

Supplemental Statement Regarding WCNH-LP and Waiver Request

Highland Community Broadcasting (“HCB”) is the licensee of low power FM station WCNH-LP, Concord, New Hampshire (Facility ID 126127). There is principal community contour overlap between the new station at Bow, New Hampshire proposed in this application and WCNH-LP. Pursuant to the procedures set forth in *Public Notice*, Media Bureau Announces NCE FM New Station and Major Change Filing Procedures for October 12-October 19, 2007 Window, DA 07-3521 at pages 3-4, released August 9, 2007 (“*Filing Window Notice*”), HCB hereby (1) proposes to divest its interest in WCNH-LP prior to a grant of this application; and (2) requests a waiver of the Commission’s Rule that would otherwise result in the attribution of WCNH-LP to HCB for purposes of determining HCB’s eligibility for diversity credit under the Commission’s NCE point system. See generally Section 73.7003(b).

As a supplement and in addition to the aforementioned waiver request to avoid attribution of WCNH-LP for purposes of the Commission’s diversity criterion, and HCB’s pledge to divest WCNH-LP prior to a grant of this application, HCB is also requesting herein a temporary waiver of Section 73.860(b) of the Commission’s Rules (LPFM cross-ownership rule) and the divestiture requirement as set forth in the *Filing Window Notice*, to allow HCB to continue to operate WCNH-LP until such time as HCB is ready to commence operations on its proposed station if this application is granted, rather than divesting its interest in WCNH-LP prior to the grant of this application.¹ This waiver request does not replace the divestiture pledge and waiver request set forth in parts (1) and (2) of the preceding paragraph, but is intended as a supplement thereto. If this request for a temporary waiver of Section 73.860(b) is not granted, HCB will fulfill its divestiture pledge as set forth in part (1) above.

A grant of the requested waiver will not contravene the Commission’s underlying intent in adopting the LPFM cross ownership rule. At the same time it would promote goals the Commission described in creating the LPFM service, specifically to provide locally based service to allow new voices to be heard, and to provide a service to the community that is not otherwise provided by full service stations.

¹ This application for a new station at Bow, New Hampshire, is one of five applications for a new full service NCE FM station that HCB is filing. The other four applications seek new stations on the following frequencies: 90.5 MHz at Eliot, Maine; 88.3 MHz at Gilford, New Hampshire; 89.9 MHz at Hillsboro, New Hampshire; and 88.5 MHz at Kingston, New Hampshire. None of these other four proposed stations will have any principal community overlap with WCNH-LP, nor will they provide service to WCNH-LP’s service area. Each of these other four applications contains a similar request for a temporary waiver of Section 73.860(b) as set forth herein, to allow HCB to continue operating WCNH-LP until it is ready to begin broadcast operations on any new full service station that is authorized by a grant of any of its five applications. If more than one of HCB’s applications is granted, and the waiver of Section 73.860(b) is granted, HCB would divest its interest in WCNH-LP prior to commencing operation on any of the newly authorized full service stations.

HCB applied for a new LPFM station in one of the early application filing windows for the then new LPFM service (BNPL-20000831ABT). Its application was granted June 30, 2003. WCNH-LP commenced operations on February 29, 2004. WCNH-LP has a classical music format. To HCB's knowledge there is no full service station with such a format licensed in the state of New Hampshire, or that otherwise provides service to WCNH-LP's service area. WCNH-LP's programming includes broadcasts of local performances such as the Concord Chorale, the New Hampshire Philharmonic Holiday Pops, the Romette Hedley Arnold Memorial Concert, and the Granite State Symphony Orchestra. These broadcasts of local performances, by local organizations, help to promote the local arts, provide access to the arts to those unable to attend the live performances, and educate the public about classical music in New Hampshire. To HCB's knowledge there is no other station or media outlet in New Hampshire that carries these locally originated programs.

It is HCB's intent to provide the same type of program service on its proposed full service stations as it now provides on WCNH-LP. If HCB is required to divest WCNH-LP prior to the grant of this application, the unique program service that WCNH-LP provides will be lost for the period between the divestiture and the time that HCB is ready to begin broadcasting on the new full service station at Bow, with no suitable replacement.²

If HCB's application for a new station at Bow is denied, but one of HCB's other applications is granted, then WCNH-LP's unique service could be lost entirely within WCNH-LP's service area.³ In normal circumstances, HCB could apply for a translator station that might replace the service loss resulting from its divestiture of WCNH-LP. However, in 2005 the Commission imposed a freeze on the processing of all pending applications for new FM translator station construction permits. Further Notice of Proposed Rulemaking at para. 33. Although originally described as a six-month freeze, it has been in effect for more than three years and remains in effect today. The Commission also has not opened a filing window for new FM translator construction permit applications since that time and is not likely to do so until after the freeze is lifted and the Commission's staff has at least started to process the approximately 8,000 pending translator applications. See Ibid.

Additionally, as it now stands no other party would be able to apply for a new LPFM station to replace the service loss resulting from the divestiture of WCNH-LP. In its Further

² If the Bow application and at least one other HCB application are granted, and one of the other stations is the first to begin operations, HCB recognizes that there would still be a period when service on WCNH-LP would be lost to its service area before the Bow station commences operating. However, it would be a much shorter time period than if HCB is required to divest WCNH-LP prior to the grant of any of its applications.

³ WCNH-LP would go silent as, absent a waiver, current Commission rules prohibit the assignment or transfer of a low power FM station. 47 C.F.R. Section 73.865; see also Creation of a Low Power Radio Service, Second Order on Reconsideration and Further Notice of Proposed Rulemaking, 20 FCC Rcd 6763 (2005) (delegating authority to the Media Bureau to grant waivers of Section 73.865 on a case-by-case basis and seeking comment on whether the Commission should amend its rules to allow transfers of control or assignments of LPFM licenses) (hereafter Further Notice of Proposed Rulemaking).

Notice of Proposed Rulemaking (at para. 40), the Commission also announced a freeze on the scheduling of a window for the filing of new and major change LPFM applications until it has resolved the future of the LPFM service and the issues presented in the Further Notice of Proposed Rulemaking.⁴ That rule making proceeding is still pending.⁵ If that proceeding is not resolved before the Commission is prepared to grant any of HCB's applications, absent a grant of the requested waiver it will mean an immediate loss of service.⁶

Thus, HCB is requesting a temporary waiver of the LPFM cross-ownership rule to allow it to continue to own and provide service on WCNH-LP until it is ready to begin operating any of its proposed new full service stations. This is in fact similar to what the Commission allows with respect to non-fill-in translator and Class D stations that must be divested to avoid attribution of such an interest under the NCE diversity criterion. For those translator and Class D stations, the Commission allows an applicant to avoid attribution if it pledges to request the cancellation of the translator or Class D station authorization prior to the *commencement of operations* by a same-area full service NCE FM station. Filing Window Notice at page 3, citing Creation of Low Power Radio Service, Memorandum Opinion and Order, 16 FCC Rcd 5074, 5102-03 (2001) (subsequent history omitted); and Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations, Memorandum Opinion and Order, 22 FCC Rcd 6101 at para. 47 (2007) (hereafter NCE Omnibus Order).

While HCB recognizes that there are no rules requiring the divestiture of such non-fill-in translators or Class D stations, and that such divestiture pledges are made for the purpose of seeking credit under the NCE diversity criterion, the ultimate goal of the required divestiture is similar to the required divestiture of an LPFM interest. That is, to prevent having attributable interests in at least two stations with principal community contour overlap (in the case of HCB's Bow application). But, because divestiture of such translator or Class D stations is not required until the new full service station is ready to commence broadcasting, there would be no loss of service. Absent the requested temporary waiver, the LPFM divestiture is required to occur prior to the grant of a new NCE FM construction permit application, not the commencement of a new station's operations, and will result in a service loss.

⁴ Among the other reasons the Commission cited for not opening a new LPFM filing window is the higher priority that the current NCE FM filing window must take, the first such filing opportunity since April 2000. See Further Notice of Proposed Rulemaking at para. 40.

⁵ Indeed, if this application for Bow is not granted and the rule making proceeding is resolved in the near future, the results and possible new rules adopted could determine the options that HCB would have with respect to preserving the service WCNH-LP now provides to its service area. This includes the possibility of assigning the WCNH-LP license to a third party that would continue its unique program service, or possibly replacing WCNH-LP with a translator station.

⁶ It is unclear in such a situation the extent to which the Media Bureau would be willing to consider a waiver of Section 73.865 to allow HCB to seek a party to which it might be able to assign or transfer the WCNH-LP license, nor how long such a process might take.

The temporary waiver that HCB is requesting would not result in the concurrent operation of an LPFM station and full service station. Rather, it is intended to allow the continuation of a unique service to the public on a noncommercial (*i.e.*, not-for-profit) basis until such time as HCB is ready to commence operations of its proposed full service station (or the first of its full service stations if more than one of its applications is granted). The Commission has authorized a multitude of temporary waivers of its broadcast multiple and cross-ownership rules (Section 73.3555) to allow the continued operation of multiple, commercial (*i.e.*, for profit) stations that would otherwise violate Section 73.3555, to give those licensees a reasonable period to come into compliance with Section 73.3555 without creating undue hardship (some such waivers have extended for years, such as waivers of the newspaper-broadcast cross-ownership rule). HCB is requesting far less than what the Commission has authorized in the commercial broadcast context in that it is not proposing the concurrent operation of stations that would otherwise contravene Commission rules or policy. It seeks only to continue to operate one service until the new service is ready to start operating. There is no rational reason why the Commission should be willing to grant waivers to for-profit entities allowing the concurrent operation of stations that would otherwise violate multiple or cross-ownership proscriptions, while refusing to grant a less extensive waiver to a noncommercial, not-for-profit educational entity that seeks to continue a unique low power service until it is ready to *begin* operating a new full service station.

Indeed, the public interest considerations are at least as strong in this case as in the commercial context. Allowing the continued operation of WCNH-LP on the temporary basis proposed would prevent the early termination of a unique program service that addresses otherwise unmet needs within its service area. Because WCNH-LP is a noncommercial low power, noncommercial service, its continued operation would have no impact on the local radio market.⁷

No harm will result to the underlying intent of the LPFM cross-ownership rule if the temporary waiver is granted. Describing the reasons for the rule the Commission stated,

[T]he interest in bringing new voices to the airwaves would be best served by barring cross-ownership between LPFM licensees and existing broadcast owners and other media entities. We believe that the rules we have adopted for the LPFM service -- *including* the strict cross ownership ban -- will lead to more access by all segments of the population to the airwaves.

⁷ There are additional reasons for granting the temporary waiver if HCB's Bow application is denied but one of its other applications is granted, in which case HCB would not be able to replace the divested WCNH-LP service with a new full service station. In that case, a waiver grant would provide additional time, while the FCC continues to consider the LPFM Further Notice of Proposed Rulemaking, for HCB to either (a) divest WCNH-LP in a manner that would allow the continuation of its unique service (such as through an assignment which itself would require a waiver and separate consideration by the Media Bureau staff pursuant to the Further Notice of Proposed Rulemaking), or (b) if the LPFM proceeding is concluded during this period, to perhaps file for a new translator station to replace the loss of service that will occur with the divestiture of WCNH-LP.

Creation of Low Power Radio Service, Memorandum Opinion and Order on Reconsideration, 15 FCC Rcd 1928 at para. 76 (2000) (emphasis in original) (subsequent history omitted). The temporary waiver requested will not deter new voices from reaching the airwaves nor deny access to any other parties. As noted, the Commission will not open a new window for LPFM applications until it has concluded its pending rule making examining the future of the LPFM service. Thus, no other party could apply for or have access to the frequency that would be vacated by the early divestiture of WCNH-LP.⁸ To the contrary, the early divestiture of WCNH-LP will remove what has been a new voice from continuing to provide a unique service.

Further, when the Commission adopted the LPFM cross-ownership rule it focused on prohibiting *existing* stations or media from having an attributable interest in the new service. See Creation of Low Power Radio Service, Report and Order, 15 FCC Rcd 2205 at para 29 (2000) (“no broadcaster or other media entity, or any party with an attributable interest in them, can hold any attributable ownership interest in an LPFM licensee”). The Commission was not focused on and did not address what might happen when an LPFM licensee contemplated upgrading its operation to a full service station. The Commission did, however, recognize that the LPFM service would provide a way “for new speakers to gain experience in the field.” *Ibid.* HCB has gained such experience, and based on that experience now desires to provide wider access to its unique programming via full service stations. The Commission should not deter such efforts by requiring the premature termination of an existing LPFM service, particularly when it will cause the loss of a unique program service thereby disserving the public interest, without creating any new opportunities for other parties. The purpose of the LPFM cross-ownership rule was to prevent existing media from entering the fledgling LPFM service; it was not intended to hinder an LPFM licensee from one day seeking to operate a full service station.

For all of the above reasons a grant of the temporary waiver HCB is requesting will serve the public interest without violating the spirit or intent of the LPFM cross-ownership rule.

⁸ In the event the Commission concludes the pending LPFM rule making and subsequently opens a new LPFM filing window before HCB is ready to begin operating its full service station, the Commission could condition the requested waiver to require HCB to divest WCNH-LP at some earlier time than requested herein if deemed necessary for the public interest. For example, assuming the result of the rule making is to permit the assignment or transfer of an LPFM station, the Commission could afford HCB a period of three to six months following the effective date of such new rules to either assign or transfer the WCNH-LP license or turn the license in. But, so long as the LPFM rule making is pending there is no opportunity for any other party to seek to use WCNH-LP’s frequency.