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FCC Proposes New Processing Rules for Low Power FM and FM Translator Applications

The Federal Communications Commission has issued a *Third Further Notice of Proposed Rule Making* in its ongoing procedure governing the Low Power FM, FM Booster and FM Translator services in order to implement the provisions of the Local Community Radio Act of 2010 (“LCRA”). Its stated goals are to faithfully implement the LCRA, resume the processing of approximately 6,500 translator applications that remain pending from its last (2003) filing window, and to determine how to license future LPFM facilities. In order to preserve its options, the FCC has implemented an immediate freeze on “move in” translator applications.

As an initial yet essential issue, the Commission notes the ambiguity of the LCRA language and seeks guidance as to its proper interpretation.

Thus, the first section directs the Commission to ensure that licenses are available for all three services. A Media Bureau study found that pending translator applications in most of the top 150 markets would effectively preclude any possibility of future LPFM licensing. The Commission questions whether the Congressional directive was meant to apply only to new LPFM stations or whether the presence of existing stations might suffice. Even so, the Commission notes that the third section of the LCRA further requires that the three services remain “equal in status” and asks if this requires that they be equal in number (in which case the vastly greater number of existing translators and boosters would mandate future favoring of LPFMs). Added complication arises from the greater flexibility of the translator technical eligibility rules, which are based upon interference protection, while LPFM mandates minimum spacing; as a result, translators not only are easier to fit into moderately congested regions but have less preclusive impact.

A second area of fundamental uncertainty surrounds the directive that the Commission base its licensing decisions “on the needs of the local community.” Yet, the services are vastly different, as translators and boosters are precluded from originating significant local programming, whereas LPFM stations receive comparative preferences for doing so. Indeed, the Commission routinely ignores translators and boosters in its channel allotment proceedings, whereas the LPFM service was created to supplement full-power stations’ ability to address local community needs, and the restriction on LPFM owners’ other media involvement is designed to ensure that LPFM stations expand diversity in their communities of license.

Despite these concerns, the Commission has tentatively proposed a market-specific application processing policy, in which further translators would be licensed only to the extent

that sufficient spectrum would remain for LPFM opportunities. Specifically, the Commission proposes a set of service floors to ensure at least eight LPFM channels in markets 1-20, seven in markets 21-50, six in markets 51-100 and five in markets 101-150 (as well as smaller markets where more than four translator applications are pending). In markets where the number of available LPFM channels is below the applicable floor, the Commission would dismiss all pending translator applications. In other markets, the Commission would process the pending translator applications. (Judging from a spreadsheet attached to the Notice, only nine of the top fifty markets, but most smaller markets, are apt to fall into this category.) Settlements might be allowed, but only to the extent that changes in channels and locations to resolve mutual exclusivity would safeguard the available LPFM channels. The Commission acknowledges that casting its proposal in terms of a “market” does not literally fit the reference in the LCRA to “local community,” but justifies its approach as practical and a reasonable application of its court-approved authority to define “community” according to specific contexts.

To implement this approach, the Commission proposes a three-pronged procedure. It would resume processing the thousands of pending translator applications from the 2003 filing window in markets with sufficient spectrum for LPFM. It would also open an LPFM-only window, possibly as early as next summer. Once those applications were processed, it would open a translator-only window.

The FCC has imposed a freeze on translator applications proposing to move into a new market (but not moves within the same market). The freeze also extends to any translator modification that proposes a site for the first time within any market with fewer LPFM channels available than the proposed channel floor.

The Commission plans to address means to prevent speculative filings and trafficking in translator permits and licenses. It notes, for example, that two applicants had filed 66 of the 74 pending translator applications proposing service to the New York City market. Since settlements are encouraged and for-profit sales are permitted, the Commission suggests that a limit upon filings within a given window will be the most effective means to prevent abuse. If adopted, a cap could apply on a national basis or for particular markets. Even so, the Commission plans to abandon its 2007 policy that would have limited participants in the 2003 window to having only ten of their pending applications processed.

Finally, the Commission proposes loosening its restriction upon the use of FM translators by AM stations. It noted the success of that 2009 policy change, as evidenced by anecdotal reports of AM stations having vastly increased their coverage of local community events. Currently only FM translators authorized as of May 1, 2009 are eligible to rebroadcast an AM station within its 2 mV/m daytime contour or 25 miles of its transmitter site; the Commission now suggests extending cross-service eligibility to translator applications *on file* as of May 1, 2009. (In another proceeding, the Commission is considering eliminating the date restriction altogether.)

The four current Commissioners all issued statements strongly supporting the item, and so it seems reasonable to assume that its recommendations will be adopted in due course (unless, of course, the members of the Commission change in the interim). Yet many broadcasters

remain concerned over potential interference from an abundance of new, thinly-regulated facilities. Thus, under the current scheme, an LPFM station can be authorized at a distance of 41½ miles from a co-channel Class A station, but listeners between 35 and 40 miles from the Class A are apt to experience interference, which will not be a bar to the continued operation of the LPFM station. Moreover, translator applicants from the last window facing summary dismissal after nearly a decade-long wait are apt to be displeased. Questions have also been raised over the wisdom of opening an LPFM application window next year before any court challenges to the underlying standards and procedures will have been completed.

Comments on the proposals will be due 30 days after publication of the *Third Further Notice of Proposed Rule Making* in the *Federal Register*, and replies 15 days after that. A copy of the complete text can be downloaded from the FCC's website at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0712/FCC-11-105A1.pdf. Please let us know if you would like to discuss the challenges and opportunities posed by these matters.

If you have any questions, contact [Peter Gutmann](#) or any member of the firm's [Communications Law Group](#).

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