Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of Razorcake/Gorsky Press, Inc.	)	File No. BNPL-20131114AXZ
For a New LPFM Station at Pasadena, California	)	Facility ID No. 195577

MEMORANDUM OPINION AND ORDER

Adopted: March 22, 2017 **Released: March 22, 2017**

By the Commission:

1. The Commission has before it a July 29, 2016, Application for Review (AFR) filed by Educational Media Foundation (EMF), licensee of KYLA(FM), Fountain Valley, California. EMF seeks review of a Media Bureau (Bureau) decision[1] that (1) denied its objection to and its petition to deny an application (Application) filed by Razorcake/Gorsky Press, Inc. (Razorcake) for a new low power FM (LPFM) station at Pasadena, California (Station), and (2) granted the Application, along with Razorcake's request for a waiver (second-adjacent waiver) of the second-adjacent channel minimum distance separation requirements set forth in Section 73.807 of the Commission's rules (Rules).[2] For the reasons discussed below, we deny the AFR.

2. In order to avoid harmful interference to existing stations, Section 73.807 of the Rules requires that LPFM stations be situated specified distances from other co-, first- and second-adjacent channel facilities. Section 3(b)(2)(A) of the Local Community Radio Act of 2010 (LCRA), as reflected in Section 73.807(e)(1), allows an applicant whose proposed LPFM station does not meet the second-adjacent channel spacing requirements to seek a waiver if it can demonstrate that its proposed facilities "will not result in interference to any authorized radio service."[3] Razorcake submitted such a waiver request in the Application, accompanied by an engineering exhibit. The Bureau concluded that the waiver showing was sufficient and granted the waiver.

3. EMF takes issue with the Bureau's conclusion, which rested upon its finding that Section 3(b)(2)(A) of the LCRA and Section 73.807(e)(1) require an applicant seeking a second-adjacent waiver to demonstrate its proposed LPFM station will not cause interference to any FM station in any service operating on a second-adjacent channel.[4] EMF maintains that Razorcake's showing was defective because it failed to demonstrate that the Station will not cause interference to its co-channel KYLA(FM). EMF maintains that Section 3(b)(2)(A) of the LCRA (and, consequently, Section 73.807(e)(1)) requires an FM applicant seeking a second-adjacent waiver to demonstrate that its proposal will not cause interference to *any* radio station, "not just…stations that operate on second adjacent channels."[5]

[1] *Razorcake/Gorsky Press, Inc.*, Letter Order (MB June 30, 2016) (*Letter Order*).

[2] 47 CFR § 73.807.

[3] Pub. L. No. 111-371, 124 Stat. 4072 (2011).

[4] *Letter Order* at 3.

[5] AFR at 6-14. EMF claims the Station will cause interference to its station and submitted an engineering report to support this claim. AFR at 4, *citing* EMF's Petition to Deny at 3-6 and Exh. A-2. Because it found that LPFM applicants seeking second-adjacent waivers need only address whether their proposed operations would result in interference to stations operating on second-adjacent channels, the Bureau did not consider the substance of EMF's

(continued….)

According to EMF, the plain language of the statute is clear and unambiguous:[6] any means any, and accordingly includes co-channel stations such as KYLA(FM).[7]

4. We disagree that the terms of the second-adjacent channel waiver provision are unambiguous and that EMF's interpretation is the only, or even the most reasonable, interpretation. As the court explained in *Bell Atlantic Tel. Cos. v. FCC*:

> textual analysis is a language game played on a field known as "context." The literal language of a provision taken out of context cannot provide conclusive proof of congressional intent, any more than a word can have meaning without context to illuminate its use. In short, "the meaning of statutory language, plain or not, depends on context."[8]

The court noted that consideration of context is particularly important when "we are charged with understanding the relationship between two different provisions within the same statute,"[9] as is the case here. "[W]e must analyze the language of each to make sense of the whole."[10]

5. Contrary to EMF's contention,[11] in the context of Section 3(b)(2)(A) of the LCRA, the meaning of the term "interference" is not clear or unambiguous.[12] For instance, the term "interference"—which is not preceded by any limiting language—could mean any interference on any channel, as EMF maintains. As the Bureau noted in the *Letter Order*,[13] though, Section 3(b)(2) is focused solely on proposed LPFM stations that do not satisfy the Commission's second-adjacent channel spacing requirements and could cause interference to stations operating on second-adjacent channels. Thus, the term "interference" could mean second-adjacent channel interference.

6. This latter interpretation of the LCRA is consistent with the existing LPFM regulatory requirements it was intended to complement and the structure of the statute. As explained by the Bureau,[14] when the Commission created the LPFM service ten years before the LCRA, it imposed the spacing requirements to "preserve the integrity and technical excellence of the existing FM radio service."[15] Thus, the Commission stated, "[t]he extent of interference protection from LPFM stations to existing FM, LPFM and FM translator and booster service generally will be that afforded by minimum

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allegation or its report. *Letter Order* at 5. For the same reason, we too do not examine the merits of EMF's assertion that the Station will cause interference to its station.

[6] AFR at 6.

[7] *Id*. at 3-4, 6.

[8] 131 F.3d 1044, 1047 (D.C. Cir. 1997), *quoting Bailey v. U.S,* 516 U.S. 137 (1995). The D.C. Circuit also explained the traditional tools of statutory construction, including "examination of the statute's text, legislative history, and structure, as well as its purpose," should be employed in determining whether the meaning of a statutory provision is plain or ambiguous. *Id*. at 1047.

[9] *Id*.

[10] *Id*.

[11] AFR at 3-4, 6-14.

[12] EMF alternately focuses on the term "any" and the phrase "any authorized radio service" in its arguments. *Id*. at 6-7 (discussing the term "any") and 7-10 (disputing Bureau's interpretation of "any authorized radio service"). Its real concern, however, is with the meaning of the term "interference." Thus, we focus our analysis on this term.

[13] *Letter Order* at 3.

[14] *Id*.

[15] *Id., citing Creation of Low Power Radio Service*, Report and Order, 15 FCC Rcd 2205, 2233-34 paras. 70-71 (2000) (*LPFM Report and Order*).

separation requirements," noting, "[t]hese were designed to provide the same degree of interference protection that full-service stations provide each other."[16] Significantly, the LCRA did not alter the existing co- or first-adjacent channel spacing requirements. Indeed, while the legislation permits the Commission to waive the second-adjacent channel spacing requirements upon an appropriate showing by an applicant,[17] it prohibits the agency from reducing the requirements designed to protect stations operating on co- or first-adjacent channel facilities.[18] Since stations operating on co- or first-adjacent channels (such as KYLA(FM)) are already protected from interference by a second-adjacent waiver applicant's required compliance with the distance separation requirements for such facilities, we agree with the Bureau's conclusion that the more reasonable interpretation of Section 3(b)(2) is that enunciated by the Bureau in the *Letter Order*: that the second adjacent waiver applicant must demonstrate that it will not cause second-adjacent channel interference.[19]

7. By its very nature, waiver of a requirement constitutes a determination that the protections afforded by that requirement are unnecessary in a particular case. It therefore is logical to require a second-adjacent waiver applicant to demonstrate that stations operating on second-adjacent channels to the proposed LPFM station will not be harmed due to that station's operations. Conversely, it makes no sense to require such an applicant to demonstrate why other parties which the second-adjacent spacing requirement was *not* intended to protect would not be harmed by the waiver. This is particularly the situation where, as here, independent requirements that are not being and cannot be waived (*i.e.,* the other minimum separation requirements imposed by Section 73.807) protect those co- and first adjacent channel stations, such as KYLA(FM), from interference. Significantly, EMF does not challenge the Bureau's conclusion that Razorcake demonstrated that its proposal would not cause interference to any second-adjacent channel station and that it satisfied the minimum spacing requirements designed to ensure no interference to any co- or first-adjacent channel station.

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[16] *Id., citing LPFM Report and Order,* 15 FCC Rcd at 2231 para. 64.

[17] Section 73.807(e)(1) requires that, to obtain a second-adjacent channel waiver, "the LPFM station must establish, using methods of predicting interference taking into account all relevant factors, including terrain-sensitive propagation models, that its proposed operations will not result in interference to any authorized radio service. The LPFM station may do so by demonstrating that no actual interference will occur due to intervening terrain or lack of population. The LPFM station may use an undesired/desired signal strength ratio methodology to define areas of potential interference." 47 CFR § 73.807(e)(1).

[18] *Id., citing* LCRA § 3(b)(1).

[19] We acknowledge that we are reading the term "interference" as having one meaning when used in Section 3(b)(2)(A) of the LCRA and another meaning when used in the interference remediation provisions contained in Sections 7(1) through 7(5) of that same law. As the Supreme Court has noted, identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute. *Yates v. United States*, 135 S.Ct 1074, 1082 (2015) (*Yates*), *citing FAA* v. *Cooper*, 132 S. Ct. 1441(2012) ("actual damages" has different meanings in different statutes); *Wachovia Bank, N. A.* v. *Schmidt*, 546 U.S. 303, 313-314 (2006) ("located" has different meanings in different provisions of the National Bank Act); *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U.S. 581, 595-597 (2004) ("age" has different meanings in different provisions of the Age Discrimination in Employment Act of 1967); *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) ("wages paid" has different meanings in different provisions of Title 26 U.S.C.); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 342-344 (1997) ("employee" has different meanings in different sections of Title VII of the Civil Rights Act of 1964); *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U.S. 804, 807-808 (1986) ("arising under" has different meanings in U.S. Const., Art. III, §2, and 28 U.S.C. §1331); *District of Columbia* v. *Carter*, 409 U.S. 418, 420-421 (1973) ("State or Territory" has different meanings in 42 U.S.C. §1982 and §1983); *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433-437 (1932) ("trade or commerce" has different meanings in different sections of the Sherman Act). We further note that, on one occasion, EMF itself has referred to Section 3(b)(2) as "dealing with second-adjacent interference." AFR at 8.

8. EMF maintains that "a holistic reading" of the LCRA supports its more expansive reading of the statutory requirements for a second-adjacent channel waiver request.[20] We disagree. The Bureau's reading of the operative phrase in Section 3(b)(2) allows us to interpret the various provisions of the LCRA as a harmonious whole.[21] A reading of "interference to any authorized radio service" as referring to all interference to any station, on the other hand, is incompatible with other provisions of the LCRA.[22] Specifically, such a reading would subject an LPFM station operating pursuant to a second-adjacent waiver but fully spaced to all stations on third-adjacent channels to two different sets of interference remediation requirements with respect to stations operating on third-adjacent channels. Such an LPFM station would be required to "eliminate" all instances of interference to "existing or modified full-service FM station[s]" on third-adjacent channels under EMF's reading of Section (3)(b)(2) but merely "address" the interference under Section (7)(3). Because a requirement to "eliminate" such interference would render the requirement to "address" it superfluous, the canon against surplusage also suggests that EMF's reading of the term "interference" in Section 3(b)(2)(A) was not intended by Congress.[23] In addition, there is no rational basis for the Commission to impose the technical standards which EMF advocates. Neither the *LPFM Sixth Report and Order*, which implemented the LCRA,[24] nor, for that matter, EMF offers support for the creation of two radically different co- and first-adjacent channel interference protection and remediation regimes based on whether or not the LPFM station at issue is fully spaced or short spaced to other stations operating on second adjacent channels.[25]

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[20] AFR at 10-11.

[21] As the Supreme Court has noted, statutory construction is a "holistic endeavor." *United Sav. Assoc'n. v. Timbers of Inwood Forest Associates*, *Ltd.*, 484 U.S. 365, 371 (1988); *accord Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004). "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Id. See also Bell Atlantic*, 131 F.3d at 1047.

[22] Such a broad reading is also inconsistent with the meaning given to the term "interference" in the Commission's Small Entity Compliance Guide for Low Power FM. *Creation of a Low Power Radio Service*, Small Entity Compliance Guide, 28 FCC Rcd 193, 197-8 (OCBO 2013) ("An LPFM licensee operating pursuant to a second-adjacent waiver must eliminate any second-adjacent channel interference caused by its operations.").

[23] *Yates,* 135 S. Ct at 1085, *citing Marx* v. *General Revenue Corp.*, 133 S. Ct. 1166 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

[24] *Creation of a Low Power Radio Service*, Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Rcd 15402 (2012) (*LPFM Sixth Report and Order*).

[25] EMF attempts to justify such a state of affairs by noting that "[t]ranslator applicants are required to conduct interference studies for co- and first-adjacent channels prior to submitting their applications" and pointing out that the Commission itself has recognized similarities between the regime established in Sections 3(b)(2)(A) and (B) and the regime applicable to FM translator stations. AFR at 10-12, *citing LPFM Sixth Report and Order*, 27 FCC Rcd at 15428-29 paras. 77-78. In the *LPFM Sixth Report and Order*, the Commission drew parallels between "the second-adjacent waiver provisions of the LCRA" and "the regime applicable to FM translator stations." *LPFM Sixth Report and Order*, 27 FCC Rcd at 15429 para. 78. It did not draw parallels between the co- and first-adjacent channel spacing requirements and the requirements applicable to FM translators. That is because, in the LPFM context, as noted above, protection of co- and first-adjacent channel stations is achieved by compliance with the spacing requirements while, in the FM translator context, it is achieved via compliance with a contour overlap prohibition or, in the alternative, a demonstration that the proposed translator will not cause actual interference. 47 CFR §§ 73.807 (setting forth spacing requirements), 74.1204(a) (setting forth contour overlap prohibition), 74.1204(d) (contour overlap prohibition does not apply "if it can be demonstrated that no actual interference will occur). The LCRA did not change this. Thus, any parallels drawn between the interference regimes applicable to LPFM stations and FM translators are relevant only in the context of second-adjacent channel interference and, even then, only if an LPFM applicant is seeking a second-adjacent waiver.

9. We also reject EMF's contention that the Bureau's more restrictive reading is inconsistent with other provisions of the LCRA.[26] We affirm the Bureau's holding that its reading of Section 3(b)(2)(A) is consistent with the Commission's interpretation of Section 7 of the LCRA in the *LPFM Sixth Report and Order*. EMF attacks this conclusion by disputing the Commission's finding—in that order—that "Congress did not specify the type of interference to which [Sections 7(1) through 7(5) of the LCRA] apply."[27] As the Commission concluded earlier, Congress did not specify the type of interference to which Sections 7(1), (2), (3), (4), and (5) of the LCRA apply. [28] In arguing to the contrary, EMF ignores the fact that, while both Sections 7(3) and 7(5)—and Sections 7(1), (2) and (4) for that matter—include the phrase "third-adjacent channel," in no instance does that phrase modify the word "interference."[29]

10. We also reject EMF's argument that, where Congress wished to enumerate in the LCRA the specific types of stations entitled to interference protection, it did so.[30] Relying on the principle of statutory construction that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute,[31] EMF cites Section 7(3)[32] and contrasts it with Section 3(b)(2)(A). The negative inference, however, is inapplicable here where both Sections 3(b)(2)(A) and Section 7(3) include language about the types of stations entitled to interference protection but the language varies. Put another way, we are not interpreting a statutory provision that

[26] AFR at 9-10.

[27] According to EMF, Section 7 "makes repeated reference to the interference that is to be considered." *Id*. at 8, 12-13. EMF cites Sections 7(3) and 7(5)(B) in support of this claim. *Id*. at 8 and n. 22. Section 7(3) provides that LPFM stations "on third-adjacent channels shall be required to address complaints of interference within the protected contour of an affected station and shall be encouraged to address all other interference complaints … based on interference to a full-service FM station, an FM translator station, or an FM booster station by the transmitter site of a [LPFM] station on a third-adjacent channel at any distance from the full-service FM station, FM translator station, or FM booster station." LCRA § 7(3). Section 7(5) provides that the Commission shall "accept complaints based on interference to a full-service FM station, FM translator station, or FM booster station by the transmitter site of a low-power FM station on a third-adjacent channel at any distance from the full-service FM station, FM translator station, or FM booster station." LCRA § 7(5)(B).

[28] These provisions refer to "the same interference protections," "any interference" or "any such interference," "interference" or "interference to a full-service FM station, an FM translator station, or an FM booster station." While they impose interference protection and remediation obligations on "LPFM stations on third-adjacent channels," none of them specify that the interference referred to is third-adjacent channel interference.

[29] The phrase "third-adjacent channel" appears to modify the phrase "low-power FM station" in Sections 7(1), (2), (3), (4) and 7(5)(B) and thus to indicate which LPFM stations are subject to the requirements set forth in in these provisions. LCRA § 7(1) ("those low-power FM stations licensed at locations that do not satisfy third-adjacent channel spacing requirements …"), (2) ("a new low-power FM station is constructed on a third-adjacent channel"), (3) ("Low-power FM stations on third-adjacent channels," "a low-power FM station on a third-adjacent channel"), (4) ("low-power FM stations on third-adjacent channels "), (5)(B) ("a low-power FM station on a third-adjacent channel").

[30] AFR at 8.

[31] *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006), *citing Lindh v. Murphy*, 521 U.S. 320, 330 (1997) and *Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'").

[32] LCRA § 7(3) (requiring LPFM stations operating on third-adjacent channels "to address complaints of interference within the protected contour of an affected station" and encourages such LPFM stations "to address all other interference complaints, including complaints … based on interference to a full-service FM station, an FM translator station or an FM booster station by the transmitter site of a low-power FM station on a third-adjacent channel at any distance from the full-service FM station, FM translator station or FM booster station").

excludes language about the types of stations entitled to interference protection. Thus, no negative inference can be drawn.

11. Finally, we consider and reject EMF's argument that, in granting the Razorcake waiver request, the Bureau "depart[ed] from the Commission's longstanding waiver standards."[33] In support of its contention, EMF cites to and discusses precedent related to application of the Commission's general waiver standard, which is set forth in Section 1.3 of the Rules.[34] EMF asserts that the Bureau should have considered "whether or not the circumstances of any particular [second-adjacent] waiver request would serve the public interest."[35] We find no merit to this argument.[36] The Bureau considered the waiver request under the waiver provision in the LCRA, not that in Section 1.3 of the Rules. Section 3(b)(2)(A) of the LCRA permits the Commission to waive the second-adjacent channel spacing requirements applicable to LPFM stations so long as an LPFM applicant establishes that its proposed operations "will not result in interference to any authorized radio service." Razorcake met this test, so the Bureau properly granted its waiver request pursuant to that provision of the LCRA.[37] Thus, it was unnecessary for it to assess the waiver request under the general waiver standard set forth in Section 1.3.

12. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(g) of the Commission's Rules, the Application for Review filed by Educational Media Foundation on July 29, 2016, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[33] AFR at 14-17.

[34] *Id*. at 14-15, *citing Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *WAIT Radio*, 418 F.2d 1153, 1157 (D.C. Cir. 1969); *Greater Media Radio Co., Inc*., Memorandum Opinion and Order, 15 FCC Rcd 7090 (1999); *Paul Ingebrightsen*, Letter Order, 31 FCC Rcd 6946 (OET 2016); *Stoner Broadcasting System, Inc*., Memorandum Opinion and Order, 49 FCC 2d 1011, 1012 (1974).

[35] AFR at ii.

[36] The Commission specifically rejected EMF's suggestion that it require additional showings of LPFM applicants seeking second-adjacent waivers in the *LPFM Sixth Report and Order* and affirmed its decision more recently in another decision. EMF Comments, MM Docket No. 99-25, at 5 (filed May 8, 2012) ("waivers should be granted only in unique circumstances where the applicant can clearly demonstrate that, due to intervening terrain or other similar factors, there is little or no appreciable potential for interference to any nearby FM station"); *LPFM Sixth Report and Order*, 27 FCC Rcd at 15426 para. 74 ("Nothing in the LCRA or its legislative history suggests that Congress intended to require that waiver applicants make additional showings. …. Indeed, to require additional showings of waiver applicants would impose requirements that go beyond those established in the LCRA that we do not believe are either necessary to the implementation of its interference protection goals or consistent with the localism and diversity goals underlying the LPFM service."); *Calvary of Birmingham*, 31 FCC Rcd 5163, 5164 n. 2 (2016) (noting references to the general waiver standard set forth 47 CFR § 1.3, and precedents related to application of that standard, finding Bureau appropriately examined and granted second-adjacent waiver requests under the standard set forth in Section 3(b)(2)(A) of the LCRA and 47 CFR § 73.807(e)(2), and concluding that, because the Bureau found the waivers justified under the statutory waiver standard, the general standard and the precedents related to that standard did not come into play). Accordingly, EMF's contention that this issue is one of first impression for the Commission, AFR at 2, has no basis in fact.

[37] *See Ethyl Corp. v. EPA*, 51 F.3d 1053, 1058-59 (D.C. Cir. 1995) (upholding waiver of certain requirements based solely on satisfaction of statutory waiver criteria).