

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	MB Docket No. 13-249
Revitalization of the AM Radio Service	)	

**PETITION OF PROMETHEUS RADIO PROJECT FOR  
EMERGENCY PARTIAL STAY AND PROCESSING FREEZE PENDING  
REVIEW OF PETITION FOR RECONSIDERATION**

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## SUMMARY

Prometheus Radio Project (“Prometheus”) petitions the Federal Communications Commission (“FCC” or “Commission”) to issue an emergency partial stay of the amendment to 47 CFR §74.1201(g) as adopted in the Commission’s February 23, 2017 decision in Docket No. 13-249, *Second Report and Order*, 32 FCCRcd 1724 (2017) (“Order”), and to impose a processing freeze for any translator applications filed in reliance upon the new decision.

The new provision is currently scheduled to become effective on April 10, 2017. There will be hundreds, perhaps even thousands of translator applications filed immediately thereafter, as evidenced by the trade press heading proclaiming “AM Broadcasters – April 10 is Christmas for You.” Ordinarily, unopposed translator applications are granted within weeks of filing.

The premature grant of new translator applications will cause immediate and irreparable harm to many of the Low Power FM (“LPFM”) licensees Prometheus has advised and assisted and to their listeners, whose rights are “paramount” under the First Amendment. Incumbent LPFM stations will thereafter be severely limited in seeking to relocate within their communities of service because these new FM translators will box in or short-space them. If, as is frequently the case, LPFM licensees lose their transmitter location and must relocate, they will be forced to shut down or to relocate to a distance that could preclude them from reaching their established community audience.

Prometheus and others intend to seek reconsideration. They will be able to demonstrate that there is a very substantial likelihood of success because the Order was adopted in violation of the Administrative Procedure Act (“APA”) and is arbitrary and capricious. The Order’s elimination of a set distance limitation for locating FM translators was not a logical outgrowth of the Commission’s *Further Notice for Proposed Rulemaking* (“FNPRM”), which proposed only a

modest modification of the distance limitation. Indeed, it is apparent that the Office of Management and Budget shares this view, because it determined that the final version of the Order deviated so substantially from the proposal that its preapproval under the Paperwork Reduction Act was deemed insufficient and directed the Commission to resubmit the Order for further review. The Order is also arbitrary and capricious because it does not address, much less resolve the question of the adverse impact that the Order will have on LPFM and its inconsistency with the goals of the Local Community Radio Act (“LCRA”), and incorrectly equates commercial AM radio service with community-based non-commercial radio.

There is strong and highly relevant precedent for grant of a stay under these circumstances. During the period when the Commission was first implementing the LPFM services, the pendency of thousands of translator applications filed in a 2003 filing window threatened to thwart the prospects of LPFM. To address this problem, the Commission imposed a freeze on the grant of translator applications while it assessed the circumstances and fashioned an appropriate remedy. Similar action is needed here.

## ARGUMENT

Prometheus respectfully petitions the Commission to issue an emergency partial stay of the amendment to 47 CFR §74.1201(g) as adopted in the Commission's February 23, 2017 decision in Docket No. 13-249, *Second Report and Order*, 32 FCCRcd 1724 (2017) ("Order"), and to impose a processing freeze for any translator applications filed in reliance upon the new decision.

Section 1.429(k) of the Commission's rules permits the Commission, for good cause shown, to stay the effective date of a rule pending a decision on reconsideration. The Commission has adopted the four-factor test established by the U.S. Court of Appeals for the District of Columbia Circuit as set forth in *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n* and modified by *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.* This requires a petitioner seeking a stay to demonstrate that: (1) it appears likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be substantially harmed if the stay is granted; and (4) the public interest favors granting a stay.<sup>1</sup>

All four of these stay factors favor grant of a stay.

### **I. LPFM Licensees And Their Listeners Will Suffer Immediate And Irreparable Harm In The Absence Of A Stay.**

Newly-granted FM translators in the vicinity of incumbent LPFM stations pose an imminent threat to the viability of those stations and the community-based non-commercial

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<sup>1</sup> *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (1958) (*Virginia Petroleum*).

service they provide. LPFM stations that must, in the ordinary course of operations, relocate will be greatly constrained because they will have a delimited area in which they can relocate. This can, at the very least, reduce the number of listeners they can serve. If they cannot locate a new transmitter site in the reduced permissible zone, these stations will be forced off the air.

**A. Removal of the distance limitation will dramatically constrain the ability of incumbent LPFM stations to relocate in order to continue serving their communities.**

There are many reasons why broadcasters must relocate their transmitters. This ability is especially important for LPFM stations. Many full-power, professionally managed stations have the resources to own their own transmitter sites. When they must lease their location, they generally have the benefit of lengthy and stable leases on desirable high-altitude transmitter sites. LPFM stations usually cannot afford to locate on cell towers or established broadcast towers owned by the large tower companies. Instead, LPFMs typically must rent their sites in smaller buildings which are more likely to be torn down or converted to other uses. LPFMs also lack the clout to negotiate long-term favorable leases. Thus, they are subject to the whims of landlords, unforeseen property sales, and zoning issues beyond their control. It is also not uncommon for LPFM stations to need to relocate in order to improve service or to enter into a more affordable or viable leasing situation.

Relocation is thus especially problematic for LPFM stations. To begin with, because of their small service area, they are necessarily constrained to a small geographic area. Thus, when new translators go on the air, further delimiting their flexibility to move, the need to move even a relatively short distance can be catastrophic.

The removal of any distance limitation for newly-filed FM translator applications will thus have a dramatic and adverse effect on the listeners of affected LPFM stations. Each LPFM licensee that has gone on the air has done so by navigating what is, for non-professionals, a

difficult course of learning how to apply and obtain a license, recruiting and training local residents to build, manage and operate a station and raising the necessary funds to create and maintain the station. The prospect of losing or impairing these hard-won accomplishments will undermine the rights of these active participants as well as other listeners in the community to have access to the diverse voices and perspectives that LPFM stations provide, notwithstanding the fact that their First Amendment rights “to receive suitable access to social, political, esthetic, moral, and other ideas and experiences” are “paramount.”<sup>2</sup>

The need to relocate is an especially daunting prospect for LPFM stations. They face a constant struggle to remain financially viable and are always looking for ways to reduce costs. The smaller the area to which they can relocate, the less capacity they will have to renegotiate their existing leases or search for more affordable locations. This can force them to cease operations or move so far from their target base as to completely sever the link with their audience.

Despite the Commission’s assurance that encroachment will not occur, Prometheus anticipates the Order will harm LPFM and its listeners by further enabling encroachment and short-spacing. As Prometheus demonstrated in its ex parte presentation dated February 16, 2017, the 2016 translator filing windows led to a significant increase in short spacing of LPFM stations,<sup>3</sup> and therefore the impact of the Order will be particularly damaging.

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<sup>2</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 391 (1969).

<sup>3</sup> An analysis of CDBS database conducted on January 12, 2017 by Prometheus Radio Project shows 81 translators short-spaced to LPFMs on January 15, 2016 and 270 on December 15, 2016. See *A History of Encroachment on LPFMs*, Prometheus Radio Project, <http://www.prometheusradio.org/history-encroachment-lpfms>; see also Ex Parte Letter from Prometheus Radio Project, MB 13-249, Feb. 16, 2017, available at <https://www.fcc.gov/ecfs/filing/102160585211674>.

**B. The harm that LPFM stations and their listeners face will be immediate and irreparable.**

It is indisputable that AM licensees will file hundreds, if not thousands, of new translator applications as soon as the new rules become effective, as currently scheduled, on April 10, 2017. Since unopposed applications can be granted immediately, and they are often acted upon within a few weeks or a month, the harm that LPFM licensees and their listeners face is immediate. And, because it will be legally and politically difficult or impossible to rescind licenses granted under the new rules, the damage will be irreparable.

The likely flood of new applications is very real. The prospect of the new opportunity for AM licensees to obtain FM translators was proclaimed in the trade press with the headline “AM Broadcasters - April 10 is Christmas for You.”<sup>4</sup> As one leading practitioner put it, “There will no doubt be many broadcasters looking to take advantage of these new rules soon.”<sup>5</sup> Later, he repeated the observation, adding that “they will be able to do so starting April 10.”<sup>6</sup> Indeed, the prospect of new translator opportunities resulted in so many so many inquiries and indications about immediate filings that the Media Bureau was impelled to issue a Public Notice<sup>7</sup> warning

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<sup>4</sup> Radio Ink, *AM Broadcasters – April 10 is Christmas for You*, RADIO INK, Mar. 16, 2017, <http://radioink.com/2017/03/16/broadcasters-april-10-christmas/>.

<sup>5</sup> David Oxenford, FCC Approves Expansion of Use of FM Translators By AM Stations – But Warns Broadcasters Not to Jump the Gun and File Before New Rules Become Effective, BROADCAST LAW BLOG, Mar. 2, 2017, <http://www.broadcastlawblog.com/2017/03/articles/fcc-approves-expansion-of-use-of-fm-translators-by-am-stations-but-warns-broadcasters-not-to-jump-the-gun-and-file-before-new-rules-become-effective/>.

<sup>6</sup> David Oxenford, Relaxed Rules for Location of FM Translators to Rebroadcast AM Stations Effective April 10, BROADCAST LAW BLOG, Mar. 16, 2017, <http://www.broadcastlawblog.com/2017/03/articles/relaxed-rules-for-location-of-fm-translators-to-rebroadcast-am-stations-effective-april-10/>.

<sup>7</sup> Public Notice, “Media Bureau Procedures for Processing FM Translator Modification Applications,” DA 17-202 (March 1, 2017), [https://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0301/DA-17-202A1.pdf](https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0301/DA-17-202A1.pdf).



AM licensees that they should not apply prematurely, prompting one broadcast law firm to advise: “AM Owners: Don’t Jump the Gun on FM Translator Applications.”<sup>8</sup>

## **II. Prometheus Is Highly Likely To Prevail On The Merits.**

There is a substantial likelihood that Prometheus’ petition for reconsideration will prevail on the merits. The very significant change between what the Commission proposed and what it did in the Order was not a logical outgrowth of the FNPRM. Moreover, the change made in the Order was arbitrary and capricious, as it did not address the adverse impact on LPFM and was wholly inconsistent with the goals of the LCRA.

### **A. Removal of all distance limitations was not a logical outgrowth of the FNPRM.**

In the Order, the Commission abandoned any distance limit designed to keep FM translators within their core service area, thereby affording AM stations the right to place FM translators anywhere within their station’s daytime 2 mV/m contour.<sup>9</sup> Until now, FM translators have been allowed only, at a maximum, within 25 miles of the AM station’s transmitter.<sup>10</sup> In the FNPRM, the Commission proposed extending this limit to a 40-mile radius, because this would give some flexibility “while not allowing a cross-service fill-in translator to extend the station’s coverage beyond [the AM station’s] core service area.”<sup>11</sup> The Commission did not raise the possibility that it would eliminate any distance limitation. It nonetheless abandoned the concept of the core service area and eliminated any distance restriction.<sup>12</sup> This would allow FM

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<sup>8</sup> FHH Law, AM Owners: Don’t Jump the Gun on FM Translator Applications, COMMLAWBLOG, Mar. 2, 2017, <http://www.commlawblog.com/2017/03/articles/broadcast/am-owners-dont-jump-the-gun-on-fm-translator-applications/>.

<sup>9</sup> *Second Report and Order*, 32 FCCRcd 1724, 1726 ¶4 (2017) (“Order”).

<sup>10</sup> *Id.* at 1724 ¶2.

<sup>11</sup> *FNPRM*, 30 FCCRcd 12145, 12171 ¶68 (2015).

<sup>12</sup> *Order*, 32 FCCRcd at 1726 ¶4.

translators to be established anywhere within the 2 mV/m daytime contour of the primary AM station. The Commission has acknowledged in the past that AM stations operating above 2.5 kW “often have extremely large 2 mV/m daytime contours,”<sup>13</sup> and the abandonment of the distance rule will give AM stations enormous latitude that was not contemplated or asked about in the FNPRM.

Under the Administrative Procedure Act, an agency must give adequate notice of proposed changes so that affected parties can meaningfully address them in their comments. Changes that are not a “logical outgrowth” of a proposed amendment do not satisfy this requirement. As the D.C. Circuit has said,

[I]n *International Union, United Mine Workers of America v. Mine Safety & Health Administration*, 407 F.3d 1250 (D.C.Cir.2005) (“*International Union*”), we noted:

[The APA's notice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.

*Id.* at 1259 (citing *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C.Cir.1983)).<sup>14</sup>

The outright abandonment of a distance-based limitation is not a logical outgrowth of the proposed rule change. Those opposed cannot be expected to “divine the [agency’s] unspoken thoughts,”<sup>15</sup> and here, Prometheus and others could not have contemplated that the Commission might have used this proceeding to abandon the distance limitation. The Commission’s purported justification for this modification, that it “has already held that the 2 mV/m contour in

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<sup>13</sup> *In the Matter of Amendment of Serv. & Eligibility Rules for FM Broad. Translator Stations*, 24 FCC Rcd 9642, 9658-59 (2009).

<sup>14</sup> *Env'tl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005).

<sup>15</sup> *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991).

all cases constitutes an AM station's primary service area...,<sup>16</sup> falls far short of the mark. This incorrectly conflates "core service area" with "primary service area," two distinct and drastically different concepts.

Primary service area is directly defined as the 2 mV/m contour in most situations,<sup>17</sup> which is the area that is "protected from objectionable interference,"<sup>18</sup> so including that information is not only irrelevant to the core service area, it is being used to obfuscate the Order's expansion of the core service area. The core service area, or core market area, as discussed by the Commission in the FNPRM, is necessarily a limited subset of the primary service area.<sup>19</sup> These definitions are functional and distinct. The Commission recognizes, in its discussion of the "2009 Translator Order," that the distance limits were designed to keep translators in that core market, within 25 miles of the AM station.<sup>20</sup> Further, the Commission expressed in the FNPRM its continued desire to limit translator use to the AM station's core market<sup>21</sup> by maintaining a 40-mile limit.

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<sup>16</sup> *Order*, 32 FCCRcd at 1726 ¶4.

<sup>17</sup> 47 C.F.R. §17.182 ("The groundwave signal strength required to render primary service is 2 mV/m for communities with populations of 2,500 or more and 0.5 mV/m for communities with populations of less than 2,500. Because only Class A stations have protected primary service extending beyond the 2 mV/m contour . . .").

<sup>18</sup> 47 C.F.R. §73.21.

<sup>19</sup> *FNPRM*, 30 FCCRcd at 12174 ¶68 (citing *In the Matter of Amendment of Serv. & Eligibility Rules for Fm Broad. Translator Stations*, 24 FCCRcd 9642, 9649 n.45 (2009) ("the 25-mile limit is simply a constraint to prevent high-power AM stations from using fill-in translators in locations outside their core service area")).

<sup>20</sup> *FNPRM*, 30 FCCRcd at 12174 ¶68 (referencing *Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Report and Order, 24 FCC Rcd 9642, 9658 (2009)).

<sup>21</sup> *FNPRM*, 30 FCCRcd at 12174 ¶68 ("we agree that some additional degree of flexibility is appropriate, especially given the factual situations (e.g., highly directional antenna patterns with deep signal nulls) described by some commenters. We do, however, continue to desire to limit cross-service translator use to an AM station's core market.").

Moreover, the citations provided by the Commission in the Order directly refute the claim that the core service area is the same as the primary service area. The cited text reads that the 2 mV/m daytime contour depicts the core market area *only* for stations operating on 2.5 kW or less.<sup>22</sup> However, the text then immediately specifies that the 25-mile limit was necessary specifically for more powerful stations because the “extremely large 2 mV/m daytime contours” did *not* constitute the AM station’s core market area.<sup>23</sup> The concept is simple: for AM stations operating on 2.5 kW or less, the 2 mV/m contour defines the core service area; for AM stations operating above 2.5 kW, the 2 mV/m contour exceeds the core service area.

At no point did the Commission indicate that it intended to destroy the concept of the core service area. In fact, the FNPRM reaffirms the distinction by referring to each concept in their respective contexts.<sup>24</sup> The Commission’s sudden abandonment of this concept, which resulted in a massive increase in the distance and flexibility in which cross-service translators may be placed, could not have been foreseen in the FNPRM. Without the abandonment of the core service area, which the Commission purported to uphold, the Commission could not have so

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<sup>22</sup> *In the Matter of Amendment of Serv. & Eligibility Rules for Fm Broad. Translator Stations*, 24 FCCRcd at 9658 (2009) (“While we recognize that AM stations typically have a protected daytime contour of 0.5 mV/m, we believe the 2 mV/m daytime contour more accurately depicts the core market area for the majority of AM stations, operating at an effective radiated power level of 2.5 kW or less.”).

<sup>23</sup> *Id.* (“[w]e also recognize that AM stations operating at a higher power level often have extremely large 2 mV/m daytime contours, and in this situation the 25-mile limit will apply to ensure that fill-in cross-service translators are used in the AM station’s core market area, rather than in a fringe area that may be part of or near another radio market”).

<sup>24</sup> *See, e.g., FNPRM*, 30 FCCRcd at 12169 ¶54 (“The tradeoff appears to be whether we should take steps that would deprive Class A stations of listeners far outside of their primary service areas”); *FNPRM*, 30 FCCRcd at 12169-70 ¶55 (“the areas of reduced coverage would be located at great distances from the transmitter and from the metropolitan area that constitutes the station’s primary service area”); *FNPRM*, 30 FCCRcd 12190, App’x B ¶8 (quoting §73.182, “[Class A] stations are designed to render primary service over a large area protected from objectionable interference”).

drastically abandoned the distance rules. Accordingly, the abandonment of the distance rules is not a logical outgrowth of the FNPRM.

Prometheus is not the only party that considers there to have been a significant and substantive change from what the Commission originally proposed. Indeed, the Office of Management and Budget (“OMB”) determined that the final version of the Order deviated so substantially from the proposal that its preapproval under the Paperwork Reduction Act was deemed insufficient and directed the Commission to resubmit the Order for further review.<sup>25</sup> Prometheus has requested documentation about OMB’s determination pursuant to the Freedom of Information Act.<sup>26</sup> It is likely that Prometheus will be able to make an even stronger APA argument once those materials are released.

Accordingly, Prometheus will be able to make a powerful argument on the merits and thus has a strong likelihood of success.

#### **B. The Order is arbitrary and capricious.**

The Commission’s Order is arbitrary and capricious because it does not address, much less resolve, the question of the adverse impact that the Order will have on LPFM, even though Prometheus raised the issue in a detailed ex parte presentation.<sup>27</sup> Specifically, the Commission did not address the restrictions that face incumbent LPFM stations when they are boxed into a single location. Rather, the Commission misstated Prometheus’ concern, framing it as only

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<sup>25</sup> See 82 FR 13069 (Mar. 9, 2017) (explaining that the effective date of the Order was “delayed indefinitely pending Office of Management and Budget (OMB) approval of a non-substantive change to the rule as originally proposed”). The Commission subsequently announced the effective date of April 10, 2017 on March 16, 2017. See 82 FR 13969 (Mar. 16, 2017).

<sup>26</sup> See FOIA Request FCC-2017-000474, letter from Andrew Jay Schwartzman to Mark Stephens (Mar. 17, 2017); Emergency Petition for Expedited Special Relief (Mar. 22, 2017).

<sup>27</sup> Ex Parte Letter from Prometheus Radio Project, MB 13-249, Feb. 16, 2017, available at <https://www.fcc.gov/ecfs/filing/102160585211674>.

involving immediate interference.<sup>28</sup> However, when the LPFM contour is tangent, or near tangent, to the contours of multiple cross-service translators such that it cannot move in any direction, that LPFM station is essentially chained to its current location. Even if the surrounding cross-service translators do not actually cause any interference to the incumbent LPFM station, they will preclude the LPFM station from moving, even if the LPFM station only needs to move a small distance. In this way, cross-service translators that do not currently encroach the LPFM station's contour will nonetheless preclude the LPFM station from moving into that space. By making it easier for numerous cross-service translators to fill these gaps near incumbent LPFM stations, the Order will seal the LPFM station in a box and essentially wait for it to die.

The Commission's action was also arbitrary and capricious because it is inconsistent with the requirements and purposes of the Local Community Radio Act.<sup>29</sup> By removing the distance limit, the Order will benefit commercial AM interests to the detriment of incumbent non-commercial LPFM stations, decreasing local, diverse, noncommercial broadcasting in a way that is contrary to the LCRA. At no point in the Order did the Commission address these inconsistencies or rebut the contention that incumbent LPFM stations will be chained to their current location as the gaps around them are filled by cross-service translators.

The goals of the LCRA and advantages of LPFM have been heralded by the Chairman and Commissioners. According to Chairman Pai, the noncommercial nature of LPFM is "critical to advancing the Commission's diversity goals" and ensuring they continue to serve their local

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<sup>28</sup> *Order*, 32 FCCRcd at 1726 ¶4 n.21 (2017) ("Order").

<sup>29</sup> Local Community Radio Act of 2010, Pub. L. 111-371 (2011).

communities.<sup>30</sup> Further, Commissioner Clyburn has stated that “[f]arm workers, tribes, niche ethnic and language communities, community service organizations...all see the LPFM service as a lifeline.”<sup>31</sup> Increasing location options for translators of AM stations while reducing relocation options for incumbent LPFM stations, undermines the goals of the LCRA by favoring expansion of commercial stations at the expense of non-commercial incumbent LPFM stations. This impending demise will irreparably harm these incumbent LPFM stations long before they are forced to cease operations. For instance, stations that are boxed in will have no fallbacks in negotiating a lease renewal.

Prometheus will demonstrate in its petition for reconsideration that the Order inhibits the ability of LPFM stations to change locations whenever the need inevitably arises. At that time, when it becomes clear that incumbent LPFM stations have been boxed into a single location by AM-held FM translators, the Commission will see the decline of the victories of diverse, locally-focused LPFM radio and the rise of homogenized, commercial programming. If the Commission wants to protect the incumbent LPFM stations that it has so often lauded, it must adopt an order that is consistent with the goals of the LCRA, which does not allow the commercial interests of AM radio to trump the nonprofit, non-commercial interests of LPFM.

Finally, the Commission’s Order improperly equates the goals of AM radio with LPFM by claiming that “smaller Class C and D AM stations...share with the LPFM service a focus on community-based programming.”<sup>32</sup> The comparison draws the false equivalence that small

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<sup>30</sup> Statement of Commissioner Ajit Pai on Announcement of LPFM Filing Window (Jun. 17, 2013), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-321648A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-321648A1.pdf)

<sup>31</sup> Statement of FCC Acting Chairwoman Mignon L. Clyburn, LPFM Implementation Report, Creation of a Low Power Radio Service, MM Docket 99-25 (Sep. 26, 2013), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-323490A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-323490A1.pdf).

<sup>32</sup> *Order*, 32 FCCRcd at 1726 ¶4 n.21.

stations necessarily achieve the same goals with their local programming. Because AM radio is commercial, it is dependent upon the marketplace to determine its programming and survival. The entire purpose of non-commercial radio is that there are niche groups that are not demographically attractive to advertisers, and thus whose interests the commercial marketplace does not reflect. Nonprofits, minority representation societies, advocacy organizations, and other groups may not create enough economic force to satisfy market demands, or will be overshadowed by larger, more moneyed interests. Market forces are fundamentally at odds with noncommercial radio, and AM radio is absolutely not a substitute for LPFM programming. The Commission miscasts this comparison and risks the future of LPFM programming in the process.

Accordingly, Prometheus is likely to prevail in demonstrating that the Order is inconsistent with the goals of the LCRA, and is arbitrary and capricious.

### **III. Other Parties Will Not Be Substantially Harmed If The Stay Is Granted.**

Because the requested stay will maintain the status quo, it will not harm any other parties, including AM licensees that might be seeking to apply for new translators. Accordingly, there is no reason to believe their commercial support or listener base will experience any negative impact if the granting of licenses is stayed until the Commission acts on forthcoming petitions for reconsideration. Indeed, failure to grant a stay will create uncertainty that may actually harm AM licensees.

### **IV. The Public Interest Weighs Heavily In Favor Of Granting A Stay.**

The public interest heavily weighs in favor of a stay. As repeatedly stated by the Commissioners themselves, the public interest is served by the existence of LPFM.<sup>33</sup> Insofar as

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<sup>33</sup> See Statement of Commissioner Ajit Pai, *supra* note 30; *see also* Statement of FCC Acting Chairwoman Mignon L. Clyburn, *supra* note 31.



the Order will impede existing LPFM service, it will adversely diminish the public's First Amendment right to have access to diverse information.<sup>34</sup> Offering diverse, locally-focused content that is not subject to commercial interests is beneficial and impactful to the local communities the LPFM station serves. LPFM further offers a valuable and unique way for nonprofit organizations to reach their core bases and spread their message to new listeners.

The interests of the public at large are best served by regulatory clarity. It would be a disservice to AM stations and the public to award new FM translator licenses that may have to be rescinded at some time thereafter.

To the extent that some AM stations are owned by local small businesses, those interests are still driven by marketplace forces. In contrast, LPFM stations are noncommercial by definition, and must serve only local, non-commercial interests. The very purpose of non-commercial broadcasting is to address needs of those whose interests are not properly recognized by the market because they are too old, too young, too poor, or too inconveniently located to attract advertisers' interests. Changing this dynamic in favor of commercial AM radio will inherently support commercial over non-commercial interests. This will adversely affect local interests and nonprofits, and therefore damage the public interest. The Order will also benefit the homogenization and standardization of radio, which also damages the public interest.

#### **V. Precedent Supports The Grant of a Narrowly Drafted Stay.**

There is strong and highly relevant precedent for grant of a stay under these circumstances. During the period when the Commission was first implementing the LPFM services, the pendency of thousands of translator applications filed in a 2003 filing window threatened to thwart the prospects of LPFM. Based on the information then available, the

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<sup>34</sup> See p. 3, *supra*.

Commission said that it was “impossible to determine the precise extent to which the 2003 window-filed FM translator applications have impacted the potential licensing of new LPFM stations....”<sup>35</sup> Accordingly, it said that as “an interim measure while we consider these important questions, we direct the Media Bureau to stop granting FM translator new station construction permits for which short-form applications were filed in the 2003 window.”<sup>36</sup>

Similar relief is appropriate here. Prometheus asks that the Commission stay the effectiveness of newly modified Section 74.1201(g) insofar as it would permit grant of applications for new FM translators that would not otherwise have been permitted prior to the adoption of the Order. It also asks that the Commission adopt a freeze on all pending FM translator applications that would not otherwise be been granted prior to the adoption of the Order. The stay and freeze should remain effective until administrative and judicial litigation over the validity of the Order is final.

Prometheus does not object to the filing of applications for new translator applications, pending the outcome of reconsideration so long as applicants are advised that the applications will not be granted until such time as the proposed stay and freeze are lifted.

## CONCLUSION

The Commission should stay the Order as described herein and freeze the granting of new FM translator applications that would not otherwise have been permitted prior to the adoption of the Order pending finality of reconsideration proceedings of the Order and all judicial review thereof, and grant all such other relief as may be just and proper.

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<sup>35</sup>*Second Order on Reconsideration and Further Notice of Proposed Rulemaking*, 20 FCCRcd 6763, 6778, ¶33 (2005); *see also Third Report and Order and Second Further Notice of Proposed Rulemaking*, 22 FCCRcd 21912 (2007).

<sup>36</sup>*Id.*

Respectfully submitted,

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