

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

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

SECOND ORDER ON RECONSIDERATION AND
FURTHER NOTICE OF PROPOSED RULEMAKING

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By the Commission: Commissioners Copps and Adelstein issuing separate statements.

I. INTRODUCTION

1. In January 2000, the Commission adopted rules establishing the low power FM ("LPFM") service. We authorized the LPFM service to provide opportunities for new voices to be heard, while at the same time maintaining the integrity of existing FM radio service and preserving its ability to transition to a digital transmission mode. Since then, the experiences of LPFM applicants, permittees, and licensees have demonstrated that the Commission's LPFM rules may need some adjustment in order to ensure that we maximize the value of the LPFM service without harming the interests of full-power FM stations or other Commission licensees. In this Second Order on Reconsideration, we modify our rules governing minor changes and technical minor amendments for LPFM stations. We also clarify the definition of locally originated programming for purposes of resolving mutually exclusive LPFM applications. In the Further Notice of Proposed Rulemaking, we seek comment on a number of technical and ownership issues related to LPFM. We believe this proceeding will result in an improved LPFM service, while maintaining the integrity of the FM service.

II. BACKGROUND

2. In the 2000 Report and Order, the Commission authorized two classes of LPFM service: The LP100 class, consisting of stations with a maximum power of 100 watts effective radiated power (ERP) at 30 meters antenna height above average terrain (HAAT), providing an FM service radius (1 mV/m or 60 dBu) of approximately 3.5 miles (5.6 kilometers), and the LP10 class, consisting of stations with a maximum power of 10 watts ERP at 30 meters HAAT, providing an FM service radius of

1 Creation of Low Power Radio Service, 15 FCC Rcd 2205 (2000) ("Report and Order").

2 Id. at 2206.

3 Id. at 2211; 47 C.F.R. § 73.811(a).

approximately one to two miles (1.6 to 3.2 kilometers).<sup>4</sup> To avoid compromising existing FM radio service, we imposed separation requirements for LPFM with respect to full power stations operating on co-, first- and second-adjacent and intermediate frequency (IF) channels.<sup>5</sup> We concluded, based on technical analyses, that 100-watt LPFM stations operating without third-adjacent channel separation requirements would not result in unacceptable new interference to existing FM stations.<sup>6</sup> We decided, therefore, not to impose third-adjacent channel separation requirements because we believed that doing so would unnecessarily and substantially restrict the number of LPFM stations that could be authorized, particularly in higher population areas.<sup>7</sup>

3. In the *Report and Order*, we also established ownership and eligibility rules for the LPFM service. We restricted LPFM service to noncommercial educational (“NCE”) operation by non-profit entities and public safety radio services.<sup>8</sup> With certain narrow exceptions, we restricted ownership to entities with no attributable interest in any other broadcast station or other media subject to our ownership rules.<sup>9</sup> We prohibited the sale or transfer of an LPFM station.<sup>10</sup> For the first two years of the LPFM service, we prohibited multiple ownership of LPFM stations and limited ownership to locally-based entities.<sup>11</sup> To resolve mutually exclusive applications, we established a point system that favors local ownership and locally-originated programming, with time-sharing and successive license terms as tie-breakers.<sup>12</sup>

4. The *Report and Order* directed the Mass Media Bureau to announce by public notice the opening of a national filing window for LP100 applications.<sup>13</sup> In March 2000, the Mass Media Bureau announced that it would accept LPFM applications in five separate filing windows, each limited to an application group of ten states and at least one other U.S. jurisdiction, in order to “ensure the expeditious implementation of the LPFM service and to promote the efficient use of Commission resources.”<sup>14</sup> The Commission conducted a lottery to determine the order of the application groups, and the Mass Media Bureau announced that the first LPFM filing window would open on May 30, 2000.<sup>15</sup> Subsequent filing windows opened on August 28, 2000, January 16, 2001, and June 11, 2001. The fourth and fifth LPFM application groups were consolidated into a single window in order to speed the filing process for applicants in these states.<sup>16</sup>

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<sup>4</sup> *Report and Order*, 15 FCC Rcd at 2212; 47 C.F.R. § 73.811(b). LP10 stations are intended to fit in some locations where LP100 stations cannot, due to separation requirements, and to provide groups with the opportunity to operate stations that reach smaller communities or groups with a common interest. *Report and Order*, 15 FCC Rcd at 2212.

<sup>5</sup> *Id.* at 2233-46.

<sup>6</sup> *Id.* at 2246.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 2213.

<sup>9</sup> *Id.* at 2217.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 2219, 2222. We adopted rules permitting multiple ownership of LPFM stations to be phased in over time. *Id.*

<sup>12</sup> *Id.* at 2260.

<sup>13</sup> *Id.* at 2256.

<sup>14</sup> *FCC Announces Five-Stage National Filing Window for Low Power FM Broadcast Station Applications*, DA 00-621 (MMB rel. Mar. 17, 2000).

<sup>15</sup> *Low Power FM Filing Window*, DA 00-914 (MMB rel. Apr. 28, 2000).

<sup>16</sup> *Low Power FM Filing Window*, DA 01-904 (MMB rel. Apr. 10, 2001).

5. On reconsideration in September 2000, the Commission issued some revisions and clarifications, but generally affirmed the decisions reached in the *Report and Order*.<sup>17</sup> We rejected arguments by petitioners proposing more stringent channel separation requirements, as well as arguments in favor of relaxing the requirements adopted in the *Report and Order*.<sup>18</sup> We adopted complaint and license modification procedures to address any unexpected, significant third-adjacent channel interference problems caused by the operation of a particular LPFM station.<sup>19</sup> We declined to modify the permissible power levels for the service.<sup>20</sup> We modified the spacing standards adopted in the *Report and Order* to require that LPFM stations operating on third-adjacent channels protect stations operating radio reading services.<sup>21</sup> We also declined to alter the NCE nature of the service.<sup>22</sup> We increased the flexibility of the ownership rules for government, transportation and public safety entities and universities.<sup>23</sup> We provided clarifications on eligibility issues concerning Indian tribes, student stations, licensees in the Instructional Television Fixed Service (ITFS), and schools with multiple campuses.<sup>24</sup> We affirmed our tie-breaker criteria, with certain clarifications regarding the credit for programming that is locally originated.<sup>25</sup> We also addressed a number of additional technical and ownership issues.<sup>26</sup>

6. The Making Appropriations for the Government of the District of Columbia for FY 2001 Act (“2001 D.C. Appropriations Act”), enacted in December 2000, required the Commission to modify its rules to prescribe LPFM station third-adjacent channel spacing standards and to prohibit any applicant from obtaining an LPFM station license if the applicant previously had engaged in the unlicensed operation of a station.<sup>27</sup> As a result of rule revisions adopted pursuant to the 2001 D.C. Appropriations Act, facilities proposed in a number of otherwise technically sufficient applications filed in the first two LPFM filing windows became short-spaced to existing full-power FM and/or FM translator stations.<sup>28</sup> The 2001 D.C. Appropriations Act also instructed the Commission to conduct an experimental program to evaluate whether LPFM stations would interfere with existing FM stations if the LPFM stations were not subject to the additional channel spacing requirements, and to submit a report to Congress, including the Commission’s recommendations to Congress regarding reduction or elimination of the minimum separations for third-adjacent channels. The Commission selected an independent third party, the Mitre Corporation (“Mitre”), to conduct the field tests. Mitre submitted a report to the Commission, on which we sought public comment.<sup>29</sup> On February 19, 2004, the Commission staff submitted the required report

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<sup>17</sup> *Creation of a Low Power Radio Service*, 15 FCC Rcd 19208 (2000) (“*Reconsideration Order*”).

<sup>18</sup> *Id.* at 19215-18.

<sup>19</sup> *Id.* at 19232.

<sup>20</sup> *Id.* at 19210.

<sup>21</sup> *Id.* at 19219.

<sup>22</sup> *Id.* at 19218-19.

<sup>23</sup> *Id.* at 19240.

<sup>24</sup> *Id.* at 19237-40.

<sup>25</sup> *Id.* at 19246-47.

<sup>26</sup> Appendix B lists the Petitions for Reconsideration or Clarification filed on the *Reconsideration Order*.

<sup>27</sup> Pub. L. No. 106-553, § 632, 114 Stat. 2762, 2762-A-111 (2000).

<sup>28</sup> See *Creation of a Low Power Radio Service*, 16 FCC Rcd 8026, 8028 (2001) (“*Second Report and Order*”). These applications were subsequently dismissed.

<sup>29</sup> See *Comment Sought on the Mitre Corporation’s Technical Report, Experimental Measurements of the Third-Adjacent-Channel Impacts of Low-Power FM Stations*, DA 03-2277 (Jul. 11, 2003).

to Congress and, based on the Mitre study, recommended that Congress “modify the statute to eliminate the third-adjacent channel distant separation requirements for LPFM stations.”<sup>30</sup>

7. On February 8, 2005, the Commission held a forum on LPFM. The forum was intended to inform the Commission of achievements by LPFM stations and the challenges faced as the service marks its fifth year.<sup>31</sup> As of the date of release of this *Second Order on Reconsideration and Further Notice of Proposed Rulemaking*, more than 1,175 LPFM construction permits have been granted. Of these 1,175 permits, approximately 590 stations are on the air, serving mostly mid-sized and smaller markets.<sup>32</sup> The actions we take today, based in part on testimony received at the LPFM forum, are designed to increase the number of LPFM stations on the air and strengthen the viability of those stations that are already operating.

### III. SECOND ORDER ON RECONSIDERATION

#### A. Ownership and Eligibility

8. In the *Report and Order*, the Commission established a point system for resolving mutual exclusivity among LPFM applicants.<sup>33</sup> The point system includes three selection criteria for mutually exclusive applicants.<sup>34</sup> First, applicants that have an established community presence of at least two years’ duration are awarded one point.<sup>35</sup> Second, applicants that pledge to operate at least 12 hours per day are assigned one point.<sup>36</sup> Finally, applicants that pledge to originate locally at least eight hours of programming per day are assigned one point.<sup>37</sup> The Commission defined local origination for purposes of resolving mutual exclusivity in LPFM applications as the production of programming within 10 miles of the reference coordinates of the proposed transmitting antenna.<sup>38</sup>

9. On reconsideration, the Commission considered a request to broaden the definition of locally originated programming to include programming that “covers local persons and/or their activities and/or local issues.”<sup>39</sup> The Commission agreed that clarification was warranted, but declined to adopt the

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<sup>30</sup> Report to Congress on the Low Power FM Interference Testing Program, Pub. L. No. 10-553 (rel. Feb. 19, 2004).

<sup>31</sup> Forum testimony cited herein is available on video cassette in the Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center.

<sup>32</sup> As of the date of this *Order on Reconsideration and Further Notice of Proposed Rulemaking*, there are 343 licensed LPFM stations; the remaining on-air stations have completed construction and filed applications for licenses to cover their construction permits.

<sup>33</sup> *Report and Order*, 15 FCC Rcd at 2258-60.

<sup>34</sup> *Id.* at 2260.

<sup>35</sup> *Id.* An applicant is deemed to have an established community presence if the applicant is able to certify that for a period of at least two years prior to application, the applicant has been physically headquartered, has had a campus, or has had 75 percent of its board members residing within 10 miles of the reference coordinates of the proposed transmitting antenna. *Id.*

<sup>36</sup> *Id.* The minimum operating hours for LPFM stations are five hours per day, at least six days per week. 47 C.F.R. § 73.850(b). LPFM stations are licensed for unlimited time operations, except for stations operating pursuant to a time sharing agreement. 47 C.F.R. § 73.850(a).

<sup>37</sup> *Report and Order*, 15 FCC Rcd at 2261. The Commission found that as a competitive selection factor, local program origination can advance the Commission’s policy goal of addressing unmet needs for community-oriented radio broadcasting. *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Reconsideration Order*, 15 FCC Rcd at 19246, quoting Bowles Petition at 3.

proposed language. Instead, the Commission explained that because the intent of awarding a point for a pledge to provide locally originated programming is to encourage licensees to maintain production facilities and a meaningful staff presence within the community served by the station, a definition of local program origination as the production of programming by the licensee within 10 miles of the proposed transmitting site is most appropriate.<sup>40</sup> The Commission clarified explicitly that this rule does not necessarily preclude an applicant from claiming a point for local origination based on coverage of a high school away game played more than 10 miles away, so long as the production involves facilities located within a 10-mile radius of the antenna.<sup>41</sup>

10. The United Church of Christ, Office of Communication, Inc. (“UCC”) requests that the Commission further clarify the definition of locally originated programming.<sup>42</sup> UCC states that it is concerned that certain LPFM applicants are construing this term liberally and intend to time-shift programming obtained via satellite and rebroadcast it in an attempt to meet the local program origination pledge.<sup>43</sup> We do not believe that there is any reason for concern that the definition of locally originated programming, as clarified on reconsideration, may be construed broadly enough to encompass programming delivered by satellite. Nevertheless, we will take this opportunity to re-emphasize that the local origination selection criterion is intended to encourage licensees to maintain production facilities and a meaningful staff presence within the community served by the station. Programming that is produced outside of the 10-mile radius and does not involve any local production facilities does not serve this goal. Accordingly, we clarify that such programming, including time-shifted programming obtained via satellite, may not be used to fulfill a locally originated programming pledge made as part of the mutually exclusive LPFM application selection process.

## B. Technical Rules

11. In the *Report and Order*, the Commission adopted a window filing process for applications for new LPFM stations and major modifications in the facilities of authorized LPFM stations.<sup>44</sup> New station and major modification applications are accepted only during window filing periods specified by the Commission.<sup>45</sup> An application proposing a “minor change” to authorized LPFM facilities, however, may be filed at any time.<sup>46</sup> The *Report and Order* defined a minor change as a transmitter site relocation of less than two kilometers for an LP100 station and a relocation of less than one kilometer for an LP10 station.<sup>47</sup> Minor change applications may also propose a change to an adjacent or IF frequency or, upon a technical showing of reduced interference, to any other frequency.<sup>48</sup> As noted, new station and major modification applications may be amended only during specified window filing periods.<sup>49</sup> Only “minor amendments” to such applications may be filed outside a filing window.<sup>50</sup> In the

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<sup>40</sup> *Id.* This approach also eliminates any need for the Commission to evaluate the content of a station’s broadcasts in order to determine their local nature. *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Petition for Reconsideration or, in the Alternative, Clarification of UCC-OC, et al., MM Docket No. 99-25, at 2, 10 (filed Jun. 11, 2001) (“UCC 2001 Petition”).

<sup>43</sup> *Id.* at 10.

<sup>44</sup> *Report and Order*, 15 FCC Rcd at 2256; *see also* 47 C.F.R. § 73.870(b).

<sup>45</sup> *Id.*

<sup>46</sup> 47 C.F.R. § 73.870(a).

<sup>47</sup> *Id.* at 2264; *see also* 47 C.F.R. § 73.870(a).

<sup>48</sup> *Id.*

<sup>49</sup> 47 C.F.R. § 73.871(a).

*Second Report and Order*, implementing the 2001 D.C. Appropriations Act, the Commission determined that it was necessary to adopt a more restrictive approach for “minor amendments” to pending applications, compared with the approach adopted for “minor changes” to authorized facilities, in order to facilitate the expeditious processing of the numerous applications filed in the initial LPFM windows.<sup>51</sup> Accordingly, we barred channel change amendments outside window filing periods.<sup>52</sup> The Commission concluded, however, that our goal of promptly licensing LPFM stations would not be compromised by permitting applicants to change proposed station locations by small distances.<sup>53</sup> Thus, in order to provide “some flexibility for applicants that lose a proposed transmitter site or become aware of a more desirable nearby site after the close of a filing window,” we defined minor amendments to include transmitter site relocations of less than two kilometers for LP100 stations and relocations of less than one kilometer for LP10 stations—identical to the transmitter site relocation limits permissible in applications seeking minor changes to authorized facilities.<sup>54</sup>

12. In its petition for reconsideration of the *Second Report and Order*, UCC requests that we amend our definition of minor change (*i.e.*, an application that seeks modifications to authorized facilities and is permissibly filed outside a filing window) to include transmitter site relocation of up to 5.6 kilometers for LP100 licensees and 3.2 kilometers for LP10 licensees.<sup>55</sup> Although UCC does not explicitly request that we also amend our definition of minor amendment (*i.e.*, an amendment to a pending new station or major modification application that is permissibly filed outside a filing window) to parallel the requested expansion of the definition of minor change, we interpret UCC’s request to encompass both the minor change and minor amendment definitions, both of which were addressed in the *Second Report and Order*.<sup>56</sup> UCC claims that many LPFM applicants have not been able to obtain local government approval for their first choice transmitter locations and must apply for alternative sites.<sup>57</sup> UCC states that the practical experience of UCC, LPFM applicants, and their technical advisors demonstrates that while a two kilometer limit often precludes a workable solution in such situations, a 5.6 kilometer limit will often provide the necessary flexibility for applicants to relocate.<sup>58</sup>

13. We recognize that LPFM licensees have faced a number of legal and practical constraints in identifying, securing, and retaining transmitter sites. We are also aware that in some circumstances, developments that occur during the pendency of an application may make it difficult or even impossible for an LPFM applicant to use the site originally proposed. Permitting transmitter site relocation of up to 5.6 kilometers for LP100 licensees and 3.2 kilometers for LP10 licensees would provide needed flexibility. Accordingly, we will amend Sections 73.870 and 73.871 of our rules to permit the filing of minor change applications and minor amendments requesting authority for transmitter site relocation of

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<sup>50</sup> 47 C.F.R. § 73.871(c).

<sup>51</sup> *Second Report and Order*, 16 FCC Rcd at 8028.

<sup>52</sup> *Id.*; 47 C.F.R. § 73.871(c).

<sup>53</sup> *Second Report and Order*, 16 FCC Rcd at 8028.

<sup>54</sup> *Id.*; 47 C.F.R. § 73.871(c).

<sup>55</sup> UCC 2001 Petition at 8; *see also* Letter from Harold Feld, Media Access Project to Jon Cody, Office of Chairman Michael K. Powell (Sept. 30, 2004) (“9/30/04 MAP Ex Parte”).

<sup>56</sup> *See Second Report and Order*, 16 FCC Rcd at 8028.

<sup>57</sup> UCC 2001 Petition at 8.

<sup>58</sup> *Id.* UCC contends that this definition of minor change would be consistent with LPFM stations’ 60 dBu contour.

up to 5.6 kilometers for LP100 licensees and 3.2 kilometers for LP10 licensees.<sup>59</sup> We clarify that minor amendments may be filed only to applications that are currently pending.<sup>60</sup>

14. Although we are expanding the permissible distance for transmitter site relocation in an amendment to a pending application, we continue to believe that efficient LPFM window application processing requires a relatively fixed database of technical proposals and, therefore, that a narrow definition of “minor” amendment remains necessary.<sup>61</sup> Thus, we will not expand the definition of minor amendment to encompass channel changes. Nevertheless, we recognize that it is in the public interest to provide LPFM applicants as much technical flexibility as possible. Accordingly, we delegate authority to the Media Bureau to open settlement windows for closed LPFM groups to permit applicants entering into settlement agreements to file major change amendments specifying new FM channels. In 2003, the Commission established a similar filing window which successfully facilitated the rapid licensing of a number of LPFM stations.<sup>62</sup> For applications amended in such windows, we delegate authority to the Media Bureau to waive Section 73.871(a) of our rules<sup>63</sup> on a case-by-case basis upon a determination that such waiver will promote expeditious application processing and maximize new LPFM station licensing opportunities. Any settlement agreement submitted under these procedures must be universal.

#### IV. FURTHER NOTICE OF PROPOSED RULEMAKING

15. In *ex parte* meetings and filings and at the recent LPFM forum hosted by the Commission, members of the LPFM community have urged the Commission to revise certain LPFM rules. Five years after the establishment of LPFM, we believe it is now appropriate to assess the practical ramifications of the rules adopted in the *Report and Order*, *Reconsideration Order*, and *Second Report and Order*. We believe that some of the LPFM community’s proposals are appropriate for further consideration, and we seek comment on them as discussed below.

##### A. Ownership and Eligibility

###### 1. Transferability

16. In the *Report and Order*, the Commission declined to allow the sale of LPFM stations.<sup>64</sup> We determined that a prohibition on transfers or assignments of construction permits and licenses for LPFM stations would best promote the Commission’s interest in ensuring spectrum use for low power operations as soon as possible, without the delay associated with license speculation.<sup>65</sup> We concluded that the goals of the LPFM service would be best met if unused permits and licenses were returned to the

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<sup>59</sup> The amended rules are listed in Appendix A.

<sup>60</sup> UCC asserts that the 2001 D.C. Appropriations Act, which required the Commission to establish third-adjacent channel spacing requirements for LPFM, effectively reduced the number of available frequencies and forced LPFM applicants to seek new locations for their transmitters. UCC 2001 Petition at 8. We clarify that applications dismissed for any reason, including pursuant to the third-adjacent channel spacing requirements adopted in the *Second Report and Order*, may not be amended because they no longer are pending.

<sup>61</sup> See *Second Report and Order*, 16 FCC Rcd at 8028-29.

<sup>62</sup> See *Settlement Period Announced for Closed Groups of Pending Low Power FM Mutually Exclusive Applications Filed in Windows I, II, and III*, DA 03-2744 (MB rel. Aug. 28, 2003).

<sup>63</sup> 47 C.F.R. § 73.871(a).

<sup>64</sup> *Report and Order*, 15 FCC Rcd at 2269.

<sup>65</sup> *Id.* We concluded that, given the modest facilities and NCE nature of LPFM stations, non-transferability would not discourage LPFM licensees from serving their listeners. *Id.*

Commission.<sup>66</sup> Section 73.865 of our rules provides that “[a]n LPFM authorization may not be transferred or assigned except for a transfer or assignment that involves: (1) Less than a substantial change in ownership or control; or (2) An involuntary assignment of license or transfer of control.”<sup>67</sup> Based on forum testimony, *ex parte* presentations, and requests for waiver of Section 73.865 filed with the Media Bureau’s Audio Division, we now believe that our rule prohibiting transfer or assignment of LPFM construction permits or licenses may be unduly restrictive and may hinder, rather than promote, LPFM service.<sup>68</sup> We therefore seek comment on whether we should permit the transfer and/or assignment of LPFM authorizations and, if so, whether transfer or assignment should be broadly permitted or limited to special circumstances.<sup>69</sup> We also seek comment on the effect, if any, of a change in transferability with respect to ownership amendments to pending LPFM new and major change applications.<sup>70</sup>

17. First, we seek comment on whether we should amend our rules to permit the transfer of control of LPFM licensee entities. If we permit the transfer of control of LPFM licensees, should we impose any restrictions on such transfers, beyond the requirement that the licensee entity continue to meet our LPFM eligibility criteria? We seek comment regarding the types of organizational structures utilized by LPFM licensees and how transfers of control of LPFM licensees, if permitted, would be effectuated. For example, are LPFM licensees likely to undergo transfers of control by virtue of changes in governing boards, shifting composition of membership bodies, acquisition of a licensee by another organization, or other means? Because the question has been raised frequently on the record, we seek comment more specifically on whether and how to amend our rules to permit the transfer of control of an LPFM licensee in the case of a sudden change in the majority of a governing board. In the *Reconsideration Order*, we clarified that the gradual change of a governing board or membership body to the point that a majority of its members are new since the authorization was granted will not, by itself, constitute a prohibited transfer of control.<sup>71</sup> Our rules, however, do not permit a sudden change in the board or membership of an LPFM licensee, which would constitute an impermissible transfer of control. Several panelists at our recent LPFM forum testified that this restriction causes unnecessary complications for LPFM licensees.<sup>72</sup> The Media Access Project (“MAP”) has requested that the Commission modify its rules so that typical board

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<sup>66</sup> *Id.*

<sup>67</sup> 47 C.F.R. § 73.865(a).

<sup>68</sup> See, e.g., Testimony of Sakura Saunders, KDRT-LP, LPFM Forum (Feb. 8, 2005) (describing challenges in changing composition of LPFM governing boards and a situation in which two NCE organizations would like to operate a station jointly but cannot transfer the license to a new, jointly-run organization); Letter from Cheryl Leanza, Media Access Project, to Marlene Dortch, Secretary, Federal Communications Commission (Aug. 17, 2004) (“8/17/04 MAP Ex Parte”), Attachment.

<sup>69</sup> In the case of an assignment, the authorization passes to a new entity. In a transfer of control situation, the identity of the licensee does not change. Rather, control of the licensee passes to different principals, typically by a transfer of ownership interest. See *Transfers of Control of Certain Licensed Non-Stock Entities*, 4 FCC Rcd 3403 n.4 (1989) (“*Non-Stock Transfer NOP*”).

<sup>70</sup> See 47 C.F.R. § 73.871. In the *Second Report and Order*, we stated that “consistent with the prohibition on the transfer of LPFM station construction permits and licenses, ownership amendments will be limited to changes where the original parties to an application retain more than a fifty percent ownership interest in the application as originally filed. Ownership amendments may preserve or diminish but not improve an applicant’s comparative position. For example, changes in an applicant’s governing body filed after the close of a window would be considered to determine whether an applicant remains entitled to a point for established community presence only if the applicant certified that it met the requirements for this point in the originally filed application.” *Second Report and Order*, 16 FCC Rcd at 8028-29.

<sup>71</sup> *Reconsideration Order*, 15 FCC Rcd at 19248.

<sup>72</sup> See, e.g., Testimony of Sakura Saunders, KDRT-LP, LPFM Forum (Feb.8, 2005).



changes on a non-profit board will be permissible under the Commission's rules.<sup>73</sup> Prometheus Radio Project ("Prometheus") argues that if the LPFM service is to be accessible to community groups, its regulations must take into account that changes in governing boards are part of the nature of existence of such groups.<sup>74</sup> Based on the record, we propose to amend our rules to permit changes of more than 50 percent of the membership of governing boards that occur suddenly, in addition to the gradual board changes that are currently permitted under our rules. We seek comment on this proposal.

18. Similarly, we seek comment on whether we should amend our rules to permit the assignment of LPFM authorizations from the licensee to another entity. If we permit LPFM authorizations to be assigned and control of LPFM licensees to be transferred, should we allow consideration for these transactions? In short, should we permit the sale of LPFM stations? If so, should we establish a holding period during which a station may not be sold at all, or may not be sold for more than the licensee's legitimate and prudent expenses? We seek comment below on whether to permanently restrict eligibility for LPFM authorizations to local entities and/or permanently prohibit multiple ownership of LPFM stations and how our actions in that regard should affect assignments and transfers.

19. Finally, assuming that we amend our rules to permit transfer and/or assignment of LPFM authorizations, what procedures should we implement to ensure the integrity of the process and the promotion of local service? Can general guidelines be established for the transfer of control or assignment of LPFM stations, or should the Commission delegate to the Media Bureau authority to review proposed transfers and assignments on a case-by-case basis?<sup>75</sup> In particular, we seek comment on the process by which LPFM permittees and licensees may request approval for or report transfers of control. For LPFM licensees with a traditional corporate organizational structure, should we apply our rules governing transfers of control of stock corporations?<sup>76</sup> Given the non-profit nature of LPFM licensees, we believe it is likely that many LPFM authorizations are held by non-stock corporations. The Commission has never formally adopted a policy setting forth a clear standard for transfers of control by non-stock corporations.<sup>77</sup> In 1989, we issued a notice of inquiry regarding transfers of non-stock corporations, but the proceeding did not reach the rulemaking stage.<sup>78</sup> Nevertheless, we believe this notice of inquiry may provide helpful guidance in establishing the process by which the Commission will consider transfers of control of LPFM licensees, if we determine to permit such transfers. In the *Non-Stock Transfer NOI*, the Commission proposed that gradual changes in the governing boards of membership organizations and governmental entities<sup>79</sup>—even if the changes ultimately resulted in the

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<sup>73</sup> 8/17/04 MAP Ex Parte.

<sup>74</sup> See Comments of Prometheus Radio Project, et al., MM Docket No. 99-25 at 22 (filed Oct. 14, 2003) ("Prometheus Mitre Study Comments").

<sup>75</sup> Section 310(d) of the Act prohibits the assignment of any construction permit or station license or the "transfer of control of any corporation" that holds a construction permit or station license, "except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby." 47 U.S.C. § 310(d).

<sup>76</sup> With respect to traditional corporations, we have developed general guidelines for determining where control resides, what constitutes a transfer of control, and how permittees and licensees may seek approval of such transfers. See *Non-Stock Transfer NOI* ¶5.

<sup>77</sup> See, e.g., *Applications of Seven Locks Broadcasting Co.*, 94 FCC 2d 899, 901 (1983).

<sup>78</sup> *Non-Stock Transfer NOI*, 4 FCC Rcd at 3403.

<sup>79</sup> The *Non-Stock Transfer NOI* described a membership organization as an entity in which a body of members elects a board of directors, which in turn exercises policy making authority in accordance with the entity's written organizational document. Examples of "membership" include contributors to a non-profit organization who are entitled to vote for the organization's board of directors, or individuals who belong to an association or union, or the congregation of a church. The governing board for a governmental entity is generally appointed by elected officials, either directly or indirectly, and the written organizational document, such as a statute or regulation, can

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replacement of a majority of the original board members—would not be considered transfers of control within the meaning of the Act, and would need to be reported only as appropriate on the licensee’s ownership reports.<sup>80</sup> This approach is consistent with our clarification regarding LPFM stations in the *Reconsideration Order*. Under the proposal in the *Non-Stock Transfer NOI*, a sudden change in a majority of the governing board of a membership organization or governmental entity would be considered an insubstantial transfer of control, subject to a modified “short form” consent procedure, including the filing of an FCC Form 316.<sup>81</sup> We seek comment on whether to adopt a similar approach for changes in governing boards of LPFM licensees that are non-stock entities.<sup>82</sup>

20. As discussed in detail above, our current rule prohibiting the transfer of LPFM stations is hampering the LPFM service by, for example, impeding routine transitions to new governing boards and limiting the ability of an LPFM licensee to assign its license to a new, jointly-controlled entity composed of several similarly focused organizations. We believe that introducing some level of transferability to the LPFM service is critical. We also believe that delaying relief to LPFM stations until this proceeding is completed will not serve the public interest. Accordingly, we delegate to the Media Bureau authority to consider, on a case-by-case basis, requests for waivers of Section 73.865 of our rules. The Media Bureau may grant a waiver upon determination that such waiver will maximize spectrum use for low power FM operations. For example, waiver may be appropriate, assuming the public interest would be served, in certain circumstances: a sudden change in the majority of a governing board with no change in the organization’s mission; development of a partnership or cooperative effort between local community groups, one of which is the licensee; and transfer to another local entity upon the inability of the current licensee to continue operations. This is not an exhaustive list of circumstances appropriate for waiver. However, until we have further considered the transferability issue, we do not believe that waiver is appropriate to permit the for-profit sale of an LPFM station to any entity or the transfer of an LPFM station to a non-local entity or an entity that owns another LPFM station.

## 2. Ownership and Eligibility Limitations

21. In the *Report and Order*, we placed certain restrictions on LPFM ownership for the first two years after the opening of the first filing window for the LPFM service. First, for the first two years, no entity may own more than one LPFM station.<sup>83</sup> After the first two years, our rules allow one entity to own up to five stations nationally, and after the first three years, our rules allow an entity to own up to ten

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usually be changed only by the action of a superior governmental agency. *Non-Stock Transfer NOI* ¶11.

<sup>80</sup> *Id.* ¶29.

<sup>81</sup> *Id.*

<sup>82</sup> The *Non-Stock Transfer NOI* proposed a different approach for organizations with self-perpetuating boards. *Id.* ¶11. For an organization with a self-perpetuating board, such as a foundation or a private educational institution, the ultimate policy making authority rests in a governing board that selects its own replacements. Unlike membership organizations or governmental entities, the ultimate authority of the organization with a self-perpetuating board is the board itself, rather than a body outside the board. For such entities, the Commission proposed that once changes resulted in the replacement of the majority of the board, even if the changes were gradual, an insubstantial transfer of control would occur and prior Commission approval would be required pursuant to a modified short form consent procedure. *Id.* A sudden change in a majority of a self-perpetuating board of a licensed non-stock entity would be considered a substantial transfer of control requiring the licensee to seek Commission consent under the FCC Form 315 (long form) transfer procedures. *Id.* Should we follow this approach regarding LPFM stations?

<sup>83</sup> *Report and Order*, 15 FCC Red at 2216. We adopted an attribution exception for local chapters of national or other large organizations, if a local chapter is separately incorporated and has a distinct local presence and mission. *Id.* at 2225.

stations nationwide.<sup>84</sup> No entity may own more than 10 LPFM stations. Second, for the initial and subsequent windows opened within two years of the first filing window for LPFM, all LPFM applicants were required to be based within 10 miles of the station they sought to operate.<sup>85</sup> Beginning two years after the first window for LPFM service opened, non-local applicants were eligible to apply for LPFM stations.<sup>86</sup> UCC requests that we permanently prohibit multiple ownership and either permanently restrict eligibility to local entities or extend the restriction for an additional period of time.<sup>87</sup>

22. We adopted these rules in order to foster diversity and to maximize the opportunities for applicants to obtain LPFM authorizations by disallowing any common ownership of LPFM stations during the start-up of the service. After the start-up phase was over, however, we allowed the accumulation of additional stations where local applicants had not applied.<sup>88</sup> We stated in the *Report and Order* that we believed that, in addition to ensuring the fullest use of LPFM spectrum in the long term, this approach would balance the interests of local entities, whom we expected to be the first entrants in the service, and national NCE entities, which we anticipated would be interested in additional local outlets to increase their reach and achieve certain efficiencies of operation.<sup>89</sup> Our intention was to make it more likely that local entities would operate this service, but to ensure that if no local entities came forward, the available spectrum would not go unused.<sup>90</sup> In the *Reconsideration Order*, we considered a request from UCC that we extend the two-year time periods for the community-based requirement and the national cap, and concluded that the *Report and Order* struck an appropriate balance between the interests of local groups and our interest in ensuring that the LPFM service is used fully.<sup>91</sup> Accordingly, we declined to modify these rules at that time.

23. Now that more than two years has passed since the first set of LPFM filing windows, we seek comment regarding whether we should amend our rules to reinstate for a period of time or make permanent our restrictions regarding local entities and multiple ownership. Would a continued limitation on multiple ownership foster diversity of programming and viewpoint or would it prevent LPFM licensees from achieving economies of scale? Does an eligibility restriction for local entities ensure local service for listeners or might it result in some communities losing LPFM service because no local entity seeks to provide it? Should we permanently restrict eligibility to local entities but grant a waiver of such restriction in cases in which the applicant can demonstrate that no local entity has sought to provide service? We further seek comment regarding the relationship between any such restrictions and our consideration regarding transferability of LPFM stations. Specifically, if we make permanent the local entity eligibility restriction and the prohibition on multiple ownership, how should such limitations be considered in the context of applications for assignment or transfer of control of LPFM stations, discussed above?

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<sup>84</sup> *Id.* at 2222.

<sup>85</sup> *Id.* at 2219. The applicant must be able to certify that it or its local chapter or branch is physically headquartered, has a campus, or has 75 percent of its board members residing within 10 miles of the reference coordinates of the proposed transmitting antenna. *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> 9/30/04 MAP Ex Parte; Petition for Reconsideration of UCC-OC, et al., MM Docket No. 99-25 (filed Mar. 16, 2000) (“UCC 2000 Petition”) at 3-6.

<sup>88</sup> *Report and Order*, 15 FCC Rcd at 2222.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 2219-20.

<sup>91</sup> *Reconsideration Order*, 16 FCC Rcd at 19242. *See also* UCC 2000 Petition at 3-6.

### 3. Time-Sharing

24. In the *Report and Order*, the Commission established a point system for resolving mutual exclusivity among LPFM applicants.<sup>92</sup> If mutually exclusive applicants have the same point total, any two or more of the tied applicants may propose to share use of the frequency by submitting a time-share proposal within 30 days of the release of a public notice announcing the tie.<sup>93</sup> Such proposals are treated as amendments to the time-share proponents' applications and become part of the terms of the station's license.<sup>94</sup> MAP asserts that because LPFM applicants have few resources, the 30-day deadline for the submission of a time-share proposal is too short.<sup>95</sup> MAP has requested that we extend the submission deadline to 90 days from the date a mutually exclusive group is announced.<sup>96</sup> We agree that 30 days may not afford sufficient time for two or more small organizations to commence and complete negotiations and prepare a time-share proposal for the Commission's consideration. Accordingly, we propose to extend the period to 90 days. We seek comment on this proposal.

25. If a tie among mutually exclusive applications is not resolved through time-sharing, the tied applications are reviewed for acceptability and applicants with tied, grantable applications are eligible for equal, successive, non-renewable license terms of no less than one year each for a total combined term of eight years.<sup>97</sup> In the *Report and Order*, although we provided LP100 and LP10 licensees with the same license terms and renewal expectancy as full-power FM radio stations, we determined not to extend a renewal expectancy to licenses granted under these final tie-breaker procedures.<sup>98</sup> We now believe that the public interest would be better served by permitting the renewal of viable time-share arrangements, rather than subjecting operating stations to the uncertainty of window filing schedules and the risks of the LPFM comparative process. Accordingly, we tentatively propose to permit the renewal of licenses granted under involuntary time-sharing successive license term procedures. We seek comment on this proposal and the means of implementing such renewal expectancy. Should licenses be renewed in the same order as they are granted, *i.e.*, the sequence in which the parties file applications for licenses to cover their construction permits? We note that increased flexibility in transferability of LPFM licenses, combined with a renewal expectancy, may result in involuntary time-sharing licensees modifying their time-sharing arrangements prior to seeking renewal. We seek comment on how best to accommodate such developments in the renewal process.

## B. Technical Rules

### 1. Construction Period

26. In the *Report and Order*, we established an 18-month construction period for both LP10 and LP100 services.<sup>99</sup> The Commission believed that most permittees would be able to and would have sufficient incentive to construct their low power stations in a much shorter time period than other

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<sup>92</sup> *Report and Order*, 15 FCC Rcd at 2258-60.

<sup>93</sup> 47 C.F.R. § 73.872(c).

<sup>94</sup> *Id.*

<sup>95</sup> UCC 2001 Petition at 4.

<sup>96</sup> *Id.*

<sup>97</sup> 47 C.F.R. § 73.872(d).

<sup>98</sup> *Report and Order*, 15 FCC Rcd at 2267. LPFM licenses are renewed for a term not to exceed eight years from the date of expiration of the preceding license, and competing applicants are not considered if the licensee meets the renewal standard of Section 309(k)(1) of the Act. *Id.*

<sup>99</sup> *Report and Order*, 15 FCC Rcd at 2278.

broadcast permittees, given the relative technical simplicity of such stations.<sup>100</sup> We recognized, however, that zoning and permitting processes could, in some cases, delay construction.<sup>101</sup> Accordingly, we afforded permittees 18 months to construct, and stated that the 18-month deadline would be strictly enforced.<sup>102</sup> We are aware that some LPFM permittees have met the construction deadline only with great difficulty, and that some have been unable to complete construction within the 18-month period.<sup>103</sup> MAP has requested that the Commission waive or extend construction deadlines to avoid forfeit of LPFM construction permits for failure to construct.<sup>104</sup> However, the Commission's current policy regarding all broadcast station construction deadlines is to extend such deadlines only in extremely limited situations that dictate the tolling of the construction period: acts of God; administrative or judicial review of a construction permit grant; failure of a Commission-imposed condition precedent on the permit; or judicial action related to necessary local, state, or federal requirements.<sup>105</sup> Thus, although some LPFM permittees may face delays that are outside of their control, if such delays do not qualify under our tolling rules, a permittee must either complete construction or forfeit the permit.<sup>106</sup> We believe that our policy regarding extension of broadcast station construction deadlines generally serves the public interest. We recognize, however, that the LPFM 18-month construction period may be too short in some cases. Our intention is to maximize the likelihood that LPFM permittees will get on the air. Accordingly, we propose to extend the LPFM construction period to three years, the same period afforded other broadcast permittees. We seek comment on this proposal.

27. We note that some LPFM construction permits are scheduled to expire in the near future, while we are considering this issue, and that other LPFM permittees with expired permits have requests pending before the Media Bureau for additional time to construct. We will adopt an interim waiver policy to increase the likelihood that these permittees will complete construction and commence operation. Although our rules do not generally permit waiver of broadcast construction permit deadlines, we note that all other broadcast permittees are afforded 36 months to construct facilities.<sup>107</sup> Here, where the construction period is half as long, we believe that waivers generally are warranted to extend outstanding LPFM construction permits to three years. Pending Commission action on this *Further Notice*, we delegate to the Media Bureau the authority to consider requests for waiver of the construction period even if the requirements under our tolling rules are not met. The Media Bureau may determine that a waiver is appropriate if an LPFM permittee demonstrates that it cannot complete construction within the allotted 18 months for reasons beyond its control, that it reasonably expects to be able to complete construction within the additional 18 months that the construction extension would provide, and that the public interest would be served by the extension.

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 2279.

<sup>102</sup> *Id.*

<sup>103</sup> Letter from Harold Feld, Media Access Project, to Marlene H. Dortch, Secretary, Federal Communications Commission (Dec. 8, 2004) ("12/8/04 MAP Ex Parte"); 8/17/04 MAP Ex Parte, Attachment. *See also* Comments of Nick Ring, WBCR-LP, LPFM Forum (Feb. 8, 2005) (open microphone for comments from audience).

<sup>104</sup> 8/17/04 MAP Ex Parte, Attachment.

<sup>105</sup> *See* 47 C.F.R. § 73.3598; 1998 Biennial Regulatory Review—Streamlining of Mass Media Applications, Rules, and Processes, 14 FCC Rcd 17525, 17540 (1999) ("*Streamlining Order*").

<sup>106</sup> In the *Streamlining Order*, we stated that only in the case of "rare and exceptional circumstances" would we "entertain requests for waiver of our strict tolling provisions." *Id.* at 17541.

<sup>107</sup> *See* 47 C.F.R. § 73.3598.

## 2. Technical Amendments

28. Although we are amending Section 73.871 of our rules to permit greater flexibility for applicants to file minor amendments to relocate transmitter sites, the amended rule will continue to preclude time-sharing applicants from relocating the transmitter to a central location, unless such location falls within the new distance limits. UCC has requested that we amend our rules to allow applicants that submit a time-share agreement to relocate the transmitter to a central location, provided one is available in the channel finder.<sup>108</sup> We agree that increasing flexibility for time-sharing applicants to relocate the transmitter will facilitate time-share arrangements and expedite grant of LPFM licenses. Accordingly, we propose to permit applicants that submit a time-sharing proposal to file a minor amendment proposing to relocate the transmitter to a central location, notwithstanding the site relocation limits set forth in Section 73.871. We seek comment on this proposal.

## 3. Interference Protection Requirements

29. As part of our overall plan to protect FM stations from interference from new LPFM stations, in the *Report and Order* we adopted minimum distance separation requirements for LPFM stations.<sup>109</sup> We concluded that minimum spacing rules would provide the most efficient means to process a large number of applications while ensuring the overall technical integrity of the FM service.<sup>110</sup> Because FM translator and booster stations generally do not have specific class limitations, LPFM-FM translator separation requirements were determined by analyzing the 60 dBu contours of authorized translator stations and grouping them into three cohorts based on station power and height.<sup>111</sup> We also amended certain Part 74 rules to require that FM translator and booster stations protect the 60 dBu contour of LP100 stations.<sup>112</sup> On reconsideration, we stated that the interference protections we adopted “place LPFM stations and FM translators on essentially equal footing” with respect to protecting each other from interference.<sup>113</sup> We noted, however, that Commission policy treats translators as a secondary service, and that a “proper role of FM translators among aural services to the public is to provide secondary service to areas in which direct reception of signals from FM broadcast stations is unsatisfactory due to distance or intervening terrain obstructions.”<sup>114</sup> We declined on reconsideration to modify our rules to eliminate the protections afforded to LP100 stations because such modifications would have rendered LPFM stations secondary to translators.<sup>115</sup>

30. LPFM advocates now request that the Commission reassess the relationship between FM translators and LPFM stations for licensing purposes.<sup>116</sup> Prometheus argues that because NCE translators may be fed by satellite,<sup>117</sup> such translators often are used to retransmit distant signals, contrary to the

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<sup>108</sup> UCC 2001 Petition at 7.

<sup>109</sup> *Report and Order*, 15 FCC Rcd at 2233; *Reconsideration Order*, 15 FCC Rcd at 19223.

<sup>110</sup> *Report and Order*, 15 FCC Rcd at 2233-34.

<sup>111</sup> *Id.* at 2233.

<sup>112</sup> *Id.*; *Reconsideration Order*, 15 FCC Rcd at 19223; *see also* 47 C.F.R. § 74.1204.

<sup>113</sup> *Reconsideration Order*, 15 FCC Rcd at 19223.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 19224.

<sup>116</sup> *See* Testimony of Marianne Knorzer, KRBS-LP, LPFM Forum (Feb. 8, 2005). *See also* 12/8/04 MAP Ex Parte; 9/30/04 MAP Ex Parte; 8/17/04 MAP Ex Parte; Prometheus Mitre Study Comments at 18-20.

<sup>117</sup> *See* 47 C.F.R. § 74.1231(b).

intended purpose of the translator service to merely extend the reach of local stations.<sup>118</sup> Prometheus contends that every new translator that does not expand the reach of a station originating local programming takes the place of a potential LPFM station that will originate local programming.<sup>119</sup> In particular, Prometheus argues that the Commission's March 2003 filing window for translator applications opened in major cities before a full LPFM filing window opened, thereby eliminating virtually all opportunities for new LPFM stations in top-25 markets.<sup>120</sup> Prometheus also claims that translator applications are being filed not by members of local communities, but by non-local organizations applying for large numbers of translator licenses.<sup>121</sup> To overcome the preclusive impact of the 2003 translator window, Prometheus requests that the Commission give locally controlled and operated LPFM stations priority over translators.<sup>122</sup>

31. We agree that it is appropriate to reevaluate the current co-equal status of LPFM and FM translator stations as a result of the extraordinary volume of FM translator construction permit applications—more than 13,000—filed with the Commission during the March 2003 filing window. The Media Bureau's Audio Division already has granted approximately 3,300 new station construction permit applications from the singleton filings, a number nearly equal to the total number of FM translator stations licensed and operating prior to the filing window.<sup>123</sup> Approximately 8,000 applications remain on file. New LPFM station applications must protect each of these authorized facilities and pending applications. Because LPFM and FM translator stations are licensed under fundamentally different technical rules,<sup>124</sup> it is impossible to determine the precise extent to which the 2003 window-filed FM translator applications have impacted the potential licensing of new LPFM stations. In this regard, Prometheus's contention that every new translator "takes the place" of a potential LPFM station is incorrect. Nonetheless, we are confident that these filings have had a significant preclusive impact on future LPFM licensing opportunities based solely on application volume. This impact concerns us particularly because the 2000-2001 national LPFM window filing process demonstrated that very few opportunities for LPFM stations remained in major markets at that time.<sup>125</sup> Moreover, as Prometheus notes, many of the translator applications were filed by a relatively small number of non-local filers without any apparent connection to the communities specified in the applications.

32. On the other hand, as we stated in the *Reconsideration Order*, "translator-based delivery of broadcast programming is an important objective," and we continue to support this objective.<sup>126</sup> Some FM translators provide important aural services to unserved and underserved areas. Translators also are

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<sup>118</sup> 8/17/04 MAP Ex Parte; Prometheus Mitre Study Comments at 18. See also Testimony of Sakura Saunders, KDRT-LP, LPFM Forum (Feb. 8, 2005).

<sup>119</sup> Prometheus Mitre Study Comments at 19.

<sup>120</sup> *Id.* See also Testimony of Jon Gerbracht, WEES-LP, LPFM Forum (Feb. 8, 2005).

<sup>121</sup> Prometheus Mitre Study Comments at 19.

<sup>122</sup> *Id.* at 20.

<sup>123</sup> The total number of FM translator and booster stations licensed as of March 31, 2003, prior to consideration of any applications filed during the 2003 translator filing window, was 3,818. See *Broadcast Station Totals as of March 31, 2003* (MB rel. May 5, 2003) (News Release).

<sup>124</sup> See *infra* ¶¶ 34-36.

<sup>125</sup> The Commission imposed a freeze on the filing of new and major change applications for non-reserved band FM translators in 1997. *Implementation of Section 309(j) of the Communications Act*, 12 FCC Rcd 22363, 22388 (1997). The Mass Media Bureau opened the four-part national LPFM filing window in 2000-01, two years before opening the 2003 translator window. See *supra* ¶ 4. Accordingly, we reject Prometheus's characterization of the timing of these windows.

<sup>126</sup> *Reconsideration Order*, 15 FCC Rcd at 19224.

used to deliver syndicated national programming to well-served communities. Our rules impose strict ownership limits on commercial translator licensees<sup>127</sup> and require the use of off-air signal delivery systems<sup>128</sup> for both commercial and NCE translators operating in the non-reserved FM band.<sup>129</sup> These rules generally prohibit a commercial FM station from using translators to expand service beyond its protected contour.<sup>130</sup> In contrast, an NCE licensee may own and operate translators that reach listeners far beyond the service area of its co-owned primary station. Thus, many NCE licensees use FM translators to distribute programming throughout the country. Notwithstanding Prometheus's complaint regarding non-local filers in the March 2003 translator window, this is not a recent development in the FM translator service.

33. In a notice of inquiry in the Commission's broadcast localism proceeding, we sought comment on how best to harmonize our licensing processes for FM translators and LPFM stations to enhance localism.<sup>131</sup> As the Commission asked in the Localism NOI, "[r]ecognizing that both LPFM stations and translators provide valuable service, what licensing rule changes should the Commission adopt to resolve competing demands by stations in these two services for the same limited spectrum?"<sup>132</sup> We seek comment on whether and, if so, under what conditions LPFM applications should be treated as having "primary" status to prior-filed FM translator applications and authorized FM translator stations. Should all LPFM applications have primary status because LPFM stations are permitted to originate local programming? Should primary status be limited to LPFM applicants that pledge to originate locally at least eight hours of programming per day?<sup>133</sup> Should the Commission provide "grandfathered" protection rights to certain classes of FM translators? Possible class designations include currently licensed and operating stations; stations licensed prior to the adoption of the *Report and Order*; currently authorized translator stations, including the construction permits issued to the 2003 window filers; and/or "fill-in" FM translators but not "other area" translator stations.<sup>134</sup> Should the Commission dismiss all pending applications for new FM translator stations and make potential refilings subject to the resolution of the licensing issues raised in this proceeding? Should the Commission dismiss the pending mutually exclusive FM translator applications? As an interim measure while we consider these important questions, we direct the Media Bureau to stop granting FM translator new station construction permits for which short-form applications were filed in the 2003 window. This freeze is effective upon the release of this *Further Notice* and shall remain in effect for six months.

34. In addition to requesting that the Commission grant LPFM stations priority with respect to FM translators, some LPFM advocates have requested that the Commission adopt more flexible technical licensing rules for the LPFM service as a partial remedy to the preclusive impact of the FM translator filings and limited LPFM spectrum availability in many large and medium-sized communities.

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<sup>127</sup> See 47 C.F.R. § 74.1232(d).

<sup>128</sup> See 47 C.F.R. § 74.1231(b).

<sup>129</sup> The March 2003 window was limited to non-reserved band proposals. None of these authorized or proposed stations may rebroadcast signals delivered direct to the station via satellite. See 47 C.F.R. § 74.1231(b). Thus, we find misplaced Prometheus's attempt to link the "problem" of the 2003 window to our satellite delivery rules.

<sup>130</sup> A commercial FM station may consent to the rebroadcast of its signal beyond the station's protected contour if the rebroadcasting translator station licensee has no interest in or connection with the primary station. See 47 C.F.R. § 74.1232(d).

<sup>131</sup> *Broadcast Localism*, 19 FCC Rcd 12425, 12442 (2004) ("*Localism NOP*").

<sup>132</sup> *Id.*

<sup>133</sup> See 47 C.F.R. § 73.872(b)(3). LPFM applicants that pledge to originate at least eight hours of local programming each day are awarded one point under the LPFM comparative point system.

<sup>134</sup> See 47 C.F.R. §§ 74.1201 (h) and (i).



Specifically, they have requested that LPFM applicants be permitted to utilize the contour overlap interference protection approach, rather than mileage separations.<sup>135</sup> Adoption of a contour overlap approach is statutorily barred at this time. Congress has mandated the use of a distance separation methodology to protect FM stations from LPFM station interference by directing the Commission to prescribe co-, first-, second-, and third-adjacent channel “minimum distance separations” for LPFM stations.<sup>136</sup> Thus, the Commission may not use the fundamentally different contour methodology to license LPFM stations.

35. Even were we not statutorily prohibited from adopting a contour approach, we believe that significant policy considerations weigh in favor of continuing to license LPFM stations in accordance with the minimum distance separation methodology adopted in the *Report and Order*.<sup>137</sup> This protection scheme is modeled on the certain “go-no go” predicted interference licensing methodology utilized for commercial FM stations.<sup>138</sup> Although we recognize that this methodology is more restrictive than the FM translator contour methodology,<sup>139</sup> we believe that implementation of LPFM minimum distance separation requirements has proven to be simple and reliable, and therefore appropriate for the LPFM service. Because adoption of a contour methodology would require the preparation of complex and costly engineering exhibits, we believe that such approach would inevitably result in higher application error rates, extended processing time frames, and licensing delays. The Media Bureau has processed over 3000 applications from the first LPFM window. At this point, it is abundantly clear that many LPFM applicants had significant problems successfully preparing basic technical showings, completing simplified application forms, and responding to staff requests for required amendments. Excluding the Congressionally mandated dismissals of applications that failed to protect full service stations operating on third-adjacent channels, the staff dismissed approximately one-third of all applications for basic technical and legal defects. We believe that the more complex contour methodology would create even more processing problems. In addition, the choice of a distance separation methodology was critically important in the Audio Division’s development of the extremely accessible and successful LPFM channel finder tool utility.

36. An equally important policy consideration is that an integral part of the more flexible translator rules, Section 74.1203(a) of the Commission’s rules, would be wholly inappropriate for the LPFM service.<sup>140</sup> Under this rule, an FM translator may not cause any actual interference to any authorized broadcast station.<sup>141</sup> This rule is a necessary complement to the more flexible translator contour rule, essentially shifting to translator applicants, permittees, and licensees the risk that a translator must go off the air if interference cannot be eliminated. The Section 73.1203(a) interference complaint procedure regularly results in the cancellation of FM translator authorizations by the Media Bureau. We believe that the risks associated with a rule prohibiting any interference, such as the rule applicable to translators, far outweigh the potential benefit of additional LPFM licensing opportunities that use of the contour method might afford. We believe that it would be inappropriate to expose community

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<sup>135</sup> 12/8/04 MAP Ex Parte; *see also* Testimony of Harry Kozlowski, WCNH-LP, LPFM Forum (Feb. 8, 2005); Testimony of Jon Gerbracht, WEES-LP, LPFM Forum (Feb. 8, 2005).

<sup>136</sup> *See* 2001 D.C. Appropriations Act.

<sup>137</sup> *Report and Order*, 15 FCC Rcd at 2232-35.

<sup>138</sup> *See* 47 C.F.R. § 73.207.

<sup>139</sup> *Report and Order*, 15 FCC Rcd at 2233.

<sup>140</sup> 47 C.F.R. § 74.1203(a).

<sup>141</sup> In contrast, an LPFM station may continue to operate when it would cause interference within the 60 dBu contour (but not 70 dBu contour) of a full service FM station. In addition, if an LPFM station is predicted to cause interference within a full service station’s 70 dBu contour, it may continue to operate if it can show that actual interference would be unlikely. *See Report and Order*, 15 FCC Rcd at 2232; *infra* ¶37.

organizations with limited funds and little technical and legal sophistication to this kind of uncertainty, particularly given the effort invested by organization members, station management, and numerous volunteers. Given the high level of uncertainty associated with the more flexible translator allocation scheme, adoption of this approach for LPFM seems ill-advised in light of the interest expressed by many LPFM operators for greater “primary” status and for greater protection against “encroachments” from new full power stations and facility modifications by existing stations.

#### 4. Protection From Subsequently Authorized Full Service FM Stations

37. Full-service FM stations, including subsequently authorized new stations, facility modifications, and upgrades, are not required to protect facilities specified in LPFM applications or authorizations. In order to provide a measure of stability to operating LPFM stations, however, the Commission concluded in the *Report and Order* that an LPFM station generally may continue to operate even if it is predicted to cause interference within the protected service contour of a subsequently authorized FM service, including new stations and facilities modifications or upgrades of existing stations.<sup>142</sup> Under Section 73.809 of the Commission’s rules, LPFM stations are responsible for resolving all allegations of actual interference to the reception of a co-channel or first-, second-, or third-adjacent channel full service station within the full service station’s 70 dBu contour.<sup>143</sup> This rule requires an LPFM station to cease operations if the LPFM station cannot demonstrate that interference is unlikely to occur.

38. Although to date only one LPFM station has been forced off the air pursuant to this procedure, operating LPFM stations have expressed concerns about the potential impact of “encroaching” full-service stations.<sup>144</sup> MAP has requested that we adopt a “processing policy” that would permit the denial of a full service FM station’s modification application if “grant of the application will deny a local community content by reducing the coverage area available to LPFM stations.”<sup>145</sup> We do not believe that such an ad hoc processing policy would afford any degree of certainty to operating LPFM stations. Moreover, we disagree with the basic thrust of this proposal, which effectively would provide primary status to LPFM stations with respect to subsequently filed applications for new or modified full service station facilities. As we stated in the *Report and Order*, “[w]e do not believe that an LPFM station should be given an interference protection right that would prevent a full-service station from seeking to modify its transmission facilities or upgrade to a higher service class. Nor should LPFM stations foreclose opportunities to seek new full-service radio stations.”<sup>146</sup> We believe, however, that it would be useful to consider whether to limit the Section 73.809 interference procedures to situations involving co- and first-adjacent channel predicted interference, where the predicted interference areas are substantially greater than for second- and third-adjacent channel interference. Although the effective service area of an LPFM station could be diminished as a result of a second- or third-adjacent channel full service station “move-in,” the predicted interference area to the full service station would be limited to a small area in the immediate vicinity of the LPFM station transmitter site. In these circumstances, the public interest may favor continued LPFM second- and third-adjacent channel operations over a subsequently authorized

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<sup>142</sup> *Report and Order*, 15 FCC Rcd at 2232. Because FM stations have a core responsibility to serve their principal communities, an operating LPFM station is not permitted to cause interference within a commercial or NCE FM station’s 70 dB contour. If an LPFM station cannot demonstrate that interference is unlikely to occur within this contour, it will be directed to cease operations upon the commencement of program tests by the commercial or NCE FM station. *Id.*

<sup>143</sup> See 47 C.F.R. § 73.809(a)(1).

<sup>144</sup> See Testimony of Marianne Knorzer, KRBS-LP, LPFM Forum (Feb. 8, 2005).

<sup>145</sup> See Letter from Harold Feld, Media Access Project, to Marlene H. Dortch, Secretary, Federal Communications Commission (Feb. 15, 2005) (misdated Feb. 15, 2004) (“2/15/05 MAP Ex Parte”).

<sup>146</sup> *Report and Order*, 15 FCC Rcd at 2230.

upgrade or new full service station.

39. We seek comment on whether to amend Section 73.809. Should an LPFM station be permitted to continue to operate even when interference is predicted to occur within the 70 dBu contour of an “encroaching” second- or third-adjacent channel full service station? Should an LPFM station be permitted to remain on the air if the area of predicted interference does not receive service from the full service station prior to the grant of a construction permit for a new station or facilities modification of an existing station? Should the LPFM station be permitted to remain on the air if the full service station’s community of license would not be subject to predicted interference? It is always the case that an “encroachment” issue involves the licensing of a subsequently filed full service station application. As such, would an amendment to Section 73.809 be consistent with Congress’s directive barring the reduction of third-adjacent channel distance separations for “low-power FM radio stations”?<sup>147</sup>

### C. Filing Windows

40. The Commission has not announced any upcoming filing windows for new or major change LPFM applications. MAP requests that the Commission establish “regular” filing windows for new LPFM stations.<sup>148</sup> Currently, all licensable aural services use some form of a window filing process for new stations and for major modifications to authorized stations.<sup>149</sup> As a general matter, we agree that the Commission should schedule windows at reasonable intervals for each of the aural services. We believe, however, that it would be premature to schedule a window for the filing of LPFM new station and major modification applications at this time. First, it would be inefficient to open a window prior to the Commission completing consideration of the FM translator and other licensing issues raised in this *Further Notice*. Second, we are mindful of the fact that the Media Bureau has recently begun the process of awarding construction permits under the new NCE full-service comparative criteria.<sup>150</sup> Following the resolution of the approximately 170 “closed” NCE groups (consisting of approximately 870 applications), the Commission will open a national filing window for new NCE stations and for major changes in authorized NCE facilities, the first such filing opportunity since April 21, 2000.<sup>151</sup> Although we recognize the critically valuable service that LPFM stations can play in serving their communities, this NCE full service licensing process must remain a higher priority at this time. We intend to proceed in a manner that takes into account the limited staff resources that can be devoted to processing applications for service in the FM band. We believe that this approach will, in the long run, permit the more prompt processing of applications filed in the next LPFM window, a goal endorsed by numerous LPFM advocates.

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<sup>147</sup> See 2001 D.C. Appropriations Act.

<sup>148</sup> See 9/30/04 Ex Parte. See also Testimony of Sakura Saunders, KDRT-LP, LPFM Forum (Feb. 8, 2005); 12/8/04 MAP Ex Parte.

<sup>149</sup> See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services*, 13 FCC Rcd 15920, 15972-74 (1998) and 47 C.F.R. §§ 73.3571, 73.3572, and 73.3573; see also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 15 FCC Rcd 7386, 7421 (2000) and 47 C.F.R. § 73.3573(e)(2); see also *Report and Order*, 15 FCC Rcd at 2254-57 and 47 C.F.R. § 73.870(b). The one exception to this licensing rule is that applications for new FM booster station construction permits, which must operate on a co-channel basis and may not extend the service contour of the associated commercial or NCE primary station, may be filed at any time. See 47 C.F.R. § 74.1233.

<sup>150</sup> See *Public Notice, Section 1.65 Amendment Deadline Established for Noncommercial Educational FM and FM Translator Station Applicants*, DA 04-4009 (MB rel. Dec. 22, 2004).

<sup>151</sup> See *Reexamination of the Comparative Standard for Noncommercial Educational Applicants*, 15 FCC Rcd 7386 (2000).

## V. PROCEDURAL MATTERS

### A. Regulatory Flexibility Act

41. As required by the Regulatory Flexibility Act, the Commission has prepared a Final Regulatory Flexibility Analysis (“FRFA”) relating to the *Second Order on Reconsideration* portion of this *Second Order on Reconsideration and Further Notice of Proposed Rulemaking*. The FRFA is set forth in Appendix C. The Commission has also prepared an Initial Regulatory Flexibility Analysis (“IRFA”) of the possible significant economic impact on a substantial number of small entities of the proposals addressed in the *Further Notice* portion of this *Second Order on Reconsideration and Further Notice of Proposed Rulemaking*. The IRFA is set forth in Appendix D. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *Further Notice*, and they should have a separate and distinct heading designating them as responses to the IRFA.

### B. Paperwork Reduction Act of 1995

42. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified “information collection burden for small business concerns with fewer than 25 employees,” pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

43. The Commission will send a copy of this *Second Report and Order and Further Notice of Proposed Rulemaking* in a report to Congress and the Government Accountability Office pursuant to the Congressional Review Act.<sup>152</sup>

### C. Ex Parte Rules

44. *Permit-But-Disclose*. This proceeding will be treated as a “permit-but-disclose” proceeding subject to the “permit-but-disclose” requirements under Section 1.1206(b) of the Commission’s rules.<sup>153</sup> *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.<sup>154</sup> Additional rules pertaining to oral and written presentations are set forth in section 1.1206(b).

### D. Filing Requirements

45. *Comments and Replies*. Pursuant to Sections 1.415 and 1.419 of the Commission’s rules,<sup>155</sup> interested parties may file comments and reply comments **on or before** 30 days after publication in the Federal Register and reply comments **on or before** 45 days after publication in the Federal Register. Comments may be filed using: (1) the Commission’s Electronic Comment Filing System

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<sup>152</sup> *See* 5 U.S.C. § 801(a)(1)(A).

<sup>153</sup> *See* 47 C.F.R. § 1.1206(b); *see also* 47 C.F.R. §§ 1.1202, 1.1203.

<sup>154</sup> *See* 47 C.F.R. § 1.1206(b)(2).

<sup>155</sup> *See id.* §§ 1.415, 1.419.

(“ECFS”), (2) the Federal Government’s eRulemaking Portal, or (3) by filing paper copies.<sup>156</sup>

46. *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments. For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and include the following words in the body of the message: “get form.” A sample form and directions will be sent in response.

47. *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission’s contractor will receive hand-delivered or messenger-delivered paper filings for the Commission’s Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

48. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., CY-A257, Washington, D.C., 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.

49. *Accessibility Information.* To request information in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the FCC’s Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY). This document can also be downloaded in Word and Portable Document Format (PDF) at: <http://www.fcc.gov>.

## VI. ORDERING CLAUSES

50. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained in Sections 4(i), 303(r), 403, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 403, and 405, this *Second Order on Reconsideration and Further Notice of Proposed Rulemaking* **IS ADOPTED**.

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<sup>156</sup> See *Electronic Filing of Documents in Rulemaking Proceedings*, 13 FCC Rcd 11322 (1998).

51. **IT IS FURTHER ORDERED** that, pursuant to the authority contained in Sections 4(i), 303(r), 403, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 403, and 405, and Section 1.429(d) and (i) of the Commission's rules, 47 C.F.R. § 1.429(d) and (i), the petitions for reconsideration or clarification listed in Appendix B **ARE GRANTED** to the extent provided herein and otherwise **ARE DENIED**.

52. **IT IS FURTHER ORDERED** that the Commission's rules **ARE AMENDED** as set forth in Appendix A. **IT IS FURTHER ORDERED** that the provisions of this *Second Order on Reconsideration* and the Commission's rules, as amended in Appendix A, **SHALL BECOME EFFECTIVE** 30 days after publication in the Federal Register.

53. **IT FURTHER IS ORDERED**, that, pursuant to Sections 0.201-.204 of the Commission's rules, 47 C.F.R. § 0.201-.204, and Section 5(c)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(1), the Chief, Media Bureau, **IS DELEGATED AUTHORITY** to act as described in paragraphs 14, 20, and 27 herein.

54. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Second Order on Reconsideration and Further Notice of Proposed Rulemaking*, including the Final Regulatory Flexibility Analysis and Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**APPENDIX A**

Part 73 of the Code of Federal Regulations is amended as follows:

**PART 73 – RADIO BROADCAST SERVICES**

1. The authority for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, 334, 336.

2. Section 73.870 is amended by revising paragraph (a) to read as follows:

**§ 73.870 Processing of LPFM broadcast station applications.**

(a) A minor change for an LP100 station authorized under this subpart is limited to transmitter site relocations of 5.6 kilometers or less. A minor change for an LP10 station authorized under this subpart is limited to transmitter site relocations of 3.2 kilometers or less. Minor changes of LPFM stations may include changes in frequency to adjacent or IF frequencies or, upon a technical showing of reduced interference, to any frequency.

3. Section 73.871 is amended by revising paragraph (c) to read as follows:

**§ 73.871 Amendment of LPFM broadcast station applications.**

(c) Only minor amendments to new and major change applications will be accepted after the close of the pertinent filing window. Subject to the provisions of this section, such amendments may be filed as a matter of right by the date specified in the FCC's Public Notice announcing the acceptance of such applications. For the purposes of this section, minor amendments are limited to:

- (1) Site relocations of 3.2 kilometers or less for LP10 stations;
- (2) Site relocations of 5.6 kilometers or less for LP100 stations;
- (3) Changes in ownership where the original party or parties to an application retain more than a 50 percent ownership interest in the application as originally filed; and
- (4) Other changes in general and/or legal information.

**APPENDIX B**  
**PETITIONS FOR RECONSIDERATION OR CLARIFICATION**

The Friends of the South County Library  
United Church of Christ, Office of Communication, Inc., *et al*



## APPENDIX C FINAL REGULATORY FLEXIBILITY ANALYSIS

This Final Regulatory Flexibility Analysis (“FRFA”) conforms to the Regulatory Flexibility Act of 1980, as amended (“RFA”)<sup>1</sup>.

### Need for, and Objectives of, the Second Order on Reconsideration

The Commission received petitions for reconsideration of the *Second Report and Order* that requested reconsideration of a variety of issues. This *Second Order on Reconsideration* resolves those issues that were timely raised. We do not change most of the determinations made in the *Second Report and Order*. We do, however, amend the definitions of minor change and minor amendment to permit greater flexibility in transmitter site relocation for LPFM authorizations.

### Description and Estimate of the Number of Small Entities to Which Rules Will Apply

The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules, if adopted.<sup>2</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small government jurisdiction.”<sup>3</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>4</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>5</sup>

The Small Business Administration (SBA) defines a radio broadcasting station that has \$5 million or less in annual receipts as a small business.<sup>6</sup> A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.<sup>7</sup> Included in this industry are commercial, religious, educational, and other radio stations.<sup>8</sup> The 1992 Census indicates that 96 percent (5,861 of 6,127) of radio station establishments produced less than \$5 million in revenue in 1992.

The Commission’s LPFM rules apply to a new category of FM radio broadcasting service. As of the date of release of this *Second Order on Reconsideration and Further Notice of Proposed Rulemaking*,

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<sup>1</sup> See 5 U.S.C. § 604. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> 5 U.S.C. § 603(b)(3).

<sup>3</sup> 5 U.S.C. § 601(6).

<sup>4</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

<sup>5</sup> 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission’s statistical account of television stations may be over-inclusive.

<sup>6</sup> 13 C.F.R. § 121.201, SIC code 4832.

<sup>7</sup> 1992 Census, Series UC92-S-1, at Appendix A-9.

<sup>8</sup> *Id.* The definition used by the SBA also includes radio broadcasting stations which also produce radio program materials. Separate establishments that are primarily engaged in producing radio program material are classified under another SIC number, however. *Id.*

the Commission's records indicate that more than 1,175 LPFM construction permits have been granted. Of these 1,175 permits, approximately 590 stations are on the air, serving mostly mid-sized and smaller markets.<sup>9</sup> It is not known how many entities ultimately may seek to obtain low power radio licenses. Nor do we know how many of these entities will be small entities. We expect, however, that due to the small size of low power FM stations, small entities would generally have a greater interest than large ones in acquiring them.

### **Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

Most of the provisions of the *Second Report and Order* are unchanged by the *Second Order on Reconsideration*. Establishing the LPFM service requires the collection of information for the purposes of processing applications for (among other things) initial construction permits, assignments and transfers, and renewals. We also require lower power radio stations to comply with some of the reporting, recordkeeping, and other compliance requirements as full power radio broadcasters. This *Second Order on Reconsideration* amends the definitions of minor change and minor amendment to permit increased flexibility in transmitter site relocation for LPFM authorizations. In order to receive authorization for such site relocation, LPFM applicants, permittees, and licensees must file minor change applications or minor amendments to pending applications.

### **Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>10</sup>

We believe that the LPFM service has created and will continue to create significant opportunities for new small businesses. In addition, the Commission generally has taken steps to minimize the impact on existing small broadcasters. To the extent the *Second Order on Reconsideration* imposes any burdens on small entities, we believe that the resulting impact on small entities is favorable because they will have more flexibility in relocating LPFM transmitter sites.

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<sup>9</sup> As of the date of this *Order on Reconsideration and Further Notice of Proposed Rulemaking*, there are 368 licensed LPFM stations; the remaining on-air stations have completed construction and filed applications for licenses to cover their construction permits.

<sup>10</sup> 5 U.S.C. § 603(c)(1)-(c)(4)

**Report to Congress**

The Commission will send a copy of the Second Order on Reconsideration and Further Notice of Proposed Rulemaking, including this FRFA, in a report to Congress pursuant to the Congressional Review Act.<sup>11</sup> In addition, the Commission will send a copy of the Second Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Second Report and Order (or a summary thereof) will also be published in the Federal Register.<sup>12</sup>

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<sup>11</sup> See 5 U.S.C. § 801(a)(1)(A).

<sup>12</sup> See 5 U.S.C. § 604(b).

## APPENDIX D INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”)<sup>1</sup> the Commission has prepared this present Initial Regulatory Flexibility Analysis (“IRFA”) concerning the possible significant economic impact on small entities of the policies and rules proposed in the *Further Notice of Proposed Rulemaking* portion of this item. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided in the *Second Order on Reconsideration and Further Notice of Proposed Rulemaking*. The Commission will send a copy of the *Second Order on Reconsideration and Further Notice of Proposed Rulemaking*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>2</sup> In addition, the *Second Order on Reconsideration and Further Notice of Proposed Rulemaking* and IRFA (or summaries thereof) will be published in the Federal Register.<sup>3</sup>

### **Need for, and Objectives of, the Second Order on Reconsideration**

Since the LPFM service was created in 2000, the experiences of LPFM applicants, permittees, and licensees have demonstrated that the Commission’s LPFM rules may need some adjustment in order to ensure that we maximize the value of the LPFM service without harming the interests of full-power FM stations or other Commission licensees. In this *Further Notice of Proposed Rulemaking*, we seek comment on a number of technical and ownership issues related to LPFM. We believe this proceeding will result in an improved LPFM service, while maintaining the integrity of the FM service.

### **Description and Estimate of the Number of Small Entities to Which Rules Will Apply**

The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules, if adopted.<sup>4</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small government jurisdiction.”<sup>5</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>6</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

The Small Business Administration (SBA) defines a radio broadcasting station that has \$5 million or less in annual receipts as a small business.<sup>7</sup> A radio broadcasting station is an establishment primarily

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (“CWAAA”).

<sup>2</sup> See 5 U.S.C. § 603(a).

<sup>3</sup> See 5 U.S.C. § 603(a).

<sup>4</sup> 5 U.S.C. § 603(b)(3).

<sup>5</sup> 5 U.S.C. § 601(6).

<sup>6</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

<sup>7</sup> 13 C.F.R. § 121.201, SIC code 4832.

engaged in broadcasting aural programs by radio to the public.<sup>8</sup> Included in this industry are commercial, religious, educational, and other radio stations.<sup>9</sup> The 1992 Census indicates that 96 percent (5,861 of 6,127) of radio station establishments produced less than \$5 million in revenue in 1992.

The Commission's LPFM rules apply to a new category of FM radio broadcasting service. As of the date of release of this *Second Order on Reconsideration and Further Notice of Proposed Rulemaking*, the Commission's records indicate that more than 1,175 LPFM construction permits have been granted. Of these 1,175 permits, approximately 590 stations are on the air, serving mostly mid-sized and smaller markets.<sup>10</sup> It is not known how many entities ultimately may seek to obtain low power radio licenses. Nor do we know how many of these entities will be small entities. We expect, however, that due to the small size of low power FM stations, small entities would generally have a greater interest than large ones in acquiring them.

### **Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

The *Further Notice of Proposed Rulemaking* seeks comment on a number of technical and ownership issues related to LPFM. The potential reporting requirements that could be adopted include: (i) applications to be filed to seek authority for assignment of an LPFM station or transfer of control of an LPFM permittee or licensee; (ii) waiver requests for assignment of an LPFM station or transfer of control of an LPFM permittee or licensee, pending the Commission's consideration of the issues raised in the *Further Notice*; (iii) forms to be filed by new applicants or proposed assignees or transferees to demonstrate local eligibility and/or compliance with a multiple ownership prohibition; (iv) renewal applications to be filed by involuntary time-share licensees; (v) waiver requests for extension of an LPFM construction period; and (vi) applications to be filed seeking approval to centrally relocate a transmitter site in the case of a voluntary time share proposal.

### **Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>11</sup>

We believe that the LPFM service has created and will continue to create significant opportunities for new small businesses. In addition, the Commission generally has taken steps to minimize the impact on existing small broadcasters. To the extent that rules proposed in the *Further Notice* would impose any burdens on small entities, we believe that the resulting impact on small entities would be favorable because the proposed rules, if adopted, would expand opportunities for LPFM applicants, permittees, and licensees to commence broadcasting and stay on the air.

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<sup>8</sup> 1992 Census, Series UC92-S-1, at Appendix A-9.

<sup>9</sup> *Id.* The definition used by the SBA also includes radio broadcasting stations which also produce radio program materials. Separate establishments that are primarily engaged in producing radio program material are classified under another SIC number, however. *Id.*

<sup>10</sup> As of the date of this *Order on Reconsideration and Further Notice of Proposed Rulemaking*, there are 368 licensed LPFM stations; the remaining on-air stations have completed construction and filed applications for licenses to cover their construction permits.

<sup>11</sup> 5 U.S.C. § 603(c)(1)-(c)(4)

**STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

*Re: Creation of a Low Power Radio Service*

This proceeding is a welcome step towards addressing long outstanding questions regarding low-power FM radio service. These locally-based stations which are licensed to churches, schools, and other community organizations increase localism and diversity in our media. They are already helping in significant ways to meet the needs of under-represented communities. They are benefiting local talent by providing more outlets for airplay. They are providing community coverage in often strikingly-successful ways. As fewer and fewer conglomerates control the airwaves, there is an even greater need for low power radio. I look forward to a full record on the questions raised in this Notice and an expeditious resolution of this proceeding.

**STATEMENT OF  
COMMISSIONER JONATHAN S. ADELSTEIN**

*In the Matter of Creation of a Low Power Radio Service, MM Docket No. 99-25, Second Order on Reconsideration & Further Notice of Proposed Rulemaking*

I'm pleased to support today's item, designed to move the ball forward in the further development of low power FM radio. LPFM provides local communities with new voices, which is so important, especially in today's era of excessive radio consolidation. The public should have greater diversity on the radio dial. The Commission's action today will provide immediate relief to dozens of stations that need additional time to complete construction or effect ownership changes. I look forward to addressing the issues raised in the item that are critical to the expansion of this emerging radio service, which is possible to accomplish without causing interference to existing broadcasters.

One of the most significant obstacles to further development of LPFM isn't addressed by today's item, however, because the Commission is currently prohibited by statute from fixing it. LPFM stations are currently required to protect full-power FM stations operating on third-adjacent channels. The Commission initially concluded that such protection isn't necessary. The Mitre Corporation, in its independent and Congressionally-mandated study, reached the same conclusion, and the Commission has therefore recommended that Congress lift the statutory restriction. I therefore hope that Congress will act soon on Senator McCain's bill to remove this unnecessary requirement, allowing LPFM to develop more and provide new voices to an even greater segment of the population, without causing harmful interference to existing broadcasters.