



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

**DA 20-126
Released: February 4, 2020**

**In Reply Refer To:
1800B3-TSN**

Prometheus Radio Project
P.O. Box 42158
Philadelphia, PA 19101

Mega-Philadelphia LLC
535 Route 38 East
Cherry Hill, NJ 08002

**In re: Mega-Philadelphia LLC
W239DS, Camden, New Jersey
Facility ID No. 202134
File No. BNPFT-20180508ABL**

Petition for Reconsideration

Dear Petitioner and Applicant:

Prometheus Radio Project (Petitioner) has filed a Petition for Reconsideration (Petition) of the Media Bureau's (Bureau) June 8, 2018, *Letter Decision* dismissing, and alternatively denying, an informal objection (Objection) filed against the referenced application.¹ Petitioner, along with the two other objectors, sought reconsideration of the *Letter Decision*.² In the Petition that remains before us, Paul Bame, who signed the informal objection and petition for reconsideration on behalf of Petitioner, established sufficient standing on Petitioner's behalf to maintain a petition for reconsideration of our denial of the informal objection as to Mega-Philadelphia LLC's (MPL) application for a new cross-service FM translator for W239DS at Camden, New Jersey.³ We thus consider the Petition on its merits and, as discussed below, deny the Petition.

¹ *Center for International Media Action; Common Frequency, Inc.; Prometheus Radio Project*, Letter Decision, 33 FCC Rcd 5394 (MB 2018) (*Letter Decision*). Petitioner, Center for International Media Action, and Common Frequency, Inc. filed informal objections against a total of 994 pending translator applications, including the application for W239DS. The *Letter Decision* dismissed and denied all those objections.

² The objectors filed Petitions for Reconsideration involving 328 of the 994 translator stations that were the subject of the informal objections. In a letter dated July 12, 2018, the Media Bureau dismissed all of the petitions for reconsideration, except for the petition filed against W239DS, on the ground that the petitions lacked standing. *Center for International Media Action; Common Frequency, Inc.; Prometheus Radio Project*, Letter Decision, 33 FCC Rcd 6733 (MB 2018) (*July Reconsideration Decision*).

³ File No. BNPFT-20180508ABL (Camden Application).

Background. In the informal objection, Petitioner argued that the Camden Application did not ensure filing opportunities for low-power FM (LPFM) stations, pursuant to Section 5 of the Local Community Radio Act of 2010.⁴ The Bureau dismissed the informal objection for failing to allege properly supported facts that, if true, would establish a substantial and material question of fact that grant of the application would be inconsistent with the public interest.⁵ Alternatively, the Bureau denied the objection on various substantive grounds.⁶

In the Petition, Petitioner states that the grounds for denial of the objections were arbitrary and capricious, and were not consonant with the dictates of Section 5 of LCRA (Section 5). In substantial part Petitioner contends that the extensive safeguards implemented in FM Translator Auction 83 to preserve secondary service spectrum for LPFM stations must be used in all subsequent secondary service windows. It further argues that because the Commission has used such mechanisms in other contexts, specifically the so-called Mattoon Waiver, it must use it in all contexts involving licensing FM translator stations. Petitioner also questions the staff's contention that the structural limits of Auction 100, namely those limiting new fill-in translator stations to one per AM station, were not sufficient to meet the requirements of Section 5, as application caps were found insufficient in Auction 83.

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order or raises new facts or changed circumstances not known or existing at the time of the petitioner's last opportunity to present such matters.⁷ We find that Petitioner has not met this burden.

The gravamen of the Petition is that the Camden Application does not comport with the dictates of Section 5, in that it proposes a new translator that could impede a potential move of existing LPFM station WPPM-LP to the northwest, and thus that the Camden Application is not compliant with the LCRA. As discussed below, we find that the Camden Application conformed to the procedures established for Auction 100, and further that the Auction 100 procedures comport with Section 5.

Petitioner essentially repeats its assertions in the original informal objection, namely, that MPL did not demonstrate that grant of its application would leave sufficient spectrum in the Camden market for future LPFM licensing. Section 5 by its terms requires that, when licensing new FM translators, boosters, or LPFM stations, the Commission must ensure: (1) that licenses are available to FM translator stations, LPFM stations, and FM booster stations; (2) that licensing decisions are made based on the needs of the local community; and (3) that FM translator stations, LPFM stations, and FM booster stations remain equal in status and secondary to existing and modified full-service FM stations.

Petitioner contends that Section 5 requires us to continue using what we termed the "extraordinary *ad hoc* processing measures" the Commission established in the context of disposing of over 13,000 new translator applications filed in Auction 83, while preserving sufficient spectrum to open

⁴ Pub. L. 111-371, 124 Stat. 4072 (2011) (LCRA). See Objection at 8-13. Although the informal objections were filed against all 994 FM translator applications that were pending as of the May 16, 2018, filing date of the objections, we limit our discussion herein to the arguments as they apply to the Camden Application.

⁵ *Letter Decision* at 2-3. The Bureau also dismissed the informal objections against translator applications that had been previously granted or dismissed as well as those directed at applications for modification of translator licenses.

⁶ *Id.* at 3-6.

⁷ 47 CFR § 1.106(c); *WWJZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686, para. 2 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 397 U.S. 967 (1966); *Davis & Elkins Coll.*, Memorandum and Order, 26 FCC Rcd 15555, 15556, para. 5 (MB 2011).

a subsequent LPFM window.⁸ It is useful to note, however, that neither the processing measures adopted in the *LPFM Fourth R&O* nor those adopted in the subsequent *AMR First R&O*, although both subjected to notice-and-comment rulemaking procedures, were codified. This is because neither set of procedures was considered to be of general applicability in applying the dictates of Section 5 to all new secondary service licensing. Rather, the Commission must devise different procedures for each secondary service filing window, that are responsive to the unique circumstances and public interest considerations underlying that particular filing opportunity.

In the case of Auction 83, 13,377 new FM translator applications were freely filed by any party wishing to do so, without restriction on the number of applications filed by any one applicant, the location of the proposed translator(s), or the alienability of the ultimately granted authorization.⁹ Grant of all or most of these applications would have severely depleted spectrum available to other secondary services, including LPFM. By 2011, eight years after the Auction 83 window opened, Congress enacted the LCRA, to guard against such spectrum depletion. Thus, faced with an unprecedented volume of translator applications filed in the general Auction 83 window, the Commission introduced extraordinary remedial measures, including limiting the number of filed applications that applicants could continue to prosecute, and requiring applicant-filed preclusion studies, all to preserve spectrum for future LPFM stations.¹⁰ As discussed below, however, Auction 100 was designed to limit the number of new translator applications so as to avoid the extreme volume of applications filed in Auction 83, thus the extraordinary remedial measures employed in that auction were not required.

As a result of the severe remedial restrictions placed on Auction 83 applicants, 5,450 new translator permits were awarded, out of 13,377 applications filed. The measures taken to winnow the number of successful Auction 83 applications enabled the October-November 2013 LPFM filing window,¹¹ in which 1,994 out of a total of 2,827 new LPFM station applications filed were granted.

In 2013, the Commission initiated the *AM Revitalization* proceeding.¹² The Commission observed that listenership of AM stations—the earliest broadcast service—had decreased due to various factors, including the availability of higher-fidelity listening options, inter-station interference, and environmental interference (e.g., computers, LED bulbs, etc.).¹³ Notwithstanding the decline in listenership, the Commission stressed the importance of AM stations to the communities they serve:

⁸ *Letter Decision*, 33 FCC Rcd at 5396, citing *Media Bureau Announces January 10 - January 25, 2013 Filing Window for Auction 83 FM Translator Application Selections and Caps Showings*, Public Notice, 27 FCC Rcd 15961 (MB 2012) (*Cap Public Notice*); *Media Bureau Offers Examples to Clarify Auction 83 FM Translator Application Selections and Cap Showings Requirements*, Public Notice, 28 FCC Rcd 98 (MB 2013). See also *Creation of a Low Power Radio Service*, Fourth Report and Order and Third Order on Reconsideration, 27 FCC Rcd 3364, 3372, para. 18 (2012) (*LPFM Fourth R&O*).

⁹ See *Creation of a Low Power Radio Service*, Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Rcd 15402, 15404, para. 4 (2012) (*LPFM Sixth R&O*) (noting that 40 percent of FM translator permits initially awarded in Auction 83 window were assigned to non-applicants, and that co-owned filers of the largest number of applications sought to assign more than 50 percent of the construction permits they received).

¹⁰ See generally *LPFM Fourth R&O*, 27 FCC Rcd at 3382-88, paras. 38-49; *LPFM Fifth R&O*, 27 FCC Rcd at 15404-07, paras. 4-13 (discussing need for application caps).

¹¹ See, e.g., *Media Bureau Announces Availability of the Revised FCC Form 318 and the Filing Procedures for October 15 - October 29, 2013, Low Power FM Filing Window*, Public Notice, 28 FCC Rcd 8854 (MB 2013).

¹² *Revitalization of the AM Radio Service*, Notice of Proposed Rule Making, 28 FCC Rcd 15221 (2013) (*AMR NPRM*).

¹³ *Id.* at 15222-23, paras. 4-6.

Today, AM radio remains an important source of broadcast entertainment and information programming, particularly for locally oriented content. AM broadcasters provide unique, community-based programming to distinguish themselves from other media sources in an increasingly competitive mass media market. (citation omitted) For example, all-news/talk, all-sports, foreign language, and religious programming formats are common on the AM band. Indeed, over 90 percent of all news/talk stations operate on the AM band. (citation omitted) Local programming is also prevalent on the AM dial, including discussions of local news, politics and public affairs, traffic announcements, and coverage of community events such as high school athletic contests.¹⁴

Thus, in the *AMR NPRM*, the Commission emphasized not just the value of AM programming generally, but specifically the value of such programming to the local communities served by AM stations. It then proposed several measures designed to revitalize the AM band generally and to assist existing AM broadcasters specifically. The latter category included a proposal to open a filing window during which AM station licensees could apply for a fill-in cross-service FM translator, with a cap of one translator application per AM station. Each such translator would be permanently linked to the AM primary station that it rebroadcast—the proposed translator could not be assigned or transferred except in conjunction with the AM primary station that licensed it. The Commission sought comment as to the effect of such a window on other services, including LPFM,¹⁵ and specifically noted its belief that “a narrowly tailored filing window for such FM translators, as proposed above, could yield significant public interest benefits with little to no detriment either to the FM translator service or to licensing opportunities for LPFM stations, especially since the filing window proposed here will follow the 2013 LPFM filing window.”¹⁶ Thus, the Commission not only considered the effect of the *AM Revitalization* windows on other secondary services such as LPFM, it ensured that the windows would open only after LPFM applicants had the opportunity to secure spectrum for their proposed facilities.

In the *AMR First R&O*, the Commission ordered, first, two filing windows for AM licensees wishing to purchase and modify existing FM translators to use as cross-service translators, followed by two auction windows for new cross-service FM translators, which have since been designated Auctions 99 and 100.¹⁷ The Commission limited participation in the Auction 99 and 100 windows to those AM station licensees that had not already participated in a modification window.¹⁸ This restriction reduced the number of new translator applications that could be filed, as many AM broadcasters opted to modify and relocate an existing FM translator rather than apply for a new one. Although some commenters expressed concern about the effect of the new cross-service FM translator auction windows on licensing opportunities for other secondary services,¹⁹ none sought reconsideration of the tailored window-specific eligibility requirements and adopted filing procedures.²⁰

¹⁴ *Id.* at 15222, para. 3.

¹⁵ *Id.* at 15228, para. 17.

¹⁶ *Id.* at 15229, para. 18.

¹⁷ *AMR First R&O*, 30 FCC Rcd at 12152-54, paras. 15-17.

¹⁸ *Id.* at 12153, para. 17.

¹⁹ *Id.* at 12150 n.28; CFI Comments.

²⁰ Petitioner did seek reconsideration of the Second Report and Order in the *AM Revitalization* proceeding, *Revitalization of the AM Radio Service*, Second Report and Order, 32 FCC Rcd 1724 (2017) (*AMR Second R&O*), in which the “fill-in” area for cross-service FM translators was expanded from the lesser of the AM primary station’s daytime 2 mV/m contour or a 25-mile radius centered at the AM transmitter, to the greater of those areas. Petitioner argued that the Commission’s failure to adopt a set distance limit from an AM transmitter for siting cross-service

In short, the procedures adopted for the AMR filing windows, like those adopted following the Auction 83 filing window, were designed, first, to prioritize the LPFM filing window before opening translator opportunities to AM licensees, and second, to strike a balance between the stated goals of the *AM Revitalization* proceeding and the need to preserve spectrum for future applicants. First, the Commission limited participation to AM station licensees and permittees on a one-per-AM station basis, thus effectively capping the potential number of applications at 4,684 (the total number of AM stations at the time).²¹ Second, translators were required to operate on a fill-in basis only, thus markedly restricting the area in which such a translator could be located.²² Third, the introduction of a modification window, allowing AM broadcasters to move an existing FM translator up to 250 miles rather than add a new FM translator, further limited the number of potential new FM translator grants, as modification window participants were precluded from participating in Auction 99 or 100. Finally, new translators awarded through the Auction 99 and 100 filing windows may not be assigned or transferred except in conjunction with the AM primary station by which it is owned, and may not rebroadcast any other station, thus limiting the extent to which it can be moved and precluding potential interference with other secondary station licensing opportunities.

The end result of these restrictions is that no more than 1,770 new cross-service FM translators have been or can be granted as a result of the Auction 99 and 100 filing windows, out of a theoretical maximum of 4,684. This is comparable to the percentage of new translator grants from the Auction 83 window, *vis-à-vis* the original number of applications, suggesting that the restrictions placed on Auction 99 and 100 applicants were equally efficacious in terms of overall spectrum preservation.

To the extent that Petitioner argues that Section 5 requires a market-by-market evaluation of secondary spectrum availability, or prohibits further award of FM translator construction permits in markets where translators outnumber LPFM stations, we reiterate that nothing in the language of Section 5 mandates such specific measures. It requires only that the Commission ensure that licensing opportunities are available for all secondary services, that its licensing decisions are made based on the needs of the local community, and that all secondary services remain equal in status (not number) and secondary to full-service FM stations. The Auction 99 and 100 procedures are in full compliance with Section 5's dictates.²³ The Commission determined that AM radio stations provide important community-

FM translators would negatively impact LPFM stations and their ability to relocate. That petition was denied by the Commission. *Revitalization of the AM Radio Service*, Order on Reconsideration, 33 FCC Rcd 5082 (2018).

²¹ The current total of AM stations, as of September 30, 2019, is 4,601.

²² When the *AMR First R&O* was adopted this area was further restricted to the lesser of the AM primary's daytime 2 mV/m contour or a 25-mile radius. It was later expanded in the *AMR Second R&O*.

²³ We reject Petitioner's contention that Auction 83 procedures have been utilized outside the Auction 83 context, specifically in the licensing of FM translator modifications using the so-called "Mattoon Waiver," first established in *John F. Garziglia, Esq.*, Letter Decision, 26 FCC Rcd 12685 (2011) (*Garziglia*). Petition at 7, 9-10. First, nothing in *Garziglia* or any subsequent Commission decision requires a preclusion study, and currently the staff does not require them. Second, in *Garziglia* it was noted that "certain temporary restrictions on the modification of translator stations were necessary to preserve LPFM licensing opportunities in identified spectrum-limited markets." 26 FCC Rcd at 12688 (emphasis added). That decision clearly did not contemplate that such restrictions would be permanent. Finally, while Petitioner emphasizes the staff's finding that the translator modification in *Garziglia* would not foreclose future LPFM licensing opportunities, it neglects to mention another finding, that of the public interest in revitalizing the AM broadcast band: the staff found that the proposed waiver was "consistent with our continued efforts to revitalize the AM service and to make the most efficient use of limited spectrum." *Id.* at 12688-89. As stated in the text, the purpose of the Auction 99 and 100 windows was to assist the primary AM broadcast service through use of FM translators, and that purpose informs our determination much as it did in *Garziglia*.

based programming, and that measures needed to be taken to preserve that service. Thus, the needs of local communities were taken into account, and those communities will benefit by having AM service that is expanded into areas and dayparts that local AM stations cannot currently provide, with better signal quality. Moreover, to the extent that the Commission chose to augment existing AM service with FM service, FM translators represented the only viable option.²⁴ LPFM stations are not authorized to re-broadcast the signals of other services, and are by definition noncommercial educational stations that could not re-broadcast commercial AM programming in any event. While Section 5 mandates that secondary services be equal in status, FM translators and LPFM stations are not equal in their ability to address the articulated public interest need of preserving AM service to communities.

Given the unique suitability of FM translators to the *AM Revitalization* effort, the Commission implemented measures designed to minimize the number of new translator grants and thus preserve spectrum for other secondary services. Applications were capped at one per AM station (as opposed to allowing multiple translator grants) and further capped by forcing applicants to choose between modifying an existing translator or applying for a new one. Finally, nothing in the Auction 99 or 100 procedures elevates new cross-service FM translators to higher status than LPFM stations, and in fact the siting and alienability restrictions on these new translators in many cases give them less flexibility than previously authorized FM translators and LPFM stations.

Section 5 does not, by its terms, mandate that the same drastic spectrum-preservation measures adopted in Auction 83 be used in Auctions 99 and 100, just as it does not require that the same measures adopted in Auctions 99 and 100 be used in subsequent FM translator or LPFM windows.²⁵ The Commission must make public interest decisions for all aural services, and these decisions always involve a balancing of interests. The prevailing interest in Auction 83 was to prevent an extraordinary number of FM translator applications from depleting all available secondary service spectrum. In Auctions 99 and 100, the prevailing interest was to enable AM stations to expand and improve the service they provide to their communities. Were we to impose the extreme market-by-market limits used in Auction 83 that Petitioner demands, we could severely dilute—if not undercut completely—the public interest benefits to local markets served by AM stations that the Commission sought to implement in the *AMR First R&O*.²⁶

We therefore reject Petitioner's contention that the procedures set up for Auction 83 must be utilized in all subsequent secondary service filing windows. We find that the Commission's procedures

²⁴ We disagree with Petitioner's suggestion that, under Section 5, LPFM stations rather than FM translators are universally preferred for service to urban areas, while translators should be reserved for service to rural areas (Petition at 7-8). Petitioner bases this argument on language in the *LPFM Fourth R&O*, 27 FCC Rcd at 3372, para. 18, in which the Commission noted that both LPFM stations and FM translators serve communities, but that the smaller coverage area of an LPFM station lends itself better to urban areas, while the wider coverage of FM translators makes them more useful in rural areas. As we noted in *Mr. Justin Howze and Marissa C. Repp, Esq.*, Letter Decision, DA 19-1229 at 2 n.7 (MB Dec. 4, 2019) (*Howze*), the fact that an LPFM station's limited coverage area makes the station more effective in an urban area is not the same as saying that *only* LPFM stations may be licensed in urban areas. LPFM stations have in fact been licensed at smaller communities and in rural areas, and likewise FM translators have proved effective in more densely populated urbanized areas. Indeed, and as we observed in *Howze*, to accept such a segregation of the two services into urban-only LPFMs and rural-only FM translators would implicitly negate LCRA Section 5's mandate to treat the two services as equal in status.

²⁵ We also note, as we did in the *Letter Decision*, 33 FCC Rcd at 5398, that Section 5 by its terms gives to the Commission, not the applicant, the responsibility of ensuring availability of licenses for secondary services.

²⁶ *Cf. Nat'l Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 425 (D.C. Cir. 2009) (noting that while Commission's engineering judgment regarding interference from LPFM stations to full-service FM stations did not change, it reevaluated the competing priorities of interference protection and preserving existing service in the face of changed circumstances).

for Auctions 99 and 100, adopted after notice and comment, comport with Section 5 while serving the stated public interest rationale for the auction filing windows. Accordingly, we deny the Petition.

Conclusion. For the foregoing reasons, the Petition for Reconsideration IS DISMISSED as to Center for International Media Action and Common Frequency, Inc., and IS DENIED as to Petitioner Prometheus Radio Project.

Sincerely,

A handwritten signature in blue ink, appearing to read "A. Shuldiner", with a stylized flourish at the end.

Albert Shuldiner
Chief, Audio Division
Media Bureau