

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

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

ORDER ON RECONSIDERATION

Adopted: May 21, 2018

Released: May 22, 2018

By the Commission: Commissioner Rosenworcel concurring; Commissioner Clyburn not participating.

I. INTRODUCTION

1. On February 24, 2017, the Commission released its *Second Report and Order* in this proceeding, a continuation of the Commission's ongoing effort to revitalize the AM Radio Service.¹ In the *Second R&O*, the Commission amended the rule establishing where an FM translator rebroadcasting an AM station could be located.² Prometheus Radio Project (Prometheus) filed a Petition for Emergency Partial Stay and Processing Freeze Pending Review of Petition for Reconsideration (Stay Petition),³ and timely filed a Petition for Reconsideration (Reconsideration Petition).⁴ As discussed below, we deny the Reconsideration Petition. In light of that disposition, we dismiss the Stay Petition as moot.

II. BACKGROUND

2. The Commission's rules allow an AM station to rebroadcast its signal on an FM translator subject to geographic limits on where the FM translator may be located. Prior to the *Second R&O*, a cross-service FM translator had to be located such that its 60 dB μ contour was contained within the *lesser* of (a) the AM station's daytime 2 mV/m contour, or (b) a 25-mile radius centered at the AM station's transmitter site.⁵ In the *Notice of Proposed Rulemaking* in this proceeding, the Commission sought comment on possible improvements to the rules pertaining to AM broadcasting in order to

¹ *Revitalization of the AM Radio Service*, Second Report and Order, 32 FCC Rcd 1724 (2017) (*Second R&O*).

² 47 CFR § 74.1201(g). A summary of the *Second R&O* was published in the *Federal Register* on March 9, 2017, announcing that the effective date of the revised rule was April 10, 2017. See 82 Fed. Reg. 13069 (Mar. 9, 2017). See also *Media Bureau Announces Notice of Effective Date of Rule Change Adopted in Second Report and Order in Revitalization of the AM Radio Service Published in Federal Register; Effective Date of Modified Section 74.1201(g) of Commission Rules is April 10, 2017*, Public Notice, 32 FCC Rcd 1908 (MB 2017).

³ Prometheus filed the Stay Petition on April 3, 2017.

⁴ Prometheus filed the Reconsideration Petition on April 10, 2017. REC Networks filed an Opposition to Prometheus Radio Project's Motion for Emergency Stay (REC Stay Opposition) on April 5, 2017. The National Association of Broadcasters (NAB) filed the following responsive pleadings: an April 6, 2017, Opposition to the Petition of Prometheus Radio Project for Immediate Partial Stay and Processing Freeze Pending Review of Petition for Reconsideration; an April 17, 2017, Further Opposition to the Petition of Prometheus Radio Project for Immediate Partial Stay and Processing Freeze Pending Review of Petition for Reconsideration (NAB Stay Opposition); and a May 19, 2017, Opposition to the Petition for Reconsideration of Prometheus Radio Project and Opposition to Motion for Extension of Time (NAB Reconsideration Opposition). Prometheus filed a Reply to Opposition to Petition for Reconsideration on May 30, 2017.

⁵ 47 CFR § 74.1201(g) (2016). This rule was adopted in *Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Report and Order, 24 FCC Rcd 9642 (2009) (*2009 Translator Order*).

revitalize further the AM band.⁶ Several commenters on the *NPRM* requested that the Commission reconsider the rules established in the *2009 Translator Order* for locating cross-service fill-in FM translators.⁷ In the *Further Notice of Proposed Rulemaking* in this proceeding, the Commission proposed to allow locating a cross-service FM fill-in translator at any site where its 60 dBu contour is contained within the *greater* of the AM station's daytime 2 mV/m contour or a 25-mile radius.⁸ The *AMR FNPRM* also proposed that "in no event may the translator's [60 dBu] contour extend beyond a 40-mile (64 km) radius centered at the AM transmitter site."⁹

3. On February 2, 2017, the Office of the Chairman released to the public the text of the draft *Second R&O* that he circulated to the Commissioners for consideration at the February 23, 2017, Open Meeting. This enabled Prometheus and all other interested parties to view the document, which dealt with the *AMR FNPRM*'s proposals, before the Commissioners voted on the item.¹⁰ The draft *Second R&O* did not include the 40-mile limit or any other set distance limit for AM stations with a 2 mV/m contour exceeding 25 miles, stating that refraining from adopting a limit would "be consistent with [the] objective, articulated in the *AMR FNPRM*, to provide flexibility to an AM station using a cross-service translator to serve its core market while not extending its signal beyond the station's core service area," and noting that "the Commission has already held that the 2 mV/m contour in all cases constitutes an AM station's primary service area."¹¹

4. Prometheus, which filed neither comments in response to the *AMR FNPRM* nor replies to any of the comments that were filed, submitted an *ex parte* letter on February 16, 2017, two weeks after the draft *Second R&O* was released to the public and on the eve of the Sunshine Period before the February 23, 2017, Open Meeting.¹² In the February Ex Parte, Prometheus objected to the Commission's failure to adopt the proposed 40-mile limit.¹³ Prometheus argued that refraining from adopting the limit was not a logical outgrowth of the initial proposal, and contended that without the proposed 40-mile limit, expanded siting options for cross-service FM translators would lead to an increase in the short-spacing of

⁶ *Revitalization of the AM Radio Service*, Notice of Proposed Rule Making, 28 FCC Rcd 15221, 15240, para. 45 (2013) ("We therefore encourage parties to submit comments in this docket for the purpose of advancing these and other specific proposals to revitalize the AM service. In particular, we ask parties to provide us with any proposals to improve the long-term future of the AM service.").

⁷ *Revitalization of the AM Radio Service*, First Report and Order, Further Notice of Proposed Rule Making, and Notice of Inquiry, 30 FCC Rcd 12145, 12173-74, para. 67 (2015) (*AMR FNPRM*).

⁸ *Id.* at 12173-74, paras. 66-68.

⁹ *Id.* at 12174, para. 68. The Commission reasoned that the amended rule, including the 40-mile limit, "provides sufficient flexibility to provide useful signal coverage, while not allowing a cross-service fill-in translator to extend the station's coverage beyond its core service area." *Id.*

¹⁰ See Press Release, FCC, FCC Chairman Pai Takes First Step to Increase Transparency of Rulemakings; Pilot Program Will Release Documents to Public for the First Time (Feb. 2, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-343300A1.pdf. The text of the item circulated to the Commissioners and made publicly available on February 2, 2017 is available at: https://apps.fcc.gov/edocs_public/attachmatch/DOC-343304A1.pdf (*Draft Second R&O*).

¹¹ *Draft Second R&O* at para. 4 (citing, as to the primary service area of an AM station, *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Order on Reconsideration, 27 FCC Rcd 12829, 12838, para. 16 (2012)).

¹² *FCC to Hold Open Commission Meeting Thursday, February 23, 2017*, Commission Meeting Agenda, (Feb. 16, 2017); Letter from Andrew J. Schwartzman, Esq., and Drew Simshaw, Esq., to Chairman Ajit Pai, Commissioner Mignon Clyburn, and Commissioner Michael O'Rielly (Feb. 16, 2017) (February Ex Parte) (*available at* <https://ecfsapi.fcc.gov/file/102160585211674/17-02-16%20Prometheus%20Letter%20re%20AM%20Revitalization%20AS%20FILED.pdf>).

¹³ See February Ex Parte.

low-power FM (LPFM) stations from multiple directions, and would significantly restrict incumbent LPFM stations' ability to relocate in the event of lost transmitter sites.¹⁴

5. On February 23, 2017, the Commission adopted the *Second R&O*, including the rejection of the 40-mile limit.¹⁵ The Commission responded to Prometheus's contentions in the February Ex Parte, pointing out that Prometheus neglected to quantify the number of LPFM stations that would be affected, and noting that nothing in the amended translator siting rule would affect the rules mandating minimum spacing or prohibiting contour overlap between FM translators and LPFM stations.¹⁶ Prometheus subsequently filed the Stay Petition and Reconsideration Petition.

III. DISCUSSION

6. On reconsideration, we disagree with Prometheus's objections to the amendment made to the FM translator siting rule, and deny its petition. Prometheus offers two broad arguments in support of its Reconsideration Petition. First, it claims the decision not to adopt a set distance limit on siting of cross-service translators for AM stations with a 2 mV/m contour exceeding 25 miles was not a logical outgrowth of the original proposal as set forth in the *AMR FNPRM*, and therefore removing the limit violates the Administrative Procedure Act (APA). Second, Prometheus claims that the *Second R&O* was arbitrary and capricious, arguing that it did not address the issues raised in the February Ex Parte, it is contrary to the goals of the Local Community Radio Act of 2010 (LCRA), and it falsely equates the public interest value of smaller, commercial AM radio stations with the community-oriented noncommercial educational LPFM service.

7. *Logical Outgrowth.* We reject Prometheus's claim that the Commission's decision declining to impose a set distance limit on siting of cross-service translators for AM stations with a 2 mV/m contour exceeding 25 miles was adopted without adequate notice and opportunity for comment under the APA. Sections 553(b) and (c) of the APA require agencies to give public notice of a proposed rulemaking that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved" and to give interested parties an opportunity to submit comments on the proposal.¹⁷ The notice "need not specify every precise proposal which [the agency] may ultimately adopt as a rule,"¹⁸ and the final rule "need not be the one proposed in the NPRM."¹⁹ Instead, the final rule "need only to be a 'logical outgrowth' of its notice."²⁰ An NPRM satisfies the logical outgrowth test if it "expressly ask[s] for comment on a particular issue or otherwise ma[kes] clear that the agency [is] contemplating a particular change."²¹ As long as parties should have anticipated that the rule ultimately adopted was possible, it is considered a "logical outgrowth" of the original proposal, and there is no violation of the APA's notice requirements.²²

¹⁴ *Id.* at 2-3.

¹⁵ See *Second R&O*, 32 FCC Rcd at 1724, 1727, para. 5.

¹⁶ *Second R&O*, 32 FCC Rcd at 1726-27 n.21.

¹⁷ 5 U.S.C. §§ 553(b)-(c).

¹⁸ *Nuvio Corp. v. FCC*, 473 F.3d 302, 310 (D.C. Cir. 2006) (citing *Action for Children's Television v. FCC*, 564 F.2d 458, 470 (D.C. Cir. 1977) (internal quotation marks and citations omitted)).

¹⁹ *Agape Church, Inc. v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013).

²⁰ *Covad Communications Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006).

²¹ *CSX Transportation, Inc. v. Surface Transportation Board*, 584 F.3d 1076, 1081 (D.C. Cir. 2009). See also *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 700 (D.C. Cir. 2016) (*United States Telecom*).

²² See *Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 951-52 (D.C. Cir. 2004) (*Northeast Maryland*).

8. As an initial matter, we note that Prometheus mischaracterizes the Commission's action as "removing" the 40-mile limit from Section 74.1201(g),²³ as though that proposed provision already existed in the rule and the proposal contemplated deleting it. In fact, the limit was one of two components of the *AMR FNPRM* proposal amending the former rule: first, to change the word *lesser* to *greater* with regard to the alternative criteria for siting cross-service translators; and second, to impose the 40-mile limit, which would be a new addition to the rule. In the *AMR FNPRM*, the Commission sought comment on the entire proposed amendment, including "any costs that commenters believe are likely to arise from the proposal."²⁴ As recognized in the *Second R&O*, a number of commenters in response to the *AMR FNPRM* described the costs of a set distance limit for AM stations with a 2 mV/m contour exceeding 25 miles, and explained why the Commission should allow cross-service translators associated with such stations to be located farther than 40 miles from an AM station's transmitter.²⁵ In the end, the Commission adopted the first component of the proposal (changing the word "lesser" to "greater") but decided not to adopt the second component, (a set distance limit for AM stations with a 2 mV/m contour exceeding 25 miles).²⁶ "One logical outgrowth of a proposal is surely . . . to refrain from taking the proposed step."²⁷ The Commission's NPRM need only "fairly apprise interested persons of the 'subjects and issues' involved in the rulemaking."²⁸

9. Our conclusion that the Commission's decision was a logical outgrowth of the original proposal is bolstered by the fact that the comments filed in response to the *AMR FNPRM* demonstrate that parties anticipated that the Commission might choose not to adopt any set distance limit for AM stations with a 2 mV/m contour exceeding 25 miles.²⁹ Commenters foresaw a possible Commission decision to omit the set distance limit, inasmuch as they advocated, in their comments, that the Commission not adopt

²³ See Reconsideration Petition at 5, 8.

²⁴ See *AMR FNPRM*, 30 FCC Rcd at 12174, para. 68.

²⁵ *Second R&O*, 32 FCC Rcd at 1725, para. 3 and nn.12-13. See, e.g., Crawford Broadcasting Co. (Crawford) Comments at 4-5 ("There are cases where an AM station's 2 mV/m contour extends well beyond 40 miles and significant population clusters are located in those areas beyond 40 miles but within the 2 mV/m contour. These population clusters are, in some cases, key to a station's economic viability."); NAB Comments at 1-4 (noting, *inter alia*, that the proposed 40-mile limit would disadvantage the many listeners in substantial population centers located 41 miles or more away from stations' transmitter sites, but within the station's 2 mV/m contour); Univision Local Media, Inc., (Univision) Comments at 10-11 (explaining that a 40-mile cap "would create unique service challenges for potential listeners" who reside beyond the 40-mile limit but within the 2 mV/m daytime contour, backed by a study demonstrating the 40-mile cap's preclusive effect on usable nighttime service provided by two Univision AM stations); du Treil, Lundin & Rackley, Inc., (DLR) Comments at 7 (explaining that the 40-mile cap is not "necessary or desirable" because there "are cases where directional antenna pattern shapes and/or ground conductivity result in AM service to areas that would be restricted from receiving FM translator service if this were a requirement").

²⁶ *Second R&O*, 32 FCC Rcd at 1726 and n.21 (citing *Northeast Maryland*, 358 F. 3d at 951-52 ("Agencies are free—indeed they are encouraged—to modify proposed rules as a result of comments they receive."))

²⁷ *New York v. U.S. EPA*, 413 F.3d 3, 44 (2005) (citing *Am. Iron and Steel Inst. v. EPA*, 886 F.2d 390, 400 (D.C. Cir. 1989)). See also *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174-75 (2007) (agency decision to place workers inside the proposed exemption, rather than outside as proposed, was "reasonably foreseeable" because notice was "simply a proposal" that the agency was "considering," and "might choose to adopt or to withdraw"); *Arizona Public Service Co. v. EPA*, 211 F.3d 1280, 1299-1300 (D.C. Cir. 2000) (concluding that "any reasonable party should have understood," in light of public comment, that Environmental Protection Agency might reach opposite conclusion to original proposal; agency conclusion was "not wholly unrelated or surprisingly distant" from original proposal but a "change of heart on this issue [that] only demonstrates the value of the comments it received").

²⁸ *Air Transport Ass'n of America v. FAA*, 169 F.3d 1, 6-7 (D.C. Cir. 1999).

²⁹ See, e.g., *United States Telecom*, 825 F.3d at 712 (comments supported interpreting the text of the NPRM as providing notice that a particular outcome was a possibility because "interested parties interpreted the NPRM as presenting just that possibility"); *Northeast Maryland*, 358 F.3d at 952 (comments filed in support of and in opposition to proposed distinction demonstrated that interested parties understood issues and stakes).

its proposal of a set distance limit for AM stations with a 2 mV/m contour exceeding 25 miles.³⁰ We thus find that the Commission's decision not to adopt a set distance limit was a logical outgrowth of the original proposal, and that Prometheus's rights were not abridged for lack of notice.³¹

10. *Arbitrary and Capricious.* We next reject Prometheus's argument that the decision in the *Second R&O* declining to impose a set distance limit on siting of cross-service translators for AM stations with a 2 mV/m contour exceeding 25 miles was arbitrary and capricious. Despite Prometheus's claims, the Commission did not fail to account for any adverse impact that the Order will have on LPFM stations. Rather, the Commission found that the public interest benefits of providing greater flexibility for AM stations to locate cross-service translators, even beyond the 40-mile limit, were significant and that nothing in the record, including Prometheus's February Ex Parte, demonstrated harm to LPFM stations that would outweigh these benefits. Nothing in Prometheus's Petition undermines this conclusion.

11. As an initial matter, Prometheus does not dispute the significant benefits of providing greater flexibility for AM stations to locate cross-service translators.³² Instead, Prometheus devotes much of its Reconsideration Petition to its contention that the possibility of siting cross-service translators beyond 40 miles from an AM transmitter will result in numerous such translators locating near existing LPFM stations, thereby "boxing in" LPFM stations and limiting their ability to relocate in the event of

³⁰ See *supra* note 25. See, e.g., Crawford Comments at 4-5 (encouraging Commission to adopt proposal without the 40-mile restriction); NAB Comments at 3 ("proposed 40-mile cap should be eliminated as unnecessary"); Univision Comments at 10 ("the proposed 40-mile (64 km) contour limitation is unnecessary"); DLR Comments at 7 (40-mile cap is not "necessary or desirable").

³¹ We also reject Prometheus's claim, as part of its logical outgrowth argument, that the *Second R&O* "incorrectly conflates" the concepts of "core service area" and "primary service area." Reconsideration Petition at 5-6. See also *id.* at 7 (claiming that the Commission abandoned the concept of the "core service" or "core market" area without notice). Prometheus cites to the original 2009 *Report and Order* establishing AM broadcasters' ability to re-broadcast programming over FM translator stations, which restricted cross-service translator siting to no more than 25 miles from the AM transmitter (or within the station's 2 mV/m contour when the station's nominal power is 2.5 kW or less) in order to ensure that such translators would be restricted to the AM station's "core service" or "core market" area. 2009 *Translator Order*, 24 FCC Rcd at 9652, 9658-59, paras. 22, 38. In the *FNPRM*, the Commission stated that AM stations needed additional flexibility to site cross-service translators. See *AMR FNPRM*, 30 FCC Rcd at 12174, para. 68. On the other hand, the Commission also stated that it "continue[d] to desire to limit cross-service translator use to an AM station's core market." *Id.* The Commission sought comment on whether a 40-mile limit would provide AM stations with sufficient flexibility while preventing a fill-in translator from extending its primary station's coverage beyond its "core service area." *Id.* Thus, the Commission put interested parties on notice that it was contemplating expanding what it considered to be the "core service" or "core market" area. Based on the comments received, see *supra* note 25, the Commission determined a "core service" or "core market" area limited to a 40-mile radius from the AM transmitter was unduly restrictive and that the better approach based on the record would be to allow stations to site cross-service translators anywhere in their 2 mV/m contour, which the Commission previously determined is an AM station's "primary service area." *Second R&O*, 32 FCC Rcd at 1726 (citing *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Order on Reconsideration, 27 FCC Rcd 12829, 12838, para. 16 (2012)).

³² See *supra* note 25.

future loss of a transmitter site.³³ We agree with NAB that this argument is speculative at best.³⁴ As Prometheus explains, a ten-mile radius extension beyond 40 miles yields a 56 percent increase in the area to which a cross-service translator can locate.³⁵ In some circumstances, this expanded area might result in a cross-service translator moving closer to an LPFM station, but in other circumstances it might result in a cross-service translator moving farther away from the LPFM station. That is, Prometheus disregards the fact that the larger area also increases the possible translator sites that are *not* adjacent to incumbent LPFM stations.³⁶ In other words, increasing the area relative to an AM transmitter in which a cross-service translator can be located also increases the area in which a translator need *not* locate. In addition, as NAB suggests, the move of a cross-service translator to a greater distance from an AM transmitter could open up a relocation opportunity for an LPFM station closer to a city center.³⁷ Given the vast expanses Prometheus claims will now be available for translator sites, the probability that cross-service translators will more often gravitate toward LPFM stations rather than away is highly conjectural.³⁸

12. Although Prometheus contends that LPFM stations are required by circumstances to relocate more often than full-power stations and thus will be particularly impacted by the potential for “boxing in,” it offers scant evidence in support of this claim. Its showing on this point consists of the observation that, in 2016, proportionally almost three times as many LPFM stations filed modification applications as did full-power stations.³⁹ Modification applications, however, can be filed for numerous reasons other than station relocation, such as changes in antenna or antenna height, channel changes, correction of coordinates, or changes in effective radiated power. Thus, the mere fact that LPFM stations file numerous modification applications does not, of itself, support the conclusion that LPFM stations undertake a disproportionate number of station relocations, and the record does not support this conclusion. Prometheus does not indicate how many of the modification applicants it references proactively sought station relocations, versus involuntary relocations. It also does not present evidence that LPFM stations are more prone to forced relocations than other classes of broadcast station, beyond its

³³ Reconsideration Petition at 12 (“The concerns raised by Prometheus relate to the problem of translators that will inevitably be tangent to an LPFM, where those translators have contours that nearly touch but do not overlap the LPFM contour. 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 there is no immediate interference.”).

³⁴ NAB Reconsideration Opposition at 7. *See also* NAB Stay Opposition at 7. On May 11, 2017, Prometheus filed a Motion for Extension of Time in which to file a Reply to the NAB Reconsideration Opposition, in which it stated that it “anticipates that there will be multiple oppositions filed to which it will need to reply.” Motion for Extension of Time at 1. In fact, only one party opposed the Reconsideration Petition, with two oppositions to the Stay Petition. Consequently, Prometheus was able to file a timely Reply to Opposition to Petition for Reconsideration on May 30, 2017 (Reconsideration Reply). We thus dismiss the Motion for Extension of Time as moot.

³⁵ Reconsideration Petition at 10 (increase of ten miles’ radius over the proposed 40-mile radius increases area from 5,026 square miles to 7,854 square miles).

³⁶ To the extent Prometheus assumes that any application establishing or relocating a cross-service translator necessarily abuts the contour of an LPFM station in the hundreds of square miles available, this argument appears to assume that LPFM stations are uniformly distributed throughout the country. The record provides no support for such an assumption.

³⁷ NAB Stay Opposition at 7-8.

³⁸ Further, to the extent that Prometheus claims that directional AM stations have even greater distances from the transmitter to which cross-service translators can locate (Reconsideration Petition at 10), it neglects to mention that the directionality limits the area to the major lobes of the directional 2 mV/m contour. The increased distances in such cases lie only along certain azimuths. Thus, the impact of translator relocation beyond 40 miles from the AM transmitter in such instances would be limited to those LPFM stations lying in the direction of the major lobes.

³⁹ Reconsideration Petition at 13. Prometheus states that 361 such applications were filed from among 2,109 licensed LPFM stations, or 17 percent, compared to 640 such applications filed from among 11,258 full-power stations, or 5.7 percent.

unsupported assumptions regarding filed applications and generalizations as to the financial resources and circumstances of LPFM stations as a class.⁴⁰

13. The “boxing in” of incumbent LPFM stations that Prometheus claims is “inevitable” also underlies its next contention, that failure to adopt a set distance limit on siting of cross-service translators is contrary to the goals of the Local Community Radio Act of 2010.⁴¹ Prometheus contends that the Commission’s action would “favor translators to the detriment of LPFM,” and would “have a dramatic and adverse effect on the listeners of affected LPFM stations.”⁴² Again, however, this contention presupposes that declining to adopt a set distance limit on siting of cross-service translators for AM stations with a 2 mV/m contour exceeding 25 miles will necessarily favor “expansion of commercial stations at the expense of non-commercial incumbent LPFM stations,” irreparably harming the latter by inhibiting their ability to relocate.⁴³ For the reasons discussed above, we conclude that Prometheus has failed to demonstrate that the unusual combination of events that might result in harm to LPFM stations is likely to occur (that is, the LPFM station loses its current site; it has no relocation opportunities; and the lack of relocation opportunities is due to the siting of cross-service translators beyond 40 miles from their primary AM transmitters).⁴⁴ Prometheus has failed to demonstrate that the remote possibility of any harm to LPFM outweighs the substantial benefits of increased flexibility for cross-service translators.

14. Prometheus claims that the Commission’s decision not to adopt a set distance limit on siting of cross-service translators violates the LCRA, which requires the Commission, when licensing new FM translator stations, FM booster stations, and low-power FM stations to ensure that the (1) “licenses are available to FM translator stations, FM booster stations, and low power FM stations”; and (2) such decisions are made “based on the needs of the local community.”⁴⁵ As an initial matter, the Commission does not have a statutory obligation under the LCRA or any other statute to prefer possible LPFM protection over revitalization of the AM radio service. In addition, the *Second R&O* did not

⁴⁰ See, e.g., *id.* at 2 (“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.”); *id.* at 8 (“As frequent as [station relocations are] for full-power commercial broadcasters, the need to move is much more common for LPFM stations.”). Prometheus lists further circumstances that it claims necessitate more frequent LPFM station relocations, but does not cite specific occurrences. The listed circumstances include: inability to rent transmitter/antenna space on cell towers or established broadcast towers, siting instead on smaller buildings more likely to be torn down or converted to other uses; lack of negotiating power with landlords that would enable long-term, stable leases; and desire to relocate in order to improve service or enter into more affordable or viable leases. *Id.* at 12-13.

⁴¹ Pub. L. 111-371, 124 Stat. 4072 (2011) (LCRA).

⁴² Reconsideration Petition at 14-15, citing LCRA.

⁴³ Reconsideration Petition at 16.

⁴⁴ REC Networks, in its opposition, while stipulating that “some of the [previously modified and relocated] translators have substantially impacted a small number of LPFM stations,” nevertheless notes that of the FM translator modification applications filed in the 2016 window allowing cross-service translators to be relocated up to 250 miles in order to rebroadcast AM stations, “many of them are in areas where an LPFM station was not impacted.” REC Stay Opposition at 2. We note that LPFM stations, unlike full-power FM stations or FM translators, have the ability to propose, as a minor modification, a move to any frequency on a showing of reduced interference. 47 CFR § 73.870(a)(1). This affords LPFM licensees, in one respect, even more flexibility than other FM station operators, insofar as an LPFM station forced to relocate could avoid interference at a new site from a translator or other FM station by means of a simple channel change.

⁴⁵ Reconsideration Petition at 14. Section 5 of the LCRA states:

The Federal Communications Commission, when licensing new FM translator stations, FM booster stations, and low-power FM stations, shall ensure that (1) licenses are available to FM translator stations, FM booster stations, and low power FM stations; (2) such decisions are made based on the needs of the local community; and (3) FM translator stations, FM booster stations, and low- power FM stations remain equal in status and secondary to existing and modified full-service FM stations.

involve a specific local community whose needs could be evaluated. To the extent the Commission is obliged to consider local community needs in the abstract, the Commission has stated that FM translators and LPFM stations “both serve the needs of communities, albeit in different ways.”⁴⁶ While the Commission went on to note that LPFM stations undertake specific commitments to local programming,⁴⁷ in deciding to offer AM stations more flexibility in siting fill-in cross-service translators, including eliminating a set distance limit, the Commission recognized that such flexibility was in the public interest, as it allows an AM station to improve its program service to listeners in the local communities within its primary service contour. Given that the record, as discussed above, does not establish the threat to LPFM licensing that Prometheus posits, and that the *Second R&O* addresses community needs by allowing improved primary service by AM broadcasters, the requirements of Section 5 of the LCRA have been met.

15. Finally, Prometheus argues that the *Second R&O* draws a “false equivalence” between commercial AM stations and LPFM stations. This overstates the Commission’s position, as expressed in the *Second R&O*.⁴⁸ The Commission did not suggest that commercial stations are a “substitute to achieving the goals of” noncommercial stations, as Prometheus argues.⁴⁹ Rather, the Commission noted that “many if not most of the stations benefiting from the amended rule will be smaller Class C and D AM stations, many of which have restricted or no nighttime power, that also share with the LPFM service a focus on community-based programming.”⁵⁰ This observation was in response to Prometheus’s argument that the Commission’s action was “favoring expansion of commercial stations, many of which are controlled by large national ownership groups, at the expense of non-commercial local LPFM.”⁵¹ In any event, elimination of the set distance limit on siting of cross-service translators does not favor expansion of commercial stations at the expense of noncommercial stations. As an initial matter, the increased flexibility in siting of cross-service translators will benefit both commercial and noncommercial AM stations. In addition, as noted above, the potential for harm to noncommercial LPFM stations resulting from this increased flexibility is remote.

16. For all of the above reasons, we reject Prometheus’s contention that the Commission’s decision not to adopt a set distance limit on siting of cross-service translators for AM stations with a 2 mV/m contour exceeding 25 miles was arbitrary and capricious. We therefore deny the Reconsideration Petition. Because we are denying the Reconsideration Petition, Prometheus’s Stay Petition is moot and we dismiss it.

IV. ORDERING CLAUSES

17. Accordingly, **IT IS ORDERED** that the Petition for Reconsideration filed by Prometheus on April 10, 2017, **IS DENIED**.

18. **IT IS FURTHER ORDERED** that the Petition for Emergency Partial Stay and Processing Freeze Pending Review of Petition for Reconsideration filed by Prometheus on April 3, 2017, **IS DISMISSED AS MOOT**.

⁴⁶ *Creation of a Low Power FM Radio Service*, Fourth Report and Order and Third Order on Reconsideration, 27 FCC Rcd 3364, 3372, para. 18 (2012).

⁴⁷ *Id.* at 3373, para. 18.

⁴⁸ *Second R&O*, 32 FCC Rcd at 1726-27 n.21.

⁴⁹ Reconsideration Petition at 17.

⁵⁰ *Second R&O*, 32 FCC Rcd at 1726-27 n.21.

⁵¹ February Ex Parte at 3. The REC Stay Opposition demonstrates that Prometheus’s assessment is not necessarily shared by all members of the LPFM community. REC Networks states that it “not only advocates for LPFM but [it] will take into consideration the interests of rural ‘mom and pop’ broadcast stations including AM broadcast stations, especially those that are Class C and D stations. These small-town Class C and D AM stations are more likely to be owned by a local community, small group or minority entity.” REC Stay Opposition at 1.

19. **IT IS FURTHER ORDERED** that the Motion for Extension of Time filed by Prometheus on May 11, 2017, **IS DISMISSED AS MOOT**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary