

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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

**REPLY COMMENTS OF  
THE NATIONAL ASSOCIATION OF BROADCASTERS**

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## EXECUTIVE SUMMARY

The Local Community Radio Act (“LCRA” or “Act”) carefully balances the dual goals of providing licensing opportunities for low power FM (“LPFM”) services while preserving the audio quality of full-service commercial and non-commercial FM stations (“FM stations”). The LCRA reflects Congress’ work to craft legislation serving the interests of both LPFM and FM radio stations.

LPFM commenters, however, advocate for changes to the Commission’s rules that would upend Congress’ carefully drawn balance. Specifically, LPFM advocates urge the Commission to implement the LCRA’s provision governing waivers to operate LPFM stations on second-adjacent channels in such an expansive manner that it would effectively negate the Act’s general prohibition against locating LPFM stations on these channels. They press for virtually unfettered access to second-adjacent channels despite the LCRA’s plain mandate that second-adjacent channel spacing not be changed and that waivers to operate second-adjacent channels may be granted only if the proposed operations “will not” result in interference to any authorized radio service. Against all logic, Commission precedent, and statutory provisions, LPFM commenters also ask for approval of second-adjacent channel waivers even if a full-service FM station must accept some measure of interference and even if a full-spaced, third-adjacent channel is available. NAB strongly opposes these proposals.

Instead, the Commission must take a cautious, careful approach to second-adjacent waivers. The plain language of the LCRA and its legislative history both clearly indicate Congress’ understanding of the serious risk of interference that LPFM stations on second-adjacent channels may pose to FM services. The Commission is obligated to implement Congress’ clear intent. Also, the Commission needs to be

mindful that many LPFM stations, if they are forced to cease operations due to interference complaints, will lack the resources and engineering expertise to resolve these complaints and restore service. Such entities may have to forfeit the substantial time and resources they invested in an LPFM facility. It is therefore critical that every effort be made to fully examine a proposed second-adjacent operation upfront, during the waiver process, to minimize instances where an LPFM station must shut down due to interference problems.

Accordingly, NAB recommends several steps intended to forestall the authorization of interfering second-adjacent LPFM stations. First, waiver applicants should be required to demonstrate with “clear and convincing” evidence that the proposed operations will not result in interference. Second, a presumption of interference should be attached to any proposal that would be short-spaced under the current rules, to help guide the Commission’s consideration of “close calls.” Finally, applicants should be required to serve a copy of their request on the potentially short-spaced FM station, to allow that station the opportunity to examine the application’s engineering demonstration of no interference. The Commission should also consider making the FM station’s affirmation of a waiver request’s engineering showing a precondition of approval.

LPFM commenters seek to further undermine the LCRA by belatedly redefining the parameters for LPFM services. In particular, they support the creation of a new high-powered class of LPFM service that could operate at a maximum output of 250 watts (“LP250”). NAB objects to the introduction of LP250 stations. The LCRA is based explicitly on the Commission’s current regulations and technical requirements, all of

which reflect the long-standing LPFM maximum power limit of 100 watts. The LCRA's legislative history repeatedly describes LPFM as a 100 watt service, as did LPFM advocates during deliberations on the Act. Broadcasters and LPFM interests reached a hard-fought compromise regarding the LCRA's interference protection provisions based on a 100 watt LPFM service. Authorization of LP250 stations would increase risks of interference to FM stations, and substantially undermine the Commission's ongoing implementation of Section 5 of the LCRA, governing the prioritization of LPFM and FM translator stations.

Finally, the LPFM advocates' belated proposal to create a new 50 watt LPFM service ("LP50") should be rejected. As with LP250 stations, the introduction of LP50 stations would be inconsistent with the LCRA, which is based on LPFM as a 100 watt service. The proposal for LP50 stations is also untimely, and its adoption at this juncture would not allow for proper consideration. The insertion of 50 watt LPFM stations into already crowded urban markets would be technically inefficient, given the large interference contours of such stations compared to their very small service areas.

For these reasons, NAB urges the Commission to faithfully implement the plain text and intent of the LCRA, and reject the LPFM advocates' proposals that would upend Congress' carefully designed and balanced legislation.



## **I. Introduction**

NAB and the broadcasting industry worked closely with Congress and LPFM advocates for several years to craft legislation that would serve the interests of both LPFM and FM broadcasters.<sup>4</sup> We emphasized the need to protect FM stations from interference given their critical role as the primary audio source for news, public affairs, entertainment, and life-saving information during times of emergency. We also respected the commitment of low power stations to provide hyper-local programming that could complement FM stations. LPFM advocates repeatedly characterized their stations as 100 watt facilities that would not interfere with the signals of primary FM stations or impair listeners' experience.

The record in this proceeding, however, reveals the LPFM industry's disregard for the carefully balanced legislation ultimately adopted by Congress. Specifically, they press for virtually unfettered access to channels second-adjacent from full-power stations, the introduction of new high-powered 250 watt stations, and the insertion of new 50 watt LPFM stations into already crowded markets. NAB opposes these proposals because they would increase the risk of interference to full-service FM stations, and change the essential nature of LPFM service. Perhaps most importantly, these proposals are fundamentally at odds with the LCRA and with Congress' long-held understanding of low power radio service as a 100 watt, hyper-local, non-interfering service.

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<sup>4</sup> Comments of the National Association of Broadcasters, Creation of Low Power Radio Service, MM Docket No. 99-02, at 1-2 (May 7, 2012).

## **II. Waivers to Operate LPFM Stations on Second-Adjacent Channels Should Only Be Granted in Truly Unusual Circumstances**

### **A. *Second-Adjacent Waivers Must be Narrowly Limited***

Section 3 of the LCRA eliminates the minimum distance separation requirements between LPFM and full-service FM stations that operate on third-adjacent channels, while reaffirming the parallel requirements for second-adjacent channels. LCRA §§ 3(a) and (b)(1). The inclusion of these provisions in the same section of the Act demonstrates Congress' recognition that LPFM stations on second-adjacent channels pose a higher risk of interference to FM stations,<sup>5</sup> and in general, should not be allowed to operate on second-adjacent channels. The plain language of the Act is unambiguous, and must be fully implemented.<sup>6</sup>

Despite this clear statutory language, LPFM commenters urge the Commission to implement the LCRA's second-adjacent waiver provision in such an over-expansive manner as to effectively nullify the controlling general prohibition against such operations. LCRA, § 3(b)(2)(A). LPFM advocates urge approval of second-adjacent waivers with seemingly no boundaries. For example, they endorse granting such waivers even if full-service FM stations must accept some interference,<sup>7</sup> despite the

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<sup>5</sup> H.R. Rep. No. 375, 111st Cong., 1<sup>st</sup> Sess. 9 (2009) ("LCRA House Report") (explaining that Section 3 eliminates the third-adjacent requirements and directs the Commission to prescribe protection for second-adjacent channels); see also *Creation of Low Power Radio Service*, Report and Order, 15 FCC Rcd 2205, 2209 (2000) ("LPFM First Report and Order").

<sup>6</sup> *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (Court finding that a statute must be given full effect unless there is good reason to believe Congress intended the language to have some more restrictive meaning).

<sup>7</sup> Comments of REC Networks, MM Docket No. 99-25, at 13-16 (filed May 7, 2012). LPFM interests are so reluctant to ensure that an LPFM proposal would not result in interference, they even oppose the Commission's suggestion that LPFM applicants be required to show that no interference will occur to the LPFM applicant itself. Comments of Common Frequency ("CF"), MM Docket No. 99-25, at 3-4 (filed May 7, 2012).

Act's clear mandate that waivers for "proposed operations [on second-adjacent channels] will not result in interference to any authorized radio service." *Id.*

LPFM advocates also want to be able to obtain second-adjacent waivers even if fully-spaced third-adjacent channels are available.<sup>8</sup> Under this proposal, waivers to operate on second-adjacent channels would not be limited to unusual occurrences or be available only if no viable alternatives existed.<sup>9</sup> This proposal is contrary to all logic, Commission precedent, and Congressional intent, and would allow LPFM applicants to pursue a second-adjacent channel instead of an open third-adjacent channel merely because the LPFM station prefers that channel,<sup>10</sup> regardless of the impact on incumbent FM stations.<sup>11</sup>

This approach would turn the LCRA on its head, since the Act so clearly expands opportunities for LPFM stations on third-adjacent channels, while reaffirming the long-held prohibition against LPFM stations on second-adjacent channels.<sup>12</sup> During the

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<sup>8</sup> Comments of Jeff Sibert, MM Docket No. 99-25, at 2 (filed May 7, 2012); Prometheus Comments at 19; REC Networks Comments at 12; CF Comments at 3.

<sup>9</sup> Pursuant to 47 C.F.R. § 1.925(b)(3), the Commission may waive specific requirements of its rules if it is shown that (a) the underlying purpose of the rules would not be served or would be frustrated by application to the instant case; or (b) in view of unique or unusual factual circumstances, application of the rules would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.

<sup>10</sup> See REC Networks Comments at 12 (stating that an LPFM may request a particular second-adjacent channel as "part of an agreement with other LPFM applicants.").

<sup>11</sup> The Commission also asks if it should consider whether the LPFM proposal would avoid a short-spacing between the proposed LPFM facility and a full-service FM station, FM translator or FM booster station on a third-adjacent channel. Notice at ¶ 19. The third-adjacent channel spacing requirements were eliminated in LCRA. Preventing short-spacing on third-adjacent channels thus should not be a relevant justification for approval of second-adjacent channel waiver request.

<sup>12</sup> 47 C.F.R. § 73.807; LPFM First Report and Order, 15 FCC Rcd at 2235. See *also* Comments of National Public Radio, MM Docket No. 99-25, at 5 (filed May 7, 2012) ("The Commission therefore should only grant a second adjacent waiver if there are no

LCRA deliberations, second-adjacent waivers were contemplated as an option only in extremely limited circumstances, such as when a third-adjacent channel is unavailable, and subject to other specific limits.<sup>13</sup> To maintain the balanced approach set forth in the Act, NAB submits that all applications for waiver of the second-adjacent channel spacing rules should be required to demonstrate that no fully-spaced third-adjacent channels are available within 25 km of the proposed site that would require a waiver of 2<sup>nd</sup> adjacent channel spacing rules. This should be an initial requirement, and would not absolve the applicant of complying with the LCRA's other provisions (including strict requirements for a waiver of second-adjacent spacing) and all the Commission's rules.

***B. The LCRA Compels Cautious Consideration of Second-Adjacent Waivers***

LPFM commenters do not acknowledge their LCRA-mandated obligation to protect FM stations from interference. As noted above, Congress clearly intended that second-adjacent waivers should be rare, and not so freely available as to undermine the general prohibition against LPFM stations operating on second-adjacent channels.<sup>14</sup> The plain text of the statute requires that waivers “will not result in interference to *any* authorized radio service.”<sup>15</sup> Use of the explicit term “will” requires a clear and convincing showing of no interference to any other radio service, including FM stations on second-adjacent and non-second-adjacent channels. The Act also reaffirmed that

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fully spaced channels available to the applicant.”). Furthermore, the presence of a fully-spaced third-adjacent channel should not lend justification to an LPFM proposal for a second-adjacent channel.

<sup>13</sup> LCRA, § 3(b) (second-adjacent waiver applicants must demonstrate that the proposed operations will not result in interference to any authorized radio service).

<sup>14</sup> See NAB Comments at 6-7 and note 14.

<sup>15</sup> LCRA, § 3(b)(2)(A) (emphasis added). See also Comments of Educational Media Foundation (“EMF”), MM Docket No. 9925, at 2 (filed May 7, 2012), *citing* Notice at ¶ 18.

“low-power FM stations remain . . . secondary to existing and modified full-service FM stations.” LCRA § 5(3).

Beyond the clear language of the statute, the LCRA’s legislative history shows Congress’ intent to protect FM stations from interference. The LCRA House Report states: “We are committed to creating a low-power FM radio service only if it does not cause unacceptable interference to existing radio service.”<sup>16</sup> Statements on the House floor offer further support. For example, Representative Henry Waxman stated: “I’m pleased that the bill includes strong protections against unreasonable interference for incumbent radio broadcasters.”<sup>17</sup>

In addition to the legal requirement, second-adjacent waivers should be rare because second-adjacent LPFM stations could harm the technical integrity of FM service. Increased interference would disrupt the expectations of listeners who rely on FM radio for news and entertainment, political discourse, and potentially life-saving information during times of emergency.<sup>18</sup>

Finally, the Commission must be circumspect in granting waivers because the Act requires that an interfering LPFM station must immediately cease operations, and stay off the air until it can resolve the interference or show that its facility is not the cause. LCRA, § 3(b)(2)(B). Many LPFM applicants will be small organizations with little broadcasting experience and technical expertise. A significant number of these entities likely will submit applications that fail to comply with the Commission’s rules, or

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<sup>16</sup> LCRA House Report at 2. See *also* LCRA House Report at 4: “LPFM stations must also afford interference protection to full-power FM stations and to FM translator and booster stations.”

<sup>17</sup> 155 Cong. Rec. H14904 (daily ed. Dec. 15, 2010) (Statement of Rep. Waxman).

<sup>18</sup> NAB Comments at 9-10.

implement service that ultimately causes interference to FM stations.<sup>19</sup> A Commission notice to cease operations could be devastating to many LPFM stations, as they frequently may lack the resources needed to resolve the interference (e.g., by moving their transmitter) and restore service. As EMF states, the LCRA may well impose “a death sentence on any LPFM that locates its transmitter at the wrong location, too close to a full-power station.” EMF Comments at 3.

For all these reasons, the Commission should take a cautious approach to second-adjacent waiver requests, and only grant waivers in truly unusual circumstances. NAB therefore submits that an applicant should be required to demonstrate with clear and convincing evidence that the “proposed operations will not result in interference to any authorized radio service.”<sup>20</sup> The Commission’s use of the “clear and convincing” standard in other waiver contexts could inform its consideration of second-adjacent channel waiver requests.<sup>21</sup>

NAB further submits that the Commission should clarify the standards for such waivers by attaching a presumption of interference to any proposal that would otherwise be short-spaced under the Commission’s rules. A certain percentage of waiver requests will be close calls for the Commission, depending on the location of the proposed LPFM transmitter, the relevant terrain and other factors. In such cases, it may

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<sup>19</sup> Even EMF, with a sophisticated engineering staff, and access to state-of-the-art interference prediction software, receives interference complaints about a significant number of its translators placed on second-adjacent channels. Relatively inexperienced LPFM operators will likely face even greater difficulties predicting or resolving interference problems. EMF Comments at 4.

<sup>20</sup> LCRA, § 3(b)(2)(A).

<sup>21</sup> See, e.g., 47 U.S.C. § 339(a)(2) (waiver of digital television signal strength testing); 47 C.F.R. § 64.1150(d) (waiver of advance notice required for change of telecommunications service provider).

be unclear if actual interference will occur, notwithstanding the best efforts of the LPFM applicant to engineer a suitable channel. A general presumption that interference will occur to a short-spaced full-service FM station will help guide the Commission's consideration of these waivers, and help prevent subsequent interference that was not evident in the engineering exhibit included with the application.<sup>22</sup> Such a presumption is fully consistent with the LCRA's strong mandate that waivers of second-adjacent spacing "*will not* result in interference to any authorized radio service." LCRA, § 3(b)(2)(A) (emphasis added).

Finally, NAB supports EMF's proposal that second-adjacent waiver applicants be required to serve their request on the potentially short-spaced FM station.<sup>23</sup> This would allow the FM station to evaluate the application for potential interference issues, thereby furthering the LCRA's mandate and the Commission's goal to preserve the integrity of the FM band. Interference that is examined "in the lab" does not always behave as predicted in the real world, especially if local terrain factors are significant. Additional engineering review to identify potential interference upfront, during the waiver consideration process, would also benefit LPFM interests by reducing situations in which an LPFM station must cease operations and potentially forfeit its entire investment, subsequent to the initiation of service. Accordingly, the Commission should consider making it a precondition of a second-adjacent waiver that the potentially short-

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<sup>22</sup> NAB also proposes that waiver applicants be required to certify that no other LPFM stations are located within a certain radius of the proposed transmitter site. We suggest a radius of 15 miles, or other appropriate figure depending on the market size. Such a requirement would serve the public interest in protecting FM stations from interference. LCRA, § 3(b) (barring the Commission from reducing the interference protections for co-, first- and second-adjacent channels); House Report at 2 (expressing Congress' intent to prevent unacceptable interference to full-service FM stations).

<sup>23</sup> EMF Comments at 5-6.

spaced FM station have an opportunity to review the application and comment on the relevant engineering.

### **III. 250 Watt LPFM Stations Would Undermine the LCRA and Change the Fundamental Nature of LPFM**

In response to the Notice's request for comment on whether to authorize high-powered 250 watt LPFM stations ("LP250") in certain smaller communities and rural areas,<sup>24</sup> LPFM commenters support access to 250 watt stations, but seek to expand it much further by opposing the geographic and eligibility restrictions proposed by the Commission.<sup>25</sup> LPFM advocates seek authorization of high-powered LPFM stations not only in rural areas, but also within urban areas.<sup>26</sup> They further support granting LP250 licenses to inexperienced new applicants,<sup>27</sup> as opposed to limiting access, at least initially, to entities that have demonstrated their capability to construct and operate a 100 watt LPFM station.<sup>28</sup> Finally, LPFM advocates dismiss the Commission's concerns

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<sup>24</sup> Notice at ¶ 49. The Commission sought comment on appropriate geographical limits for 250 watt LPFM stations, such as restricting them to rural areas and transmitters located a certain distance from the city center in larger markets, or banning them altogether in the top 50 markets. *Id.* at ¶ 51. The Notice also expressly recognized authorizing higher powered LPFM stations may "undermine the LCRA protection standards and interference remediation procedures, which are presumably grounded on the current LPFM maximum power level," *id.*, and asked if increasing the maximum LPFM power level could increase potential interference to full-service FM stations. *Id.*

<sup>25</sup> Prometheus Comments at 30-34; REC Networks Comments at 24-30.

<sup>26</sup> Comments of Nexus Broadcast, MM Docket No. 99-25, at 1 (filed May 7, 2012); Prometheus Comments at 31; REC Networks Comments at 27-29; CF Comments at 16; Sibert Comments at 4; Comments of The Amherst Alliance, MM Docket No. 99-25, at 11-12 (filed May 7, 2012). Some LPFM supporters favor introduction of 250 watt stations only within the parameters proposed by the Commission. Comments of the National Lawyers Guild, Committee on Democratic Communications & Media Alliance, MM Docket No. 99-25, at 7 (filed May 7, 2012).

<sup>27</sup> Prometheus Comments at 33; REC Networks Comments at 25.

<sup>28</sup> See, e.g., Comments of Wesli Annemarie Dymoke and Don Schellhardt, Esq., MM Docket No. 99-25, at 2-3 (filed May 7, 2012).

that authorizing high-powered stations would undermine the LCRA,<sup>29</sup> or cause interference to full-service FM stations.<sup>30</sup>

**A. The LCRA Is Based on LPFM as a Service With a Maximum Operating Level of 100 Watts**

Broadcasters object to the introduction of high-powered 250 watt LPFM stations. As discussed above, Congress carefully designed the LCRA to balance the interest in providing LPFM licensing opportunities with the need to prevent interference to FM stations and preserve the technical integrity of the FM band. Section 3 of the LCRA embodies this balance by opening third-adjacent channels to LPFM use, while reaffirming the general prohibition against LPFM operations on second-adjacent channels, and reconfirming the secondary status of LPFM service. LCRA, §§ 3 and 5.

The Commission should not adopt any rules that would upset this delicate balance, especially one that introduces an entirely new class of high-powered 250 watt LPFM stations that was never previously authorized by the Commission, nor contemplated by Congress. The legislative history of the LCRA shows Congress' understanding that LPFM stations operate at a maximum of 100 watts. NPR Comments at 2-3. The LCRA House Report explained that "LPFM radio services . . . must operate at less than 100 watts." LCRA House Report at 4. Congress understood that LPFM stations "broadcast very weak signals (100 watts or less) that reach a limited geographic area." *Id.* at 8.

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<sup>29</sup> Prometheus Comments at 30; REC Networks Comments at 26.

<sup>30</sup> Prometheus Comments at 34. Prometheus and Common Frequency in fact contend that LP250 stations are needed because their higher wattage will enable urban LPFM stations to counteract incoming interference from full power stations. *Id.* at 31; CF Comments at 17. In asserting this argument, these parties ignore the entire body of Commission precedent governing LPFM, and the LCRA, both of which mandate that secondary LPFM services protect primary full-power FM stations from interference, and not the other way around.

Congress presumably based this understanding in part on the representations of LPFM advocates themselves: “These radio stations reach out five to seven miles in diameter on the regular FM dial. They broadcast at 100 watts – the same power as a light bulb.”<sup>31</sup> In letters to Congress, LPFM advocates also characterized LPFM stations as 100 watt operations, and with an even smaller broadcast radius of only three to five miles.<sup>32</sup>

It is thus clear that Congress crafted the LCRA based on LPFM as a 100 watt service. Allowing LPFM stations to increase power to 250 watts would be contrary to Congress’ understanding of LPFM service, and Congress’ deliberately drawn compromise among broadcasters and LPFM interests. Like Congress, NAB and our local station members relied on the representations of LPFM service repeatedly provided by its advocates during the LCRA deliberations. Commission modification of its rules to permit LP250 stations at this stage would be inequitable and inconsistent with Congressional intent.

***B. Authorization of LP250 Stations Would Increase the Risk of Interference to Full-Power FM Stations***

Allowing LPFM stations to increase power to 250 watts would also undermine the technical grounds for the LCRA, which is based on the Commission’s current regulations and channel spacing requirements, all of which reflect a maximum LPFM

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<sup>31</sup> Statement of Cheryl A. Leanza, Policy Director, United Church of Christ, Office of Communications, Inc., Hearing on H.R. 1147, the Local Community Radio Act of 2009, H.R. 1133, the Family Telephone Connection Protection Act of 2009, and H.R. 1084, the Commercial Advertisement Loudness Mitigation Act, Before the House Subcommittee on Communications, Technology and the Internet, 111<sup>th</sup> Cong. 1<sup>st</sup> Sess. (June 11, 2009), at 2 (“UCC Testimony”).

<sup>32</sup> 155 Cong. Rec. H14906 (Dec. 15, 2009) (reproducing a letter to Members of the U.S. House of Representatives from Prometheus, Free Press, and numerous other LPFM supporters, dated December 14, 2009).

power level of 100 watts.<sup>33</sup> An increase in power level from 100 watts to 250 watts would enable a typical LPFM station to increase its service area from 93.2 square kilometers (“km<sup>2</sup>”) to about 108 km<sup>2</sup>, and its interference contour with respect to co-channel full-power FM stations from 740 km<sup>2</sup> to 1,212 km<sup>2</sup>.

LP250 stations would pose a substantially higher risk of interference to more full-service FM stations, contrary to the LCRA.<sup>34</sup> We note that Congress’ elimination of the third-adjacent channel minimum spacing requirements was based on its understanding of LPFM as a 100 watt service. Without these protections, third-adjacent 250 watt stations could very well cause interference to FM stations, particularly those that operate at lower power levels. LP250 stations will carry a much higher risk of interference to FM stations in all areas, but most acutely in urbanized areas where the FM band is tightly packed. As the Commission has recognized, many of these markets are “spectrum-limited,” with relatively fewer opportunities for additional 100 watt LPFM stations.<sup>35</sup> Allowing LPFM stations to ramp up their power to 250 watts will only lead to more harmful interference to FM stations. For these reasons, NAB submits that LP250 stations should not be authorized, but if there is any consideration of doing so, any entity interested in seeking a 250 watt station should be willing, at a minimum, to

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<sup>33</sup> LPFM First Report and Order, 15 FCC Rcd at 2206, 2211; 47 C.F.R. §§ 73.807, 73.809, and 73.811.

<sup>34</sup> Broadcasters also observe that approving LP250 stations could lead to further problematic proposals. For example, one LPFM supporter urges the Commission to authorize 1000-watt LPFM stations. Comments of William Spry, MM Docket No. 99-25, at 1 (filed May 1, 2012). When the Commission initially authorized LPFM service, it considered and rejected 1000 watt LPFM stations as not in the public interest because of the serious interference concerns they would pose to FM stations. LPFM First Report and Order, 15 FCC Rcd at 2211. Broadcasters strongly oppose any consideration of such extremely high-powered LPFM stations.

<sup>35</sup> See, e.g., Fourth Report and Order at ¶ 2.

accede to third-adjacent channel protection standards, despite their elimination in the LCRA for 100 watt LPFM stations.<sup>36</sup>

NAB also notes that authorizing high-powered LP250 stations would completely change the Commission's analysis in the Fourth Report and Order regarding prioritization of LPFM and FM translator stations. In that decision, the Commission sought to "fully and faithfully effectuate the licensing directives set forth in Section 5 of the LCRA while also taking into account the constraints of limited spectrum and technical licensing requirements." Fourth Report and Order at ¶ 2. In particular, the Commission relied on extensive spectrum availability studies to determine the LPFM licensing opportunities that remain in various markets across the country. *Id.* Based on these studies, the Commission identified the universe of pending FM translator applications that must be dismissed to achieve its dual goals of providing LPFM licensing opportunities in as many markets as possible while facilitating to the maximum extent possible the grant of pending translator applications in all markets. *Id.*

All of these analyses and conclusions in the Fourth Report and Order are based on LPFM as a service with a maximum operating level of 100 watts. Section 5 of the LCRA mandates that, when licensing new LPFM and FM translator stations, the Commission must ensure that licenses remain available for both LPFM and FM translator stations. LCRA, § 5(1). The Commission interpreted this mandate to require

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<sup>36</sup> As discussed above, the Commission must also be mindful of the resources needed to construct and operate an LPFM station. All of these expenses will be higher for LP250 stations than 100 watt stations. Given the higher risk of interference associated with LP250 stations, more LPFM stations ultimately will receive Commission notice to cease operations or otherwise resolve interference complaints, leading to loss of investments by small nonprofit entities.

consideration of both existing and future 100 watt LPFM stations. Permitting 100 watt LPFM stations to increase power to 250 watts, and licensing new LP250 stations, would exponentially increase the preclusive effect of LPFM stations on FM translators. Presumably, both the number of pending FM translator applications and the availability of frequencies for translators that could be licensed in a future auction window would be directly impacted. Accordingly, authorization of LP250 stations would completely alter the balance struck by the Commission in the Fourth Report and Order, undermine Section 5 of the LCRA, and belatedly disadvantage entities that have waited almost a decade for their FM translator applications to be processed.

Finally, authorizing LP250 stations would also change the fundamental local nature of LPFM service.<sup>37</sup> No longer could LPFM service be characterized as a low-powered service “designed to serve very localized communities” and “small, local groups with particular shared needs and interests.”<sup>38</sup> No station with a coverage area of approximately 108 square kilometers could sincerely be characterized as “simple” and “inexpensive to operate” or “intensely local.” UCC Testimony at 2 and 8. NAB submits that if an organization wants to operate a 250 watt radio station, it should be required to obtain a Class A license just like the numerous broadcasters who operate at that power level today. All operators of 250 watt stations should receive equal treatment, which means that LP250 stations would have to comply with the full panoply of Commission

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<sup>37</sup> While urging the Commission to authorize LP250 stations, Prometheus also urges the Commission to reduce LPFM stations’ pledge to broadcast 56 hours of local programming per week to an obligation to air only 20 hours per week. Prometheus Comments at 44. Similarly, Common Frequency asks the Commission to loosen the local residency requirements for LPFM operators. CF Comments at 22. Granting all these requests would result in a higher-powered and less localized LPFM service.

<sup>38</sup> LPFM First Report and Order, 15 FCC Rcd at 2208, 2213.

regulations and public interest obligations that govern FM radio service. All such stations should be required to comply with the Commission's main studio, public file, and emergency alert system rules, and any other rules that LPFM stations have been exempted from based on their special status.<sup>39</sup>

#### **IV. 50 Watt LPFM Stations Are Inconsistent with the LCRA and Technically Inefficient**

In response to the Commission's query on eliminating the 10 watt class of low power FM ("LP10") stations, Notice at ¶ 48, LPFM commenters reply with a new, unsolicited request for the creation of a class of 50 watt LPFM ("LP50") stations.<sup>40</sup> They assert that LP10 stations may be inadequate, and that the superior field strength of LP50 stations will improve indoor listening when compared to LP10 facilities.

Prometheus Comments at 28. They also contend that authorizing LP50 stations would substantially increase the number of LPFM opportunities in the largest Arbitron markets that lack "sufficient" spectrum for additional 100 watt stations. *Id.* at 26.

For many of the same reasons described above regarding 250 watt stations, NAB objects to the creation of LP50 stations. Specifically, Congress never contemplated the authorization of 50 watt LPFM stations when crafting the LCRA, and creating this new class of service would upend the Act's carefully designed balance between eliminating the third-adjacent channel protections while reaffirming the interference protections for second-adjacent channels. The creation of LP50 stations

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<sup>39</sup> When authorizing LPFM service, the Commission exempted LPFM stations from the main studio, public file and ownership reporting requirements, and permitted LPFM stations to participate in EAS on a modified basis. LPFM First Report and Order, 15 FCC Rcd at 2277, 2279.

<sup>40</sup> CF Comments at 14-15; REC Networks Comments at 20-24; Prometheus Comments at 26-29; Amherst Comments at 10-11.

would also undermine Congress' carefully drawn compromise among LPFM interests, full-service broadcasters, and FM translator applicants and licensees.

The LPFM advocates' request for the creation of LP50 stations, moreover, is untimely. The Notice merely states that the Commission has not issued any construction permits for 10 watt stations, and accordingly, seeks comment on eliminating this class of service. Notice at ¶ 20. It does not solicit comment on the creation of LP50 stations, or permitting LP10 stations to increase power to 50 watts, or even allude to these hypotheticals.

Pursuit of LP50 service in this docket is unfair in that it would not afford full opportunity for administrative consideration. If the Commission wanted to create an LP50 service, it should do so in the context of a full rulemaking. There, consistent with the Administrative Procedure Act ("APA"), the Commission could test the matter of LP50 stations "via exposure to diverse public comment . . . to ensure fairness to affected parties."<sup>41</sup> The Commission could offer the creation of LP50 stations with a full description of how such a service might operate and allow interested parties to fully examine the repercussions. At a minimum, the Commission must set forth the surrounding issues, and provide broadcasters and other interested parties the opportunity to fully analyze the preclusive effect of LP50 stations on the licensing of future FM translators, the potential interference LP50 stations may cause to full-power FM radio stations, and other potential effects.

It would be wrong to treat consideration of LP50 stations in this docket as a logical outgrowth of the Notice. Although Prometheus simply presumes the

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<sup>41</sup> *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

Commission's agreement that LP50 stations are an attractive middle ground between LP10 stations and 100 watt LPFM stations, there is no basis for this presumption. Prometheus Comments at 29. Nothing in the Commission's proposal to eliminate LP10 stations implies a need to insert more LPFM stations into large markets than 100 watt LPFM stations would permit. To the contrary, the Notice seeks to implement Section 3 of the LCRA, which is based on Congress' understanding (and LPFM advocates' characterizations) of LPFM as a 100 watt service.

Prometheus apparently assumes that creating LP50 stations would further its goal of finding more ways to license LPFM facilities. But Prometheus fails to acknowledge the Commission's countervailing obligations under the LCRA to preserve opportunities for FM translators in as many communities as possible, or the LCRA's mandate that LPFM stations remain secondary to existing and modified full-service FM stations, and must protect FM stations from interference.<sup>42</sup>

To be clear, the Notice does not propose or even suggest the possible creation of a new level of LPFM service between 10 and 100 watts.<sup>43</sup> The idea of LP50 stations strays too far from the content of the Notice for a reasonable person to anticipate its discussion,<sup>44</sup> and should not be considered by the Commission at this stage of the proceeding.<sup>45</sup>

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<sup>42</sup> Fourth Report and Order at ¶¶ 4 and 18.

<sup>43</sup> The Notice specifically seeks comment on creating a new higher-powered class of service, but only in the context of a service above 100 watts, not higher than 10 watts and below 100 watts. Notice at ¶¶ 49-51.

<sup>44</sup> *Council Tree Commc'ns, Inc. v. FCC*, 619 F.3d 235, 249 (3d Cir. 2010).

<sup>45</sup> *Compare Prometheus Radio Project v. FCC*, 652 F.3d 431, 449 (3d Cir. 2011) (finding the Commission failed to meet the APA's notice and comment requirements regarding the newspaper/broadcast cross-ownership rule).

The proposal for LP50 stations should also be rejected as technically inefficient. As the LPFM commenters describe, these stations would be sought in larger urban communities.<sup>46</sup> These areas are currently crowded with many commercial and noncommercial radio stations, which will very likely reduce the already small service area of a 50 watt station due to incoming interference. Thus, licensing of spectrum in such a manner in these markets would not be efficient.<sup>47</sup> Moreover, large areas of spectrum space will be occupied by the interfering contours of LP50 stations, compared to their relatively small service areas. A typical LP50 station may have an interference contour of over 480 km<sup>2</sup> to co-channel full-power FM stations compared to a service area of only 47 km<sup>2</sup>. As the New Jersey Broadcasters Association (“NJBA”) describes with respect to LP10 stations, the introduction of such micro-power stations in large crowded markets would result in “cannibalization” of existing radio services.<sup>48</sup> Presumably, the impact of LP50 stations would be even worse. The harm that LP50 stations potentially would cause to full-power stations and listeners’ expectations far outweigh any benefit they might provide.<sup>49</sup> To protect listeners’ expectations of high audio quality, the Commission should not adopt the proposal for a new class of 50 watt LPFM stations.

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<sup>46</sup> See, e.g., Prometheus Comments at 26.

<sup>47</sup> See Comments of du Treil, Lundin & Rackley, Inc., MM Docket No. 99-25, at 5 (filed May 7, 2012) (discussing similar issues concerning LP10 stations).

<sup>48</sup> NJBA Comments at 2.

<sup>49</sup> *Id.* (referencing similar problems raised by LP10 stations). NJBA raises another complication concerning LP10 stations that would apply equally, if not more so, to LP50 stations. The Commission’s licensing model fails to accurately reflect the dynamic, mobile nature of today’s radio listeners. The insertion of LP50 stations, especially in crowded large markets, would result in mobile listeners driving through one or more scattered large areas of interference. NJBA Comments at 3.

**V. Conclusion**

For the reasons stated above, NAB respectfully urges the Commission to implement the LCRA fully and faithfully, take a cautious and careful approach to second-adjacent waivers and reject proposals by LPFM advocates to upend Congress' balanced legislation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jane E. Mago".

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