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## Court Affirms LPFM-Friendly Rules

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In a somewhat unexpected show of support for the LPFM service, the U.S. Court of Appeals for the D.C. Circuit has rejected the NAB's challenge to certain LPFM-friendly rules adopted by the Commission in 2007.

Back in 2007, the Commission:

- ' modified its "cease-operation" rule (Section 73.809) to provide that an LPFM station causing interference to a later-authorized (or later-modified) full service station would apply only to co-channel and first-adjacent channel situations, *not* second-adjacent situations;
- ' established new standards for waiving separation requirements when (a) a later-authorized/modified full service station would ordinarily displace an LPFM *but* (b) there are no alternate, rule-compliant channels to which the LPFM might relocate; and
- ' created a "rebuttable non-binding presumption" essentially elevating LPFM's over later-filed full service applications for change of city of license in the overall pecking order *if* the LPFM guy can demonstrate that it has "regularly provided at least eight hours per day of locally originated programming."

The NAB challenged these changes, pointing out that they seemed flatly inconsistent with other Commission rules, at least some of which had been mandated by Congress. For example, Congress has expressly insisted that the FCC maintain third-adjacent protection for full-service stations as against LPFMs. But if full-service stations are entitled to third-adjacent protection, doesn't that automatically imply that they should also be protected from the presumably more problematic second-adjacent interference?

The Court acknowledged that some of the NAB's arguments were at least "seemingly intuitive" – but in the end those arguments ran smack into Congress's language, which plainly did not support the NAB. Logically, of course, whittling away at second-adjacent protections does appear to be inconsistent with Congress's express mandate that *third-adjacent* (*i.e.*, more attenuated) protections be maintained. However, the fact that

Congress did not expressly mandate maintenance of second-adjacent protection was fatal to the NAB's argument. (As the Court saw it, the FCC's position was neither "demonstrably at odds" with the statute nor "contrary to common sense" – strong praise, indeed.)

The Court also disagreed with NAB's attack on the "rebuttable non-binding presumption" which (to the passing eye, at least) appears to be purely content-based, since it is triggered by the LPFM's claim of having provided "locally originated programming". But in the Court's view, the term "locally originated programming" refers to the "geographic location of the production of programming", *not* the "substantive content of the programs." (The Court did keep the NAB's content-based argument alive for another day by dismissing it as unripe because "there is no clear indication that the Commission will regulate content in applying the presumption".)

The bottom line is that the LPFM industry has survived this latest legal challenge and has come out arguably better positioned than it had been before. Meanwhile, in Congress, there continues to be interest in eliminating the third-adjacent interference protection standard as well. With a new set of Commissioners soon to take over the Commission, it will be interesting to see whether the LPFM folks continue to ascend in the hierarchy of broadcast services.