment on the several issues set forth below.

A. Section 73.807 Second-Adjacent Channel Waiver Standard

74. *Third Report and Order* details an interim processing policy that the Commission will use to consider Section 73.807 of the Rules waiver requests from certain LPFM stations. As set forth more fully therein, when implementation of a full-service station community of license modification would result in an increase in interference caused to the LPFM station or its displacement, the LPFM station may seek a

a. second-adjacent channel short spacing waiver in connection with an application proposing operations on a new channel. We seek comment generally on

b. whether to codify the waiver and processing policies set forth in the *Third Report and Order*;

c. Would modifications to these policies better balance the interests of LPFM and full-service stations?

- d. Should the procedures be narrowed to apply only when the LPFM station is subject to displacement pursuant to Section 73.809 of the Rules?
- e. Should the Rules provide a deadline for the filing of the LPFM alternate channel application and waiver request and, if so,
- f. what should the deadline be?
- g. Should waivers be limited to second-adjacent channel short-spacings?¹
- h. Should waivers be granted only when the LPFM station can demonstrate no actual interference due to lack of population, terrain, or other factors, as we allow in the FM translator service?²
- i. Should continued LPFM operations be subject to the resolution of all *bona fide* actual interference complaints?
- j. Should the “encroaching” full-service station be responsible for providing technical assistance and assuming financial responsibility for all direct expenses associated with resolving all *bona fide* actual interference complaints, e.g., the purchase of radio filters, etc.?
- k. Do the orders to show cause procedures fully protect impacted stations’ due process rights?
- l. Would additional procedures help ensure that the Commission has a full record on which to evaluate waiver requests?
- m. Should these procedures be expanded to include co- and first-adjacent channel situations? Finally, we seek comment on
- n. whether rule changes are warranted to provide additional flexibility to propose LPFM station modifications.

B. Station Displacement

75. As detailed more fully in the *Third Report and Order*, the Commission is adopting a processing policy to evaluate on a going forward basis each community of license modification proposal that would result in the displacement of an LPFM station or stations.

- a. We seek comment generally on whether the Commission should amend Section 73.809 of the Rules to establish a licensing presumption that would protect certain operating LPFM stations from subsequently proposed community of license modifications. We also seek comment on each aspect of the current processing policy. Specifically,
- b. should the presumption be limited to those LPFM stations that have regularly provided eight hours of locally originated programming daily?

¹ Third-adjacent channel waiver short-spacings appear to be explicitly barred under the 2001 DC Appropriations Act.

² See 47 C.F.R. § 74.1204(d).

c. What criteria should the Commission use to determine whether an LPFM station has “regularly” satisfied the eight-hour programming requirement?

d. Should the presumption be extended to protect LPFM stations against subsequently filed petitions for rulemaking for new FM allotments and/or modification applications not proposing community of license changes? Finally, we seek comment on

e. other approaches to resolve LPFM station displacement conflicts and the reasons why such alternative approaches would more appropriately balance the interests of these services.

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

76. Currently,

a. a full-service station applicant has no obligation to assist an LPFM station potentially impacted by implementation of its new station or modification proposal. We believe that this policy is inconsistent with the comity and respect to which LPFM stations are entitled and with certain reimbursement policies which the Commission has established for full-service stations which are involuntarily required to change channels.³ As proposed in part by the Station Resource Group,⁴ we tentatively conclude that an applicant for a new or modified station should be required to assume certain technical, financial, and notice obligations if implementation of the proposal could impact an LPFM station. Specifically we tentatively conclude that in these circumstances,

b. the full-service station should be required to provide notice of its application filing to the LPFM station. As part of its application filing, the

c. full-service station should be required to include the results of its search for an alternate LPFM channel. It should also be

d. required to cooperate in good faith with the LPFM station in developing the best technical approach, including a possible LPFM site relocation, to ameliorate the interference and/or displacement impact of its proposal. In addition, the

e. encroaching” full-service station should be responsible for certain expenses relating to any LPFM station channel change and/or transmitter site change necessitated by the full-service station proposal. We tentatively conclude

f. such expenses should be limited to the physical changes in the LPFM station’s transmission system. We seek comment on each of these tentative conclusions and on

g. other measures to ensure the equitable treatment of LPFM stations.

77. We believe that these procedures should apply if the LPFM authorization was issued or a pending LPFM facility application was filed prior to the filing of a full-service station application for construction permit or license, including one that proposes a community of license modification. We tentatively conclude that

³ See *Circleville, OH*, Second Report and Order, 8 FCC 2d 159 (1967); *Harold A. Jahnke*, 46 RR 2d 659 (1979).

⁴ See Station Resource Group Reply Comments at 5.

a. these procedures should be limited to those situations in which implementation of the full-service proposal would result in the full-service and LPFM stations operating at less than the minimum distance separations set forth in Section 73.807 of the Rules and could result in either an increase in interference caused to the LPFM station or the permanent displacement of the LPFM station. We seek

b. comment on these proposed limitations on the scope and extent of these remedial procedures.

D. Contour Protection-Based Licensing Standards for LPFM Stations

78. An LPFM new station or modification application must protect all existing stations and prior filed applications on the basis of distance separations set forth in Section 73.807 of the Rules.⁵ This methodology, used in connection with virtually all FM non-reserved band full-service station licensing, provides a straight-forward standard for determining technical acceptability. As a result of this methodology's simplicity, the Commission was able to provide an on-line "channel finder" utility prior to the first series of LPFM filing windows. This tool enabled unsophisticated potential applicants to identify without expense available FM spectrum in their local communities.

79. Prometheus and other LPFM advocates argue that the

a. Commission should adopt a more flexible "contour" methodology for the licensing of LPFM stations.⁶ Although full-service NCE FM stations are licensed pursuant to a contour methodology,⁷ it appears that these parties are urging the Commission to

b. permit LPFM station licensing pursuant to the FM translator protection rule, Section 74.1204 of the Rules. As demonstrated by the filing of over 13,000 applications in the 2003 window for new non-reserved band FM translator construction permits, adoption of this standard would vastly expand LPFM licensing opportunities throughout the nation and create the possibility of locating new LPFM stations in a number of major and spectrum-congested markets.

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

a. Thus, modifying our Rules to permit LPFM applicants to "engineer in" new proposals on the basis of contour protection standards would result in new licensing opportunities. (May want to comment on this statement)

⁵ 47 C.F.R. § 73.807.

⁶ See, e.g., Prometheus Radio Project Letter to Chairman Kevin Martin (Nov. 13, 2007).

⁷ 47 C.F.R. § 73.509.

81..The two other factors are closely tied to the fact that FM translators are licensed on a secondary basis. As a secondary service, translators are licensed without regard to the extent of received interference they would receive.⁸ LPFM stations also receive the benefit of this flexibility.⁹ The fourth factor is the Section 74.1204(d) exception to the Section 74.1204(a) of the Rules contour methodology. Under paragraph (d) of that section, the general FM translator contour overlap provisions will not apply “if it can be demonstrated that no actual interference will occur due to intervening terrain, *lack of population* or such other factors as may be applicable.”¹⁰

a. For many years, the Commission has permitted FM translator applications to use the D/U signal strength ratio methodology to establish the area of predicted interference and to demonstrate the “lack of population” within this area to satisfy the requirements under Section 74.1204(d) of the Rules.¹¹ (May want to comment on “lack of population”)

82. However, the FM translator technical rules include a second and essential requirement: the

a. inflexible obligation to resolve all *bona fide* actual interference complaints pursuant to Section 74.1203(a) of the Rules. (May want to comment on this statement). A translator station that cannot resolve all complaints must suspend operations.¹² The two Rules operate in tandem. The flexibility of Section 74.1204(d) of the Rules is backstopped by the permanent Section 74.1203(a) secondary service obligation to resolve actual interference complaints.

83. We tentatively conclude that the licensing of LPFM stations pursuant to the standards of Section 74.1204 of the Rules or some other

a. “contour-based” methodology is in the public interest (may want to comment on this). We

b. tentatively conclude that an LPFM station licensed under this standard would be required to resolve all actual interference complaints or cease operations. We seek comment on this tentative conclusion. We also tentatively conclude

c. not to allow the use of alternative propagation methodologies, such as Longley Rice, to show lack of interference. These showings impose enormous staff processing burdens and are typically subject to opposition. Additionally, as demonstrated by the significant number of FM translator proposals submitted in the 2003 filing window, we believe that

⁸ NCE FM Class D stations, which operate on a secondary basis, are also licensed without regard to the extent of interference that the proposed facilities would receive. *See* 47 C.F.R. § 73.512(d).

⁹ The magnitude of “received interference” LPFM licensing flexibility with regard to authorized FM stations is the difference between the separations set forth in the rule “for no interference received from maximum class facility” and the lesser “required” separation. *See* 47 C.F.R. § 73.807(a).

¹⁰ 47 C.F.R. § 74.1204(d) (emphasis added).

¹¹ *See Living Way Ministries*, Memorandum Opinion and Order, 17 FCC Rcd 17054, 17055-60 (2002) *petitions for recon. pending*. The *Third Report and Order* does not reach a conclusion on the “co-

¹² 47 C.F.R. § 73.1203(b).

permitting D/U ratio showings to establish “lack of population” subject to interference provides ample licensing flexibility.

d. We seek comment specifically on whether it is appropriate to license LPFM stations to community groups, which often have limited resources and technical expertise, under a standard that subjects such stations to the constant risk of being forced off the air if they cannot resolve interference complaints promptly. We also

e. seek comment on whether it is appropriate to adopt an LPFM technical licensing regime that would require the use of consulting engineers. We tentatively conclude that Section 73.807 of the Rules should be retained if a “contour” rule is adopted in this proceeding. Stations holding licenses issued pursuant to the current Rule would not be required to resolve actual interference complaints except in accordance with the provisions of Section 73.809 of the Rules. We seek

f. comment on this approach which would provide differing levels of protection to operating LPFM stations based on each station’s choice of technical processing standards. (see above)

.E. LPFM – FM Translator Protection Priorities

84. The *Third Report and Order* does not reach a conclusion on the “co-equal” status between LPFM stations and FM translator stations. Under the Rules for these services, a first-filed LPFM or FM translator application must be protected by all subsequently filed LPFM and FM translator applications. Localism, diversity and competition remain our key radio broadcasting goals.

a. We find that it would be useful to develop a better record on whether and how these goals would be advanced by altering the priorities between these two services. We seek comment on this issue. In particular, we seek comment on

b. whether we should distinguish between translators that are fed by satellite and those that received and retransmit programming delivered terrestrially. We also seek comment on

c. the extent to which providing priority to LPFM stations could impact established listening patterns or disrupt established translator signal delivery systems that NCE broadcasters rely on extensively to disseminate programming. We also seek comment on the

d. Prometheus proposal to limit the number of translator stations that would have priority over subsequently applied for LPFM facilities.¹³ Prometheus

e. proposes to limit priority status to 25 translator stations for each originating station but would not consider “full power repeaters” as originating stations. We seek comment both on this proposed cap and Prometheus’

f. proposed definition of “originating station,” for the purpose of applying this cap. We also

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

g. seek comment on whether such an approach is administratively feasible given the fact that an FM translator may without prior consent or notice to the Commission change its primary station.

V. CONCLUSION

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