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LoPo FM: Revised Rules Released

Restrictions relaxed, rivals relegated rearward

Harry F. Cole
703-812-0483
cole@fhhlaw.com

Last month we reported on changes in the LPFM rules – some of which had been adopted, others of which were still in the proposal stage. The full text of the Commission’s decision has now been released, and we have a better idea of what the immediate and not-so-immediate future has in store for LPFM.

The news is generally good – **IF** you happen to be an LPFM licensee. It’s not so good for just about everybody else.

The changes address a number of ownership and transferability questions. But the more controversial aspects are on the technical side. The Commission has afforded LPFM stations considerably greater protection from full-service stations than had previously been the case, and has proposed even more protection (or, at least, regulatory flexibility advantageous to LPFMers). The adopted changes and proposals include the following:

Adopted Changes

Ownership – LPFM licenses are available only to non-profit entities, which tend to be non-stock companies controlled by boards. When a majority of a controlling board changes, then control of that entity has been transferred, and prior FCC approval would ordinarily be required. Historically, the Commission has carved out an exception when the shift in control occurs gradually over time. But in its recent action, the FCC has determined that even a “sudden change of more than 50 percent” of an LPFM’s governing board will **not** be deemed a “substantial change in ownership and control” requiring prior approval.

The thinking here is that, in most cases, changes in the board of such organizations don’t normally result in changes in the entity’s basic philosophy (which in some senses is the noncommercial world’s equivalent of a business plan). Rather, new members tend to be volunteers who share the general approach of those they replace – and, thus, the

Commission can be reasonably confident that no substantial change in the station's operation will result. (By contrast, if it were shown that a "sudden change" in fact resulted in substantial changes in station operations, policies or philosophies, the Commission might raise questions.)

Additionally, the FCC has thought better of its ban on the sale of LPFM licenses. Now such licenses *can* be assigned, as long as (a) the price is no more than the depreciated fair market value of the station's physical equipment and facilities, and (b) the buyer is qualified to hold an LPFM license, and (c) the station has been owned and operated for at least three years. The ban on assignment or transfer of LPFM *construction permits* remains in place.

The Commission has, however, re-tightened the overall ownership limit on LPFMs. When the service was first created, the limit was one LPFM station per customer, and that customer had to be a "local" entity. Those restrictions were relaxed over time so that up to ten LPFM's could be owned by a single entity which did *not* have to be "local". The Commission has now reimposed the one station limit and the localism requirement. And in an effort to assure that "local" ownership ultimately translates into "local" programming, the Commission has also clearly held that "repetitious automated programming does not meet the local origination requirement." In order to meet that requirement, a program may be broadcast *no more than* twice. And the geographic definition of "local" has been expanded for towns outside the top 50 urban markets.

The Commission also tweaked its LPFM time-sharing rules some to encourage private resolution of time-sharing situations.

Interference protection from later-authorized full-service stations – Here's where the fun really begins. Historically, the LPFM service was viewed as "secondary", meaning that an LPFM station could not interfere with, and it had to accept interference from, any full-service (or "primary") station. That quaint notion is now history.

Under the new rules, an application for a new or modified full-service FM station (either commercial or noncommercial) gets protection against any earlier-filed LPFM application (or earlier authorized LPFM facility) which is on the same channel, first-adjacent channel, or IF channel to the full-service station ***only to the extent that*** the interference from the LPFM is both predicted to occur and actually does occur either (a) within the full-service station's 3.16 mV/m contour or (b) the full-service station's community of license or (c) any area of the full-service station's community of license which is predicted to receive at least a 1 mV/m signal.

This means that such protection is *not* available to full-service stations if the interfering LPFM signal is on a second-adjacent channel. Instead, the Commission has developed an interim procedure for dealing with such situations. The new procedure is applicable to situations where interference from changes to a full-service station would result in second-adjacent short-spacing between the LPFM and full-service facilities specified in a later-filed full-service application (including primarily city of license changes). The short-spacing must result in either an increase in interference caused to the LPFM or the displacement of LPFM, *and* the procedure does *not* apply if any alternate, fully-spaced, rule-compliant channel for the LPFM to move to is available. Rather, the policy applies when the only channel(s) to which the LPFM could move are second-adjacent to the full-service channel but short-spaced to it.

While the Commission would presumably be willing to apply this second-adjacent policy to third-adjacent situations as well, Congress has prevented that, at least for the time being. But in its decision the Commission also expresses its determination to ask Congress to reverse itself and eliminate (or at least substantially curtail) third-adjacent protection for full-service stations. Additionally, the Commission has made clear that it views the Congressionally-imposed third-adjacent protection as limited to a narrow class of situations – meaning that LPRM interference on third-adjacents may be acceptable to the FCC even under the existing law.

When situations arise which implicate this new policy, the FCC’s staff will contact the affected LPFM station and will consider waiver requests which it may file in response. The full-service station in question will then have to show why its application would better serve the public interest. Should a full-service application successfully navigate this gauntlet and get granted, it will be subject to a condition that it, as an “encroaching” station, will have to provide the LPFM station with technical assistance and will be financially responsible for all “direct expenses associated with resolving actual interference complaints.” So much for the primary status of full-service stations.

And in the even more dire circumstance when an LPFM is faced with displacement and there aren’t even any short-spaced second-adjacent channels available, something strange happens. In its discussion of such circumstances, the Commission starts out with the reassuring news that, in such case, “generally” it will “favor grant of the full-service station modification application.” So far, so good. But in the next sentence, it announces that it believes that it “is appropriate to apply a presumption” that it would be best to waive the secondary status of LPFMs and instead accord the LPFM protection and dismiss the “encroaching” full-service application. The presumption is subject to some limits. Section 307(b) considerations weighing in favor of the full-service applicant would trump the LPFM. Also, the LPFM has to have “regularly provided” at least eight

hours per day of locally originated programming, and the presumption will apply only when (a) implementation of a full-service station's *community of license modification* would cause a significant increase in caused interference to the LPFM, making the LPFM's continued operation infeasible, and (b) the LPFM has no other way to alter its own operations to avoid the conflict. (*Note*: This policy would apparently *not* apply to modifications that don't involve city of license changes.)

LPFM/Translator priorities – Full-service stations aren't the only ones being moved toward the back of the bus. Although the FCC has historically treated LPFM and FM translator stations as "co-equal" services, the Commission is now considering changes to that hierarchy. And in the meantime, thousands of translator applications that have been pending for more than four years will be dismissed because of concerns that they may be precluding more LPFM opportunities. To assure that those translator applications don't impede the progress of LPFMers, the Commission has imposed an after-the-fact cap of ten on translator applications. The cap applies to all 7,000 or so mutually exclusive translator applications still in the pipeline since 2003 (*note* – the cap does *not* apply to the 100 or so still-pending singletons), which means that if you happen to have more than ten of those still-pending MX applications, you have to pick the ten you're going to continue to prosecute.

The good news for translator applicants here is that, with the imposition of the cap, the nearly three-year-old freeze on processing those pending applications has now been lifted.

Proposed Changes

In the closing portion of its decision, the Commission solicits comments on a number of technical proposals aimed at improving the viability of the LPFM service. These include codifying in some form the interim procedure (described above) for situations involving the need for waiver of second-adjacent short-spacing rules to avoid displacement. While the FCC has (also as described above) already announced an anti-displacement policy – a policy the availability of which hinges in part on whether or not the LPFM station has "regularly provided" at least eight hours per day of locally originated programming – the Commission is also asking how it's supposed to determine whether that condition has been satisfied. (The fact that the Commission is asking for help in defining terms which it appears already to be utilizing in its interim waiver policy seems curious, to say the least: if the Commission doesn't know yet what the term means, how can it be applying it already? These are the mysteries of the FCC.)

Further underscoring the precarious nature of full-service broadcasting's "primary" status over LPFM, the Commission also tentatively concludes that a full-service applicant for

new or modified facilities “should be required to assume certain technical, financial and notice obligations if implementation of the proposal could impact an LPFM station.” What the FCC has in mind is requiring full-service applicants to: (a) notify potentially-affected LPFM stations of the filing of the application; (b) search for an alternate channel for the LPFM and include its search results in the application; (c) co-operate with the LPFMer to develop “the best technical approach” (including site relocation) for “ameliorat[ing]” the impact of the full-service proposal; and (d) be responsible for certain expenses relating to any LPFM channel change and/or site change necessitated by the full-service proposal. Comments on any and all of these proposals are invited.

The Commission is also considering (among other alternatives) junking the mileage separation allotment mechanism used thus far for LPFMs and replacing it with a contour protection methodology similar to that used for FM translators. But wait a minute. While translators are authorized pursuant to a contour protection approach, they are also absolutely obligated to correct any interference which they cause – or cease operation. Such a harsh requirement may not be suitable for the LPFM service, according to the FCC, which questions whether it’s “appropriate” to saddle LPFM licensees – *i.e.*, “community groups which often have limited resources and technical expertise” – with a standard that “subjects such stations to the constant risk of being forced off the air if they cannot resolve interference complaints promptly.”

Finally, the Commission is interested in hearing what we all think about whether LPFM should be treated as a “co-equal” service vis-à-vis FM translators. The Commission suggests that LPFM stations may advance the goals of localism, diversity and competition better than translators.

Having already jumped ahead with a number of interim policies and procedures and then having come up with expansive proposals involving major issues likely to have substantial impact on the entire FM side of the spectrum (full-service, LPFM and translators alike), the Commission has also announced that it intends to resolve all these issues within six months. Good luck with that.

And for all you window watchers out there, the Commission has committed that the next window opportunity for broadcast filings that opens will be for LPFM applications – but the FCC gave no target date for that opportunity.

As of press time, neither the effective date for the new rules nor the deadline for comments had yet been set. Suffice it to say, though, that the FCC does appear to be bound and determined to elevate the status of LPFM well above its original lowly position. This is a proceeding to which attention must be paid.