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

In the Matter of	**)**	
Amendment of Part 74 of the Commission's Rules	**)**	MB Docket No. 18-119
Regarding FM Translator Interference	**)**	FCC 19-40

PETITION FOR RECONSIDERATION

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SUMMARY

The Rulemaking's stated goal was to "strike a balance" and effectively create compromise among divergent stakeholders. While such compromise is often the essence of the administrative rule making process, such brokering among interests cannot occur unless it meets statutory obligations. Certain aspects of the Rulemaking, unfortunately, fail to meet significant statutory requirements in such foundational statutes as the Administrative Procedure Act ("APA"), the Communications Act of 1934, as amended ("Communications Act"), and the Local Community Radio Act of 2010 ("LCRA").

The LPFM Coalition seeks, through this Petition, to have the Commission set aside and/or commence a further rulemaking on those issues identified herein that fail to meet such statutory requirements. These include:

(a) The Rulemaking's explicit statement that it is designed to provide improvements important only for full-service stations and FM translator operators – but not for LPFM stations, in violation of LCRA Section 5(3).

(b) The Rulemaking's provision that any pending adjudication of interference complaints filed under current rules would be processed under new regulations, despite APA requirements that all rule making have only "future effect designed to implement, interpret, or prescribe law or policy."

(c) New regulation, made without adequate APA-required explanation, that effectively ignores multiple listener interference complaints from a single building even if it that building is very tall (e.g., a skyscraper with hundreds or even thousands of

(d) discrete units) or extends for one or more square city blocks encompassing more occupants than found in several square miles in areas with large lots and smaller scale low-slung buildings;

(e) Self-contradictory statements that, by their own illogic, fail to provide required APA justification for the Commission's rejection of proposed requirements for preclusion studies for FM Translator relocation applications;

(f) Requirements that Interference Complaints contain U/D Data, which measures underlying interference, using a calculation rubric that explicitly excludes any measure of interference;

(g) Misstatements and mistaken attributions, whose presence in the Rulemaking evince a lack of due care, thus rendering the Rulemaking arbitrary and capricious under the APA.

The Commission's failures in these areas require remedy. Their implementation pursuant to the Rulemaking, without modification, would be *ultra vires*, and/or unsupported by substantial evidence, and/or arbitrary and capricious or otherwise not in accordance with law.

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PETITION FOR RECONSIDERATION

1. The LPFM Coalition ("LPFM Coalition"), through counsel, hereby submits this Petition for Reconsideration ("Petition") of the Commission's rule making ("Rulemaking") amending Part 74 of the Commission's Rules Regarding FM Translator Interference, as released on May 9, 2019 in FCC 19-40, and published in the Federal Register on June 14, 2019.[1]

Standing and Timeliness

2. This Petition is timely filed pursuant to 47 C.F.R Sec. 1.429[2] and 47 C.F.R. Sec. 47 C.F.R. Sec. 1.4(j).[3]

3. The petitioner and each of the Coalition's members[4] have standing to file for reconsideration. They participated fully by filing comments, replies and supplements in the rule making proceedings underlying the Rulemaking.[5] Similarly, both the Coalition and its

[1] 84 FR 277374 (2019).

[2] Notably, Sec. 1.429(d), which establishes a 30-day deadline to file for reconsideration of a final rule making order.

[3] When a Commission filing deadline falls on a weekend, this rule moves the deadline to the first day afterward on which the Commission is open for business. Thus, the deadline for a petition for reconsideration in this matter is July 15, 2019.

[4] A list of LPFM Coalition members is attached hereto at Exhibit A.

[5] 47 USC Sec. 405(a).

constituent members also have standing under Sec. 405(a) of the Communications Act as "person[s] aggrieved or whose interests are adversely effected thereby. . . ,"[6] as the Rulemaking affects the rights and liabilities of LPFM stations under interference rules changed thereby.

Summary

4. The LPFM Coalition recognizes that the Commission must balance the divergent interests of multiple stakeholders when it reviews and updates longstanding rules in light of "the present-day saturation of the FM spectrum in many markets."[7]

5. The Rulemaking's stated goal was to "strike a balance"[8] and effectively create compromise among divergent stakeholders. While such compromise, created by consideration of comments and replies,[9] is an important part of the administrative rule making process, any brokering or balancing among interests cannot occur unless it meets statutory obligations.[10]

6. Certain aspects of the Rulemaking, unfortunately, fail to meet significant statutory requirements in such foundational statutes as the Administrative Procedure Act ("APA"),[11] the

[6] *Id.*

[7] *Rulemaking* at para. 4.

[8] *Id.*

[9] See 5 USC. Sec. 553(c)

[10] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) ("an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider.")

[11] Codified at 5 USC Sec. 551 *et seq.*

Communications Act of 1934, as amended ("Communications Act"),[12] and the Local Community Radio Act of 2010 ("LCRA").[13]

7. The LPFM Coalition seeks, through this Petition, to have the Commission set aside and/or commence a further rulemaking on those issues identified herein that fail to meet such statutory requirements. These include:

(a) The Rulemaking's explicit statement that it is designed to provide improvements important only for full-service stations and FM translator operators – but not for LPFM stations,[14] in violation of LCRA Section 5(3).[15]

(b) The Rulemaking's provision that any pending adjudication of interference complaints filed under current rules will be processed under new regulations, despite APA requirements that all rule making have only "future effect designed to implement, interpret, or prescribe law or policy."[16]

(c) New regulation, made without adequate APA-required explanation, that effectively ignores multiple listener interference complaints from a single building[17] even if it that building is very tall (e.g., a skyscraper with hundreds or even thousands of discrete units) or extends for one or more square city blocks

[12] Codified at Title 47 USC Sec. 151 et seq.

[13] 111 P.L. 371, 124 Stat. 4072 (2011).

[14] *Rulemaking* at para. 4.

[15] "FM translator stations, FM booster stations, and low-power FM stations remain equal in status and secondary to existing and modified full-service FM stations."

[16] 5 U.S.C. Sec. 551(4).

[17] *Rulemaking* at para. 15.

encompassing more occupants than found in several square miles in areas with large lots and smaller scale low-slung buildings;

(d) Self-contradictory statements that, by their own illogic, fail to provide required APA justification for the Commission's rejection of proposed requirements for preclusion studies for FM Translator relocation applications;[18]

(e) Requirements that Interference Complaints contain U/D Data, which measures underlying interference, using a calculation rubric that explicitly excludes any measure of interference;[19]

(f) Misstatements and mistaken attributions, whose presence in the Rulemaking evince a lack of due care, thus rendering the Rulemaking arbitrary and capricious under the APA.

8. As fully discussed below, the Commission's failures in these areas require remedy. Their implementation pursuant to the Rulemaking, without modification, would be *ultra vires,* and/or unsupported by substantial evidence, and/or arbitrary and capricious or otherwise not in accordance with law.[20]

Request for Stay

9. While this Petition and any related appeals are pending, the Commission should stay implementation of the Rulemaking, if not in full, at least for those specific issues listed in paragraph 7, above. Such a stay should remain in effect until (a) final resolution of this Petition and (b) until the time for any level of appeal has expired, and (c) no such appeal remains

[18] *Rulemaking* at para. 9.

[19] *Rulemaking* at para. 23.

[20] See APA at 5 U.S.C. Sec. 706.

pending, and (d) the time for the Commission to rescind the Rulemaking on its own motion has ended ("Finality"). Pursuant 47 C.F.R. Sec. 1.44(e), a separate Request for Stay has been filed concurrently with this Petition, and, to the extent necessary, is incorporated herein by reference.

Discussion

10. Despite LCRA Requirements, the Commission Explicitly Failed to Provide Equal Status between LPFM and FM Translators in the Rulemaking. The Rulemaking unequivocally fails to treat the LPFM service as "equal in status" to the FM Translator service, despite LCRA requirements that it do so.[21]

11. The is wholly evident in the Rulemaking's preamble background section,[22] which only states the Rulemaking is "providing greater certainty for translator operators, and preserving existing protections for full service stations . . . ."[23] It fails to indicate any intention, whatsoever, of providing LPFM stations with greater certainty in the interference resolution process. Nor does it state – or even suggest – that LPFM stations already enjoy such certainty in other ways.[24] This lack of LPFM inclusion fails to comply with the LCRA Section 5(3) mandate that FM Translators and LPFM stations have equal status vis-à-vis full power stations.[25] LPFM's equal need for certainty is ignored. Such ignorance creates inequality in status in violation of LCRA Section 5(3).

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[21] LCRA Section 5(3), *supra*, n. 15.

[22] Marked, in the Rulemaking Table of Contents as "Heading II."

[23] *Rulemaking* at para 4.

[24] The Commission states "LCRA does not require identical regulation of each secondary service." *Rulemaking* at para. 47. But it does require equal status. LCRA, Sec. 5(3).

[25] "FM translator stations, FM booster stations, and low-power FM stations remain equal in status and secondary to existing and modified full-service FM stations."

12. At best, the Rulemaking acknowledges such LCRA mandates in word,[26] even as it ignores them in deed. Such outer contour limits do not replace the need to explain how the stated regulatory goal of the Rulemaking (to provide FM Translators with certainty that goal) complies with LCRA Section 5(3) when the Rulemaking is silent as to how LPFM would similarly obtain such certainty vis-à-vis full power stations.

13. "If the intent of Congress is clear, that is the end of the matter;"[27] "The legislature says what it means and means what it says."[28] Equal status means equal status. In failing to provide it, the Rulemaking violates both LCRA and the APA – and it cannot stand without modification to bring it into statutory compliance.

14. The Rulemaking Imposes Impermissible Retroactive Burdens on LPFM Stations and Listeners with Pending Interference Complaints by Forcing Remediation Under New Rules Rather than Rules in Place at the Time of Complaint.[29] The APA requires that rule making, absent specific statutory authority, must only have "future effect designed to implement, interpret, or prescribe law or policy."[30] This provision has, by contrast, retroactive effect.

15. "The legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place. "*Nat'l Petrochem. & Refiners Ass'n v. EPA*, 630 F.3d 145, 158 (D.C. Cir. 2010) (quoting *Landgraf v. USI Film Prods*., 511 U.S. 244, 265 (1994)). "[A]

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[26] *Rulemaking* at para. 47.

[27] *Chevron, U.S.A., Inc. v. NRDC, Inc*., 467 U.S. 837, 842 (1984).

[28] *Hamer v. Neighborhood Hous. Servs. of Chicago*, 583 U.S. ___ (2017), 138 S. Ct. 13, 20, 199 (2017) (internal citations omitted).

[29] *Rulemaking* at para. 49.

[30] 5 U.S.C. Sec. 551(4).

statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

16. The Rulemaking[31] ignores these strictures by retroactively imposing new interference remediation rules on existing Translator interference proceedings still pending from before publication and/or implementation of the Rulemaking. While the law, as reflected in *Bowen* would allow for such retroactivity if specific statutory authority exists for it, the Rulemaking does not cite any such statutory authority – no doubt, because it does not exist.

17. Instead, the Rulemaking claims authority to retroactively impose new rules on long-pending complaints made under existing rules by falsely analogizing such rules to license applications.[32] The APA, however, classifies rule making and licensing differently, and imposes a separate rubric for agency action depending on which classification applies.

18. Rules are defined in Section 551(4),[33] in relevant part, as "the whole or a part of an agency statement of general or particular applicability and <u>future effect</u> designed to implement, interpret, or prescribe law or policy . . . " (emphasis added). "Rules are made through "rule making," defined in APA Section 551(5) as an "agency process for formulating, amending, or repealing a rule."[34] Such procedures are "used in the formulation of a basically legislative-type

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[31] At para. 49.

[32] Citing, at n. 189, *Chadmoore Commc'ns, Inc. v. FCC,* 113 F.3rd 235, 241 (D.C. Cir. 1997) ("Chadmoore"): "The filing of an <u>application</u> creates no vested right to a hearing; if the substantive standards change so that the applicant is no longer qualified, the application may be dismissed." (internal citations omitted) (emphasis added).

[33] 5 U.S.C. Sec. 551(4).

[34] 5 U.S.C. Sec. 551(5).

judgment, for prospective application only, rather than in adjudicating a particular set of disputed facts." *United States v. Fl. E. Coast Ry. Co.*, 410 U.S. 224, 246 (1973) (emphasis added). It is axiomatic that any rule making – this Rulemaking, included – makes rules pursuant to this specific set of APA definitions that eschew retroactive effect.

19. By contrast, Section 551(6) of the APA explicitly categorizes licensing decisions not as "rules" but as "orders"[35] APA Section 551(7) expressly defines an "agency process for the formulation of an order" as an adjudication.[36] "Adjudication is concerned with the determination of past and present rights and liabilities." *Motion Picture Ass'n of Am., Inc. v. Oman*, 750 F. Supp. 3, 7 (D.C. Cir.1990) (citing *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 219 (1988) (Scalia, J., concurring) (other internal citations omitted)).

20. As the Rulemaking made rules, it is not an adjudication. This is one of the most fundamental legal distinctions, here, as "it is black-letter administrative law that adjudications are inherently retroactive."[37] The APA, however, bars retroactivity in rule making because "rulemaking deals with what the law will be."[38]

21. Pending interference complaints were filed before the Rulemaking was issued and must NOT be resolved under new rules. They must be decided on what the law was at the time. The

[35] 5 U.S.C. Sec. 551(6) ("'order' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing."

[36] 5 U.S.C. Sec. 551(7)

[37] *Catholic Health Initiatives Iowa Corp. v. Sebelius*, 718 F.3d 914, 921 (D.C. Cir 2013) (citing *NLRB v. Wyman-Gordon Co*., 394 U.S. 759, 763-66 (1969), *SEC v. Chenery Corp.*, 332 U.S. 194, 203, (1947); *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 539 (D.C. Cir. 2007) (other internal citations omitted")

[38] *Id.,* citing *Bowen v. Georgetown Univ. Hospital*, 488 U.S. at 221.

Rulemaking, thus, errs by retroactively applying new rules to these pending interference complaints.

22. The Rulemaking attempts to evade this retroactivity problem by in inaptly citing to *Chadmoore Commc'ns, Inc. v. FCC,*[39] which specifically deals with applications – NOT RULE MAKING. None of the long-pending interference complaints were filed by application. They represent petitions to a government agency[40] to enforce interference RULES that were clear on their face at the time of filing. *Chadmoore* is, therefore, irrelevant[41] and provides no support for retroactive application of new rules to pending complaints.

23. In applying the rubric for applications to rules, the Commission acted beyond its legal discretion in a manner that was either *ultra vires,* arbitrary and capricious, or otherwise contrary to law. It must set aside such retroactivity without delay, or at least stay its imposition of these retroactive rules until the statutory infirmities are cured through further rule making.

24. Should there be any lingering doubt (or desire to fight this distinction), the Commission should note that the analytic rubric the DC Circuit applies to distinguish rules and orders[42] clearly categorizes this proceeding as a rule making. This rubric looks at:

(a) "the effects of the agency's action, asking whether the agency has imposed any rights and obligations or has left itself free to exercise discretion, taking into account the agency's

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[39] *Supra,* n. 32.

[40] A right enshrined in the First Amendment.

[41] The *Rulemaking* also cites, at n. 189, to *Melcher v. FCC,* 134 F.3D 11143, 1165 (D.C. Cir. 1998), which held that applicants at the time of an FCC rule change have not a right to have their applications adjudicated under old rules. As no applications are at issue here, *Melcher* is also irrelevant.

[42] See *Nat'l Ass'n of Broadcasters v. FCC,* 569 F.3d 416, 426 (D.C. Cir.) 2009.

phrasing."[43] In this case, there is no discretion and the Commission is abrogating existing rights and imposing obligations that did not heretofore exist[44] and,

(b) three additional analytic parts including: "(1) the [a]gency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency."[45]

25. The Rulemaking meets all three tests in this second prong: (1) the Commission commenced the regulatory changes at issue with a notice of proposed rule making,[46] which is the unequivocal technical name for a public document initiating rule making under the APA; (2) both the Translator Interference NPRM[47] that initiated the rule making and the Rulemaking[48] itself were published in the Federal Register, with rule changes to appear in the Code of Federal Regulations;[49] and (3) the provisions at issue have binding effect on how private parties resolve FM translator interference disputes.

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[43] *Id.* (citing *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin*., 452 F.3d 798, 806 (D.C. Cir. 2006)).

[44] Examples include (but are not limited to) the disenfranchisement of listeners in multi-unit or expansive buildings, but also include requirements for involving licensees in interference issues even if one of its listeners complain directly to the FCC without any station involvement.

[45] *Nat'l Ass'n of Broadcasters v. FCC, supra,* at 426 (citing *Molycorp, Inc. v. EPA*, 197 F.3d 543 (D.C. Cir. 1999) (other internal citations omitted)

[46] FCC 18-60, rel. May 10, 2018.

[47] 83 FR 26229 (2018)

[48] 84 FR 277374 (2019).

[49] Rulemaking at para. 56.

26. Lest anyone argue that this retroactive application of new regulation is harmless, it is clear that a number of stations and listeners with long-pending and well pled interference complaints will suffer harm by having to litigate, again, from scratch, under new rules. They would also continue to suffer harm from longstanding interference that would be closer to mitigation but for the inapt retroactive application of new rules requiring relitigating the interference again under new rules.[50] Such harms are not theoretical – but real and prejudicial to individuals in way that also implicates due process.[51]

27. In sum, the Commission provides no statutory grounds for retroactive application of new translator interference complaint rules to interference complaints filed and pending before even public notice, let alone implementation of the Rulemaking. Therefore, the Commission may NOT apply these new rules to pending unresolved interference complaints. "That is what the APA says, and there is no reason to think Congress did not mean it." *Bowen v. Georgetown Univ. Hosp.* at 224.

28. The Rulemaking Would Completely Discount Multiple Listener Interference Complaints from the Same Building, No Matter How Many Units and How Big or Expansive the Building; This Undermines the Regulatory Imperative that: "It Is the Right of the Viewers and Listeners, Not the Right of the Broadcasters, Which is Paramount."[52] The Rulemaking took this path

[50] A good example is in the Houston, Texas market in FCC File No. BLFT-20170406ACJ, where an LPFM station has submitted evidence of continuing and unmitigated FM Translator interference despite Audio Division issuance more than 75 days ago of a letter instructing the translator licensee to mitigate appropriately or shut down. The FM Translator has done neither, and by Aug. 14, 2019, the interfering station would be able to demand undefined commercially reasonable efforts – and the extra time such efforts take despite an order that it fix the interference problem in May.

[51] Whether through curtailing petitioning rights guaranteed by the First Amendment, or those more directly protected by the Fifth and Fourteenth Amendment to the Constitution.

[52] *CBS v. FCC*, 453 U.S. 367, 395 (1981) (internal citations omitted).

despite the Commission's own prior conclusion, in this very proceeding, that proposals that have the Commission "overlook or undervalue multiple listener complaints from the same approximate location, such as an apartment building"[53] would be in tension with its mandated "focus on 'reception by the public' in Section 74.1203(a)(3) and prevention of interference to 'populated areas' in Section 74.1204(f)."[54]

29. It is true the APA might allow an agency to make such a regulatory zigzag if either (a) no statute prohibited it[55] or (b) the rule change was accompanied by sufficient explanation based on discernable reasoned decision-making[56] on the record of the proceeding. Otherwise, the APA[57] prohibits agency zigzags, as exhibited here, as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[58]

30. "'The APA's requirement of reasoned decision-making ordinarily demands that an agency acknowledge and explain the reasons for a changed interpretation.' 'An agency may not,

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[53] *Amendment of Part 74 of the Commission's Rules Regarding FM Translator Interference* ("Translator Interference NPRM"), 33 FCC Rcd 4729 (2018), at para. 17.

[54] *Id.*

[55] *Chevron, U.S.A., Inc. v. NRDC, Inc*., 467 U.S. at 843 ("If the intent of Congress is clear, that is the end of the matter")

[56] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) ("The he agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made.") (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

[57] *See* 5 U.S.C. Sec. 706(2).

[58] "[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., *supra,* at 43.

for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.'"[59]

31. "Whatever the ground for the departure from prior norms, however, it must be clearly set forth."[60] The agency also "must show that there are good reasons for the new policy . . . ."[61] If not, an agency action would be arbitrary and capricious in violation of the APA.

32. The Rulemaking failed to meet such statutory mandates by imposing regulations that would officially ignore all but the first listener complaint from a single building, no matter how large, how tall or how wide the building is.

33. The FCC stated, in the Translator Interference NPRM, and re-asserted in the Rulemaking, that it wanted to ensure that complaints come from listening to "separate receivers at separate locations."[62] That may sound fair and reasonable – so four people who live or work together and listen to one radio don't get to complain four times about the same interference to the same radio. But rather than stopping there, the Commission expands its "separate receivers at separate locations" standard so it excludes separate receivers at separate locations in the same building. This is true even at a single building like the Pentagon that covers nearly 28.7 acres,[63]with about

[59] *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 706 (D.C. Cir. 2016) (citing *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) and *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, (2009)).

[60] *Atchison, T. & S. F. R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973)

[61] *United States Telecom Ass'n v. FCC*, 825 F.3d at 706.

[62] *Translator Interference NPRM* at paras. 16-17.

[63] Goldberg, Alfred, *The Pentagon, The First 50 Years* (1992), published by the Historical Office of the Secretary of Defense (1992) at 57. Available at https://apps.dtic.mil/dtic/tr/fulltext/u2/a259419.pdf (visited Jul. 10, 2019).

26,000 individuals inside the building on a normal workday[64] – all of whom would be relegated to a single interference complaint. This provision would similarly affect the approximately 3000 residents of the University of Texas's Jester dormitory at 201 East 21st Street in Austin, which occupies an entire city block and is so large that it has had its zip code.[65]

34. Moreover, under the Rulemaking's provision discounting all but the first interference complaint from a single building, no matter how large or expansive, ("One Building/One Complaint Standard"), most listeners living or working in such buildings would become disenfranchised from their constitutional right to petition the government[66] for redress when confronted with interference as the FCC would simply ignore all but one complaint as a matter of regulation. This disenfranchisement would occur in congested areas all over the country where large buildings are more likely to exist, and where less spectrum is available given "the present-day saturation of the FM spectrum in many markets."[67]

35. Nonetheless, the Rulemaking provides no analysis as to why the Commission suddenly found the One Building/One Complaint Standard comports with the longstanding fundamental regulatory focus on the right of viewers and listeners above all else. It also failed to explain why it is diverging from what it said in the Translator Interference NPRM where the Commission found the One Building/One Complaint Standard to "be in tension with our focus on "reception

[64] https://pentagontours.osd.mil/Tours/facts.jsp (visited Jul. 10, 2019).

[65] http://flintco.com/projects/v/1732/ut-jester-west-residence-hall (visited Jul 10, 2019).

[66] "The First Amendment's Petition Clause protects 'the right of the people . . . to petition the Government for a redress of grievances.'" *Venetian Casino Resort, L.L.C. v. NLRB*, 793 F.3d 85, 89 (D.C. Cir. 2015) (citing U.S. Const., Amend. I) (other citations omitted).

[67] Rulemaking at para. 4.

by the public" in Section 74.1203(a)(3) and prevention of interference to "populated areas" in Section 74.1204(f)."[68]

36. Large regulatory changes, like the One Building/One Complaint Standard also require a logical basis with substantial evidence. But, instead, the Rulemaking relies merely on one commenter's engineering speculation that: "multiple complaints in a single location **may** be the result of terrain shielding rather than translator interference . . . ."[69] The Commenter, Henson Broadcasting, did not provide any engineering analysis in making this statement, and the Commission, despite its own deep engineering resources, did not provide any of its data to support the assertion, either. This, even though the converse of "multiple complaints in a single location **may** be the result of terrain shielding rather than translator interference" is that **they also may not be**. There is no data in the Commission's findings to support the alleged premise one way or another.

37. Moreover, the Rulemaking actually mis-characterizes the Henson Broadcasting comment upon which the One Building/One Complaint Standard relies. The relevant comment actually states: "complaints also should be from a sufficient number of locations to make sure the interference is not the result of terrain shielding."[70]

38. There is a major difference in meaning between the actual Henson Media comments and the one the Rulemaking mis-attributes to that commenter. Rather than stating, as the rulemaking falsely claims, that multiple interference complaints from a single building "may be the result of terrain shielding," so only the first one should count, Henson comments that interference

[68] Translator Interference NPRM at para. 17 (emphasis added).

[69] *Rulemaking* at para. 15.

[70] Reply Comments of Henson Media at 4.

complaints should be from a "sufficient number of locations." to ensure terrain shielding does not inaccurately cause an interference-based station shutdown. It is, in context, a noncontroversial suggestion that resolution of interference complaints rely on adequate evidence. Nowhere does Henson suggest that all but one person inside an expansive building must lose the right to consideration of a constitutionally protected petition to the FCC for redress of harmful interference based on terrain shielding when it is merely one of many potential causes of reception problems and the listeners are actually far apart from one another.

39. Indeed, someone listening to a radio at one end of the Pentagon may be almost half a mile away from another listener who is also suffering from translator interference to the same station. Similarly, two listeners suffering from interference in Chicago's Willis Tower can be as much as .442 km apart,[71] while different residents of New York's Trump World Tower may be suffering interference in apartments more than a quarter kilometer from each other.[72] That is a lot further than two listeners in an adjacent single family houses on small lots, who both can still submit complaints and have them count. [73]

40. "Altogether, the evidence tells a story that does not match the explanation."[74] This, despite a very recent case in which the Supreme Court declared: "Reasoned decision making under the Administrative Procedure Act calls for an explanation for agency action."[75] The

[71] https://www.britannica.com/topic/Willis-Tower (visited Jul. 11, 2019).

[72] http://www.skyscrapercenter.com/building/trump-world-tower/735 (visited Jul. 11, 2019).

[73] Such disenfranchisement will affect people whether they live in Luxury Towers or in Public Housing, as well as people in nursing and retirement homes and at their workplaces.

[74] *Dept. of Commerce v. New York*, 588 U. S. ___ (2019), slip op No. 18–966 (rel. June 27, 2019) at 27, 2019, U.S. LEXIS 4402, 2019 WL 2619473 (finding fault with agency justifications presented to support the addition of citizenship questions to the U.S. Census).

[75] *Id.* at 28.

Rulemaking, instead, simply offers a conclusory statement that "we are persuaded"[76] to jettison longstanding and well justified protections for individual listeners to seek constitutionally-protected redress of their interference problems caused by secondary status stations[77] and, instead, adopt a proposal from the National Association of Broadcasters ("NAB") that the Commission at first rejected in the Translator Interference NPRM.[78] In so doing, the Commission failed to meet the basic APA requirement that an agency rationally justify its decisions with actual evidence.

41. Instead, "what was provided here was more of a distraction" [79] that may look superficially APA-complaint, but, in the final analysis, fails to meet APA standards requiring only prospective rule making.

42. Indeed, elsewhere in the Rulemaking, the Commission states: "In most circumstances, lack of interference can be demonstrated by on-off tests and/or field strength measurements at the relevant site."[80] Thus the Commission, not only fails to provide a reasoned justification for the One Building/One Complaint Standard, it also fails to explain why the simple on/off test that the Commission endorsed elsewhere in the Rulemaking would not work to identify actual terrain

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[76] *Rulemaking* at para.15.

[77] Translators, but also LPFM stations.

[78] *Rulemaking* at para.15 (The "NAB reiterates that "separate locations should be construed as multiple locations" or buildings.")

[79] *Dept. of Commerce v. New York, supra*, at 28.

[80] *Rulemaking* at para. 33.

shielding. The Rulemaking is clearly inconsistent in this regard. When an agency decision "is internally inconsistent, it is arbitrary and capricious."[81]

43. In sum: the APA demands explanations based on a record that provides explanations guided by internal consistency and logic. The Rulemaking, instead, provides no explanation, logical or not, other than a conclusion that "we are persuaded" about the One Building/One Rule Standard. Such rule making is contrary to law as well as arbitrary and capricious – and the Rulemaking, therefore, violates the APA and cannot remain in force.

44. The Rulemaking is Also Arbitrary and Capricious in Its Rejection of Any Preclusion Showing Requirement for FM Translator Applications; the Commission's Rationale is Self-Contradictory and Illogical. The Rulemaking specifically rejects the LPFM Coalition proposal that FM Translator licensees submit preclusion showings as part of any channel change application. The Rulemaking says its rejection is based on LCRA Sec. 5, which "only pertains to the licensing of new rather than existing stations."[82]

45. This explanation is illogical because the LPFM Coalition proposed "preclusion showings to "facilitate the grant of *only* those translator applications that would not diminish or "block" future LPFM licensing in these markets."[83] The key word here is FUTURE.

46. New LPFM stations are licensed in the FUTURE. If, as the Rulemaking says, the LCRA Sec. 5 mandate "only pertains to the licensing of new rather than existing stations,"[84] how could

[81] *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1028 (D.C. Cir. 2018).

[82] *Rulemaking* at para. 9.

[83] Comments of LPFM Coalition in response to *FM Translator NPRM*, filed Aug. 6, 2018, at para. 10 (citing *Creation of a Low Power Radio Service*, Fourth Report and Order and Third Order on Reconsideration, 27 FCC Rcd 3346, 3373 (2012) at para. 20.) (emphasis added)

[84] *Rulemaking* at para. 9.

LCRA Sec. 5 not apply to a proposal that effects future LPFM licensing? The Rulemaking essentially negates the legislative principle it purports to uphold.

47. LCRA Sec. 5 would clearly not apply if licensing took place in the past. But, it does not. An applicant files an application for a license that will come later – in the FUTURE. No one files an application for a license in the past. Existing stations have licenses that were granted in the past. In this regard, then, the Rulemaking is internally inconsistent and illogical because the Future is not the past and licenses granted in the past are not licenses in the future. Clearly, the stated rationale here is illogical.

48. An agency action is arbitrary and capricious "if the result reached is illogical on its own terms,"[85] as it violates the basic requirement for "a rational connection between the facts found and the choice made."[86] For this reason, the Commission must reverse it conclusions in this regard or stay its conclusions and consider the LPFM Coalition's proposal for preclusion studies in a further notice of proposed rule making.

49. <u>The Rulemaking is Also Internally Inconsistent and Illogical in Its Requirement for U/D Data to Accompany Interference Complaints</u>. This is evident when the Rulemaking imposes requirements that U/D data be "calculated using the Commission's standard contour prediction methodology"[87] found in 47 CFR Sec. 73.313. Section 73.313 specifically requires that calculations be made "without regard to interference." [88]

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[85] *Am. Fed'n of Gov't Emps. v. FLRA*, 470 F.3d 375, 380 (D.C. Cir. 2006) (internal quotation marks and citations omitted).

[86] *Gamefly, Inc. v. Postal Regulatory Comm'n*, 704 F.3d 145, 148 (D.C. Cir 2013) (citing *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins*., 463 U.S. 29, 43 (1983)).

[87] *Rulemaking* at para 23.

[88] In relevant part: "(a) All predictions of coverage made pursuant to this section shall be made without regard to interference and shall be made only on the basis of estimated field strengths."

50. The problem is that "U/D data" measures underlying interference (the "U" part, which is an abbreviation for undesired signals from other stations) against the strength of a station someone wants to hear (the "D" part, which is an abbreviation for desired signal). When the U/D ratio increases, interference that hinders listening is more likely. This means the Rulemaking imposes a rule used to analyze an inherently interference-driven calculation (U/D) under a rule requiring analysis that completely ignores interference (Sec. 73.313). This is essentially a rule that negates itself. It is like a consumer protection rule that requires butchers to weigh meat without concern for how heavy the product is. As this new provision essentially negates itself, it is self-contradictory and, therefore, irrational.

51. By contrast, other interference-sensitive FCC rules modified by the Rulemaking avoid such illogic by not designating interference-free Sec. 73.313 as the sole methodological guide for calculations.[89] Indeed, the National Translator Association, which the Rulemaking explicitly cited in its justification for this evidently irrational requirement for calculating U/D ratios, calls for "allowed use of Longley Rice calculations and other such propagation models and methodologies which tend to be more accurate. . . ."[90] By paying heed to the commenter's full statement, the Rulemaking would not have limited calculations to 73.313 guidelines, and avoided irrationality. But the Rulemaking does not do that.

52. In so doing, the Commission is imposing a self-negating rule that is irrational by virtue of such self-negation. An agency action is arbitrary and capricious "if the result reached is illogical on its own terms,"[91] as it violates requirements for "a rational connection between the facts

[89] *See* revisions to 47 C.F.R. Sec. 74.1233, at *Rulemaking*, App. B.

[90] *Comments of National Translator Association*, in MB Docket 18-119 (filed Aug. 6. 2018) at 10 (cited in *Rulemaking* at para. 4, n. 95).

[91] *Am. Fed'n of Gov't Emps. v. FLRA, supra* n. 85.

found and the choice made."[92] Therefore, the Commission must either set aside the U/D provision, or stay its effectiveness pending a further rule making to create a rational rule to replace it.

53. The Commission Also Mis-Attributed Comments in this Proceeding to "LPFM Advocates" When a Commenter was Not an LPFM Advocate. Most notably, the Commission attributes certain comments filed by the New Jersey Broadcasters Association ("NJBA") to "LPFM Advocates."[93] While NJBA is a valuable voice in the broadcast community, it describes itself as the "trade association for the radio and TV stations in the State of New Jersey."[94] As a trade association, the organization's primary concern is trade and commerce – that is, advertiser-supported broadcasting. NJBA is NOT an advocate for LPFM stations as they are licensed as noncommercial educational stations ("NCE"). While some NCEs may be NJBA members, that does not make an organization dominated by commercial broadcasters into an LPFM advocate. This misleading attribution, when coupled with other misstatements, mischaracterizations and incorrect citations identified previously in this pleading, suggest a deficit in careful consideration in the Rulemaking record, despite APA requirements to the contrary. It is but one more reason the Commission must roll back the Rulemaking, or at least stay its implementation until it can commence a further rule making to remedy the Rulemaking's many statutory problems.

Conclusion

54. Given the numerous statutory violations and other legal infirmities evinced in the Rulemaking, the most appropriate action now would be for the Commission to stay the mid-

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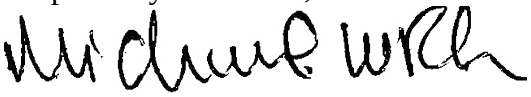
[92] *Gamefly, Inc. v. Postal Regulatory Comm'n, supra* n. 86

[93] *Rulemaking* at para. 47.

[94] http://www.njba.com/Home.html (visited Jul. 10, 2019).

August effective date of the Rulemaking and, shortly thereafter, issue a notice of further rulemaking to effectuate remedial work on the issues identified herein. At a minimum, the Commission should stay those specific Rulemaking aspects specified in this Petition and either rescind those provisions or issue a notice of further rule making to fix them. To do otherwise would render the Rulemaking *ultra vires*, arbitrary and capricious or otherwise contrary to law. The APA does not permit those regulatory conditions, and the Commission must now act accordingly.

Respectfully Submitted,



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July 15, 2019

EXHIBIT A

MEMBERS OF THE LPFM COALITION

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1. Common Frequency
2. Prometheus Radio Project
3. KAKU-LP Maui Community Television, Inc.
4. KALY-LP Somali American Community
5. KBOG-LP Bandon Community Radio
6. KCIW-LP Curry Coast Community Radio
7. KCLA-LP Civic Light Opera
8. KCMU-LP JEAN ARNOLD GROUP FOUNDATION
9. KCPK-LP Center of the World Festival
10. KCXU-LP Center for Careers and Training
11. KUAK-LP Dakota Media Access
12. KDIF-LP Arizona Interfaith Alliance For Worker Justice
13. KDLB-LP Future Roots, Inc.
14. KDLZ-LP Verge Center for the Arts
15. KDOO Cascade Community Radio
16. KDRT-LP Davis Community Television
17. KEBX-LP Golden Gate Society For Coatings Technology
18. KEPW-LP Eugene Peaceworks
19. KEXU-LP Poor Magazine
20. KFFD-LP Freeform Portland
21. KFFP-LP Radio 23
22. KGCE-LP Grace Orthodox Presbyterian Church of Modesto, Ca
23. KGIG-LP Fellowship of The Earth
24. KHBG-LP National Hispanic Media Coalition
25. KHUG-LP Sloan Canyon Communications
26. KIEV-LP The Way to Salvation Community Church
27. KISJ-LP Borderlands Community Media Foundation, Inc.
28. KISN-LP Western Oregon Radio Club
29. KJJG-LP Iglesia Centro De Liberacion
30. KJMR-LP Ntrepid Group
31. KJSO-LP North Omaha Loves Jazz Center
32. KJZX-LP Third Coast Activist Resource Center
33. KMRD-LP Madrid Community Radio
34. KODX-LP Earth On-the-Air Independent Media
35. KOUV-LP Recording NW
36. KPCA-LP Petaluma Community Access
37. KPPQ-LP Community Access Partners of San Buenaventura
38. KPSQ-LP Omni Center For Peace Justice & Ecology

39. KPYT-LP Pascua Yaqui Tribe
40. KQRZ-LP Oregon Amateur Radio Club
41. KQUA-LP Umpqua Watersheds
42. KRSA-LP La Maestra Family Clinic
43. KRSM-LP Pillsbury United Communities
44. KSFP-LP San Francisco Public Press
45. KTAL-LP Southwest Environmental Center
46. KTWH-LP Two Harbors Community Radio
47. KUBU-LP Access Sacramento
48. KUHS-LP Low Key Arts Incorporated
49. KUPR-LP Las Placitas Association
50. KUTZ-LP Midtown Radio
51. KVSH-LP Voice of Vashon
52. KWUS-LP Radio-4-Us
53. KXRW-LP Media Institute for Social Change
54. KXVS-LP Peace and Justice Network of San Joaquin County
55. KXVY-LP WIlsonville Radio Project
56. KYWS-LP West Sacramento Neighbors Fair, Inc.
57. KZNQ-LP Santa Clarita Public Broadcasters Corporation
58. KZZH-LP Access Humboldt
59. Media Alliance (media reform org) https://media-alliance.org/
60. WAMF-LP Voice of the People
61. WAYO-LP Muccc, Inc.
62. WBPU-LP African People's Education and Defense Fund, Inc.
63. WBTV-LP Vermont Community Access Media
64. WCIW-LP Coalition of Immokalee Workers
65. WCXP-LP Chicago Independent Radio Project
66. WDYO-LP Workers' Dignity
67. WDYX-LP Woods and Waters Land Trust
68. WEQY-LP Dayton's Bluff
69. WFNU-LP Frogtown Community Radio
70. WFPR-LP Franklin Public Radio
71. WHGE-LP Afro-American Historical Society of Delaware
72. WHIV-LP New Orleans Society of Infectious Disease Awareness
73. WHNH-LP Associated Churches Of Fort Wayne And Allen County, Inc
74. WHPB-LP Howell Family Consultant Inc
75. WJOP-LP Newburyport Community Media Center
76. WKCG-LP The Ordinary People Society
77. WLGM-LP Edgewater Alliance Church
78. WLWR-LP Marinette Radio Association

79. WNJI-LP Gospel Light Prayer Church
80. WNRC-LP Nichols College
81. WOHM-LP Media Reform SC
82. WOMM-LP The Big Heavy World Foundation
83. WONH-LP Pequenas Ligas Hispanas de New Haven Inc
84. WOOC-LP Media Alliance
85. WOWD-LP Historic Takoma Inc.
86. WOZO-LP The Neighborhood Center
87. WPPM-LP Philadelphia Public Access Corporation
88. WQNP-LP Beware, Inc.
89. WQRT-LP Big Car Media
90. WRBG-LP Rhythm and Blues Group Harmony Association
91. WRFN-LP Radio Free Nashville
92. WSPV-LP Valley Community Baptist Church
93. WSVQ-LP Partnership of African American Chuches
94. WSYP-LP Sankofa Youth Development Program Inc
95. WTPA-LP WLRI Incorporated
96. WUBP-LP All African People's Development and Empowerment Project
97. WUGM-LP West Michigan Community Help Network
98. WUJM-LP Caribbean Festival Association
99. WUMO-LP Aframsouth
100. WUVS-LP West Michigan Community Help Network
101. WVAO-LP Athol-Orange Community TV
102. WWPP-LP WeCount!
103. WXHR-LP Hillman Community Radio
104. WZMR-LP Zumix, Inc.
105. WZPH-LP Pasco County Educational Corporation
106. KLLG-LP LITTLE LAKE GRANGE #670
107. WLSP-LP Sun Prairie Media Center