ORAL ARGUMENT NOT YET SCHEDULED

In the

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF BROADCASTERS	)	
Petitioner,	)	
v.	)	No. 08-1117
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA	)	
Respondents.	)	

MOTION TO SUSPEND BRIEFING SCHEDULE AND HOLD THE CASE IN ABEYANCE

Intervenor Prometheus Radio Project ("Prometheus") respectfully moves this Court to suspend the briefing schedule and hold the above-captioned case in abeyance pending the Federal Communications Commission's ("Commission") action on a *Petition for Reconsideration* of the same order.

This Motion is now being filed because only after the filing of the initial brief by Petitioner National Association of Broadcasters ("NAB") has it become clear which aspects of the Commission's decision the NAB sought to challenge. Prior to the filing of the initial brief ("NAB Brief"), Prometheus was unaware which specific aspects of the Commission decision the NAB sought to challenge and had no way of knowing whether the NAB would raise issues that would overlap with the *Petition for Reconsideration*.

I. Background.

On December 11, 2007, the Commission released a *Third Report and Order* ("*Order*") adopting various rules and procedures regarding the development of the low power radio service. *See In the Matter of Creation of a Low Power Radio Service*, Third Report and Order, 22 FCCRcd 21912 (2007).

On February 19, 2008, seven parties ("Ace, *et al.*") filed a *Petition for Reconsideration* with the Commission. Ace, *et al.*, sought review of the Commission's decision with respect to the Commission's revision of 47 C.F.R. §73.809 and adoption of a waiver policy with respect to 47 C.F.R. §73.807. *See* Ace, *et al.*, *Petition for Reconsideration*, MB Docket No. 99-25 (filed February 19, 2008).[1] Ace, *et al.* have argued that the Commission's actions are procedurally flawed and contrary to law. *See id.* at 4-9.

On March 14, 2008, Petitioner National Association of Broadcasters ("NAB") sought review in this Court on the grounds that the *Order* was arbitrary and capricious and contrary to law. NAB's Petition for Review did not specifically state which of the various aspects of the *Order* it sought review of in this Court. As a result, Prometheus was unaware which specific aspects of the *Order* the NAB sought to challenge and had no way of knowing whether the NAB would raise issues that would overlap with Ace, *et al.*'s, *Petition for Reconsideration*.

In its Brief, filed with this Court on July 28, 2008, the NAB presented its full argument. Specifically, the NAB seeks review of the Commission's revision of 47 C.F.R. §73.809 and adoption of a waiver policy with respect to 47 C.F.R. §73.807. The NAB has argued that the Commission's

---

[1]For the Court's convenience, Ace, *et al.*'s, *Petition for Reconsideration* is included in this Motion as Attachment A.

actions violate the Radio Broadcast Preservation Act, violate the Administrative Procedure Act, and lack the required "sound and rational basis." Essentially, NAB's appeal mirrors the concerns raised by Ace, *et al.*'s, *Petition for Reconsideration*.

II. A Stay Pending Reconsideration Will Promote Judicial Economy.

The *Petition for Reconsideration* raises largely identical substantive concerns as those made in the NAB's Brief before this Court. For instance, Ace, *et al.* state that the Commission's revisions to 47 C.F.R. §73.809 are not justified by the record and the Commission failed to provide the adequate notice for interested parties to comment on revision to §73.809, effectively stating the Commission violated the Administrative Procedures Act ("APA"). Ace, *et al.*, *Petition for Reconsideration* at 4-5. Additionally, Ace, *et al.* seek reconsideration of the *Order* on the basis that the new policy regarding 47 C.F.R. §73.807 effectively changes the priority rules and the Commission has not justified its adoption of the policy regarding §73.807. *See id.* at 7-9.

Similarly, the NAB's Brief states also that the Commission's action is not justified by the record and violates the APA. *See* NAB Brief at 35-44. Further, the NAB argues that the Commission's *Order* unlawfully grants low power stations primary status over full-power stations.[2] *See id.* at 45-51.

In conducting its reconsideration, the Commission necessarily will address many of the substantive concerns raised by the NAB before this Court. In the event the Commission grants some or all of the points made on reconsideration, it would substantially moot the issues the NAB has raised before this Court. Moreover, after the Commission's action on the *Petition for Reconsideration,* it is likely that additional parties will seek review. For example, if the Commission

[2]Unlike Ace, *et al.*, the NAB also claims that the Commission's *Order* violates the Radio Broadcast Preservation Act.

denies Ace, *et al.*'s, *Petition for Reconsideration*, Ace, *et al*,. will likely seek review in this Court.

A Commission grant of some or all of the points raised on reconsideration would make the Court's review of those issues a waste of time. Further, it would be a waste of judicial resources to proceed with this appeal since so long as there is a reasonable prospect that other appeals of the same matter will be filed with this Court. Under similar circumstances, this Court has held that the best course of action is to hold the matter in abeyance pending Commission action on *Petitions for Reconsideration*. *Wrather-Alvarez Broadcasting, Inc. v. FCC*, 248 F.2d 646, 649 (D.C. Cir. 1957) (where judicial review and agency reconsideration of the same agency action have been filed by different parties, the Court may hold this case in abeyance pending agency action). Therefore, abeyance is the proper course of action at this time.

III. Conclusion.

WHEREFORE, Intervenor Prometheus respectfully asks that this Court suspend the briefing schedule and hold this proceeding in abeyance pending the outcome of the further proceedings at the Federal Communications Commission. Intervenor Prometheus also asks that this Court grant such further and additional relief as the Court may deem just and proper.

Respectfully submitted,

Parul P. Desai
Andrew Jay Schwartzman
MEDIA ACCESS PROJECT
Suite 1000
1625 K Street, NW
Washington, DC 20006
(202) 232-4300
Counsel for Prometheus Radio Project

August 13, 2008

ATTACHMENT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In Matter of	)	
	)	
Creation of A Low Power Radio Service	)	MB Docket No. 99-25
	)	

To: Office of the Secretary-The Commission

PETITION FOR RECONSIDERATION

1. Ace Radio Corporation, Auburn Network, Inc., Great South Wireless, LLC, Matinee Radio, LLC, Radio K-T, Inc., Scott Communications, Inc., and Great Scott Broadcasting (collectively, "Parties"), by their counsel and pursuant to Section 1.106 of the Commission's Rules, submit this Petition for Reconsideration to the *Third Report and Order*[1] in this proceeding.

2. While the Parties appreciate the Commission's desire to provide regulatory relief to low power FM ("LPFM") stations, its revision of certain LPFM service rules in the *Third R&O* marks a dramatic change in Commission policy. This change is not supported by the record in this proceeding. Specifically, the Commission has drastically overhauled Sections 73.807 and 73.809 of its Rules in a manner that frustrates its mandate in Section 307(b) of the Communications Act of 1934 (the "Act")[2]

[1] FCC 07-204 (rel. Dec. 11, 2007) (the "*Third R&O*"), 73 Fed. Reg. 3202 (2008).

[2] 47 U.S.C. § 307(b).

and ignores the needs and concerns of full-service FM broadcasters and the listening public. In that its new rules and policies are unjustified and thwart the fair distribution of radio service, the Parties urge the Commission to reconsider its revision of Section 73.809 and its interim waiver policy of Section 73.807, as set forth in the *Third R&O*.

I. **BACKGROUND**

3. The Commission has always considered LPFM stations in the 100-watt and 10-watt classes as secondary to full-service FM stations. In its *Second Order on Reconsideration*,[3] the Commission emphasized the secondary status of LPFM stations and stated (i) that "[f]ull-service FM stations, including subsequently authorized new stations, facility modifications, and upgrades" are not required to protect LPFM stations; and (ii) that LPFM stations must protect *all* full-service FM stations' 70 dBμ contours.[4] Thus, LPFM stations retained the two quintessential characteristics of a secondary license class: they must protect primary licensees but are not themselves protected *from* primary licensees. In this regard, the Commission specifically rejected a proposal from Media Access Project to deny "a full service FM station's modification application if 'grant of the application will deny a local community content by reducing the coverage area available to LPFM stations.'" The Commission stated that it disagreed that "an LPFM station should be given an interference protection right that would prevent a full-service station from seeking to modify its transmission facilities or upgrade to a higher service class."[5]

---

[3] FCC 05-75 (rel. March 17, 2005) (the "*Second Order*").

[4] *Second Order*, ¶ 37

[5] *Second Order*, ¶ 38.

4. In the *Further Notice of Proposed Rule Making* ("*FNPRM*") released in connection with the *Second Order*, the Commission solicited comments on a proposal to excise from Section 73.809 some of the limited protection afforded to full-service FM stations located on second adjacent channels to LPFM stations.[6] The Commission noted that the proposed reduction in an LPFM station's obligations to protect subsequent full-service authorizations was based on a real-world problem. Namely, a *single* LPFM station was "forced off the air" following a Section 73.809 interference complaint.[7] This single instance provides the basis for the changes in the *Third R&O*. Notably, the *FNPRM* did not even seek comment on an expansive policy allowing waiver of its second-adjacent channel spacing rule.

II. DISCUSSION

5. The Parties respect LPFM broadcasters' place in the radio industry and, as the Commission notes, have traditionally provided technical and financial assistance to the LPFM stations that they displace.[8] The Parties, however, see the rules and policies implemented in the *Third R&O* as yet another step on the path towards full protection for LPFM stations. As long as LPFM stations are required to protect the service currently provided by full service stations and full service stations are allowed to seek improvements in their facilities and/or change site when the need arises whether voluntary or involuntary, it makes sense for full power broadcasters to assist LPFM stations. Such need for assistance is recognized by the Commission where it notes that

---

[6] *Second Order*, ¶ 39.

[7] *Second Order*, ¶ 38.

[8] *Third R&O* ¶ 62.

one-third of all LPFM applications were returned as deficient.[9]

A. <u>The Revisions to Section 73.809 Are Not Justified By the Record.</u>

6. As mentioned above, in the *FNPRM*, the Commission proposed to remove second adjacent channels from its Section 73.809 interference complaint procedures. It did so on the basis of a single LPFM station's experience. Since it proposed the new rule in 2005, no additional LPFM stations have been forced off the air.[10] Moreover, while the Commission studied the impact of third-adjacent channel interference, it did not perform a similar independent study of the effects that second-adjacent channel interference has on both LPFM stations and full-power FM stations. Instead, it relied upon the now-outdated analysis of an LPFM enthusiast, REC Networks ("REC").[11]

7. The Commission treats REC's comments and its 2005 study of full-service "encroachment" as authoritative and representative.[12] In that regard, the Commission mentions an "update" to REC's 2005 encroachment study. In the absence of a citation to these revised figures, the Parties were unable to locate a filing in this docket wherein REC advised the Commission and interested parties of its new study. Nor, as of the date of this petition, were the Parties able to locate an updated study on REC's website.

---

[9] *Second Order*, ¶ 35

[10] The Media Bureau has apparently studied the issue and identified forty LPFM stations that "could" be affected, *i.e.* will be subjected to some degree of short spacing. *See Third R&O* ¶ 63.

[11] *Third R&O*, ¶ 60.

[12] *Id*.

8. With the release of the *Third R&O*, full-service FM broadcasters believe that the Commission has failed to provide the Parties with adequate notice of the true scope of its proposed overhaul of the LPFM service rules.[13] The complaint procedure set forth in Section 73.809 is of limited value where LPFM stations, operating on a second-adjacent channel to a full service station, are properly spaced.[14] But now the Commission has proposed to eliminate the second and (subject to congressional approval) third adjacent spacings to full service stations. That proposal presents a new series of issues that would have been of great interest to broadcasters had they known from the release of the *FNPRM,* that this proposal was under consideration. When filing comments to the revision to Section 73.809 as it pertains to second-adjacent channels. The Commission has apparently overlooked the nexus between the complaint procedure for properly spaced LPFM stations and the elimination of 2nd (and 3rd) adjacent channel spacings. Yet the Commission has already effectuated its proposal to allow LPFM stations to encroach within the primary station's 70 dBμ contour or within the actual boundaries of its city of license by eliminating the recourse against actual interference formerly provided by Section 73.809. The Parties urge the Commission to reconsider the

[13] Commissioners Tate and McDowell have made public their concerns about the adequacy of the FCC's notice in this proceeding. *See* November 27, 2007 Statement of Commissioners Deborah Taylor Tate Approving in Part, Dissenting in Part ("[E]nhancing the status of Low Power FM licensees as compared to full power FM stations, or creating new status and protections, is beyond the scope of the NPRM and is more appropriately addressed in the Further Notice we are issuing today. Such a sweeping change by an agency should require further notice, consideration, and comment."), and November 27, 2007 Statement of Commissioner Robert M. McDowell Approving in Part and Dissenting in Part ("This processing policy is premature. In this context, certainly, we should not make rules through waiver policies or processing policies. Rather, we should abide by our duties under the Administrative Procedure Act to seek and consider public comment before crafting and implementing rules.").

[14] In addition, where the full service station decides to relocate its transmitter site, it has the ability to identify where a second-adjacent LPFM station is located, and decide whether that station's interfering contour will be a problem.

elimination of second-adjacent stations in Section 73.809(a) under these circumstances.

9. Under the proposed new rules and interim policy, an LPFM station displaced by a subsequently authorized full-service FM station can change channels regardless of the second-adjacent channel spacings.[15] There may not be a problem when only one LPFM station operates within a full-service station's 70 dBμ contour or community of license. This will become a significant problem, however, when the number of LPFM stations encroaching within the full-service station's 70 dBμ contour increases.[16]

10. In trying to justify the rule change, the Commission points to the lifting of the freeze in January 2007 on community of license change proposals. It cites the filing of approximately 200 such applications soon after the freeze was lifted and over 100 such applications during the year since then. As a result of these filings, approximately forty LPFM stations have become short spaced.

11. This justification is completely inadequate. The freeze on community of license proposals lasted eighteen months. Based on the number of rule making petitions to change community of license filed in prior years, the total of approximately 300 such proposals is not unexpected. In fact, that total is much smaller than anticipated when one considers that the 300 applications are filed over the course of two and a half years and that the new streamlined procedures allow proposals to be processed faster and with less

---

[15] *See Third R&*O, ¶ 64.

[16] In fact, the Commission recently denied a noncommercial educational station its waiver request of a third adjacent overlap for just this reason. *See, e.g., Letter to Centenary College from Rodolfo F. Bonacci, Audio Division, Media Bureau* (November 27, 2007) ("This has been called the 'swiss cheese' effect, where a station's protected service contour is punctured by 'holes' of interference from multiple second- and third-adjacent channel FM stations."). See Exhibit A. This Exhibit includes a map which shows that it is possible for up to 118 properly spaced 2nd and 3rd adjacent channel LPFM stations could locate within a Class C station's 70 dBu countour!

risk. Furthermore, these community of license applications have had little or no impact on the minor change processing time. Thus, the Commission should conclude that the number of city of license applications filed does not justify the action taken here.

12. Similarly, the forty LPFM stations affected by the short spacing to pending community of license change proposals will not necessarily suffer interference. A quick review of some of these stations indicates that, despite some degree of short spacing, there is no overlap of interfering and protected contours. How many of these stations will actually be displaced and the need for interim waivers for displacement channels is not established.

B. The Section 73.807 Interim Waiver Policy is Substantively and Procedurally Flawed.

13. The Parties have concerns with proposals set forth in the *Second FNPRM*.[17] However, the Parties believe that reconsideration of the Commission's Section 73.807 interim waiver policy (the "Interim Policy")[18] is appropriate at this juncture. By permitting the waiver of the second-adjacent spacing rule for LPFM stations impacted by new or modified full-service FM facilities, the Interim Policy runs counter to the fair distribution of services mandated by Section 307(b) of the Act. In cases where a displaced LPFM station cannot be moved to a new channel, the Interim Policy even creates a presumption favoring retention of the LPFM over a full-service FM station's request to provide a community with its first local service.[19] Thus, the Interim Policy is

---

[17] The *Second Further Notice of Proposed Rule Making* (the "*Second FNPRM*") was not published at the same time as the *Third R&O*. *See* 73 Fed. Reg. 3202 (Jan. 17, 2008). As of the date of this Petition for Reconsideration, the *Second FNPRM* has not been published in the Federal Register. Consequently the deadline for filing comments has not yet been established.

[18] *Third R&O* ¶¶ 64-71.

[19] For the past twenty-five years, the Commission has given priority to proposals that would provide a

flawed in several respects.

14. First, the *Third R&O* fails to include a detailed explanation of how the public interest is served by permitting such a broad waiver and, in the case of certain displacements, a presumption against providing a community with its first local service. The Commission fails to demonstrate that the public's interest is better served by favoring LPFM stations of relatively limited reach with waivers of the second-adjacent channel spacing rules.

15. Second, the Commission does not adequately explain the change in circumstances that warrants departure from its prior belief made clear merely three years ago "that an LPFM should [not] be given an interference protection right that would prevent a full-service station from seeking to modify its transmission facilities or upgrade to a higher service class."[20] While the Interim Policy, as adopted, would not automatically preclude a full-service station's facility upgrade in order to protect a second-adjacent channel LPFM channel, the same is not always true for a full-service station proposing to change its community of license. The Interim Policy creates a presumption *against* a full-service station's desire to provide a community with its first local service if moving to that community will force an LPFM station providing at least eight hours of daily local programming off the air.[21] Thus, with little explanation or prior notice, the Commission has arbitrarily imposed a policy that creates an incentive for full-service broadcasters to pursue other facility upgrades in lieu of attempting to provide a

---

community with its first local service. *See*, Revision of FM Assignment Policies and Procedures, *Second Report & Order*, 90 FCC 2d 88 (1982)

[20] *Second Order*, ¶ 38.

[21] *Third R&O*, ¶ 68.

community with its first local service.[22] By making a community of license change the option of last resort, the *Third R&O* inverts the Commission's longstanding Section 307(b) policies.

16. Finally, the Commission's decision to apply its new policy of waiving Section 73.807 second-adjacent channel spacings was not merely prospective (*i.e.*, only applying to future cases), but it was also retroactive in that full-service broadcasters with pending minor change applications did not have the benefit of knowing about the new policy before filing their applications. While the Commission may be entitled to engage in retroactive rule making given appropriate circumstances, it is an absolute requirement that it must make an affirmative finding on the record that the retroactive application of such a rule is appropriate.[23] The Commission made no finding whatsoever regarding retroactive application of its interim waiver policy of second-adjacent channel spacing rule, and so its action is invalid.

CONCLUSION

17. The Commission's core duty is to ensure the fair, efficient, and equitable distribution of broadcast licenses. While the Commission has historically heeded this Congressional mandate, its focus has recently drifted from this goal, perhaps out if its desire to promote localism. The revisions to Section 73.809 and the interim Section 73.807 waiver policy are products of this misguided attempt. Both are procedurally flawed. Both frustrate the fair distribution mandate of Section 307(b). Most ironically,

[22] For example, a broadcaster desiring to change city of license may decide to do so at the current site (which would not impact an LPFM), then file an application to change its site which would impact the LPFM. But such a procedure is permitted under the proposal.

[23] *See Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737 (D.C. Cir. 1986).

however, the *Third R&O has* led the Commission to propose a displacement policy which can serve to deny communities of a first local service, thereby stunting the localism it seeks to foster. For these reasons, the Parties respectfully request that the Commission reconsider its elimination of the second-adjacent complaint procedure in Section 73.809 and its interim waiver policy.

Respectfully submitted,

Great Scott Broadcasting

By: /s/
Dennis P. Corbett
Leventhal Senter & Lerman PLLC
2000 K Street, NW
Suite 600
Washington, DC 20006
TEL: 202.429.8970
FAX: 202.293-7783

Its Counsel

Ace Radio Corporation,
Auburn Network, Inc.,
Great South Wireless, LLC,
Matinee Radio, LLC,
Radio K-T, Inc.
Scott Communications, Inc.

By: /s/
Mark N. Lipp
Scott W. Woodworth
Matthew L. Gibson
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006
TEL: 202.719.7000
FAX: 202.719.7049

Their Counsel

February 19, 2008

12799311.1

EXHIBIT A

Exhibit Explained

The attached figure shows a maximum class C 70 dBu contour (67.7 kilometers) on a given commercial channel. If LPFM protection of commercial stations on the second- and third-adjacent channels is ignored, then this figure shows hypothetically how many LPFM 60 dBu contours of fully-spaced LPFM facilities could fit within the 70 dBu contour of a class C station. The total number of facilities is 59, including 32 second-adjacent stations and 27 third-adjacent stations[1].

In addition, it would also be possible for LPFMs to populate the spectrum two and three channels below the class C FM as well (assuming there are no full service stations that block them). Hence, it is possible for a class C FM to have up to 118 second- and third-adjacent LPFMs within its city-grade contour.

[1] Spacing requirement is 13.5 kilometers for first-adjacent LPFMs and 23.5 kilometers for co-channel LPFMs.

Hypothetical Concentration of 2nd and 3rd Adjacent LPFM 60 dBu Contours Inside the 70 dBu Contour of a Class C Station

Total Number of 2nd-Adjacent LPFMs = 32
Total Number of 3rd-Adjacent LPFMs = 27