

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

In the Matter of
Amendments of Parts 73 and 74 to Improve the
Low Power FM Radio Service Technical Rules
MB Docket No. 19-193

ORDER ON RECONSIDERATION

Adopted: June 15, 2021

Released: June 16, 2021

By the Commission:

I. INTRODUCTION

1. In this Order on Reconsideration, we consider two petitions seeking reconsideration of the Commission’s Low Power FM (LPFM) Technical Rules Order.1 This Order adopted rule changes designed to improve the LPFM service and provide LPFM stations with greater flexibility. For the reasons discussed below, we dismiss, and in the alternative, deny the FBL Petition and dismiss in part and deny in part the Urick Petition. In addition, we restore text that was inadvertently deleted from an existing LPFM rule.

II. BACKGROUND

2. The Commission established the LPFM service in 2000 as a secondary, noncommercial radio service with a maximum effective radiated power (ERP) of 100 watts and simple engineering requirements. This service was created to facilitate new noncommercial voices with limited expertise and small budgets that would be able to build and operate community-oriented stations serving highly localized areas.2 The Commission has since modified the LPFM rules several times.3 The Order, which responded to a petition for rulemaking from REC Networks (REC), adopted rules to improve LPFM

1 See Amendments of Parts 73 and 74 to Improve the Low Power FM Radio Service Technical Rules, Report and Order, MB Docket Nos. 19-191, 17-105, 35 FCC Rcd 4115 (2020) (Order); Todd Urick (Common Frequency) and Paul Bame (Prometheus Radio Project) (previously commenting as “LPFM/NCE Community-Radio Engineer Advocates” or “LPFM Advocates”), along with Peter Gray (KFZR-LP), Makeda Dread Cheatom (KVIB-LP), Brad Johnson (KGIG-LP), David Stepanyuk (KIEV-LP), and Andy Hansen-Smith (KCFZ-LP), Petition for Reconsideration (rec. July 13, 2020) at 1 (Urick Petition); and Foundation for a Beautiful Life, Inc. (FBL) Petition for Reconsideration (rec. May 26, 2020) (FBL Petition).

2 See generally Creation of a Low Power Radio Service, MM Docket No. 99-25, Report and Order, 15 FCC Rcd 2205, 2207-09, paras. 3-6 (2000) (LPFM Creation Order).

3 See Creation of a Low Power Radio Service, Memorandum Opinion and Order on Reconsideration, 15 FCC Rcd 19208 (2000); modified, Second Report and Order, 16 FCC Rcd 8026 (2001), recon. in part, Second Order on Recon. and Further Notice of Proposed Rulemaking, 20 FCC Rcd 6763 (2005); modified, Third Report and Order and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 21912 (2007); review denied in part and dismissed in part, National Assoc’n of Broad. v. FCC, 569 F.3d 416 (D.C. Cir. 2009); modified, Fourth Report and Order and Third Order on Recon., 27 FCC Rcd 3364 (2012); clarified, Fifth Report and Order, Fourth Further Notice of Proposed Rulemaking and Fourth Order on Recon., 27 FCC Rcd 3315 (2012); clarified, Fifth Order on Recon. and Sixth Report and Order, 27 FCC Rcd 15402 (2012) (Sixth R&O); recon. granted in part, Sixth Order on Recon., 28 FCC Rcd 14489 (2013). See also Reexamination of the Comparative Standards and Procedures for Licensing Noncommercial Educational Broadcast Stations and Low Power FM Stations, Report and Order, MB Docket No.19-3, 34 FCC Rcd 12519 (2019) (making non-technical rule changes).

reception and options for relocation while maintaining interference protection to other radio stations and the core LPFM goals of diversity and localism.

3. Specifically, the Order expanded permissible uses of directional antennas, redefined LPFM “minor” changes, and allowed LPFM cross-ownership of FM booster stations. The Order also considered but did not adopt other commenter suggestions. Most notably, the Order did not adopt proposals to increase LPFM maximum power from 100 watts to 250 watts and to eliminate a requirement that LPFM stations use transmitters certified for LPFM use by an outside lab.<sup>4</sup>

4. Two parties filed Petitions for Reconsideration. The first was Foundation for a Beautiful Life, a former permittee that seeks reconsideration of the Order’s determination that, in accordance with general practice, the new rules will apply only to cases not already decided by staff as of the rules’ effective date. REC filed an opposition.<sup>5</sup> The second petition was a consolidated filing from Todd Urick, along with six other individuals associated with LPFM stations. The Urick Petitioners seek reconsideration of the Order’s rejection of the proposal to increase maximum ERP to 250 watts, and two actions aimed at preventing interference: (1) adoption of safeguards in connection with the expanded optional use of directional antennas; and (2) retention of the longstanding requirement that LPFM stations use transmitters certified for LPFM use. The National Association of Broadcasters (NAB) filed an opposition against creation of the LP-250 service, and REC filed in support of the expanded service, but against any immediate changes to the transmitter certification requirements.<sup>6</sup>

### III. DISCUSSION

#### A. Urick Petition

5. We affirm all aspects of the Order raised in the Urick Petition. We dismiss as procedurally infirm the request to reconsider the decision not to increase the maximum power of LPFM stations. We also deny the Urick Petition requests regarding the requirement of proofs of performance for certain LPFM directional antennas and the continued requirement that LPFM transmitters be certified for LPFM use.

6. *LPFM Maximum Power.* We dismiss the Urick Petition’s arguments in support of an LPFM power increase to a maximum ERP of 250 Watts (LP-250) and deny the claim that the Commission failed to adequately explain or support its rejection of the LP-250 proposal. Urick’s main contention is that the Commission failed to address Reply Comments in which it argued in support of REC’s proposed establishment of an LP-250 service and addressed concerns that the Commission expressed in the Notice of Proposed Rulemaking (NPRM)<sup>7</sup> in this proceeding.<sup>8</sup>

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<sup>4</sup> See Order, 35 FCC Rcd at 4129-31, 4137-38 paras. 36-41, 55-56.

<sup>5</sup> REC Opposition to Petition for Reconsideration (rec. July 28, 2020) at 1-5 (REC Opposition).

<sup>6</sup> NAB Opposition to Petition for Reconsideration (rec. Sept. 4, 2020); REC Opposition at 5-7 (expressing agreement on LP-250 but concern about elimination of certification requirement absent a Notice of Inquiry to gather more information) (REC Opposition).

<sup>7</sup> *Amendments of Parts 73 and 74 to Improve the Low Power FM Radio Service Technical Rules*, MB Docket Nos. 19-191, 17-105, Notice of Proposed Rulemaking, 34 FCC Rcd 6537 (2019) (NPRM).

<sup>8</sup> Urick Petition at 2. The Urick Petitioners are referencing the CREA Reply Comments on NPRM, which were filed jointly by Paul Bame and Todd Urick (who are among the Urick Petitioners) along with three other LPFM engineers who did not join in the Urick Petition. Other individuals who have since joined the Urick Petitioners filed individual comments and/or replies to the NPRM including Peter Gray (KFZR-LP), Makeda Dread Cheatom (KVIB-LP), Brad Johnson (KGIG-LP), David Stepanyuk (KIEV-LP), and Andy Hansen-Smith (KCFZ-LP). For purposes of this reconsideration proceeding, we will hereinafter refer to the prior commenters individually and collectively as the “LPFM Commenters.”

7. The Commission may dismiss a petition for reconsideration that presents arguments previously considered and rejected.<sup>9</sup> We find the Commission considered the full record concerning the merits and disadvantages of an LP-250 service, including REC’s proposal as well as commenter support for and opposition to the REC proposal and other aspects of an LP-250 service.<sup>10</sup> The Urick Petition reiterates many of the same arguments, and we therefore dismiss it as procedurally infirm.<sup>11</sup>

8. We also uphold on the merits the Commission’s decision not to adopt the LP-250 proposal. We disagree with the Urick Petitioners that the Commission did not adequately explain or support its rejection of the LP-250 proposal and that this aspect of the Order therefore violated the APA.<sup>12</sup> Under APA standards, an agency must “examine the relevant data and articulate a satisfactory explanation for its action.”<sup>13</sup> The agency is entitled to deference under this standard, and simply must act “within a zone of reasonableness,” having “reasonably considered the relevant issues and reasonably explained the decision.”<sup>14</sup> The Order focused on three reasons for declining to implement the proposed power increase, finding: (1) it added complexity in a service designed to be simple, increasing costs for applicants and processing burdens for the Commission; (2) inconsistency with Congress’ intent in the Local Community Radio Act of 2010 (LCRA) and with the Commission’s intent when establishing the

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<sup>9</sup> See 47 CFR § 1.429(l)(3) (providing for dismissal of a petition for reconsideration that plainly does not warrant consideration by the Commission, for example, “if the petition rel[ies] on arguments that have been fully considered and rejected by the Commission within the same proceeding”); *Connect America Fund*, WC Docket No. 10-90, Sixth Order on Recon. and Memorandum Opinion and Order, 28 FCC Rcd 2572, 2573, para. 3 (2013).

<sup>10</sup> See Order, 35 FCC Rcd at 4129-30, paras. 36-41. The Urick Petition repeats arguments that: (1) it would be an error to choose simplicity of rules over efficacy of LPM coverage; (2) previous proceedings recognized potential benefits of LP-250 service but stated that the matter required further study; (3) LP-250 service is not in conflict with the LCRA because the Commission previously recognized that the LCRA contains no power limit; (4) an LP-250 service would further LCRA sections 5(1) and 5(2) by counterbalancing LPM spectrum losses due to prior grants of FM translator applications; (5) the Commission’s reading of “equal in status” language in LCRA section 5(3) as not requiring identical licensing procedures for LPM and FM translator stations, does not preclude establishment of an LP-250 service; (6) there is substantial commenter support for LP-250; and (7) the Commission has taken action to boost the viability of other broadcast services. See Urick Petition at 2-12; Community Radio Engineer Advocates (CREA), Reply Comments on Proposed Rulemaking (rec. Nov. 4, 2019) at 4-10 (CREA Reply Comments on NRPM). The Commission specifically discussed several of these arguments, including (1), (5) and (7). See Order, 35 FCC Rcd at nn.96, 104, 110, 145. The Commission also addressed arguments (2), (3), (4) and (6) in responding to other arguments raised in the record. See Order, 35 FCC Rcd at 4129-4130, paras 38-39 (acknowledging that the LCRA “does not contain any language limiting LPM power levels,” but noting that REC’s revised proposal failed to address the Commission’s LCRA concerns because the proposal substantially increased power without any concomitant increase in spacing to other stations or showing that the resulting smaller buffer zone would be consistent with LCRA spacing requirements), 41 and 52-54.

<sup>11</sup> We note that REC itself did not seek reconsideration of the Order. Rather, it filed a new Petition for Rulemaking to present a revised, more simplified LP-250 proposal. See REC Petition for Rulemaking, Amendment of Parts 73 and 74 of the Commission’s Rules to Create a Second Class of Service for Low Power FM Broadcast Stations (rec. May 28, 2020). The Order specifically did not preclude REC or any other party from filing such new LP-250 proposals. See Order, 35 FCC Rcd at 4131, para. 40, n.107. We note that the Petition was properly filed and responds to some of the Commission’s concerns with the earlier non-adopted proposals. As such, the Consumer and Regulatory Affairs Bureau has recently put the new proposal out for comment. *Petition for Rulemakings Filed*, Public Notice, Report No. 3175 (rel. May 24, 2021).

<sup>12</sup> Urick Petition at 8-9.

<sup>13</sup> *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (*State Farm*).

<sup>14</sup> *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021).

LPFM service;<sup>15</sup> and (3) lack of changed circumstances since the Commission last declined to increase LPFM power.<sup>16</sup>

9. Specifically, we find that the Commission explained in the NPRM why it was tentatively rejecting REC's original LP-250 proposal.<sup>17</sup> In response, full power broadcasters supported that tentative decision, but LPFM organizations urged the Commission to endorse REC's modified proposal. In the Order, the Commission acknowledged that many commenters, including some LPFM Commenters who have since become Urick Petitioners, strongly desired a power increase.<sup>18</sup> In deciding to keep the existing 100-watt maximum power level, the Commission explained that REC's revision of its original proposal and reliance on public support for a power increase and a better understanding of an interference phenomenon described as the "foothills effect" did not overcome continued concerns. The Commission determined that it was not appropriate to alter the LPFM service's simplicity, which conserves both private and public resources; that there had not been any substantial change in circumstances since the Commission last declined to increase LPFM power; and that a power increase without any concomitant change in LPFM spacing would not satisfy the LCRA.<sup>19</sup>

10. We note that the Urick Petition contains two arguments that build upon earlier comments. First, the Urick Petitioners expand their contention that the Commission has not provided relief to LPFM stations by disputing a statement in the Order that the Commission has made it possible for LPFM stations to improve their signals by allowing LPFM cross-ownership of FM translators. Urick argues that potential translator use is not meaningful because the Commission has not yet opened a filing window for LPFM stations to apply for such translators.<sup>20</sup> The Order, however, explicitly recognized that the Commission had not yet provided such a window.<sup>21</sup> At the same time, the Commission expressed a belief that once LPFM stations have an opportunity to apply for and implement translator use there should be significant improvements in many of the reception issues that have caused them to seek a power increase.<sup>22</sup> The Urick Petition contains no information that would cause us to reach a different conclusion. Second, the Urick Petition also seeks reconsideration of the Commission's rejection of REC's suggested replacement of the current interference protection based on mileage separation with one based on engineering studies demonstrating no contour overlap with other stations. Urick contends that

<sup>15</sup> *Id.* at n.4, citing *Sixth R&O*, 27 FCC Rcd at 15424, para. 70, *implementing Local Community Radio Act of 2010*, Pub. L. No. 111-371, 124 Stat. 4072 (2011).

<sup>16</sup> *Id.* at paras. 36, 41.

<sup>17</sup> NPRM, 34 FCC Rcd at 6539, para. 3, n.15. In response to the problems the Commission identified and to satisfy the LCRA, REC subsequently revised its initial proposal to specify that LP-250 stations would use existing LP-100 spacings rather than obsolete LP-10 spacings. *See* Order, 35 FCC Rcd at 4129, para. 38.

<sup>18</sup> Order, 35 FCC Rcd at 4131, para. 41, n.108.

<sup>19</sup> *See* Order, 35 FCC Rcd at 4129-31, nn.96, 100, 104, 110. For example, the Order acknowledged the LPFM Commenters' views that good LPFM service is more important than simplicity and that some LPFM applicants would, therefore, prefer to pay for engineering assistance to prepare contour-based interference studies than to use simpler distance separation calculations that applicants can perform themselves but that may identify fewer potential site locations. *See* Order, 35 FCC Rcd at 4130, n.104; Urick Petition at 4. Similarly, the Order acknowledged that the LCRA does not contain any language limiting LPFM power levels but found that the commenters had not shown that the LP-250 proposal's reduction of an existing 20-kilometer buffer zone would be consistent with LCRA spacing requirements. *See* Order, 35 FCC Rcd at 4130, para. 39, n.102, citing LCRA § 3(b)(1) ("The Federal Communications Commission shall not amend its rules to reduce the minimum co-channel and first- and second-adjacent channel distance separation requirements in effect on the date of enactment of this Act between--(A) low-power FM stations; and (B) full-service FM stations.").

<sup>20</sup> *See* Urick Petition at 11, citing Order, 35 FCC Rcd 4129, para. 36.

<sup>21</sup> *See* Order, 35 FCC Rcd at 4129, n.93.

<sup>22</sup> *Id.*

contour protection showings would not be overly complex as evidenced by the Commission's use of that method for LPFM applicants seeking second-adjacent waivers for short-spaced facilities.<sup>23</sup> The Order adequately addressed that point, however, as raised by REC.<sup>24</sup> Specifically, the Commission distinguished the service-wide contour studies that would be required from all applicants within an entire new class of LPFM stations from waivers, which involve fewer applicants in more limited circumstances.<sup>25</sup> Urick's repetition of REC's suggestion provides no basis for a different decision.

11. *Proofs of Performance.* We affirm the requirement that LPFM applicants using directional antennas must, absent a specific exemption provided by the new rules, submit engineering measurements with their license applications to prove antenna performance. We are not persuaded that the Commission erred in requiring such proofs for directional LPFM stations, as it does for directional full power FM stations.<sup>26</sup> As an initial matter, the Order noted that this requirement would affect relatively few LPFM stations because the reasons for LPFM stations to operate directionally, for purposes not already exempted,<sup>27</sup> are limited.<sup>28</sup> We are not persuaded that it is inconsistent to allow LPFM omnidirectional antennas to operate without any proofs of performance but require proofs for antennas that radiate significantly less power in a particular direction.<sup>29</sup> The Order acknowledged that directional antennas address potential interference by reducing signal strength in a particular direction.<sup>30</sup> In fact, stations employ directional antennas primarily because they need to reduce signal strength in the direction of another station that would otherwise receive interference. These antennas, whether custom-designed or off-the-shelf models, must be oriented properly or they will not ameliorate such potential interference. Testing the equipment prior to licensure ensures that the facilities are producing the authorized signal pattern as installed and that the pattern has not been altered, for example, by improper orientation of the antenna or installation that is otherwise not in full compliance with manufacturer instructions. In the Commission's experience, many factors can affect the installation of directional antennas.<sup>31</sup> As such, we cannot presume that all directional antennas will be installed properly and operate as expected without such testing. Thus, the Commission has generally required broadcasters to provide measurements to prove antenna performance when licensing directional facilities.<sup>32</sup>

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<sup>23</sup> See Urick Petition at 12, citing Order, 35 FCC Rcd at 4129-4131, paras. 38-41.

<sup>24</sup> See Order, 35 FCC Rcd at 4130, para. 39, n.104, citing REC Comments at 45.

<sup>25</sup> See Order, 35 FCC Rcd at 4130, para. 39.

<sup>26</sup> See 47 CFR § 73.316(c).

<sup>27</sup> See Order, 35 FCC Rcd at 4120, para. 12. As the Order noted, the Commission has not required proofs of performance from LPFM stations where other safeguards against interference are in place. *Id.* at para. 10. For instance, the Order exempted LPFM applicants from submitting proofs for directional antennas used to protect stations on second-adjacent channels and in border regions to protect Mexican and Canadian stations because Commission rules and international agreements already provide adequate protections for such stations.

<sup>28</sup> For example, the Order did not exempt LPFM stations that might use directional antennas to protect television stations operating on TV Channel 6.

<sup>29</sup> Urick Petition at 13-14. REC fully supports, but does not expound upon, the Urick Petitioners' concerns. See REC Opposition at 5.

<sup>30</sup> See Order, 35 FCC Rcd at 4119-20, para. 10.

<sup>31</sup> See generally *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas*, Memorandum Opinion and Order, MM Docket No. 87-121, 6 FCC Rcd 5356, 5363-64, paras. 47-48 (1991) (subsequent history omitted) (establishing engineering certification of proper installation of FM directional antennas in accordance with manufacturer instructions in response to commenter concerns that performance can be affected by such matters as position of the radiating elements, proximity of metallic objects, and spacing from the broadcast tower).

<sup>32</sup> See 47 CFR §§ 73.154 (AM), 73.316(c) (FM).

12. We also reject the argument that the Commission erred in failing to exempt all LPFM directional facilities because proof of performance studies are costly and arguably unnecessary given that LPFM stations already abide by minimum spacing rules.<sup>33</sup> This claim is based on an assumption of proper installation, which, as stated above, we cannot presume. Regarding the cost of the proof of performance studies, the Order rejected the proposal that the Commission reduce pre-licensing costs by instead requiring LPFM stations to resolve any actual interference caused, as required of FM translators.<sup>34</sup> The Order noted commenter concern that LPFM applicants without the financial resources to conduct a pre-licensing study might also be unable to afford mitigation of interference discovered after operations begin.<sup>35</sup> The Urick Petition does not address this concern, and we deny it with respect to the issue of proofs of performance.

13. *Certified Transmitters.* We also affirm the Order's decision to leave unchanged the section 73.1660(a)(2) requirement that transmitters used for LPFM stations be certified for LPFM use by an outside lab.<sup>36</sup> In so doing, we agree with REC's continued concern that uncertified LPFM equipment might cause interference to Emergency Alert System messages, and harm to aeronautical communications, especially untested, low-cost equipment and self-constructed kits that companies market directly to consumers through online retailers.<sup>37</sup> We also have concerns about the potential for

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<sup>33</sup> See Urick Petition at 13-14.

<sup>34</sup> Order, 35 FCC Rcd at 4121, para. 14, n. 46. See 47 CFR § 74.1203(a).

<sup>35</sup> Order, 35 FCC Rcd at 4121, para. 14, citing NAB Comments at 3. The Order also stated that an interference mitigation requirement could be more resource-intensive for non-LPFM stations and the Commission which would, respectively, need to file and evaluate interference complaints resulting from directional equipment. *Id.*

<sup>36</sup> See 47 CFR § 73.1660(a)(2); Order, 35 FCC Rcd at 4137-38, paras. 55-56. Certification is approved by the Commission based on data submitted by an applicant, generally the equipment manufacturer. 47 CFR § 2.907(a).

<sup>37</sup> REC Opposition at 6, citing *ABC Fulfillment Services, LLC d/b/a Hobby King USA*, Forfeiture Order, 35 FCC Rcd 7441 (2020). REC, thus, opposes use of uncertified equipment absent alternative protections. REC believes that before considering whether to relax the certification requirements the Commission should obtain data through a Notice of Inquiry, including information about the experience and expertise of LPFM staff, the range of equipment stations might want to use, the state of the marketplace, and the types of non-certified transmitters discovered during enforcement inspections. See REC Opposition at 6-7. REC does, however, propose a "compromise" that would provide an exception to the transmitter certification requirement for applicants able to demonstrate that: (1) the equipment has been verified or type accepted in accordance with the Commission's rules; (2) the LPFM station has designated a chief operator in accordance with 47 CFR § 73.1870; and (3) the chief operator has physical access to the transmission facility and holds a credential from an industry-recognized organization such as the Society of Broadcast Engineers. REC Reply (Uruck Petition) at 6 (rec. Aug. 14, 2020). REC suggests incorporating these requirements into 47 CFR §§ 73.1660 (Acceptability of Broadcast Transmitters) and 73.1870 (Chief Operators). REC first offered its proposal at the end of the pleading cycle on reconsideration, in a reply to its own opposition to the Uruck Petition, and the record is not developed on the costs and benefits of such a requirement for LPFM stations. To the extent that REC or others want to pursue any of its alternatives, they may wish to file a Petition for Rulemaking. REC suggests another alternative in *ex parte* comments filed in response to the publicly released draft text of this Order on Reconsideration. See REC Ex Parte Letter, MM Docket No. 19-193 (rec. June 7, 2021), responding to *Improving Low Power FM Radio*, Public Draft (May 27, 2021), <https://www.fcc.gov/document/improving-low-power-fm-radio-0>. REC clarifies that its concerns about uncertified transmitters pertain to those mass marketed through e-commerce web sites and to those constructed by hobbyists but not to professional transmitters that meet the Supplier's Declaration of Conformity (SDoC) procedures outlined in 47 CFR § 2.906. *Id.* at 3. REC would carve out an exception for SDoC equipment that has not been submitted to a lab for certification or, in the alternative, establish a waiver for those transmitters. Like the proposal discussed above, there is not an adequate record to fully evaluate this proposal. But we note that we have sought to adopt simple and straightforward rules for the LPFM service and believe that adoption of this proposal at this juncture could create industry confusion regarding our transmitter certification requirements. We further note, however, that our rules already permit waivers upon a public interest showing from any applicant with unique circumstances, (continued....)

interference if LPFM stations were to use equipment manufactured primarily to operate at the increased power levels of full service stations, and that equipment could exceed permissible LPFM power due to malfunction or improper adjustment.

14. We reject the argument that the Commission's decision to retain the LPFM transmitter certification requirement was arbitrary. As the Order explained, the Commission originally adopted the certification requirement because it was "vitaly concerned" about providing interference protection to adjacent broadcast channels and to aviation frequencies.<sup>38</sup> The Order credited REC's concern about spurious emissions and other potential technical problems that could arise from the mass marketing of uncertified equipment to consumers.<sup>39</sup> As the Order explained, use of proper equipment remains of concern because, despite the LPFM service's 20 years of generally successful operation, there continue to be instances of inspections that reveal LPFM stations using uncertified equipment and thereby an increased potential for interference.<sup>40</sup>

15. We disagree that the certification requirement is arbitrary because it only applies to LPFM broadcasters, whereas the Commission permits non-LPFM stations that operate at low power, such as 5-watt FM translators and 10-watt Class D FM stations, to use equipment that has not been certified.<sup>41</sup> Although LPFM stations and other low power facilities like Class D FM stations and some noncommercial FM translators share secondary status and noncommercial nature, there are important differences between these services that justify different requirements concerning equipment certification. Most significantly, LPFM stations operate at ten times the power of a Class D FM station and 20 times the power of a 5-watt FM translator station and, thus, are far more likely to cause interference if operating with improperly manufactured equipment. Also, the number of LPFM stations is larger than either type of station referenced above and, thus, any potential problem with LPFM equipment poses greater concern. For example, there are only 110 Class D FM stations, with few new applications permitted.<sup>42</sup> Thus, we have not identified any need to adopt new rules that would require Class D stations to replace existing verified but uncertified equipment that has been permitted since initial licensure. In contrast, there are over 2,000 LPFM stations and the Commission continues to authorize new LPFM stations nationwide to broader groups of organizations, and a new LPFM filing window is expected after the recently announced full service noncommercial FM new station filing window.<sup>43</sup>

16. We also reject the argument that the certification requirement should be eliminated because it forces LPFM stations to bear the expense of buying new transmitters, whereas other broadcasters, like Class D FM stations, can employ used equipment no longer needed by full power

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which could include stations or permittees with an interest in SDoC equipment. *See Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990), citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

<sup>38</sup> Order, 35 FCC Rcd at 4137, para. 56, citing *Creation of a Low Power Radio Service*, MB Docket 99-25, Notice of Proposed Rulemaking, 14 FCC Rcd 2471, 2485, para. 35 (1999). *See also LPFM Creation Order*, 15 FCC Rcd at 2250-51, para. 116.

<sup>39</sup> *See* Order, 35 FCC Rcd at 4137, para. 55.

<sup>40</sup> *Id.* at 4137-38, para. 56, n.160, citing *Chinese Sound of Oriental and West Heritage*, Notice of Violation, File No. EB-FIELDWR-19-00028704 (EB rel. Oct. 3, 2019); *International Crusade of the Penny*, Notice of Violation, File No. EB-FIELDWR-19-0002904 (EB rel. Aug. 9, 2019).

<sup>41</sup> Urick Petition at 15.

<sup>42</sup> We note that the Commission has not authorized new Class D FM stations for decades, except in Alaska, merely allowing pre-existing Class D stations in other locations to operate on a grandfathered basis. The remaining Class D stations, mostly licensed to high schools and colleges, often operate with limited hours that suit the missions of those licensees.

<sup>43</sup> *See* Order at n.11; *Media Bureau Announces NCE FM New Station Application Filing Window Open from November 2, 2021 to November 9, 2021*, Public Notice, DA 21-463 (rel. Apr. 21, 2021).

stations.<sup>44</sup> Nothing in the record indicates that offers of and inability to accept donated transmitters is a frequent problem affecting many LPFM applicants.<sup>45</sup> Thus, we have no reason to believe the potential cost of the certification requirement outweighs its potential benefits. We therefore deny the request for reconsideration with respect to the issue of transmitter certification.

## B. FBL Petition

17. *Prospective Application of the New Rules.* FBL seeks reconsideration of the Commission's decision that the rules adopted in the Order will apply only to LPFM applications that were not the subject of any staff determinations as of the effective date of the new rules.<sup>46</sup> It asserts that a wider group of applicants should benefit from the rule changes.<sup>47</sup> We dismiss FBL's petition because it failed to participate earlier in the proceeding, and on an alternative and independent basis, we deny the petition on the merits. FBL contends that it could not have raised its arguments earlier because it had no prior notice that the Commission would not extend the new rules to non-final decisions.<sup>48</sup> The NPRM sought comment on a proposal of significance to FBL, namely to increase the 5.6 km minor modification distance to 11.2 km, a limitation that FBL's modification application would have satisfied. This proposal did not indicate whether it proposed applying the change to applications that were the subject of non-final Commission action. FBL had the opportunity to inform the Commission that it supported the proposal and expected that, if adopted, the proposed rule would result in a favorable determination on FBL's application, but it did not submit comments. Accordingly, FBL's petition is procedurally deficient, and we therefore dismiss it.<sup>49</sup>

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<sup>44</sup> Urick Petition at 15.

<sup>45</sup> Nor do we believe that an adequate solution exists in REC's alternative protections, for the reasons stated above. *See supra*, note 37.

<sup>46</sup> *See* Order, 35 FCC Rcd at 4134, para 48.

<sup>47</sup> We note that FBL would be part of this wider group. FBL held a permit to construct a new LPFM station at Cupertino, California. On September 28, 2018, the Bureau dismissed an FBL modification application that would have moved the station more than 5.6 km, the then-applicable distance limitation for minor modification applications. 47 CFR § 73.870(a); Letter Order from James D. Bradshaw, Senior Deputy Chief, Audio Div. to FBL (MB Sept. 28, 2018). Two subsequent FBL petitions for reconsideration were also rejected by the Bureau, the latest on October 7, 2019, two weeks before comments were due on the NPRM. Letter Order from Albert Shuldiner, Chief, Audio Div. to FBL (MB Oct. 7, 2019) (denying reconsideration of finding that license modification application was void *ab initio* because the permit had expired of its own terms almost two months before the modification application was filed and dismissing further reconsideration of prior dismissal of modification application as moot). An Application for Review of that Letter Order is pending. *See* FBL, Application for Review (rec. Nov. 6, 2019), and supplemented to seek review of *Foundation for a Beautiful Life*, Letter Order (MB Oct. 5, 2020) (ordering station to cease operating).

<sup>48</sup> FBL Petition at 7, citing 47 CFR § 1.429(b).

<sup>49</sup> 47 CFR § 1.429(b) (a petition for reconsideration that relies on facts or arguments not previously presented to the Commission will be granted only if it relates to events or circumstances that have changed since the petitioner's last opportunity to present them; such facts or arguments were unknown to petitioner, and petitioner could not have discovered them through the exercise of ordinary diligence, until after the last opportunity to present them; or the Commission determines that the public interest requires their consideration); *id.* § 1.429(l). *See also Colorado Radio Corp. v. F.C.C.*, 118 F.2d 24, 26 (D.C. Cir. 1941) ("We cannot allow the appellant to sit back and hope that a decision will be in its favor and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed"); *Amendment of Part 74 of the Commission's Rules Regarding FM Translator Interference*, 35 FCC Rcd 11561, 11564, para. 8 (2020) (petition for reconsideration dismissed where argument could have been raised earlier in response to NPRM). As discussed below, the Commission structured the implementation of multiple new rules, not just the minor modification rule, to facilitate the orderly processing of applications pursuant to the revised rules. We do not have a sufficient basis to find that the public interest requires a deviation from that decision for one applicant's benefit. 47

(continued...)



18. Alternatively and independently, we deny the petition. The Commission's authority to limit the applicability of rule changes is undisputed, but FBL contends that the Order is inconsistent with the APA because the Commission did not adequately explain its actions<sup>50</sup> and relied upon ambiguous and inapposite case law.<sup>51</sup> We find, however, that the Commission's decision to apply these rules prospectively was consistent with past Commission practice and the requirements of the APA.

19. We find no support for the claim that the Order's prospective application violated the APA. When adopting new application processing procedures, the Commission needs to establish a definitive cut-off point for transition to the new requirements in order to promote administrative efficiency and to provide clear guidance to applicants.<sup>52</sup> As it has done previously,<sup>53</sup> the Commission did so in the Order, which amended multiple rules. In so doing, the Commission struck a reasonable balance between giving effect to the new rules while avoiding the need to revisit prior administrative action. Consistent with the APA requirement that agencies explain their rulemaking choices, the Order equated the prospective nature of the LPFM rules with the similar prospective impact of rules adopted for another secondary broadcast service in the 2019 *Translator Interference* proceeding.<sup>54</sup>

20. The Commission's prospective application of new rules in the Order and in the *Translator Interference* proceeding cited therein are virtually identical. FBL's argument to the contrary relies on a small wording difference, *i.e.*, that the new rules adopted in the *Translator Interference* proceeding would not affect applications already "acted upon" whereas the new rules adopted in the Order would not affect applications already the "subject of a staff decision."<sup>55</sup> There is no merit to FBL's claim that the meaning of "acted upon" is narrower than "subject to a staff decision." To the contrary, the meaning of the two phrases is identical, with each referencing prior decisions, whether or not final.<sup>56</sup> The Order correctly applied the same standard to non-final LPFM cases as it did to non-final translator cases.

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CFR § 1.429(b)(3) (Commission may grant petition based on untimely facts or arguments based on a public interest finding).

<sup>50</sup> FBL Petition at 2, 9-12.

<sup>51</sup> *Id.* at 9-11, citing Order, 35 FCC Rcd at 4134, n.129. FBL also argues that it is not in the public interest to exclude applications with non-final rulings because such applications might become grantable if given the ability to make use of the new rules. *Id.* at 12, citing 47 U.S.C. § 303. REC, the only party to address the FBL Petition, opposes FBL's arguments to apply the new rules to the FBL applications. *See supra* note 47; REC Opposition at 7. FBL responds discussing the merits of proposed broader application of the new rules. *See* FBL, Reply to Opposition of REC (rec. May 26, 2020). Among the matters that REC and FBL dispute are whether the non-retroactive application of new rules would affect FBL alone and, if so, whether the Bureau or Commission singled out FBL for discriminatory treatment.

<sup>52</sup> *See* 47 U.S.C. § 154(j) ("The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.").

<sup>53</sup> *See Amendment of Part 74 of the Commission's Rules Regarding FM Translator Interference*, Report and Order, MM Docket No. 18-119, 34 FCC Rcd 3482, para. 49 (2019) (*Translator Interference*).

<sup>54</sup> *See* Order, 35 FCC Rcd 4134 at para. 48, n.129, citing *Translator Interference*, 34 FCC Rcd 3482, para. 49 (2019).

<sup>55</sup> Order, 35 FCC Rcd at 4134, para. 48. *See* FBL Petition at 10.

<sup>56</sup> FBL's suggestion that an application with a non-final decision has not been "acted upon" is contrary to recent case law. *See Korean Gospel Broadcasting Network*, Memorandum Opinion and Order, 35 FCC Rcd 13633, 13637-38, para. 11 (2020); *Emmanuel Communications, Inc.*, 34 FCC Rcd 9294, 9296, para. 11 (2019). Moreover, the Commission recently affirmed that the new rules adopted in the *Translator Interference* proceeding do not apply to applications already acted upon. *See Amendment of Part 74 of the Commission's Rules Regarding FM Translator Interference*, MB Docket No. 18-119, Order on Reconsideration, 35 FCC Rcd 11561, 11572-73, paras. 23-25 (2020).

21. Finally, we reject FBL's suggestion that the Commission impermissibly singled out FBL for discriminatory treatment by denying it the benefit of our LPFM rule changes, violating its rights of due process and equal protection under the law.<sup>57</sup> FBL and REC agree that FBL is the only applicant with a pending matter to which the new rules apply, but each uses that premise to support a different conclusion. Even if we were to accept that premise, the record contains no evidence or other reason to support FBL's suggestion that the Commission's adherence to its prior line-drawing approach is impermissibly discriminatory. Further, contrary to the facts at issue in the case cited by FBL, this is not an instance in which the Commission is retroactively applying a new rule to deprive a person or entity of rights previously established by law.<sup>58</sup> To the extent that FBL has also raised additional arguments about the adjudication of its applications in a separate Application for Review, we will address those matters in that context.<sup>59</sup>

### C. Restoration of Inadvertently Deleted Language.

22. We take this opportunity to correct an error that occurred when the Order amended the Rules to permit LPFM stations to retransmit their signals over co-owned FM booster stations.<sup>60</sup> In making ancillary changes to add the concept of LPFM boosters to existing rules governing booster use in other services, the Commission inadvertently deleted three words ("or FM translator") from the existing language in section 74.1263(b).<sup>61</sup> We now restore that language. Because the deletion of FM translators from the scope of the rule in question was clearly inadvertent and correcting this error is noncontroversial, we find for good cause that the notice and comment procedures of the Administrative Procedure Act would serve no useful purpose and are therefore unnecessary.<sup>62</sup>

## IV. PROCEDURAL MATTERS

23. *Paperwork Reduction Act Analysis.* This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. Therefore, it does not contain any new or modified information collection burdens for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198.

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<sup>57</sup> FBL Reply at 4 (citing *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1146 (10th Cir. 2016) ("[I]f the agency were free to change the law retroactively based on shifting political winds, it could use that power to punish politically disfavored groups or individuals for conduct they can no longer alter.")).

<sup>58</sup> See *Gutierrez-Brizuela v. Lynch*, 834 F.3d at 1146.

<sup>59</sup> See *supra* note 47.

<sup>60</sup> See *Stale or Moot Docketed Proceedings*, Order, 19 FCC Rcd 2527, 2532, para. 15 (2004) (upon learning of an inadvertent ministerial error, the Commission may correct its error).

<sup>61</sup> Section 74.1263 specifies the times that FM translators and booster stations may operate. Prior to the Order, subsection (b) of that rule discussed FM booster and FM translator retransmission of AM and full power FM signals. Specifically, it read "An FM booster *or FM translator* station rebroadcasting the signal of an AM or FM primary station shall not be permitted to radiate during extended periods when signals of the primary station are not being retransmitted. Notwithstanding the foregoing, FM translators rebroadcasting Class D AM stations may continue to operate during nighttime hours only if the AM station has operated within the last 24 hours." 47 CFR § 74.1263(b) (2019) (emphasis added). In amending that section to include the new concept of FM booster stations rebroadcasting LPFM stations, the Commission inadvertently deleted the italicized FM translator language. See 47 CFR § 74.1263(b) (2020). The erroneous deletion of the words "or FM translator" occurred in the NPRM, received no comments, and was carried through to the rules adopted in the Order. This error of omission is obvious because the second sentence of the rule makes an exception for one particular type of FM translator. *Id.*

<sup>62</sup> 5 U.S.C. § 553(b)(B).

24. *Final Regulatory Flexibility Certification.* The Regulatory Flexibility Act of 1980, as amended (RFA),<sup>63</sup> requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”<sup>64</sup> This *Order on Reconsideration* disposes of petitions for reconsideration in MB Docket Nos. 19-193 and 17-105 without making any resulting rule changes. The only rule change made in the *Order on Reconsideration* merely reinserts a phrase that the NPRM and Order inadvertently deleted.<sup>65</sup> In the Order in this proceeding, the Commission issued a Final Regulatory Flexibility Analysis (FRFA) that conforms to the RFA, as amended.<sup>66</sup> The Commission received no petitions for reconsideration of that FRFA. This *Order on Reconsideration* does not alter the Commission’s previous analysis under the RFA.

25. *Congressional Review Act.* The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs, that this rule is “non-major” under the Congressional Review Act, 5 U.S.C. § 804(2). The Commission will send a copy of this Order on Reconsideration to Congress and the Government Accountability Office pursuant to 5 U.S.C. § 801(a)(1)(A).

26. The Commission will send a copy of this Report and Order to Congress and the Government Accountability Office pursuant to 5 U.S.C. § 801(a)(1)(A).

## V. ORDERING CLAUSES

27. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained in sections 1, 4(i), 4(j), 301, 303, 307, 308, 309, 316, and 319 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 301, 303, 307, 308, 309, 316, and 319, as well as the Local Community Radio Act of 2010, Pub. L. No. 111-371, 124 Stat. 4072 (2011), and the Administrative Procedure Act, 5 U.S.C. § 553(b)(B), this *Order on Reconsideration* **IS ADOPTED**.

28. **IT IS FURTHER ORDERED** that the Petition for Reconsideration filed by Todd Urick, Todd Urick (Common Frequency) and Paul Bame (Prometheus Radio Project) along with Peter Gray (KFZR-LP), Makeda Dread Cheatom (KVIB-LP), Brad Johnson (KGIG-LP), David Stepanyuk (KIEV-LP), and Andy Hansen-Smith (KCFZ-LP) **IS DISMISSED IN PART and DENIED IN PART**.

29. **IT IS FURTHER ORDERED** that the Petition for Reconsideration filed by Foundation for a Beautiful Life **IS DISMISSED and in the alternative IS DENIED**.

30. **IT IS FURTHER ORDERED** that, effective 30 days after publication in the Federal Register, section 74.1263(b) **IS AMENDED** as specified in the Appendix.

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<sup>63</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>64</sup> 5 U.S.C. § 605(b). The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” 5 U.S.C. § 601(6); See 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3). In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. 15 U.S.C. § 632. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. See 5 U.S.C. §§ 601-612.

<sup>65</sup> Because this rule change does not require notice and comment, the Regulatory Flexibility Act does not apply. *Id.* § 601(2).

<sup>66</sup> Order, 35 FCC Rcd at 4149, Appendix C.

31. **IT IS FURTHER ORDERED** that the Commission shall send a copy of this *Order on Reconsideration* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX

## Final Rules

Part 74 of Title 47 of the U.S. Code of Federal Regulations is amended to read as follows:

1. The authority citation for part 74 continues to read as follows:

Authority: 47 U.S.C. 154, 302a, 303, 307, 309, 310, 336, and 554.

2. Revise §74.1263 by amending paragraph (b) to read as follows:

§74.1263 Time of operation.

\* \* \* \* \*

(b) An FM booster or FM Translator station rebroadcasting the signal of an AM, FM or LPFM primary station shall not be permitted to radiate during extended periods when signals of the primary station are not being retransmitted. Notwithstanding the foregoing, FM translators rebroadcasting Class D AM stations may continue to operate during nighttime hours only if the AM station has operated within the last 24 hours.

\* \* \* \* \*