IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1117

NATIONAL ASSOCIATION OF BROADCASTERS,

PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA,

RESPONDENTS

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties

The parties are listed in the brief of petitioner.

B. Rulings Under Review

Creation of a Low Power Radio Service, 22 FCC Rcd 21912 (2007) (JA --)

C. Related Cases

The order on review has not previously been before this Court. Previous orders in the same agency proceeding were before the court in *National Ass'n of Broadcasters v. FCC*, No. 00-1054 (D.C. Cir.) That case was dismissed as moot after briefing and argument following the enactment of legislation that required further FCC action. *See National Ass'n of Broadcasters v. FCC*, No. 00-1054, Order (D.C. Cir. Apr. 8, 2002). Counsel are not aware of any related cases pending in this or any other Court.

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GLOSSARY

AM	amplitude modulation – a method of radio signal transmission; *see* 47 C.F.R. 73.14
dBu	decibel – a measurement of the strength of a radio signal
FM	frequency modulation – a method of radio signal transmission; *see* 47 C.F.R. 73.201
kHz	kilohertz – a measure of frequency equivalent to 1000 cycles per second
LPFM	low-power FM radio
MHz	megahertz – a measure of frequency equivalent to 1,000,000 cycles per second
mV/m	millivolt per meter – a measurement of the strength of a radio signal
RBPA	Radio Broadcasting Preservation Act, Pub. L. No. 106-553, div. B, § 632, 114 Stat. 2762, (2000)

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ON PETITION FOR REVIEW OF AN ORDER OF THE
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BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the FCC's adoption of policies and rule changes to minimize unnecessary displacement of existing LPFM radio stations by new full-power FM stations or FM stations seeking license modifications is prohibited by the Radio Broadcasting Preservation Act.

2. Whether these policies and rule changes are reasonable.

JURISDICTION

The Court has jurisdiction pursuant to 47 § U.S.C. 402(a) and 28 U.S.C. § 2342(1).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the Statutory Appendix to this brief.

COUNTERSTATEMENT OF THE CASE

This is a challenge to the Commission's decision to address some of the consequences for the low-power FM (LPFM) radio service of the agency's decision to streamline processing of full-power FM license modification requests. That streamlining decision benefited full-power FM broadcasters by, among other things, reducing the amount of time needed for them to change a full-power FM station's community of license. As a result of that decision, there has been a substantial increase in applications by full-power FM stations to change their community of license. While those applications have the potential to lead to the provision of enhanced broadcast service to the public, they also have the potential to lead to encroachment by full-power FM stations on existing LPFM operations.

In order to ameliorate the streamlining decision's impact on existing LPFM stations, preserve the public interest benefits of the LPFM service, and prevent a significant number of LPFM stations from being forced off the air as a result of strict compliance with its existing rules, the Commission provided that existing LPFM stations would no longer be responsible for correcting any interference caused to the reception of newly authorized or newly modified "second-adjacent" channel FM stations. *Creation of a Low Power Radio Service*, 22 FCC Rcd 21912, 21938 ¶ 63 (2007) (JA __). In addition, the

Commission outlined an interim standard, pending the resolution of a further notice of proposed rulemaking, for waiving its minimum separation requirements for second-adjacent channels where an LPFM station is required to move to another channel to avoid interference with a newly authorized or newly modified full-power FM station. The Commission also adopted another policy to deal with situations where no other channel is available and absent a waiver of an LPFM station's secondary status the station would be required to cease operations due to the grant of a full-power station's application to modify its license. *Id.* ¶¶ 64-71. The National Association of Broadcasters (NAB) alleges that these changes violate a provision in the Radio Broadcasting Preservation Act of 2000 that provides that the Commission may not "eliminate or reduce the minimum distance separations for third-adjacent channels." Pub. L. No. 106-553, div. B, § 632, 114 Stat. 2762, 2762A-111 (2000), and were otherwise arbitrary and capricious.

COUNTERSTATEMENT OF THE FACTS

A. BACKGROUND

1. The Regulatory Setting

The modern FM radio broadcast service has its roots in FCC decisions in 1945 to allot the portion of the radio spectrum that is currently in use for FM radio broadcasting, and in 1963 to adopt a nationwide table of assignments for FM channels used for commercial FM broadcasting. In both of these proceedings, as with all spectrum allocation decisions, the FCC adopted technical standards that balanced maximizing the number of assignments with providing a level of protection from interference among stations. *See Revision of FM Broadcast Rules-Notice of Inquiry*, 21 Radio Reg.2d (P&F) 1655, 1657 (1963).

The FM radio band, 88-108 MHz, is divided into 100 channels of 200 KHz each. For convenience, these channels are given numerical designations which range from 201-300.[1] Under Section 307(b) of the Communications Act of 1934, 47 U.S.C. § 307(b), the FCC has adopted distance separations in order to minimize signal interference among stations. *Revision of FM Broadcast Rules-First Report & Order,* 40 F.C.C. 662 (1963). Varying distance separations apply to stations on the same channel ("co-channel") and stations within 600 kHz, or three channels, above or below the station in question ("first-, second-, and third-adjacent channels"). *See* 47 C.F.R. §§ 73.207; 73.509.

Prior to 1978, the Commission licensed a class of noncommercial educational FM radio stations, known as "Class D" stations, that were permitted to operate with a maximum of 10 watts of power. Full-power stations, by contrast, currently operate with minimum power, depending on the class of station, of 6,000 to 100,000 watts. *See* 47 C.F.R. §73.211.[2] In 1978, the Commission concluded that the low-power operations, while providing valuable service in many cases, were standing in the way of more efficient, full-power operations that could bring noncommercial radio service to many who were not receiving such service. Accordingly, the Commission halted licensing of those stations at that time. *See Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations*, 69 F.C.C. 2d 240, 243 ¶23 (1978).

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[1] Channels 201-220 are reserved for use by noncommercial educational stations. 47 C.F.R. § 73.501.

[2] We are using the term "full-power" in this brief to distinguish between those FM radio stations and low-power FM, or LPFM, radio stations. The Commission has used both the term "full-power" and the term "full-service." There is no difference between the terms.

2. Creation of the LPFM Service

In January 2000, the Commission adopted rules to establish two classes of LPFM facilities: (a) an LP100 class, consisting of stations with a maximum power of 100 watts, providing an FM service radius of approximately 3.5 miles; and (b) an LP10 class, consisting of stations with a maximum of 10 watts, providing an FM service radius of approximately one to two miles. *Creation of Low Power Radio Service*, 15 FCC Rcd 2205 (2000) ("*2000 Report and Order*"). It did so in order to "create opportunities for new voices on the air waves and to allow local groups, including schools, churches and other community-based organizations, to provide programming responsive to local community needs and interests." *Id.* at 2213 ¶17.

The *Report and Order* announcing the LPFM service imposed geographic distance separation requirements for LPFM stations to protect from interference full-power FM stations operating on the co-, first-, and second-adjacent channels, as well as stations operating on intermediate frequency ("IF") channels. *Id.* at 2233-34 ¶¶70-71. The *Report and Order* concluded, however, that imposition of a third-adjacent channel separation requirement was unnecessary to protect against interference and would restrict unnecessarily the number of LPFM stations that could be authorized. The Commission therefore declined to impose such a requirement. *Id.* at 2246 ¶103.

The Commission revised and clarified some of its LPFM rules in a September 2000 reconsideration order. *Creation of a Low Power Radio Service*, 15 FCC Rcd 19208 (2000) ("*Reconsideration Order*"). The *Reconsideration Order* declined to adopt more restrictive channel separation requirements urged by certain petitioners. Instead, the Commission adopted complaint and license modification procedures to address unex-

pected third-adjacent channel interference problems caused by LPFM stations. *Id.* at 19233-34 ¶¶ 64-68. These provisions are codified at 47 C.F.R. § 73.810.

3. The RBPA and Subsequent Proceedings.

After the Commission declined to impose third-adjacent channel separation requirements in the *Reconsideration Order*, Congress enacted legislation, known as the Radio Broadcasting Preservation Act ("RBPA"), directing the Commission to modify its LPFM rules to "prescribe minimum distance separations for third-adjacent channels (as well as for co-channels and first- and second-adjacent channels) ...." *See* Pub. L. No. 106-553, div. B, § 632(a)(1)(A), 114 Stat. 2762 (2000). In addition, the statute specifically directed the Commission not to "eliminate or reduce the minimum distance separations for third-adjacent channels required by paragraph (1)(A)" and to deny LPFM applications of applicants that previously had engaged in the unlicensed operation of a radio station. *Id.* § 632(a)(2)(A). That legislation also required the Commission to conduct an experimental program to evaluate the likelihood of interference to existing FM stations if LPFM stations were not subject to the third-adjacent channel spacing requirement. *Id.* § 632(b).

The Commission modified its LPFM rules in accordance with the statutory direction. *Creation of a Low Power Radio Service*, 16 FCC Rcd 8026 (2001) ("*2001 Report and Order*"). Specifically, the Commission amended Section 73.807 of its rules, 47 C.F.R. § 73.807, to "include minimum distance separations which LPFM station applications must meet to each full-power FM and FM translator station operating on third adjacent channels in accordance with the methodology set forth in the *LPFM NPRM*." 16 FCC Rcd at 8026. However, the Commission did not modify Section 73.809

of its rules, which addresses interference protection for full-power stations that are authorized after an LPFM station has begun operating, and applied at that time only with respect to co-, first- and second-adjacent channels.

To evaluate the likelihood of interference in the absence of a third-adjacent channel separation requirement, the Commission selected an independent third party – the Mitre Corporation – to conduct field tests. The Commission subsequently sought public comment on Mitre's reported findings.[3] In February 2004, the Commission submitted its report to Congress, recommending that, based on the Mitre study, Congress "modify the statute to eliminate the third-adjacent channel distan[ce] separation requirements for LPFM stations."[4]

In March 2005, the Commission modified some of its rules governing the LPFM service and issued a further notice of proposed rule making seeking comment on a number of issues relating to LPFM ownership restrictions and eligibility, the formation and duration of voluntary and involuntary time-sharing arrangements among mutually exclusive LPFM applicants, and changes to the LPFM technical rules. *Creation of a Low Power Radio Service, Second Order and Further Notice of Proposed Rule Making*, 20 FCC Rcd 6763 (2005) (JA __) ("*2005 Further Notice*"). The *2005 Further Notice* also sought comment on the relationship between LPFM and full-power FM and FM trans-

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[3] *See* PUBLIC NOTICE, *Comment Sought on the Mitre Corporation's Technical Report, "Experimental Measurements of the Third-Adjacent Channel Impacts of Low-Power FM Stations,"* 18 FCC Rcd 14445 (2003).

[4] *Report to Congress on the Low Power FM Interference Testing Program, Pub. L. No. 106-553* (Feb. 19, 2004).

lator stations.[5] Based on the Commission's action in a separate proceeding, applicants had filed thousands of FM translator applications. Because such applications could preclude the filing of new LPFM applications, the Commission froze the processing of those applications and sought comment on possible rule modifications to lessen the impact of these applications on the LPFM service. The Commission also sought comment on whether existing LPFM stations should be protected from interference from subsequently authorized FM stations. *Id.* at 6778-81 ¶¶33-39 (JA __).

B. THE ORDER ON REVIEW

In the order on review, the Commission revised a number of its rules governing the LPFM service "as part of its ongoing efforts to promote the operation and expansion of" that service. *Creation of A Low Power Radio Service*, 22 FCC Rcd 21912, 21913 ¶1 (2007)("*Third Report and Order*") (JA __). The Commission explained that its purpose was to "maximize the value of the LPFM service without harming the interests of full-power FM stations or other Commission licensees." *Id.*

Among other things, the Commission modified the protection LPFM stations are required to provide subsequently authorized full-power FM stations. Specifically, the *Third Report and Order* revised Section 73.809 of the Commission's rules, 47 C.F.R. § 73.809, which sets forth detailed procedures to resolve complaints of actual interference caused to a subsequently authorized full-power FM station by a LPFM station and the

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[5] An FM translator is "[a] station in the broadcasting service operated for the purpose of retransmitting the signals of an FM radio broadcast station or another FM broadcast translator station without significantly altering any characteristics of the incoming signal other than its frequency and amplitude, in order to provide FM broadcast service to the general public." 47 C.F.R. § 74.1201(a).

sufficiency of actions taken by LPFM stations to eliminate such interference. *See* 22 FCC Rcd at 21936-38 (JA __). The Commission found that while only one LPFM station had so far been forced off the air by the requirements of Section 73.809, numerous LPFM stations were under a significant threat of "encroachment" by newly authorized or newly modified full-power stations as a result of changes the Commission had separately made in other rules applicable to full-power stations, particularly rule changes intended to facilitate applications by full-power stations to relocate to a different community of license. *Id.* [6]

The Commission noted that the January 2007 lifting of the freeze on the filing of FM community of license modification proposals, combined with the implementation of new streamlined licensing procedures, resulted in a "one-time flurry of filing activity," with approximately 100 FM community of license modification proposals submitted in the first week of the new Rules. *Id.* at 21938 (JA __). In all, over 200 community of license modification applications had been filed under the new rules. *Id.* The agency staff had identified approximately 40 LPFM stations that could be forced to cease operations as a result of those filings. *Id.* Finding as a result that "[c]ircumstances have changed considerably since we last considered the issue," the Commission concluded that the rules "should be amended to limit Section 73.809 interference procedures to situations involving co- and first-adjacent channel interference." *Id.*

The Commission thus eliminated the requirement in the existing rule that LPFM stations protect subsequently authorized full-service stations operating on second-adja-

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[6] *See Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License*, 21 FCC Rcd 14212 (2006), *pet. for review pending, Clay v. FCC*, No. 08-1255 (D.C. Cir. filed July 28, 2008).

cent channels from interference. 22 FCC Rcd at 21938 ¶63 (JA __).[7] It found that "second-adjacent channel interference to a full service station is generally predicted to occur only in the immediate vicinity of the LPFM station transmitter site … ten to two hundred meters from the LPFM transmitter site." *Id.* at 21938-39, ¶¶63-65 (JA __). And, the Commission pointed out, even in those small areas there are techniques available to substantially reduce or eliminate interference to listeners. *Id.* at 21938 ¶63 (JA __).

The Commission also sought to address the adverse effect of encroaching full-power stations on LPFM stations where an LPFM station must move to another channel to avoid interference but the only alternative channel does not comply with the minimum distance separations set out in Section 73.807 for second-adjacent channels. The Commission initiated a proceeding in a *Second Further Notice of Proposed Rulemaking* adopted along with the *Third Report and Order* here to consider whether to modify the minimum separation requirements between LPFM stations and full-service stations in its rules, *see* 47 C.F.R. § 73.807, "in order to better balance the interests of LPFM and full service stations." *Id.* at 21942 (JA __). In the interim, however, to LPFM stations imminently facing displacement and subject to the outcome of the proceeding on the further notice, the Commission sought to provide guidance and standards for LPFM stations for obtaining waivers of the second adjacent channel minimum separation requirement that would allow the Commission to go forward with a full-service station's relocation of its

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[7] The Commission pointed out that Section 73.809 had never required LPFM stations to protect subsequently authorized full-service FM stations operating on third-adjacent channels from interference. "[T]his Rule change [thus] does not 'eliminate or reduce' third-adjacent channel protection requirements and therefore comports with statutory requirements" of the RBPA. 22 FCC Rcd at 21938 n.168 (JA __).

community of license but in a manner that would avoid jeopardizing continued service from an existing LPFM station. *Id.* at 21939-40 (JA __).

The Commission accordingly established procedures to permit LPFM stations to seek, if necessary, a waiver of the minimum separation requirements applicable to second-adjacent stations in Section 73.807 of its Rules in order to avoid displacement by an encroaching full service station. Under these procedures, after a waiver application is received, the staff provides the affected full service station(s) with an opportunity to "show cause . . . as to why the modification of such station license[s] to allow a second adjacent channel short-spacing would not be in the public interest." 22 FCC Rcd at 21940 ¶ 67. If the staff finds that the waiver should be granted, a special temporary authorization ("STA") is issued to allow the short spacing operation by the LPFM station; the Commission will withhold any final determination on the waiver until the proceedings under the Further Notice have been completed. *Id.* Likewise, any STAs that are issued "will be subject to any action taken by the Commission in the *Second Further Notice*." *Id.*

The Commission also adopted an interim measure to address the situation where implementation of a full-power station's community of license modification would result in the displacement of an existing LPFM station (or make its operations infeasible), and no alternate channel is available for that LPFM station. *Id.* at 21941 ¶ 68 (JA _). Under those circumstances, rather than simply allowing the full-power station's license modification to shut down an existing LPFM station, the Commission found that, where the affected LPFM station "can demonstrate that it has regularly provided at least eight hours per day of locally originated programming," it would be appropriate to apply a "presump-

tion that the public interest would be better served" by waiving the secondary status of the LPFM station to the subsequently-authorized full-power stations and dismissing the full-power station's community of license modification application. *Id.* at 21940 ¶68 (JA __).

The Commission emphasized that it would "narrowly limit this policy to the class of LPFM stations that are demonstrably serving the needs of local listeners," that it would "not apply in a situation in which a full-service station proposes a facility change to improve service to its current community of license," and that it would dismiss a full-power station's "modification proposal only when no technically reasonabl[e] accommodation is available and the LPFM station makes the requisite showing." 22 FCC Rcd at 21941 ¶70 (JA __). The Commission concluded that this "policy appropriately balances the interests of full-service and LPFM stations, and recognizes the role that each service plays in promoting diversity and localism." *Id.* The Commission added that it was seeking comment on this policy in the *Second Further Notice of Proposed Rule Making* that it was adopting and that it would consider comments in response to that notice in determining whether to amend its rules to codify this policy with or without modification. *Id.*

SUMMARY OF ARGUMENT

In its action below, the Commission took modest steps to modify its rules and adopt interim policies to address potential threats to the continued operation of a significant number of LPFM stations caused in part by previous rule changes that had benefited full-power FM broadcasters. The Commission recognized the important role that LPFM stations, typically operated by local community groups, play in promoting localism and

diversity in their communities. The potential threats to LPFM stations were arising in large part as a result of changes the Commission had made to its rules in another proceeding to streamline the ability of full-power station to change their communities of license, leading to the filing of over 200 applications. The Commission here modified one rule and adopted interim policies pending a further rule making proceeding to protect local communities from losing their LPFM stations to encroaching full-power stations, while generally continuing to recognize the priority status of full-power FM stations.

Contrary to NAB's arguments, the Commission's action did not violate the Radio Broadcasting Preservation Act ("RBPA"). That statute was adopted by Congress in 2000 in response to the Commission's decision not to require LPFM stations to protect existing full-power FM stations operating on third-adjacent channels from potential interference by maintaining minimum distances between the stations. As NAB recognizes, the RBPA "established an unusually specific set of restraints on the FCC" (Br. at 20). First, the RBPA required the Commission to prescribe minimum distance separations for third-adjacent channels as well as co-, first- and second-adjacent channels. Second, the statute directed the Commission not to eliminate or reduce the minimum distance separations for third-adjacent channels. None of the actions taken by the Commission here violated these very specific restraints.

NAB contends that despite the clear and specific language of the RBPA, Congress had a broader goal in adopting the statute – to preclude the Commission from modifying or adopting new rules or policies that reduce any interference protection LPFM stations must provide full-power stations. But that broad goal is reflected nowhere in the RBPA. NAB relies on statements in a committee report and by legislators in floor debate to

support its view that Congress did not mean what it said in the statutory language and that it must have intended to accomplish NAB's far broader goals. Where statutory language is clear, however, courts may not enlarge a statute's scope to add restrictions that Congress did not enact. Moreover, the legislative history on which NAB relies has no connection to the language in the legislation that became the RBPA. As the Supreme Court, this Court and other circuits have recognized, legislative history that is "unconnected to the text of an enacted statute has no binding legal import." *Northwest Environmental Defense Center v. Bonneville Power Administration*, 477 F.3d 668 (9th Cir. 2007).

NAB's next argues unpersuasively that even if the Commission's action did not violate the RBPA, it was arbitrary and capricious. As we explain, the Commission adequately set forth the basis for its decision to modify Section 73.809's interference protection rule to eliminate the protection for second-adjacent channels. Noting the changed circumstances presented by the increase in the number of license modifications applications being filed by full-power stations, the Commission adjusted its balance of competing priorities between interference protection and preserving the existing local service of LPFM stations, a balance that was already reflected in its rules.

NAB's challenge to the interim waiver procedures adopted by the Commission to avoid unnecessary loss of LPFM station service is at the outset unripe. The issues are not fit for review at this time nor is there any harm to the parties from awaiting circumstances in which a full-power broadcaster alleges harm from Commission action on a waiver request. With respect to both provisions, future Commission action on a waiver request is inextricably intertwined with the particular facts presented by both the LPFM applicant

seeking to preserve its existing operation when faced with an encroaching new or modified full-power broadcaster and the facts presented by that affected full-power station. The Commission also made clear that it retained discretion ultimately to reach an independent conclusion as to how the public interest would best be served in particular cases regardless of the showings made by the parties. NAB has not shown, and there is no evident reason to believe, that it or its members will be harmed if they are required to await a specific situation in which one of its members alleges harm from Commission action on a waiver request.

The Commission's adoption of these interim waiver procedures to avoid unnecessary loss of an LPFM station's local service pending examination of these areas in the rule making proceeding begun as part of the same action below was in any event reasonable. The Commission has well-established authority to waive its rules upon a finding that following the rule in a particular case would be contrary to the public interest. The Commission explained why it had concluded that adopting these narrowly focused waiver policies was necessary in particular circumstances to preserve the important local service provided by LPFM stations while the Commission considered permanent solutions to the problem in the rule making. Nor did the Commission's adoption of the waiver policies violate the notice-and-comment provisions of the Administrative Procedure Act. These waiver policies come within the exception to notice and comment that the APA carves out for "general statements of policy."

Finally, NAB argues that it was unlawful for the Commission to take into account the LPFM station's provision of local programming when considering whether to grant of waiver of LPFM's secondary status because "the FCC has no general authority to regu-

late programming content." This argument is wrong in two respects. First, it ignores that broadcasters have long been required under the Communications Act to provide programming of interest to their local communities. Second, as the Commission's rules make clear, reference to the "locally originated programming" of an LPFM station does not refer to the content of the programming at all, but to the place of its production.

ARGUMENT

I. STANDARD OF REVIEW

This case principally involves an issue of statutory construction. "[T]he starting point in any case involving the meaning of a statute is the language of the statute itself." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' " *Connecticut Nat. Bank* v. *Germain,* 503 U.S. 249, 253-254 (1992) (*quoting Rubin* v. *United States,* 449 U.S. 424, 430 (1981)) (internal citations omitted).

A reviewing court may reverse the agency's determinations only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). Under that highly deferential standard, the Commission need only articulate a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983). The Court "presume[s] the validity of the Commission's action and will not intervene unless the Commission failed to consider relevant factors or made a manifest error in judgment." *Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 300 (D.C. Cir. 2003).

The deference accorded to the agency is particularly broad in a case that involves the Commission's scientific and technical expertise. *MCI Cellular Telephone Co. v. FCC*, 738 F.2d 1322, 1333 (D.C. Cir. 1984). In such a case, the Court will uphold the FCC's ruling as long as the agency has supported its technical judgment "with even a modicum of reasoned analysis." *Hispanic Information & Telecommunications Network v. FCC*, 865 F.2d 1289, 1297-1298 (D.C. Cir. 1989).

II. THE COMMISSION'S ACTIONS IN THE THIRD REPORT AND ORDER DO NOT CONFLICT WITH THE REQUIREMENTS OF THE RBPA.

While petitioner obviously wishes that Congress in the RBPA would have forbidden the Commission from taking any action whatsoever to reduce the interference protection provided to full-power FM stations, the text of the statute contains no such command. Rather, Congress only imposed two specific duties on the FCC relevant to this case. First, it directed the Commission to modify its LPFM rules to "prescribe minimum distance separations for third-adjacent channels (as well as for co-channels and first- and second-adjacent channels) ...." RBPA § 632(a)(1)(A). Second, it directed the Commission not to "eliminate or reduce the minimum distance separations for third-adjacent channels required by paragraph (1)(A) ...." RBPA § 632(a)(2)(A). The Commission has complied with those very specific statutory requirements.

A. The Relevant RBPA Language Is Clear And Does Not Prohibit The Actions That The Commission Took.

In construing a statute, the court begins with its plain language. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 474 (1992). Where the language is clear, that is the end of judicial inquiry "in all but the most extraordinary circumstances." *Id.* Here, NAB

claims (Br. at 18) that the Commission's action in the *Third Report and Order* is inconsistent with the "plain language" of the RBPA. It is not.

First, the statute requires the Commission to "prescribe minimum distance separations for third-adjacent channels (as well as for co-channels and first- and second-adjacent channels)." The Commission complied with this requirement when it modified Section 73.807 of its rules in 2001, establishing minimum distance separations to ensure that LPFM stations protect existing commercial and non-commercial full-service FM stations and translator and booster stations, on third-adjacent channels, as well as on co-, first- and second-adjacent channels. *See* p. __ above. Those rules prescribing minimum distance separations remain in effect, and Commission did not modify them in the *Third Report and Order*.

Second, the statute directs the Commission not to "eliminate or reduce the minimum distance separations for third-adjacent channels required by paragraph (1)(A) ...." RBPA, § 632(a)(2)(A). The Commission complied with this requirement in the *Third Report and Order* because nothing in that Order either eliminated or reduced minimum distance separations for third-adjacent channels.

NAB's contention (Br. at 18) that the Commission violated the RBPA by establishing procedures for waiver of the distance separation rule for second-adjacent stations in cases where an LPFM station must be relocated to another channel because of a newly authorized or newly modified full-power FM station is baseless. The statute sets forth a requirement that the FCC establish minimum distance separations for "co-channels," "first and second-adjacent channels," and "third-adjacent channels." RBPA, § 632(a)(1)(A). But it then only prohibits the Commission from eliminating or reducing

such separations for "third-adjacent channels." *Id.* § 632(a)(2)(A). Even assuming that waivers fall within the statutory prohibition on "eliminating or reducing minimum distance separations," the Commission's interim waiver procedures do not fall within that prohibition because they apply only in the case of second-adjacent channels. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("where Congress includes particular language in one section of a statute but omits it in another …, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship").

NAB contends that the Commission's action is like "read[ing] an ordinance banning bonfires 30 feet from a campground to permit fires 20 feet away." Br. at 20. In fact, an ordinance specifically stating that bonfires were banned "30 feet from a campground" likely would not be enforceable to ban bonfires 20 feet away or any distance other than 30 feet. If the legislative body adopting the ordinance intended to ban bonfires "within 30 feet of a campground," which is what NAB's analogy seems to presume, the ordinance should have been written using that language.

In any event, an analogy much closer to the facts of this case would involve an ordinance directing a campground administrator to prescribe regulations providing that there are three places in a campground where a bonfire may be started and setting different safety protections for fires at each of those locations – Station A (10 feet away from the picnic area), Station B (20 feet away from the picnic area), and Station C (30 feet away from the picnic area). The ordinance also directs the campground administrator

not to eliminate or reduce the promulgated safety protections for fires at Station C. In this scenario, there would be no basis to conclude that the ordinance would deprive the campground administrator of the authority to modify his regulations to eliminate or reduce the safety protections at Stations A and B either by subsequently amending the regulation or, in particular cases, by waiver. While the administrator arguably would be prevented from waiving the regulations with respect to Station C, the ordinance would impose no comparable restrictions with respect to Stations A and B.

Turning back to the statute at hand, had Congress actually intended, as NAB claims, to prohibit the Commission from enacting any modifications to its rules adversely affecting full-service FM stations' protection from interference by LPFM stations, the language of the RBPA does not accomplish that purpose. It is not for the Court to rewrite the statute to accomplish a perceived Congressional goal. "Legislative history may help disambiguate a cloudy text by showing how words work in context; it does not permit a judge to turn a clear text on its head." *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 984, 985 (7th Cir. 2008).

NAB argues, unaccompanied by citation to anything, that "Congress expressed its understanding that co-channel, first- and second-adjacent channel protections were 'greater included' protections needed to ensure that full-power service would not be affected by LPFM stations." (Br. at 21). If that is true, Congress did not express that understanding in the statutory language.[8] The RBPA imposes a narrowly focused

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[8] In any event, that understanding is not correct: The greater the channel separation between two stations, the shorter the minimum distance separation required between those two channels, and vice versa. It is thus not accurate to say that any reduction in second-adjacent channel minimum distance separation requirements will necessarily

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limitation on the FCC. Had Congress wished to preclude the Commission from eliminating or reducing minimum distance separations for second-adjacent channels, it could have included second-adjacent channels along with third-adjacent channels in Section 632(a)(2)(A). But it did not. The agency thus properly construed the statutory language to mean what it says – and no more. Indeed, the Commission has been cautioned by this Court that it does not have "license to construe statutory language in any manner whatever, to conjure up powers with no clear antecedents in statute or judicial construction, nor to ignore explicit statutory limitations on Commission authority." *National Ass'n of Reg. Util. Comm'rs v. FCC*, 533 F.2d 601, 618 (D.C. Cir. 1976).

NAB asserts that the RBPA is "an unusually strict statute" prohibiting any action by the FCC to 'eliminate or reduce' interference protections 'except as expressly authorized by an Act of Congress ....'" Br. at 34. NAB attempts to rewrite the statute to serve its own ends. The RBPA by its terms does not "prohibit[] any action to 'eliminate or reduce' interference protections." It prohibits any action by the FCC to "eliminate or reduce the minimum distance separations for third-adjacent channels required by paragraph (1)(A) ...." RBPA, § 632(a)(2)(A) (emphasis added). While NAB is free to complain that the text of the statute does not accurately reflect the intent of Congress and to ask Congress to correct that alleged error, it may not ignore the statute's actual language in arguing to this Court that the FCC has failed to comply with the statute.

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cause more interference than any reduction in third-adjacent channel minimum distance separation requirements. Indeed, the opposite could be true depending on the respective magnitude of the reductions.

In addition to the interim waiver procedures, NAB erroneously claims that the Commission's amendment of Section 73.809 of its rules to eliminate protection for second-adjacent channels violates the RBPA's requirement that the FCC not "eliminate or reduce the minimum distance separations for third-adjacent channels." NAB Br. at 24. As an initial matter, Section 73.809 does not even involve "minimum distance separations" and is thus distinct from the interim waiver procedure that the Commission adopted to address situations in which LPFM stations, to avoid interference to an encroaching full-power station, must move to an alternate channel that does not comply with the distance separation requirements in Section 73.807. Rather, Section 73.809's purpose is to address the impact on existing LPFM stations when interference is predicted to occur, or actually occurs, to subsequently authorized full-power stations by providing a process for determining whether predicted interference is in reality likely, or whether, if likely, it can nevertheless be corrected.[9] The rule, which was adopted with the LPFM rules in 2000 (*see 2000 Report & Order*, 15 FCC Rcd at 2231 ¶¶65-67), was *never* extended to third-adjacent channels.[10] Thus, because Section 73.809 does not involve distance separations or was never applied to third-adjacent channels, it does not fall within the terms of RBPA at all, and the Commission's action modifying it does not violate the RBPA. As the Commission stated in the order under review, "Section 73.809

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[9] Such a situation would arise because a new LPFM station must respect minimum distance separations established in the Commission's rules between its proposal and existing full-power stations (as well as other LPFM stations), but a full-power station is not required to take into account existing LPFM stations in submitted applications for new or modified facilities. *See* 47 C.F.R. § 73.807(a), (f).

[10] Section 73.810 of the Commission's rules (which the order under review does not amend) sets forth a separate complaint process governing "third adjacent channel interference cased by an LPFM station." 47 C.F.R. § 73.810 (a).

does not require LPFM stations to resolve complaints of actual interference to subsequently authorized third-adjacent channel full service stations." *Third Report and Order*, 22 FCC Rcd at 21938 n.168 (JA __).[11]

Additionally, the Commission amended Section 73.809 in the *Third Report and Order* to focus on co- and first- adjacent channel interference, eliminating the provisions relating to second-adjacent channels. *See* 22 FCC Rcd at 21938 ¶63 (JA __). While this modification could be described as "weakening the protections" against interference for subsequently authorized full-service stations vis-à-vis existing LPFM stations on second-adjacent channels, the RBPA only prohibits reductions in third-adjacent channel distance separation protections. NAB contends that the "natural reading of the RBPA" demonstrates that Congress' purpose was to "bar[] the FCC from weakening any of the protections its rules provided for full-power stations." Br. at 19 (emphasis added). But again that is not what the statute says. NAB's suggestion that the provisions of Section 73.809 are governed by the RBPA is based on the same mistaken view that the RBPA prohibits any attempt to modify any interference protection for full-service FM stations vis-à-vis LPFM stations.

Contrary to NAB's claim (Br. at 21), applying the language of the RBPA as it was enacted by Congress does not lead to an absurd result. The RBPA was adopted to respond to the Commission's establishment of an LPFM service under rules that failed to include

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[11] As the Commission has made clear (22 FCC Rcd at 21938 n.168 (JA __)), its statement in the *2005 Further Notice* that Section 73.809 makes LPFM stations "responsible for resolving all allegations of actual interference to the reception of co-channel or first-, second-, or third-adjacent channel full service stations," *2005 Further Notice*, 20 FCC Rcd at 6780 ¶37 (JA __), was in this respect inaccurate.

(over the strenuous objection of the full service broadcasters and the NAB) distance separation protections for third-adjacent channels.[12] That was the specific issue before Congress, and the terms of the RBPA specifically directs the Commission to add such protection to its rule – and no more. To be sure, Congress could have adopted broader statutory language that prohibited the Commission from making other changes in interference protections between LPFM and full-service FM stations.[13] It did not do so.

NAB claims (Br. at 21) that it "would make no sense to conclude that Congress meant to prohibit the FCC *only* from eliminating third-adjacent protection ...." On the contrary, the issue pressing Congress at the time – the problem on which NAB itself was urging for action – involved third-adjacent channel protections. And that narrow focus is reflected in the language of the statute. NAB might have been successful had it pressed Congress at the time to forbid the Commission from eliminating or reducing minimum distance separations for second-adjacent channels, but it did not. Similarly, NAB might have been successful had it sought to obtain statutorily mandated protection for full-power stations to encroach on already existing LPFM stations, but it didn't. And NAB's attempt to advance a construction of the statute based on what Congress must (or should) have intended, rather than on the language it actually adopted, "would result 'not [in] a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted," whether by "inadvertence" or otherwise, "may be included within its

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[12] *See generally H.R. Rept. No. 106-567*, 106th Cong., 2d Sess. (2000); *"FCC's Low Power FM: A Review of the FCC's Spectrum Management Responsibilities,"* Hearing Before Subcomm. on Telecom., Trade and Consumer Protection of the House Comm. on Commerce, 106th Cong., 2d Sess. (Feb. 17, 2000).

[13] Indeed, as originally introduced, the RBPA simply prohibited the Commission from adopting rules creating an LPFM service at all. *See* H.R. 3439, 106th Cong. (1999).

scope.'" *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004), *quoting Iselin v. United States*, 270 U.S. 245, 251 (1926).

"There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp. v. Higgenbotham*, 436 U.S. 618, 625 (1978). The Court has explained that its "unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding. It results from 'deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill.'" *Lamie v. U.S. Trustee*, 540 U.S. at 538, *quoting United States v. Locke*, 471 U.S. 84, 95 (1985).

Finally, NAB's argument that the RBPA categorically precludes the Commission from denying a full-power broadcaster's modification application when the grant of such application would require an existing LPFM station to cease operations because there is not an alternative channel to which the LPFM station can relocate is nothing short of remarkable. Even if one were to accept NAB's argument that the RBPA somehow prevents the Commission from waiving minimum distance separation requirements for second-adjacent channels, the Court would have to take the additional step of concluding that the RBPA *requires* the Commission to grant modification requests by full-power broadcasters that would result in distance separations shorter than those set forth in the Commission's rules. Again, while NAB undoubtedly wishes that Congress had granted full-power FM stations an unfettered right to encroach on existing LPFM stations and to require them to cease operations, such a right appears nowhere in the text of the statute.

B. The Legislative History Of The RBPA Does Not Provide Convincing Evidence That Congress Did Not Mean What It Said In The Statutory Language.

NAB asserts that applying the statutory language as written would be "'demonstrably at odds with the intentions of its drafters.'" Br. at 22, *quoting Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998). In the first place, as we have shown, "resort to legislative history is not appropriate in construing plain statutory language. '[W]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'" *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 494 (D.C. Cir. 2004), *quoting Lamie v. United States Trustee*, 540 U.S. at 534. Legislative history thus cannot be employed to make unambiguous statutory language ambiguous. If the legislators who voted for the bill that ultimately was enacted as the RBPA actually intended to adopt the broad restrictions on future FCC actions that NAB contends, they did not enact language that accomplished that goal. And it is not for the Court to correct Congress' error, if that is what it was, by adding restrictions that Congress did not enact. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) ("These are the battles that should be fought among the political branches and the industry. Those parties should not seek to amend the statute by appeal to the Judicial Branch.").

In any event, contrary to NAB's argument, the legislative history of the RBPA, to the extent relevant at all in light of the clarity of the statutory language, provides no compelling evidence that Congress intended something other than the language that was enacted.[14]

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[14] NAB's suggestion (Br. at 27 n.17) that committee reports or statements by legislators with respect to different legislation in later Congresses is relevant is unpersuasive on its

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To be sure, as NAB notes (Br. at 28-29), the section-by-section analysis in the House Committee Report on the RBPA stated that under the proposed legislation "the Commission is directed to maintain the same level of protection from interference from other stations for existing stations and any new full-power stations as the Commission's rules provided for such full-power stations on January 1, 2000," that "the Committee intends that this level of protections should apply at any time during the operation of an LPFM station," and that "LPFM stations which are authorized under this section, but cause interference to new or modified facilities of a full-power station, would be required to modify their facilities or cease operations." H.R. Rep. No. 106-567, at 8. But the Committee's discussion finds no foundation in the language of the proposed legislation, which was identical in all relevant respects to that ultimately enacted, and the Report makes no attempt to reconcile the two.[15]

Legislative history – specifically language in committee reports – that is untethered to the text of an enacted statute carries little or no weight. In *Shannon v. United States*, 512 U.S. 573 (1994), the Supreme Court rejected an argument that language in a committee report not reflected in the statutory text was entitled to authoritative

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face. The cited language provides no basis to diverge from the clear language of the RBPA. Such post-enactment legislative history is of little or no weight. *See, e.g., Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005)("[P]ost-enactment legislative history is not only oxymoronic but inherently entitled to little weight.").

[15] That Congress was "well aware" of what the Commission had done with respect to interference protection in adopting the LPFM rules (NAB Br. at 26) actually supports applying the statutory language as written. The Commission's decision to retain the protection for co-channel and first- and second-adjacent channels would explain why Congress focused its attention on prohibiting Commission changes to third-adjacent channels. *Compare Creation of a Low Power Radio Service, NPRM*, 14 FCC Rcd 2471, 2488 ¶42 (1999) *with 2000 Report and Order*, 15 FCC Rcd at 2246 ¶104.

weight in construing a statute. The Court stated: "We are not aware of any case ... in which we have given authoritative weight to a single passage of legislative history that is in no way anchored to the text of the statute." *Id.* at 583. In doing so, the Court agreed with this Court's holding that "'courts have no authority to enforce [a] principl[e] gleaned solely from legislative history that has no statutory reference point.'" *Id.*, *quoting International Brotherhood of Elec. Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697, 712 (1987).

If the Commission were to have followed NAB's approach and concluded that it lacked authority to modify any provisions affecting interference protections for full-power stations, it would have been in essentially the same position as the Bonneville Power Administration in *Northwest Environmental Defense Center v. Bonneville Power Administration*, 477 F.3d 668 (9th Cir. 2007). In that case, the BPA, a federal agency within the Department of Energy, had sought to transfer functions that had been performed by an organization known as the Fish Passage Center that was part of an interstate compact agency advising BPA on a variety of environmental and power planning issues. *Id.* at 674-77. BPA's decision was based solely on language in a Senate committee report precluding BPA from providing any further support for the Fish Passage Center. *Id.* at 677. The Ninth Circuit set aside BPA's decision, holding that "committee report language unconnected to the text of an enacted statute has no binding legal import ...." 477 F.3d at 682, *citing Shannon* and *International Brotherhood*. The court added that the "principle that committee report language has no binding legal effect is grounded in the text of the Constitution and in the structure of separated powers the Constitution created. ... If

Congress wishes to alter the legal duties of persons outside the legislative branch, including administrative agencies, it must use the process outlined in Article I." *Id.* at 684.

In addition, while there are snippets of the floor debate in the House on the RBPA that support NAB's view of Congress' intent, *see, e.g.,* NAB Br. at 28 n.19, 29, such statements are also powerless to change the statute's unambiguous language. *See Barnhart*, 534 U.S. at 457 ("Floor statements from two Senators cannot amend the clear and unambiguous language of a statute. We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text."). Furthermore, there are also statements indicating more accurately that the legislation only redressed the FCC's elimination of the distance separation requirement for third-adjacent channels. *See, e.g.,* 146 Cong. Rec. 5612 (Apr. 13, 2000) (statement of Rep. Oxley) ("This bill allows the FCC to proceed with a low-power program. It insists that the Commission reinstitute the third-channel protections that are so important for current broadcasters ...."); *Id.* at 5614 (statement of Rep. Pallone) ("The compromise we fashioned in the Committee on Commerce allows the FCC to move forward with the low-power FM as long as it protects existing third-channel interference protections."); *Id.* at 5615 (statement of Rep. Goodlatte)("There is no question that eliminating the third adjacent channel safeguard, as the Commission is doing, will lead to increased interference."); *Id.* at 5619 (statement of Rep. Barr) ("[The RBPA] would require the Federal Communications Commission (FCC) to maintain third-adjacent channel protection, and to consider independent analyses of potential Low Power FM (LPFM) interference before proceeding."); *Id.* at 5622 (statement of Rep.

Burr) ("Congress must protect all radio listeners by maintaining third-channel interference protections.").

In the end, there may be no clear evidence why Congress chose to limit the scope of the RBPA to the distance separation rule and to the protection of the distance separation requirements for third-adjacent channels. This, however, is not a basis for concluding that the section does not mean what it says, or for adding restrictions in the statute that Congress nowhere adopted. As this Court has observed, "'there would be no need for a rule – or repeated admonition from the Supreme Court – that there should be no resort to legislative history when language is plain and does not lead to an absurd result, if the rule did not apply precisely when plain language and legislative history may seem to point in opposite directions.'" *Goldring v. District of Columbia*, 416 F.3d 70, 75 (D.C. Cir. 2005), *cert. denied*, 126 S.Ct. 2985 (2006), *quoting Bombardier Corp.*, 380 F.3d at 494-95."

III. THE COMMISSION'S ACTIONS IN THE THIRD REPORT AND ORDER WERE REASONABLE.

When it created the LPFM service, the FCC declined to provide LPFM stations with an interference protection right that could prevent a full-power station from seeking to modify its transmission facilities or could foreclose future new full-power radio station licensing opportunities. *See 2000 Report & Order*, 15 FCC Rcd at 2231; *Third Report and Order*, 22 FCC Rcd at 21936-938 (JA __). The actions taken by the Commission in the *Third Report and Order* and challenged by NAB are an attempt by the agency to accommodate the sometimes competing objectives of allowing full-power stations to modify their licenses and preserving the service of existing LPFM stations. The need for an accommodation became acute in the wake of the increasing number of full-power license modification applications that the Commission had received under streamlined

proceedings, which the Commission feared, could lead to a significant number of LPFM stations being forced to cease operations. As indicated above, full-power FM broadcasters received significant benefits from the Commission's adoption of streamlined modification procedures, and it was far from unreasonable for the Commission to place minimal burdens on stations seeking to benefit from those procedures in order to ameliorate harm to current LPFM operators. Contrary to NAB's claims, the modest rule and interim policy changes the Commission adopted in the order under review reflect a reasonable balancing of the interests of LPFM and full-power stations.

A. The Interference Protection Rule

In 2005, the Commission proposed to amend Section 73.809 of its rules, which establishes a procedure for resolving interference between an LPFM station and a subsequently authorized new or modified full-service FM station "that operates on the same channel, first adjacent channel, second-adjacent channel, or intermediate frequency (IF) channel[]." 47 C.F.R. § 73.809. *See 2005 Further Notice*, 20 FCC Rcd at 6780 (JA __). Under the rule, LPFM stations were responsible (1) for demonstrating that any predicted interference is unlikely to occur and (2) for resolving all allegations of actual interference within a full-service station's 70 dBu contour or community of license. 47 C.F.R. § 73.809 (b), (c). If the LPFM station could not make either showing, it was required to cease operations. *Id.* The rule, as the Commission pointed out, had originally been adopted to give an operating LPFM licensee "a measure of stability" in circumstances where it was confronted with a newly authorized full-service station operating nearby. *2005 Further Notice*, 20 FCC Rcd at 6780 ¶37 (JA __). The rule's goal was to avoid the necessity for the LPFM station to cease operating unless there was a clear showing of

predicted or actual interference to a new full-service station and the LPFM station had the opportunity to attempt to resolve the problem. *Id.*

Noting the increasing numbers of "encroaching" full-service FM stations, the Commission proposed 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." *2005 Further Notice.* at ¶38. The Commission noted that while an LPFM station could receive more interference from the full-service station operating on a second-adjacent channel in such circumstances, "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." *Id.*

In the *Third Report and Order* the Commission concluded that to address "current and future LPFM station displacement threats," it should limit the reach of the Section 73.809 procedures to co- and first- adjacent channels. *Third Report and Order*, 22 FCC Rcd at 21938 ¶63 (JA __). This change, it should be noted, did not remove the second adjacent channel restriction for allotting LPFM stations in the first instance contained in Section 73.807 of the rules, 47 C.F.R. 73.807. Rather, it only applies to situations where a newly authorized or modified full-power station has moved in proximity to a pre-existing LPFM station.

FCC staff had identified approximately 40 LPFM stations that could be forced to cease operations under the existing rule because of the increase in full-power station community of license modification applications. 22 FCC Rcd at 21938 ¶63 (JA __). To minimize that impact, the Commission concluded that the rule should be amended to

eliminate protections for second adjacent channels where, as it had noted, the predicted interference areas are substantially less: "second-adjacent channel interference to a full service station is generally predicted to occur only in the immediate vicinity of the LPFM station transmitter site. Predicted interference to listeners can be substantially reduced or eliminated in these situations by various techniques ...." *Id.*

NAB claims that this rule change is arbitrary and capricious because the Commission had no basis on which to reverse its previous conclusion that second-adjacent protections are necessary. Br. at 37. In the first place, the Commission's decision to "retain 2nd-adjacent channel protection requirements," *see 2000 Report & Order*, 15 FCC Rcd at 2246 ¶104, was related to second-adjacent channel protections for LPFM generally, including the minimum distance separation rule, and was not focused solely on the interference protection provisions of Section 73.809, which involves situations where a newly authorized or newly modified full-power broadcast station has encroached on a pre-existing LPFM station.

In any event, in the *Third Report and Order* the Commission explained that the interference protection provisions of Section 73.809 were likely to lead to dozens of LPFM stations being forced to cease operations because of a "one-time flurry" of applications by new full-service FM stations and existing stations seeking to modify their facilities as a result of the Commission's streamlining of that application process. 22 FCC Rcd at 21938 ¶ 63 (JA __). Although the Commission acknowledged that only one LPFM station had so far been forced off the air by reason of Section 73.809, the agency explained that some "40 LPFM stations" could ultimately "be forced to cease operations"

as a result, *id.*, and NAB does not claim that the Commission's concern were unreasonable.[16]

Moreover, the Commission found that any increase in predicted interference to a newly authorized or newly modified second-adjacent channel full-power station would occur only in the immediate vicinity (10-200 meters) of the LPFM station transmitter site. 22 FCC Rcd at 21938-39 ¶¶ 63, 65 (JA __). NAB complains that the Commission "offered only a single cryptic sentence to justify its complete reversal of course." Br. at 39. The sentence NAB quotes stated, in engineering terms, that "[b]ased on desired-to-undesired ("D/U") signal strength ratio calculations, in most circumstances interference would be predicted to extend from ten to two hundred meters from the LPFM station antenna." 22 FCC Rcd at 21939 ¶65 (JA __). There is nothing "cryptic" about this observation. The concept of desired-to-undesired signals is basic to making these sorts of potential interference determinations and is spelled out in Commission rules for addressing "short-spaced" situations, *i.e.*, situations in which stations do not meet the specified distance separations.[17] *See* 47 C.F.R. 73.215. The limited area of interference to be expected is inherent in the dramatic differences in transmitter power between low-power stations that operate with 100 watts of power and full-power stations that ordinarily operate with a minimum of 6000 watts. *See* p. 4 above. NAB does not offer evidence that

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[16] The record supported the Commission's experience with respect to the threat to existing LPFM stations arising from the filing of community of license modifications by full-service FM stations pursuant to the Commission's recent changes in procedures. *See, e.g.,* Prometheus letter of April 26, 2007; Prometheus Ex Parte notices, March 5, 8, May 18, June 1, June 14, June 19 (JA __).

[17] A desired-to-undesired ratio is the difference between the strength of a desired signal and the strength of an undesired signal, expressed in decibels. *See generally 2000 Report & Order*, 15 FCC Rcd at 2207 n.1.

the Commission's engineering conclusion is wrong.[18] And the Commission's conclusion that "second-adjacent channel interference to a full service station is generally predicted to occur only in the immediate vicinity of the LPFM station transmitter" site, moreover, is not inconsistent with the Commission's conclusions in the *2000 Report & Order* that the likelihood of second-adjacent channel interference would be only "somewhat higher" than for third-adjacent channels. 15 FCC Rcd at 2246 ¶ 104.[19]

Moreover, the Commission noted that "any predicted interference to listeners can be substantially reduced or eliminated in these situations by various techniques," 22 FCC Rcd at 21938 ¶63 (JA __), and the Commission specifically advised LPFM stations seeking waivers to "propose modifications that minimize the protected area of interference." *Id.* at ¶65 (JA __). Petitioner provides no explanation as to why such techniques, which the Commission explicitly stated that it would consider in evaluating a waiver request, would not be effective in mitigating interference concerns.

The Commission is entitled "to reconsider and revise its views as to the public interest and the means needed to protect that interest if it gives a reasoned explanation for the revision." *DirectTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997). In light of the Commission's experience with LPFM over the eight years since that service was estab-

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[18] NAB's extended criticism of the Mitre Study (Br. at 41-44) is irrelevant since the Commission did not purport to rely on the findings of that study.

[19] NAB's criticisms in any event do not apply to the LPFM displacement policy, which addresses situations where potential interference cannot be resolved and there is no alternate channel to which the LPFM station can move to avoid displacement by a full-power station's proposed community of license modification. In those cases, the Commission will dismiss the modification application when the appropriate showing is made and the Commission finds that the public interest will be served by preserving the locally originated program service of the LPFM station. *See* 22 FCC Rcd at 21940-41 ¶¶ 68-71 (JA __).

lished, the changed circumstances arising from increasing number of encroaching full-service FM stations threatening the ability of existing LPFM stations to continue operating and the agency's expertise in technical matters such as radio interference rules, the Commission's explanation for its decision to modify Section 73.809 to minimize displacements of LPFM stations was reasonable and sufficient.

In addition, the rule change is likely to have a minimal effect on full-power FM broadcasters. The Commission noted that 200 modification applications had been filed by full service stations in response to its streamlining of community of license procedures, and that approximately 40 LPFM stations could be forced to cease operations if the Section 73.809 interference protection rule were not amended. *See* 22 FCC Rcd at 21938 ¶63 (JA __). As of December 2007, there were 9201 licensed full-service FM stations and 831 LPFM stations.[20] Even if there should be an increase in new or modification filings by full-service FM stations, it seems unlikely that a significant number of full power FM stations would be affected by the rule change, further justifying the Commission's determination that the public interest in minimizing displacement of operating LPFM stations warranted modifying the rule.

B. The LPFM Station Displacement Interim Waiver Policies

In addition to modifying the rule with respect to the interference protection that LPFM stations must provide to subsequently authorized full-service stations, the Commission announced interim policies, as described earlier, to address circumstances in which grant of a full-service station's application to modify its facilities could lead to the displacement of an operating LPFM station. The Commission established those policies

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[20] *Broadcast Stations Totals as of December 2007*, FCC NEWS (March 18, 2008).

to cover two situations. First, where there is an alternative channel to which the LPFM station can move, but that channel does not meet the distance separation requirements to a second-adjacent channel full-service station, the Commission announced it would consider requests for waiver of the distance separation rule. 22 FCC Rcd at 21939-40 ¶¶ 64-67. Second, in circumstances where there is no alternate channel to which the LPFM station can move, the Commission indicated it would consider requests for waiver of the secondary status of LPFM stations in certain limited and specifically defined circumstances. *Id.* at 21940-41 ¶¶ 68-70. In this regard, "where the threatened LPFM station can demonstrate that it has regularly provided at least eight hours per day of locally originated programming," the Commission would apply a "presumption" that the public interest would be better served by preserving the local service of the LPFM station than by granting the full-service station's modification application. 22 FCC Rcd at 21940 ¶ 68.

NAB contends that even if the Commission is not prohibited by the RBPA from waiving these rules, its interim waiver policies are arbitrary and capricious or otherwise unlawful. NAB's claims are not ripe and should be dismissed. If the Court considers the claims, the Commission's actions should be found reasonable.

1. The Claims Are Not Ripe.

The ripeness doctrine reflects a judgment that federal courts should avoid review of abstract or unnecessary issues in the absence of concrete harm. *See Ohio Forestry Association, Inc. v. Sierra Club*, 523 U.S. 726, 732 (1998). Ripeness involves a two-part test: "the 'fitness of the issues for judicial decision' and the 'hardship to the parties of withholding court consideration.'" *Id.* at 733; *see AT&T Corp. v. FCC*, 349 F.3d 692, 699 (D.C. Cir. 2003). NAB's contention that the Commission's interim waiver policies are

arbitrary and capricious or otherwise unlawful is not ripe for review under either criterion.

Under the "fitness" prong, the issues the Court would be called on to address here are primarily factual rather than legal issues. As is evident from the *Third Report and Order*, Commission action on waiver requests under either of the policies adopted is significantly fact-bound. The Commission pointed to numerous factual considerations that it would take into account in acting on waiver requests, including, for example, whether the LPFM stations has sought to modify it operation to minimize the area of interference, whether other channels are available for the LPFM station that would not require a waiver, the amount of locally originated programming provided by the LPFM station, and the extent to which other LPFM stations are providing service to listeners in the area.[21] In addition, the Commission also made clear that, in the case of applications for waiver of the distance separation requirements of Section 73.807 by displaced LPFM stations, it could grant special temporary authorizations but would take no final action either on waiver requests or on the applications by full-service stations that made the waiver requests necessary until it had completed the rule making begun in the *Further Notice* that it adopted along with the *Third Report and Order*. 22 FCC Rcd at 21940 ¶67 (JA __).

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[21] *See Third Report and Order*, 22 FCC Rcd at 21939-40 ¶¶ 65-67 (JA __) (describing criteria for LPFM stations seeking a waiver of second-adjacent channel distance separations to move to a new channel to avoid having to cease operations to avoid potential interference to a new or modified full-service station); *id.* at ¶¶68-69 (JA __) (describing criteria for LPFM stations seeking a waiver of LPFM's secondary status to avoid having to cease operations where there is no alternate channel to which to move in response to a license modification application from a full-service station).

As for waiver of the secondary status of LPFM stations that have no available alternative channel, the Commission made clear that the presumption it was establishing in favor of preserving local service of LPFM stations that had been providing substantial locally originated programming was sharply limited: "We emphasize that the presumption is rebuttable and does not bind the Commission to a particular result. We caution parties that even if the required showing is made, the Commission in the exercise of its discretion may conclude that denial of the full-service station application and grant of the waiver would not serve the public interest." *Id.* at ¶69 (JA __). Finally, as the Commission noted, the bases for both of these waiver policies would be examined in the further rulemaking. *See id.* at 21942-43 ¶¶74-75 (JA __).

In short, whatever action the Commission may take with regard to a particular interim waiver application is inextricably intertwined with the factual record to be developed in particular circumstances. NAB has not shown, and there is no evident reason to believe, that there would be any hardship imposed on NAB or any of its members by delaying consideration of its claims until a broadcaster brings a particular claim of harm in a particular case. "If '[t]he only hardship [a claimant] will endure as a result of delaying consideration of [the disputed] issue is the burden of having to [engage in] another suit,' this will not suffice to overcome an agency's challenge to ripeness." *AT&T Corp.*, 349 F.3d at 700.

2. The Station Displacement Policies Are Reasonable.

NAB contends that even if the RBPA does not preclude the Commission's action on its face, the Commission's policies constitute an unreasonable construction of the Act which, NAB contends, does not permit waivers. Br. at 30-34. NAB also asserts that waiv-

ing an LPFM station's secondary status is "incompatible" with the RBPA. Br. at 46-48. These are simply variations on NAB's overarching, and erroneous, theme that Congress intended in the RBPA to prohibit the Commission from making any changes in its LPFM regulatory regime that adversely affects any interference protection full-power stations receive from LPFM stations. The Commission has the undoubted authority to waive rules not mandated by statute if "particular facts would make strict compliance inconsistent with the public interest." *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *see also* 47 C.F.R. § 1.3 (FCC may waive rules for "good cause shown"), and as we have explained, neither of the waiver policies announced by the Commission in the *Third Report and Order* affect anything that is mandated by the RBPA.[22]

There is no basis for NAB's additional contention that the Commission's action violates the APA because it constitutes a "blanket waiver" or "rulemaking-by-waiver." Br. at 34, 36. The circumstances in which the Commission has announced it would consider granting waivers are precisely the type of individualized cases where strict compliance with the rule would be inconsistent with the public interest because it would force an existing LPFM station to cease operation in circumstances where the FCC has concluded the potential interference to a full-power station is not significant or that preventing the loss of locally originated programming by the LPFM station has a greater public interest value than permitting a full-service station to move. Not only did the Commission

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[22] Congress knows how to prohibit the FCC from granting waivers if it so desires. *See, e.g., News America Publishing, Inc. v. FCC*, 844 F.2d 800 (1988) (challenge to legislation prohibiting FCC from extending temporary waivers of certain ownership rules). The RBPA contains no language precluding the Commission from waiving any particular rule.

explain generally that it sought to "balance the potential for new interference to the full service station against the potential loss of an LPFM station" (22 FCC Rcd at 21939 ¶65 (JA __), but it provided detailed lists of the particular factors it would consider in acting on waiver requests in individual cases. *See id.* at ¶¶66-69.

As noted earlier (*see* p. 33 above), there is no basis for NAB's complaint that the Commission reversed course as to the effect of second-adjacent channel interference. It conclusion here is consistent with the conclusions in the *2000 Report & Order* that second-adjacent channel interference would be only "somewhat higher" than interference that could be expected in the case of third-adjacent channels. *See* 15 FCC Rcd at 2246 ¶104. The Commission engineering judgment did not change, but it adjusted the balance of the competing priorities of interference protection and preserving existing service, based on the changed circumstances it faced. In any event, in the narrow situations in which the Commission indicated that it would consider waiving the second-adjacent channel distance separation requirements, it provided ample opportunity for the full-power station to make an argument that notwithstanding the standard engineering calculations, grant of the LPFM waiver request will result in interference and that the waiver request should be denied. *See* 22 FCC Rcd at 21939 ¶67 (JA __).

NAB asserts that the "practical effect of the FCC's presumptive waiver is this: for any new or modified full-power station confronted with an LPFM station that cannot switch to another channel, the second adjacent channel minimum distance separation protections simply ***no longer exist***." Br. at 37(emphasis original). That is flatly untrue. The Commission set out six specific factors that it would take into account in acting on an LPFM station's waiver request, all of which the full-service station could contest. *See*

22 FCC Rcd at 21941 ¶69 (JA __). Moreover, the Commission pointedly noted that the presumption was rebuttable and that even if the required showing is made by the LPFM waiver applicant, "the Commission in the exercise of its discretion may conclude that denial of the full-service station application and grant of the waiver would not serve the public interest." 22 FCC Rcd at 21941 ¶69 (JA __). Indeed, the Commission emphasized that it "intend[ed] to narrowly limit this policy to the class of LPFM stations that are demonstrably serving the needs of local listeners" and that "this policy will not apply in a situation in which a full-service station proposes a facility change to improve service to its current community of license." *Id.* at ¶70.

The Commission adequately explained the purpose of its station displacement waiver procedures for addressing individual cases where applying the rule would be inconsistent with the public interest – in this case minimizing the loss of existing LPFM service due to new and modified full-power stations. Announcing waiver standards in advance is an efficient way of letting parties know how the Commission expects to act when presented with particular facts in individual cases. However, announcing such standards in advance does not convert a waiver policy into a rule where the agency has made clear that it retains discretion to deny waivers even where showings have been met. Nor does the fact that the Commission had begun a rule making proceeding to examine whether to enact these polices into rules convert waiver standards into rules.

NAB cites no basis in the APA for the proposition that the Commission cannot adopt a waiver standard announcing how it intends to act in individual cases while it is examining whether to adopt a rule that would apply generally. Nothing in the APA imposes such a restriction, nor does the Commission's broad discretion in the Communi-

cations Act suggest such a limitation. *See* 47 U.S.C. 154(j) ("Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."); *Global Crossing Tele., Inc. v. FCC*, 259 F.3d 740, 748-49 (D.C. Cir. 2001) (FCC retains broad discretion under Section 154(j) in conducting proceedings).

NAB further argues that the waiver policy with respect to the secondary status of LPFM stations violates the APA because it relies on a presumption "that 'the public interest would be better served' by granting primary status to LPFM stations that provide eight hours per day of local programming." Br. at 48. Such a presumption is consistent with the Commission's view that locally originated programming is a primary benefit of the LPFM service. 22 FCC Rcd at 21922 ¶24 (JA __). NAB contends that such a presumption lacks a rational basis because it could favor "a local disc jockey playing nationally available music" on an LPFM station over "a full-power station that may offer high quality local news, public affairs or sports programming ...." Br. at 49. Again, NAB simply distorts the policy articulated by the Commission. Among other things, the Commission indicated that it would consider "any other public interest factors raised by the full-service and LPFM station applicants or other parties," that the presumption in favor of avoiding displacement of an LPFM station that meets the required showing is rebuttable and that even where the required showing is made, the Commission may nevertheless "conclude that denial of the full-service station application and grant of the waiver would not serve the public interest." 22 FCC Rcd at 21941 ¶69 (JA __). Under these factors, there is no reason to think that full service FM stations providing local programming will be displaced by LPFM stations that do not. In this regard, NAB's contentions

simply highlight that its objections are unripe, and are more appropriately resolved in a specific factual setting. *See* page 37 above.

The Commission's adoption of its waiver policy also is not a violation of the APA notice-and-comment requirement. NAB Br. at 50. The APA carves out an exception to that requirement for "general statements of policy." 5 U.S.C. 553(b)(3)(A). The relevant criterion of whether an agency action comes within this statutory exception "is whether a purported policy statement genuinely leaves the agency and its decisionmakers free to exercise discretion." *Community Nutrition Institute v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987). The waiver policies adopted here announce the Commission's tentative intentions for responding to certain factual situations in the future, but the Commission also made quite clear that it is free to exercise discretion and is not bound by the policies in particular cases. *See, e.g., Third Report and Order*, 22 FCC Rcd at 21941 ¶69 (noting that not only is presumption rebuttable, but that "even if the required showing is made, the Commission in the exercise of its discretion may conclude that denial of the full-service station application and grant of the waiver would not serve the public interest").[23]

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[23] NAB also contends the Commission adoption of the interim procedures to consider waivers of an LPFM station's secondary status in certain situations violated the APA notice-and-comment requirement because the Commission, in the *2005 Further Notice,* had declined to adopt a similar policy and that the Commission "reversed course without warning" in the *Third Report and Order*. Br. at 51. Comparison of the "processing policy" that the Commission declined to propose in 2005 (*see* 20 FCC Rcd at 6780 ¶38(JA __)), however, with the narrow interim waiver policy that it adopted in 2007 (*see* 22 FCC Rcd at 21940 ¶¶68-70 (JA __)) demonstrates that these were two fundamentally different approaches. In any event, as we have noted, this waiver policy does not constitute a rule under the APA, which is further evidenced by the fact that the further rule making instituted here seeks comments on whether the Commission should "amend Section 73.809 of the Rules to establish a licensing presumption that would protect certain operating LPFM stations from subsequently proposed community of license modifications." *Id.* at 21943 ¶75 (JA __).

As a final objection, NAB contends that it is unlawful for the Commission to consider an LPFM station's provision of locally originated programming as one factor in determining whether to waive the LPFM station's secondary status because "the FCC has no general authority to regulate programming content absent a specific statutory mandate." Br. at 52. That argument is baseless. Broadcasters have long been required under the Communications Act to provide programming of interest to their local communities as part of their obligation to serve the public interest. *See generally Report on Broadcast Localism*, 23 FCC Rcd 1324 (2008). The Commission emphasized in the *Third Report and Order* that this is particularly true in the case of the LPFM service: "we view local origination as a central virtue of the LPFM service …." 22 FCC Rcd at 21922 ¶24 (JA __). In any event, the Commission's reference to "locally originated programming" does not refer to the content of the programming. As defined in the Commission's rules: "Local program origination … is the production of programming, by the licensee, within ten miles of the coordinates of the proposed transmitting antenna." 47 C.F.R. § 73.872(b)(3). The Commission's reference to locally originated programming in this context thus does not implicate program content at all.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

Respectfully submitted,

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September 12, 2008

In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER	)	
v.	)	**No. 08-1117**
FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA RESPONDENTS	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7) and D.C. Cir. Rule 32(a)(2), I hereby certify that the accompanying "Brief for Federal Communications Commission" in the captioned case contains **13,034** words as measured by the word count function of Microsoft Office Word 2003.

C. Grey Pash, Jr.

September 12, 2008

Statutory Addendum

Radio Broadcasting Preservation Act, Pub. L. No. 106-553, div. B, § 632, 114 Stat 2762, 2762A-111 (2000)

Sec. 632. (a)(1) The Federal Communications Commission shall modify the rules authorizing the operation of low-power FM radio stations, as proposed in MM Docket No. 99-25, to—

(A) prescribe minimum distance separations for third-adjacent channels (as well as for co-channels and first- and second-adjacent channels); and (B) prohibit any applicant from obtaining a low-power FM license if the applicant has engaged in any manner in the unlicensed operation of any station in violation of section 301 of the Communications Act of 1934 (47 U.S.C. 301).

(2) The Federal Communications Commission may not--

(A) eliminate or reduce the minimum distance separations for third-adjacent channels required by paragraph (1)(A); or (B) extend the eligibility for application for low-power FM stations beyond the organizations and entities as proposed in MM Docket No. 99-25 (47 CFR 73.853),except as expressly authorized by an Act of Congress enacted after the date of the enactment of this Act.

(3) Any license that was issued by the Commission to a low-power FM station prior to the date on which the Commission modifies its rules as required by paragraph (1) and that does not comply with such modifications shall be invalid.

(b)(1) The Federal Communications Commission shall conduct an experimental program to test whether low-power FM radio stations will result in harmful interference to existing FM radio stations if such stations are not subject to the minimum distance separations for third-adjacent channels required by subsection (a). The Commission shall conduct such test in no more than nine FM radio markets, including urban, suburban, and rural markets, by waiving the minimum distance separations for third-adjacent channels for the stations that are the subject of the experimental program. At least one of the stations shall be selected for the purpose of evaluating whether minimum distance separations for third-adjacent channels are needed for FM translator stations. The Commission may, consistent with the public interest, continue after the conclusion of the experimental program to waive the minimum distance separations for third-adjacent channels for the stations that are the subject of the experimental program.

(2) The Commission shall select an independent testing entity to conduct field tests in the markets of the stations in the experimental program under paragraph (1). Such field tests shall include—

(A) an opportunity for the public to comment on interference; and

(B) independent audience listening tests to determine what is objectionable and harmful interference to the average radio listener.

(3) The Commission shall publish the results of the experimental program and field tests and afford an opportunity for the public to comment on such results. The Federal Communications Commission shall submit a report on the experimental program and field tests to the Committee on Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate not later than February 1, 2001. Such report shall include—

(A) an analysis of the experimental program and field tests and of the public comment received by the Commission;

(B) an evaluation of the impact of the modification or elimination of minimum distance separations for third-adjacent channels on--

(i) listening audiences;

(ii) incumbent FM radio broadcasters in general, and on minority and small market broadcasters in particular, including an analysis of the economic impact on such broadcasters;

(iii) the transition to digital radio for terrestrial radio broadcasters;

(iv) stations that provide a reading service for the blind to the public; and

(v) FM radio translator stations;

(C) the Commission's recommendations to the Congress to reduce or eliminate the minimum distance separations for third-adjacent channels required by subsection (a); and

(D) such other information and recommendations as the Commission considers appropriate.

47 U.S.C. § 307(b)

(b) *Allocation of facilities*

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be--
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 553

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or
(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.
(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;
(2) reference to the legal authority under which the rule is proposed; and
(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.
(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
(2) interpretative rules and statements of policy; or
(3) as otherwise provided by the agency for good cause found and published with the rule.
(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

47 C.F.R. § 1.3

§ 1.3 Suspension, amendment, or waiver of rules.

The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.

§ 73.211 Power and antenna height requirements.

(a) *Minimum requirements.* (1) Except as provided in paragraphs (a)(3) and (b)(2) of this section, FM stations must operate with a minimum effective radiated power (ERP) as follows:

(i) The minimum ERP for Class A stations is 0.1 kW.

(ii) The ERP for Class B1 stations must exceed 6 kW.

(iii) The ERP for Class B stations must exceed 25 kW.

(iv) The ERP for Class C3 stations must exceed 6 kW.

(v) The ERP for Class C2 stations must exceed 25 kW.

(vi) The ERP for Class C1 stations must exceed 50 kW.

(vii) The minimum ERP for Class C and C0 stations is 100 kW.

(2) Class C0 stations must have an antenna height above average terrain (HAAT) of at least 300 meters (984 feet). Class C stations must have an antenna height above average terrain (HAAT) of at least 451 meters (1480 feet).

(3) Stations of any class except Class A may have an ERP less than that specified in paragraph (a)(1) of this section, provided that the reference distance, determined in accordance with paragraph (b)(1)(i) of this section, exceeds the distance to the class contour for the next lower class. Class A stations may have an ERP less than 100 watts provided that the reference distance, determined in accordance with paragraph (b)(1)(i) of this section, equals or exceeds 6 kilometers.

(b) *Maximum limits.* (1) Except for stations located in Puerto Rico or the Virgin Islands, the maximum ERP in any direction, reference HAAT, and distance to the class contour for each FM station class are listed below:

Station class	Maximum ERP	Reference HAAT in meters (ft.)	Class contour distance in kilometers
A	6 kW (7.8 dBk)	100 (328)	28
B1	25 kW (14.0 dBk)	100 (328)	39
B	50 kW (17.0 dBk)	150 (492)	52
C3	25 kW (14.0 dBk)	100 (328)	39
C2	50 kW (17.0 dBk)	150 (492)	52
C1	100 kW (20.0 dBk)	299 (981)	72
C0	100 kW (20.0 dBk)	450 (1476)	83
C	100 kW (20.0 dBk)	600 (1968)	92

(i) The reference distance of a station is obtained by finding the predicted distance to the 1mV/m contour using Figure 1 of § 73.333 and then rounding to the nearest kilometer. Antenna HAAT is determined using the procedure in § 73.313. If the HAAT so determined is less than 30 meters (100 feet), a HAAT of 30 meters must be used when finding the predicted distance to the 1 mV/m contour.

(ii) If a station's ERP is equal to the maximum for its class, its antenna HAAT must not exceed the reference HAAT, regardless of the reference distance. For example, a Class A station operating with 6 kW ERP may have an antenna HAAT of 100 meters, but not 101 meters, even though the reference distance is 28 km in both cases.

(iii) Except as provided in paragraph (b)(3) of this section, no station will be authorized in Zone I or I-A with an ERP equal to 50 kW and a HAAT exceeding 150 meters. No station will be authorized in Zone II with an ERP equal to 100 kW and a HAAT exceeding 600 meters.

(2) If a station has an antenna HAAT greater than the reference HAAT for its class, its ERP must be lower than the class maximum such that the reference distance does not exceed the class contour distance. If the antenna HAAT is so great that the station's ERP must be lower than the minimum ERP for its class (specified in paragraphs (a)(1) and (a)(3) of this section), that lower ERP will become the minimum for that station.

(3) For stations located in Puerto Rico or the Virgin Islands, the maximum ERP in any direction, reference HAAT, and distance to the class contour for each FM station class are listed below:

Station class	Maximum ERP	Reference HAAT in meters (ft.)	Class contour distance in kilometers
A	6kW (7.8 dBk)	240 (787)	42
B1	25kW (14.0 dBk)	150 (492)	46
B	50kW (17.0 dBk)	472 (1549)	78

(c) *Existing stations.* Stations authorized prior to March 1, 1984 that do not conform to the requirements of this

section may continue to operate as authorized. Stations operating with facilities in excess of those specified in paragraph (b) of this section may not increase their effective radiated powers or extend their 1 mV/m field strength contour beyond the location permitted by their present authorizations. The provisions of this section will not apply to applications to increase facilities for those stations operating with less than the minimum power specified in paragraph (a) of this section.

(d) *Existing Class C stations below minimum antenna HAAT.* Class C stations authorized prior to January 19, 2001 that do not meet the minimum antenna HAAT specified in paragraph (a)(2) of this section for Class C stations may continue to operate as authorized subject to the reclassification procedures set forth in Note 4 to §73.3573.

[53 FR 17042, May 13, 1988, as amended at 54 FR 16367, Apr. 24, 1989; 54 FR 19374, May 5, 1989; 54 FR 35339, Aug. 25, 1989; 65 FR 79777, Dec. 20, 2000]

§73.212 Administrative changes in authorizations.

(a) In the issuance of FM broadcast station authorizations, the Commission will specify the transmitter output power and effective radiated power in accordance with the following tabulation:

Power (watts or kW)	Rounded out to nearest figure (watts or kW)
1 to 3	.05
3 to 10	.1
10 to 30	.5
30 to 100	1
100 to 300	5
300 to 1,000	10

(b) Antenna heights above average terrain will be rounded out to the nearest meter.

[28 FR 13623, Dec. 14, 1963, as amended at 48 FR 29506, June 27, 1983]

§73.213 Grandfathered short-spaced stations.

(a) Stations at locations authorized prior to November 16, 1964, that did not meet the separation distances required by §73.207 and have remained continuously short-spaced since that time may be modified or relocated with respect to such short-spaced stations, *provided that* (i) any area predicted to receive interference lies completely within any area currently predicted to receive co-channel or first-adjacent channel interference as calculated in accordance with paragraph (a)(1) of this section, or that (ii) a showing is provided pursuant to paragraph (a)(2) of this section that demonstrates that the public interest would be served by the proposed changes.

(1) The F(50,50) curves in Figure 1 of §73.333 are to be used in conjunction with the proposed effective radiated power and antenna height above average terrain, as calculated pursuant to §73.313(c), (d)(2) and (d)(3), using data for as many radials as necessary, to determine the location of the desired (service) field strength. The F(50,10) curves in Figure 1a of §73.333 are to be used in conjunction with the proposed effective radiated power and antenna height above average terrain, as calculated pursuant to §73.313(c), (d)(2) and (d)(3), using data for as many radials as necessary, to determine the location of the undesired (interfering) field strength. Predicted interference is defined to exist only for locations where the desired (service) field strength exceeds 0.5 mV/m (54 dBu) for a Class B station, 0.7 mV/m (57 dBu) for a Class B1 station, and 1 mV/m (60 dBu) for any other class of station.

(i) Co-channel interference is predicted to exist, for the purpose of this section, at all locations where the undesired (interfering station) F(50,10) field strength exceeds a value 20 dB below the desired (service) F(50,50) field strength of the station being considered (e.g., where the protected field strength is 60 dBu, the interfering field strength must be 40 dBu or more for predicted interference to exist).

(ii) First-adjacent channel interference is predicted to exist, for the purpose of this section, at all locations where the undesired (interfering station) F(50,10) field strength exceeds a value 6 dB below the desired (service) F(50,50) field strength of the station being considered (e.g., where the protected field strength is 60 dBu, the interfering field strength must be 54

70 and 100 percent of the height above average terrain of the analog antenna.

(e) Licensees must provide notification to the Commission in Washington, DC, within 10 days of commencing IBOC digital operation. The notification must include the following information:

(1) Call sign and facility identification number of the station;

(2) Date on which IBOC operation commenced;

(3) Certification that the IBOC DAB facilities conform to permissible hybrid specifications;

(4) Name and telephone number of a technical representative the Commission can call in the event of interference;

(5) Certification that the analog effective radiated power remains as authorized;

(6) Transmitter power output; if separate analog and digital transmitters are used, the power output for each transmitter;

(7) If applicable, any reduction in an AM station's primary digital carriers;

(8) If applicable, the geographic coordinates, elevation data, and license file number of the auxiliary antenna employed by an FM station as a separate digital antenna;

(9) If applicable, for FM systems employing interleaved antenna bays, a certification that adequate filtering and/or isolation equipment has been installed to prevent spurious emissions in excess of the limits specified in §73.317;

(10) A certification that the operation will not cause human exposure to levels of radio frequency radiation in excess of the limits specified in §1.1310 of this chapter and is therefore categorically excluded from environmental processing pursuant to §1.1306(b) of this chapter. Any station that cannot certify compliance must submit an environmental assessment ("EA") pursuant to §1.1311 of this chapter and may not commence IBOC operation until such EA is ruled upon by the Commission.

EFFECTIVE DATE NOTE: At 72 FR 45692, Aug. 15, 2007, §73.404 was added. Paragraphs (b) and (e) of this section contain information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

Subpart D—Noncommercial Educational FM Broadcast Stations

SOURCE: 28 FR 13651, Dec. 14, 1963. Redesignated at 72 FR 45692, Aug. 15, 2007.

§ 73.501 Channels available for assignment.

(a) The following frequencies, except as provided in paragraph (b) of this section, are available for noncommercial educational FM broadcasting:

Frequency (MHz)	Channel No.
87.9	[1] 200
88.1	201
88.3	202
88.5	203
88.7	204
88.9	205
89.1	[2] 206
89.3	207
89.5	208
89.7	209
89.9	210
90.1	211
90.3	212
90.5	213
90.7	214
90.9	215
91.1	216
91.3	217
91.5	218
91.7	219
91.9	220

[1] The frequency 87.9 MHz, Channel 200, is available only for use of existing Class D stations required to change frequency. It is available only on a noninterference basis with respect to TV Channel 6 stations and adjacent channel noncommercial educational FM stations. It is not available at all within 402 kilometers (250 miles) of Canada and 320 kilometers (199 miles) of Mexico. The specific standards governing its use are contained in §73.512.

[2] The frequency 89.1 MHz, Channel 206, in the New York City metropolitan area, is reserved for the use of the United Nations with the equivalent of an antenna height of 150 meters (492 feet) above average terrain and effective radiated power of 20 kW and the Commission will make no assignments which would cause objectionable interference with such use.

(b) In Alaska, FM broadcast stations operating on Channels 200–220 (87.9–91.9 MHz) shall not cause harmful interference to and must accept interference from non-Government fixed operations authorized prior to January 1, 1982.

(Secs. 4, 5, 303, 48 Stat., as amended, 1066, 1068, 1082 (47 U.S.C. 154, 155, 303))

[43 FR 39715, Sept. 6, 1978, as amended at 47 FR 30068, July 12, 1982; 52 FR 43765, Nov. 16, 1987; 58 FR 44950, Aug. 25, 1993]

§ 73.508 Standards of good engineering practice.

(a) All noncommercial educational stations and LPFM stations operating with more than 10 watts transmitter power output shall be subject to all of the provisions of the FM Technical Standards contained in subpart B of this part. Class D educational stations and LPFM stations operating with 10 watts or less transmitter output power shall be subject to the definitions contained in §73.310, and also to those other provisions of the FM Technical Standards which are specifically made applicable to them by the provisions of this subpart.

(b) The transmitter and associated transmitting equipment of each noncommercial educational FM station and LPFM station licensed for transmitter power output above 10 watts must be designed, constructed and operated in accordance with §73.317.

(c) The transmitter and associated transmitting equipment of each noncommercial educational FM station licensed for transmitter power output of 10 watts or less, although not required to meet all requirements of §73.317, must be constructed with the safety provisions of the current national electrical code as approved by the American National Standards Institute. These stations must be operated, tuned, and adjusted so that emissions are not radiated outside the authorized band causing or which are capable of causing interference to the communications of other stations. The audio distortion, audio frequency range, carrier hum, noise level, and other essential phases of the operation which control the external effects, must be at all times capable of providing satisfactory broadcast service. Studio equipment properly covered by an underwriter's certificate will be considered as satisfying safety requirements.

[65 FR 7640, Feb. 15, 2000]

§ 73.509 Prohibited overlap.

(a) An application for a new or modified NCE-FM station other than a Class D (secondary) station will not be accepted if the proposed operation would involve overlap of signal strength contours with any other station licensed by the Commission and operating in the reserved band (Channels 200–220, inclusive) as set forth below:

Frequency separation	Contour of proposed station	Contour of other station
Co-channel	0.1mV/m (40 dBu) ...	1 mV/m (60 dBu)
	1 mV/m (60 dBu)	0.1 mV/m (40 dBu)
200 kHz	0.5 mV/m (54 dBu) ..	1 mV/m (60 dBu)
	1 mV/m (60 dBu)1 ...	0.5 mV/m (54 dBu)
400 kHz/600 kHz.	100 mV/m (100 dBu)	1 mV/m (60 dBu)
	1 mV/m (60 dBu)	100 mV/m (100 dBu)

(b) An application by a Class D (secondary) station, other than an application to change class, will not be accepted if the proposed operation would involve overlap of signal strength contours with any other station as set forth below:

Frequency separation	Contour of proposed station	Contour of any other station
Co-channel	0.1 mV/m (40 dBu) ..	1 mV/m (60 dBu).
200 kHz	0.5 mV/m (54 dBu) ..	1 mV/m (60 dBu).
400 kHz	10 mV/m (80 dBu) ...	1 mV/m (60 dBu).
600 kHz	100 mV/m (100 dBu)	1 mV/m (60 dBu).

(c) The following standards must be used to compute the distances to the pertinent contours:

(1) The distance of the 60 dBu (1 mV/m) contours are to be computed using Figure 1 of §73.333 [F(50,50) curves] of this part.

(2) The distance to the other contours are to be computed using Figure 1a of §73.333 [F(50,10) curves]. In the event that the distance to the contour is below 16 kilometers (approximately 10 miles), and therefore not covered by Figure 1a, curves in Figure 1 must be used.

(3) The effective radiated power (ERP) that is the maximum ERP for any elevation plane on any bearing will be used.

(d) An application for a change (other than a change in channel) in the facilities of a NCE-FM broadcast station will be accepted even though overlap of signal strength contours, as specified in paragraphs (a) and (b) of this section, would occur with another station in an area where such overlap does not already exists, if:

(1) The total area of overlap with that station would not be increased;

(2) The area of overlap with any other station would not increase;

(3) The area of overlap does not move significantly closer to the station receiving the overlap; and,

(4) No area of overlap would be created with any station with which the overlap does not now exist.

(e) The provisions of this section concerning prohibited overlap will not apply where the area of such overlap lies entirely over water.

[50 FR 27962, July 9, 1985, as amended at 52 FR 43765, Nov. 16, 1987; 65 FR 79778, Dec. 20, 2000]

§ 73.510 Antenna systems.

(a) All noncommercial educational stations operating with more than 10 watts transmitter output power shall be subject to the provisions of § 73.316 concerning antenna systems contained in subpart B of this part.

(b) *Directional antenna.* No application for a construction permit of a new station, or change in channel, or change in an existing facility on the same channel will be accepted for filing if a directional antenna with a maximum-to-minimum ratio of more than 15 dB is proposed.

[42 FR 36829, July 18, 1977]

§ 73.511 Power and antenna height requirements.

(a) No new noncommercial educational station will be authorized with less power than minimum power requirements for commercial Class A facilities. (See § 73.211.)

(b) No new noncommercial educational FM station will be authorized with facilities greater than Class B in Zones I and I-A or Class C in Zone II, as defined in § 73.211.

(c) Stations licensed before December 31, 1984, and operating above 50 kW in Zones I and I-A, and above 100 kW and in Zone II may continue to operate as authorized.

[50 FR 27963, July 9, 1985, as amended at 50 FR 31379, Aug. 2, 1985; 54 FR 3602, Jan. 25, 1989]

§ 73.512 Special procedures applicable to Class D noncommercial educational stations.

(a) All Class D stations seeking renewal of license for any term expiring June 1, 1980, or thereafter shall comply with the requirements set forth below and shall simultaneously file an application on FCC Form 340, containing full information regarding such compliance with the provisions set forth below.

(1) To the extent possible, each applicant shall select a commercial FM channel on which it proposes to operate in lieu of the station's present channel. The station may select any commercial channel provided no objectionable interference, as set forth in § 73.509(b), would be caused. The application shall include the same engineering information as is required to change the frequency of an existing station and any other information necessary to establish the fact that objectionable interference would not result. If no commerical channel is available where the station could operate without causing such interference, the application shall set forth the basis upon which this conclusion was reached.

(2) If a commercial channel is unavailable, to the extent possible each applicant should propose operation on Channel 200 (87.9 MHz) unless the station would be within 402 kilometers (250 miles) of the Canadian border or 320 kilometers (199 miles) of the Mexican border or would cause interference to an FM station operating on Channels 201, 202, or 203 or to TV Channel 6, as provided in § 73.509.

(3) If a channel is not available under either paragraph (a) (1) or (2) of this section, the renewal applicant shall study all 20 noncommercial educational FM channels and shall propose operation on the channel which would cause the least preclusion to the establishment of new stations or increases in power by existing stations. Full information regarding the basis for the selection should be provided.

(b) At any time before the requirements of paragraph (a) become effective, any existing Class D station may file a construction permit application on FCC Form 340 to change channel in the manner described above which shall be subject to the same requirements. In either case, any license granted shall specify that the station's license is for a Class D (secondary) station.

Section 73.1610 Equipment tests.
Section 73.1620 Program tests.
Section 73.1650 International agreements.
Section 73.1660 Acceptability of broadcast transmitters.
Section 73.1665 Main transmitters.
Section 73.1692 Broadcast station construction near or installation on an AM broadcast tower.
Section 73.1745 Unauthorized operation.
Section 73.1750 Discontinuance of operation.
Section 73.1920 Personal attacks.
Section 73.1940 Legally qualified candidates for public office.
Section 73.1941 Equal opportunities.
Section 73.1943 Political file.
Section 73.1944 Reasonable access.
Section 73.3511 Applications required.
Section 73.3512 Where to file; number of copies.
Section 73.3513 Signing of applications.
Section 73.3514 Content of applications.
Section 73.3516 Specification of facilities.
Section 73.3517 Contingent applications.
Section 73.3518 Inconsistent or conflicting applications.
Section 73.3519 Repetitious applications.
Section 73.3520 Multiple applications.
Section 73.3525 Agreements for removing application conflicts.
Section 73.3539 Application for renewal of license.
Section 73.3542 Application for emergency authorization.
Section 73.3545 Application for permit to deliver programs to foreign stations.
Section 73.3550 Requests for new or modified call sign assignments.
Section 73.3561 Staff consideration of applications requiring Commission consideration.
Section 73.3562 Staff consideration of applications not requiring action by the Commission.
Section 73.3566 Defective applications.
Section 73.3568 Dismissal of applications.
Section 73.3584 Procedure for filing petitions to deny.
Section 73.3587 Procedure for filing informal objections.
Section 73.3588 Dismissal of petitions to deny or withdrawal of informal objections.
Section 73.3589 Threats to file petitions to deny or informal objections.
Section 73.3591 Grants without hearing.
Section 73.3593 Designation for hearing.
Section 73.3598 Period of construction.
Section 73.3599 Forfeiture of construction permit.
Section 73.3999 Enforcement of 18 U.S.C. 1464—restrictions on the transmission of obscene and indecent material.

§ 73.805 Availability of channels.

Except as provided in § 73.220 of this chapter, all of the frequencies listed in § 73.201 of this chapter are available for LPFM stations.

§ 73.807 Minimum distance separation between stations.

Minimum separation requirements for LP100 and LP10 stations, as defined in §§ 73.811 and 73.853, are listed in the following paragraphs. An LPFM station will not be authorized unless these separations are met. Minimum distances for co-channel and first-adjacent channel are separated into two columns. The left-hand column lists the required minimum separation to protect other stations and the right-hand column lists (for informational purposes only) the minimum distance necessary for the LPFM station to receive no interference from other stations assumed to operating at the maximum permitted facilities for the station class. For second- and third-adjacent channels and IF channels, the required minimum distance separation is sufficient to avoid interference received from other stations.

(a)(1) An LP100 station will not be authorized initially unless the minimum distance separations in the following table are met with respect to authorized FM stations, applications for new and existing FM stations filed prior to the release of the public notice announcing an LPFM window period for LP100 stations, authorized LP100 stations, LP100 station applications that were timely-filed within a previous window, and vacant FM allotments. LP100 stations are not required to protect LP10 stations. LPFM modification applications must either meet the distance separations in the following table or, if short-spaced, not lessen the spacing to subsequently authorized stations.

Station class protected by LP100	Co-channel minimum separation (km)		First-adjacent channel minimum separation (km)		Second- and third-adjacent channel minimum separation (km)	I.F. channel minimum separations
	Required	For no interference received from max. class facility	Required	For no interference received from max. class facility	Required	10.6 or 10.8 MHz
LP100	24	24	14	14	None	None
D	24	24	13	13	6	3
A	67	92	56	56	29	6
B1	87	119	74	74	46	9
B	112	143	97	97	67	12
C3	78	119	67	67	40	9
C2	91	143	80	84	53	12
C1	111	178	100	111	73	20
C0	122	193	111	130	84	22
C	130	203	120	142	93	28

(2) LP100 stations must satisfy the second-adjacent channel minimum distance separation requirements of paragraph (a)(1) of this section with respect to any third-adjacent channel FM station that, as of September 20, 2000 (the adoption date of this *MO&O*) broadcasts a radio reading service via a subcarrier frequency.

(b)(1) An LP10 station will not be authorized unless the minimum distance separations in the following table are met with respect to authorized FM stations, applications for new and existing FM stations filed prior to the release of the public notice announcing an LPFM window period for LP10 stations, vacant FM allotments, or LPFM stations.

Station class protected by LP10	Co-channel minimum separation (km)		First-adjacent channel minimum separation (km)		Second- and third-adjacent channel minimum separation (km)	I.F. Channel minimum separations
	Required	For no interference received from max. class facility	Required	For no interference received from max. class facility	Required	10.6 or 10.8 MHz
LP100	16	22	10	11	None	None
LP10	13	13	8	8	None	None
D	16	21	10	11	6	2
A	59	90	53	53	29	5
B1	77	117	70	70	45	8
B	99	141	91	91	66	11
C3	69	117	64	64	39	8
C2	82	141	77	81	52	11
C1	103	175	97	108	73	18
C0	114	190	99	127	84	21
C	122	201	116	140	92	26

(2) LP10 stations must satisfy the second-adjacent channel minimum distance separation requirements of paragraph (b)(1) of this section with respect to any third-adjacent channel FM station that, as of September 20, 2000 (the adoption date of this *MO&O*) broadcasts a radio reading service via a subcarrier frequency.

(c) In addition to meeting or exceeding the minimum separations for Class LP100 and Class LP10 stations in paragraphs (a) and (b) of this section, new LP100 and LP10 stations will not be authorized in Puerto Rico or the Virgin Islands unless the minimum distance separations in the following tables are met with respect to authorized or proposed FM stations:

(1) LP100 stations in Puerto Rico and the Virgin Islands:

Station class protected by LP100	Co-channel minimum separation (km)		First-adjacent channel minimum separation (km)		Second- and third-adjacent channel minimum separation (km)—required	I.F. channel minimum separations—10.6 or 10.8 MHz
	Required	For no interference received from max. class facility	Required	For no interference received from max. class facility		
A	80	111	70	70	42	9
B1	95	128	82	82	53	11
B	138	179	123	123	92	19

(2) LP10 stations in Puerto Rico and the Virgin Islands:

Station class protected by LP100	Co-channel minimum separation (km)		First-adjacent channel minimum separation (km)		Second- and third-adjacent channel minimum separation (km)—required	I.F. channel minimum separations—10.6 or 10.8 MHz
	Required	For no interference received from max. class facility	Required	For no interference received from max. class facility		
A	72	108	66	66	42	8
B1	84	125	78	78	53	9
B	126	177	118	118	92	18

NOTE TO PARAGRAPHS (a), (b), AND (c): Minimum distance separations towards "grandfathered" superpowered Reserved Band stations are as specified.

Full service FM stations operating within the reserved band (Channels 201–220) with facilities in excess of those permitted in §73.211(b)(1) or §73.211(b)(3) shall be protected by LPFM stations in accordance with the minimum distance separations for the nearest class as determined under §73.211. For example, a Class B1 station operating with facilities that result in a 60 dBu contour that exceeds 39 kilometers but is less than 52 kilometers would be protected by the Class B minimum distance separations. Class D stations with 60 dBu contours that exceed 5 kilometers will be protected by the Class A minimum distance separations. Class B stations with 60 dBu contours that exceed 52 kilometers will be protected as Class C1 or Class C stations depending upon the distance to the 60 dBu contour. No stations will be protected beyond Class C separations.

(d) In addition to meeting the separations (a) through (c), LPFM applications must meet the minimum separation requirements with respect to authorized FM translator stations, cutoff FM translator applications, and FM translator applications filed prior to the release of the Public Notice announcing the LPFM window period:

(1) LP100 stations:

Distance to FM translator 60 dBu contour	Co-channel minimum separation (km)		First-adjacent channel minimum separation (km)		Second- and third-adjacent channel minimum separation (km) required	I.F . Channel minimum separation (km) 10.6 or 10.8 MHz
	Required	For no interference received	Required	For no interference received		
13.3 km or greater	39	67	28	35	21	5
Greater than 7.3 km, but less than 13.3 km	32	51	21	26	14	5
7.3 km or less	26	30	15	16	8	5

(2) LP10 Stations:

Distance to FM translator 60 dBu contour	Co-channel minimum separation (km)		First-adjacent channel minimum separation (km)		Second- and third-adjacent channel minimum separation (km) required	I.F. Channel minimum separation (km) 10.6 or 10.8 MHz
	Required	For no interference received	Required	For no interference received		
13.3 km or greater	30	65	25	33	20	3
Greater than 7.3 km, but less than 13.3 km	24	49	18	23	14	3
7.3 km or less	18	28	12	14	8	3

(e) Existing Class LP100 and LP10 stations which do not meet the separations in paragraphs (a) through (e) of this section may be relocated provided that the separation to any short-spaced station is not reduced.

(f) Commercial and noncommercial educational stations authorized under subparts B and C of this part, as well as new or modified commercial FM allotments, are not required to adhere to the separations specified in this rule section, even where new or increased interference would be created.

(g) *International considerations within the border zones.* (1) Within 320 km of the Canadian border, LP100 stations must meet the following minimum separations with respect to any Canadian stations:

Canadian station class	Co-channel (km)	First-adjacent channel (km)	Second-adjacent channel (km)	Third-adjacent channel (km)	Intermediate frequency (IF) channel (km)
A1 & Low Power	45	30	21	20	4
A	66	50	41	40	7
B1	78	62	53	52	9
B	92	76	68	66	12
C1	113	98	89	88	19
C	124	108	99	98	28

(2) Within 320 km of the Mexican border, LP100 stations must meet the following separations with respect to any Mexican stations:

Mexican station class	Co-channel (km)	First-adjacent channel (km)	Second-third adjacent channel (km)	Intermediate frequency (IF) channel (km)
Low Power	27	17	9	3
A	43	32	25	5
AA	47	36	29	6
B1	67	54	45	8
B	91	76	66	11
C1	91	80	73	19
C	110	100	92	27

(3) Within 320 km of the Canadian border, LP10 stations must meet the following minimum separations with respect to any Canadian stations:

Canadian station class	Co-channel (km)	First-adjacent channel (km)	Second-adjacent channel (km)	Third-adjacent channel (km)	Intermediate frequency (IF) channel (km)
A1 & Low Power	33	25	20	19	3
A	53	45	40	39	5
B1	65	57	52	51	8
B	79	71	67	66	11
C1	101	93	88	87	18
C	111	103	98	97	26

(4) Within 320 km of the Mexican border, LP10 stations must meet the following separations with respect to any Mexican stations:

Mexican station class	Co-channel (km)	First-adjacent channel (km)	Second-third adjacent channel (km)	Intermediate frequency (IF) channel (km)
Low Power	19	13	9	2
A	34	29	24	5
AA	39	33	29	5
B1	57	50	45	8
B	79	71	66	11
C1	83	77	73	18
C	102	96	92	26

(5) The Commission will notify the International Telecommunications Union (ITU) of any LPFM authorizations in the US Virgin Islands. Any authorization issued for a US Virgin Islands LPFM station will include a condition that permits the Commission to modify, suspend or terminate without right to a hearing if found by the Commission to be necessary to conform to any international regulations or agreements.

(6) The Commission will initiate international coordination of a LPFM proposal even where the above Canadian and Mexican spacing tables are met, if it appears that such coordination is necessary to maintain compliance with international agreements.

[65 FR 7640, Feb. 15, 2000, as amended at 65 FR 67299, Nov. 9, 2000; 65 FR 79779, Dec. 20, 2000; 66 FR 23863, May 10, 2001]

§ 73.808 Distance computations.

For the purposes of determining compliance with any LPFM distance requirements, distances shall be calculated in accordance with § 73.208(c) of this part.

§ 73.809 Interference protection to full service FM stations.

(a) It shall be the responsibility of the licensee of an LPFM station to correct at its expense any condition of interference to the direct reception of the signal of any subsequently authorized commercial or NCE FM station that operates on the same channel, first-adjacent channel, second-adjacent channel or intermediate frequency (IF) channels as the LPFM station, where interference is predicted to occur and actually occurs within:

(1) The 3.16 mV/m (70 dBu) contour of such stations;

(2) The community of license of a commercial FM station; or

(3) Any area of the community of license of an NCE FM station that is predicted to receive at least a 1 mV/m (60 dBu) signal. Predicted interference shall be calculated in accordance with the ratios set forth in §§ 73.215(a)(1) and 73.215(a)(2). Intermediate Frequency (IF) channel interference overlap will be determined based upon overlap of the 91 dBu F(50,50) contours of the FM and LPFM stations. Actual interference will be considered to occur whenever reception of a regularly used signal is impaired by the signals radiated by the LPFM station.

(b) An LPFM station will be provided an opportunity to demonstrate in connection with the processing of the commercial or NCE FM application that interference as described in paragraph (a) of this section is unlikely. If the LPFM station fails to so demonstrate, it will be required to cease operations upon the commencement of program tests by the commercial of NCE FM station.

(c) Complaints of actual interference by an LPFM station subject to paragraphs (a) and (b) of this section must be served on the LPFM licensee and the Federal Communications Commission, attention Audio Services Division. The LPFM station must suspend operations within twenty-four hours of the receipt of such complaint unless the interference has been resolved to the satisfaction of the complainant on the basis of suitable techniques. An LPFM station may only resume operations at the direction of the Federal Communications Commission. If the

Commission determines that the complainant has refused to permit the LPFM station to apply remedial techniques that demonstrably will eliminate the interference without impairment of the original reception, the licensee of the LPFM station is absolved of further responsibility for the complaint.

(d) It shall be the responsibility of the licensee of an LPFM station to correct any condition of interference that results from the radiation of radio frequency energy outside its assigned channel. Upon notice by the FCC to the station licensee or operator that such interference is caused by spurious emissions of the station, operation of the station shall be immediately suspended and not resumed until the interference has been eliminated. However, short test transmissions may be made during the period of suspended operation to check the efficacy of remedial measures.

(e) In each instance where suspension of operation is required, the licensee shall submit a full report to the FCC in Washington, DC, after operation is resumed, containing details of the nature of the interference, the source of the interfering signals, and the remedial steps taken to eliminate the interference.

[65 FR 7640, Feb. 15, 2000, as amended at 65 FR 67302, Nov. 9, 2000]

§ 73.810 Third adjacent channel complaint and license modification procedure.

(a) An LPFM station is required to provide copies of all complaints alleging that the signal of such LPFM station is interfering with or impairing the reception of the signal of a full power station to such affected full power station.

(b) A full power station shall review all complaints it receives, either directly or indirectly, from listeners regarding alleged interference caused by the operations of an LPFM station. Such full power station shall also identify those that qualify as *bona fide* complaints under this section and promptly provide such LPFM station with copies of all *bona fide* complaints. A *bona fide* complaint:

(1) Is a complaint alleging third adjacent channel interference caused by an LPFM station that has its transmitter site located within the predicted 60 dBu contour of the affected full power station as such contour existed as of the date the LPFM station construction permit was granted;

(2) Must be in the form of an affidavit, and state the nature and location of the alleged interference;

(3) Must involve a fixed receiver located within the 60 dBu contour of the affected full power station and not more than one kilometer from the LPFM transmitter site; and

(4) Must be received by either the LPFM or full power station within one year of the date on which the LPFM station commenced broadcasts with its currently authorized facilities.

(c) An LPFM station will be given a reasonable opportunity to resolve all interference complaints. A complaint will be considered resolved where the complainant does not reasonably cooperate with an LPFM station's remedial efforts.

(d) In the event that the number of unresolved complaints plus the number of complaints for which the source of interference remains in dispute equals at least one percent of the households within one kilometer of the LPFM transmitter site or thirty households, whichever is less, the LPFM and full power stations must cooperate in an "on-off" test to determine whether the interference is traceable to the LPFM station.

(e) If the number of unresolved and disputed complaints exceeds the numeric threshold specified in subsection (d) following an "on-off" test, the full power station may request that the Commission initiate a proceeding to consider whether the LPFM station license should be modified or cancelled, which will be completed by the Commission within 90 days. Parties may seek extensions of the 90 day deadline consistent with Commission rules.

(f) An LPFM station may stay any procedures initiated pursuant to paragraph (e) of this section by voluntarily ceasing operations and filing an application for facility modification within

with respect to all applications and facilities in existence as the date of the pertinent public notice in paragraph (b) of this section other than to LPFM station facilities proposed in applications filed in the same window, will be dismissed without any opportunity to amend such applications.

(d) Following the close of the window, the Commission will issue a Public Notice of acceptance for filing of applications submitted pursuant to paragraph (b) of this section that meet technical and legal requirements and that are not in conflict with any other application filed during the window. Following the close of the window, the Commission also will issue a Public Notice of the acceptance for filing of all applications tentatively selected pursuant to the procedures for mutually exclusive LPFM applications set forth at §73.872. Petitions to deny such applications may be filed within 30 days of such public notice and in accordance with the procedures set forth at §73.3584. A copy of any petition to deny must be served on the applicant.

(e) Minor change LPFM applications may be filed at any time, unless restricted by the staff, and generally, will be processed in the order in which they are tendered. Such applications must meet all technical and legal requirements applicable to new LPFM station applications.

[65 FR 7640, Feb. 15, 2000, as amended at 65 FR 67304, Nov. 9, 2000; 70 FR 39186, July 7, 2005]

EFFECTIVE DATE NOTE: At 70 FR 39186, July 7, 2005, in §73.870, paragraph (a) was revised. This paragraph contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

§73.871 Amendment of LPFM broadcast station applications.

(a) New and major change applications may be amended without limitation during the pertinent filing window.

(b) Amendments that would improve the comparative position of new and major change applications will not be accepted after the close of the pertinent filing window.

(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.

(d) Unauthorized or untimely amendments are subject to return by the FCC's staff without consideration.

[66 FR 23863, May 10, 2001, as amended at 70 FR 39186, July 7, 2005]

EFFECTIVE DATE NOTE: At 70 FR 39186, July 7, 2005, in §73.871, paragraph (c) was revised. This paragraph contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

§73.872 Selection procedure for mutually exclusive LPFM applications.

(a) Following the close of each window for new LPFM stations and for modifications in the facilities of authorized LPFM stations, the Commission will issue a public notice identifying all groups of mutually exclusive applications. Such applications will be awarded points to determine the tentative selectee. Unless resolved by settlement pursuant to paragraph (e) of this section, the tentative selectee will be the applicant within each group with the highest point total under the procedure set forth in this section, except as provided in paragraphs (c) and (d) of this section .

(b) Each mutually exclusive application will be awarded one point for each of the following criteria, based on application certification that the qualifying conditions are met:

(1) *Established community presence.* An applicant must, for a period of at least two years prior to application, have been physically headquartered, have had a campus, or have had seventy-five percent of its board members residing within 10 miles of the coordinates of the proposed transmitting antenna. Applicants claiming a point for this criterion must submit the documentation set forth in the application form at the time of filing their applications.

(2) *Proposed operating hours.* The applicant must pledge to operate at least 12 hours per day.

(3) *Local program origination.* The applicant must pledge to originate locally at least eight hours of programming per day. For purposes of this criterion, local origination is the production of programming, by the licensee, within ten miles of the coordinates of the proposed transmitting antenna.

(c) *Voluntary time-sharing.* If mutually exclusive applications have the same point total, any two or more of the tied applicants may propose to share use of the frequency by submitting, within 30 days of the release of a public notice announcing the tie, a time-share proposal. Such proposals shall be treated as amendments to the time-share proponents' applications, and shall become part of the terms of the station license. Where such proposals include all of the tied applications, all of the tied applications will be treated as tentative selectees; otherwise, time-share proponents' points will be aggregated to determine the tentative selectees.

(1) Time-share proposals shall be in writing and signed by each time-share proponent, and shall satisfy the following requirements:

(i) The proposal must specify the proposed hours of operation of each time-share proponent;

(ii) The proposal must not include simultaneous operation of the time-share proponents; and (iii) Each time-share proponent must propose to operate for at least 10 hours per week.

(2) Where a station is licensed pursuant to a time-sharing proposal, a change of the regular schedule set forth therein will be permitted only where a written agreement signed by each time-sharing licensee and complying with requirements in paragraphs (c)(1)(i) through (iii) of this section is filed with the Commission, Attention: Audio Division, Media Bureau, prior to the date of the change.

(d) *Successive license terms.* (1) If a tie among mutually exclusive applications is not resolved through time-sharing in accordance with paragraph (c) of this section, the tied applications will be reviewed for acceptability and applicants with tied, grantable applications will be eligible for equal, successive, non-renewable license terms of no less than one year each for a total combined term of eight years, in accordance with § 73.873. Eligible applications will be granted simultaneously, and the sequence of the applicants' license terms will be determined by the sequence in which they file applications for licenses to cover their construction permits based on the day of filing, except that eligible applicants proposing same-site facilities will be required, within 30 days of written notification by the Commission staff, to submit a written settlement agreement as to construction and license term sequence. Failure to submit such an agreement will result in the dismissal of the applications proposing same-site facilities and the grant of the remaining, eligible applications.

(2) Groups of more than eight tied, grantable applications will not be eligible for successive license terms under this section. Where such groups exist, the staff will dismiss all but the applications of the eight entities with the longest established community presences, as provided in paragraph (b)(1) of this section. If more than eight tied, grantable applications remain, the applicants must submit, within 30 days of written notification by the Commission staff, a written settlement agreement limiting the group to eight. Failure to do so will result in dismissal of the entire application group.

(e) Mutually exclusive applicants may propose a settlement at any time during the selection process after the release of a public notice announcing the mutually exclusive groups. Settlement proposals must include all of the applicants in a group and must comply with the Commission's rules and policies regarding settlements, including

the requirements of §§ 73.3525, 73.3588, and 73.3589. Settlement proposals may include time-share agreements that comply with the requirements of paragraph (c) of this section, provided that such agreements may not be filed for the purpose of point aggregation outside of the thirty-day period set forth in paragraph (c) of this section.

[65 FR 7640, Feb.15, 2000, as amended at 65 FR 67304, Nov. 9, 2000; 67 FR 13232, Mar. 21, 2002]

§ 73.873 LPFM license period.

(a) Initial licenses for LPFM stations not subject to successive license terms will be issued for a period running until the date specified in § 73.1020 for full service stations operating in the LPFM station's state or territory, or if issued after such date, determined in accordance with § 73.1020.

(b) The station license period issued under the successive license term tiebreaker procedures will be determined pursuant to § 73.872(d) and shall be for the period specified in the station license.

(c) The license of an LPFM station that fails to transmit broadcast signals for any consecutive 12-month period expires as a matter of law at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary.

§ 73.875 Modification of transmission systems.

The following procedures and restrictions apply to licensee modifications of authorized broadcast transmission system facilities.

(a) The following changes are prohibited:

(1) Those that would result in the emission of signals outside of the authorized channel exceeding limits prescribed for the class of service.

(2) Those that would cause the transmission system to exceed the equipment performance measurements prescribed in § 73.508.

(b) The following changes may be made only after the grant of a construction permit application on FCC Form 318.

(1) Any construction of a new tower structure for broadcast purposes, except for replacement of an existing tower with a new tower of identical height and geographic coordinates.

(2) Any change in station geographic coordinates, including coordinate corrections and any move of the antenna to another tower structure located at the same coordinates.

(3) Any change in antenna height more than 2 meters above or 4 meters below the authorized value.

(4) Any change in channel.

(c) The following LPFM modifications may be made without prior authorization from the Commission. A modification of license application (FCC Form 319) must be submitted to the Commission within 10 days of commencing program test operations pursuant to § 73.1620. For applications filed pursuant to paragraph (c)(1) of this section, the modification of license application must contain an exhibit demonstrating compliance with the Commission's radiofrequency radiation guidelines. In addition, applications solely filed pursuant to paragraphs (c)(1) or (c)(2) of this section, where the installation is located within 3.2 km of an AM tower or is located on an AM tower, an exhibit demonstrating compliance with § 73.1692 is also required.

(1) Replacement of an antenna with one of the same or different number of antenna bays, provided that the height of the antenna radiation center is not more than 2 meters above or 4 meters below the authorized values. Program test operations at the full authorized ERP may commence immediately upon installation pursuant to § 73.1620(a)(1).

(2) Replacement of a transmission line with one of a different type or length which changes the transmitter operating power (TPO) from the authorized value, but not the ERP, must be reported in a license modification application to the Commission.

(3) Changes in the hours of operation of stations authorized pursuant to time-share agreements in accordance with § 73.872.

§ 73.877 Station logs for LPFM stations.

The licensee of each LPFM station must maintain a station log. Each log entry must include the time and date of observation and the name of the person making the entry. The following