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Low Power FM Rule Clarifications and Proposals March 25, 2005

To: Broadcast Clients
From: Peter Gutmann

The FCC has clarified and proposed modifications to certain of its rules pertaining to low power FM (LPFM). Pending resolution of the proposals, an immediate six-month freeze has been imposed on granting new FM translator construction permits.

Since LPFM applications were filed in 2000-2001, 1,175 construction permits have been granted, of which half are operating. As currently authorized, LPFM stations are limited to 100 watts effective radiated power, are licensed only for noncommercial operation by local non-profit and public safety entities having no other attributable media interests, and cannot be sold or otherwise transferred. The Commission's proposals may loosen many of these restrictions to create a more competitive LPFM service. The result could have significant impact upon both the LPFM service and its relationship to translators and full-power stations.

The Commission's clarifications and proposals are as follows:

Ownership – The Commission is considering whether it should amend its rules to relax or make permanent its current restrictions that limit LPFM ownership to local entities and prohibits multiple ownership. An alternative would be to first invite applicants that meet the current restrictions and then invite others to apply in the absence of a qualified entity.

Transferability – Currently, LPFM license assignments and transfers of control are prohibited. Of several changes under consideration, the most conservative is to permit typical membership changes in the governing board of a non-profit entity, as the Commission considers such routine board changes to be part of the nature of such groups. The Commission also will consider permitting sudden changes, in which more than half of a board is replaced at once rather than cumulatively over time, and, if so, whether they should be subject to a streamlined consent procedure rather than the filing and processing of full-fledged applications, as other services now require. (Still pending is a 1989 (!) proceeding to explore these matters for all non-

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stock corporations, which could be revived and resolved on a similar basis.)

More generally, the Commission seeks to explore whether license assignments to wholly different entities should be permitted and, if so, whether monetary consideration should be allowed. Recognizing that some level of transferability is needed, the Commission is delegating to its Media Bureau the authority to waive its current ban on a case-by-case basis pending adoption of a rule change. Unfortunately, the only standard offered as to when such a waiver might be appropriate is rather opaque: where it “will maximize spectrum use for low power FM operation.” Even so, the Commission offers three examples: where there is a sudden change in the majority of a licensee’s 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.

Interference Protection – Currently, LPFM and FM translator stations have essentially equal status. In part motivated by the profusion of new FM translators already granted as a result of the March 2003 filing window (3,300 new permits – nearly as many as previously licensed) and the prospect of many more (nearly 8,000 pending), the Commission is concerned over their preclusive impact for LPFM and the local programming and operation of that service, especially since most translators are licensed to non-local entities. The Commission seeks comment on whether LPFM should be treated as having priority status compared to translators or whether

certain types of LPFM stations should be favored, based upon grandfathering or local programming commitments. The Commission may also consider prioritizing translators that provide “fill-in” service, rather than extending their primary station’s signal. (Note, though, that the elimination of third-adjacent channel contour protection, while favored by the Commission, has been blocked by Congress, and so is not under consideration at this time.)

As for full-service stations, the rules currently protect LPFM stations by permitting them to continue operation even if interference would be caused within the 70 dBu contour of a subsequent authorization, including new or modified FM facilities, provided that the LPFM station resolves complaints of actual interference on co- or first or second adjacent channels. To balance LPFM stations’ desire for stability while affording opportunities to expand full service, the Commission proposes limiting interference protection to situations where the area of predicted co- and first-adjacent channel interference is substantially greater than for second- or third-adjacent channel interference, so as to effectively limit interference to a full service station within the immediate vicinity of an LPFM site.

Minor Change Definition – Only minor engineering changes are permitted outside of filing windows. This definition is important, since the last window closed nearly four years ago, thus effectively barring any changes not qualifying as minor. Minor change site relocations are currently limited to within 2 km (1 km for a second, as-yet unauthorized class of 10 watt LPFM stations). In order to afford additional technical flexibility, the definition is to be expanded to 5.6 km (3.6 km for 10-watt

LPFMs). This change is to take effect thirty days after publication in the *Federal Register*, rather than await the outcome of rulemaking.

Settlement Window – Nearly half the LPFM applications on file remain pending, due to mutual exclusivity with other applications. To resolve the backlog, the Commission is delegating authority to its Media Bureau to open settlement windows for these “closed” groups, during which major change amendments would be considered. (Major changes include all modifications other than site relocations meeting the minor change distances.) Any settlement agreement must propose a universal resolution among a group of mutually-exclusive applications.

Construction Period – Currently, construction is required to be completed within 18 months of grant of a permit, unless certain extremely limited tolling events are encountered. The Commission proposes to extend the standard construction period to the same 36 months as

for other broadcast services. In the meantime, the Media Bureau will be authorized to extend the present 18-month limit where completion is prevented for reasons beyond a permittee’s control and where a permittee can demonstrate a reasonable expectation of completion within an additional 18 months.

Eligibility for Local Programming Credit – In resolving mutual exclusivity among competing applications, the Commission awards a comparative credit for pledges to locally originate programming at least eight hours per day. The Commission has now clarified that to qualify for the credit, such programming must be produced within a ten-mile radius of the community of license and cannot be time-shifted from satellite or another outside originating source.

If you would like to discuss the possible impact of these proposals upon your existing or proposed operations, please feel free to call upon us.

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