Who's On Second, and What's on Third?
The Meaning For Community Radio of the FCC's Third Report and Order and Second Further Notice of Proposed Rulemaking on LPFM! (3RO&2FNPRM)

Comments are due in 30 days from publication in the federal register, reply comments are due 15 days after that.

Introduction:
In the 3RO&2FNPRM, a host of minor issues that have plagued low power radio since it's initiation in 2000 were addressed. None of these issues were very controversial among most of the commenters on low power, though a few had differing opinions. All the minor issues were satisfied in a way that is satisfactory to Prometheus. The biggest, most heated issues were encroachment (the current legal right of full power stations to knock existing low power stations out of their way, at will) and channel availability for future low power stations. *Italics* are used to specify encapsulations of FCC decisions or statements. Plain text is contextual reference or Prometheus commentary on the significance of these decisions. Overall, the 3RO&2FNPRM was a big win for low power stations. There were no irreparable losses, few setbacks, clear improvement in many areas, and further comment and rulemaking planned on some key outstanding issues. Considering the much larger forces arrayed against us, the progress made has been substantial. Commissioners Copps, Adelstein, and yes, Chairman Martin, deserve substantial thanks for improving low power prospects in a moment where it looked like our interests were getting pummeled. Commissioners Macdowell and Tate dissented in part, and we can only hope that they come around for the next vote.

It is important to note that while this order made a substantial improvement, it was improvement of a nearly intolerable situation. This report and order comes nowhere near what fair-minded people would consider a just regulatory system for community radio. It is a patchwork of ameliorations of previously established unfair policies—policies which essentially give low power groups table scraps and never gets near a more fundamentally just system of broadcast ownership. We appreciate the efforts of the people at the Commission to improve the situation, but also we resonate with people at the grassroots who will see these various improvements and cry out that this is a pathetic substitute for the kind of community radio policy that we should have.

Changes in Boards of Directors:
The FCC will allow sudden changes in boards of directors of more than 50%. A change like this shall not be deemed a "substantial change in ownership and

control." This minor issue arose from the fact that the FCC was trying to prevent speculators from making an under-the-table transfer of a station by replacing the board of directors, but failed to leave room for normal changes over time in a board of directors. It also failed to take into account that many organizations have elected boards of directors. So long as the organization remains essentially intact, boards of directors can change more than 50% without forcing a complicated filing. A simple form 316 can be used for changes of more than 50% of the board of directors, and that will be considered to be an insubstantial change by the FCC.

Buying and selling LPFMs:
Up until now, ownership of low power FMs was not allowed to be transferred except by special waiver*. The rulemaking now allows transfers of licenses but will not allow transfer or assignment of construction permits*. The FCC will not allow sale of stations for profit, and put in place measures to deter speculation of licenses. Stations can be sold for the depreciated fair market value of the physical equipment and facilities of the station. Prometheus is very satisfied with this result. Stations can be sold to new organizations that would like to run them if the old organization no longer wants to, but there is not an economic incentive to traffic in licenses. Since low power licenses are received from the Commission for free, it seems absurd to allow them to acquire market value and allow people to profit simply by having put an application in at the right time. *A LPFM can only be sold to entities that meet the ownership and eligibility requirements at the time of the transfer. There is a 3 year holding period from issuance of the license before you are eligible to transfer, and you must have operated the station during that time.*

Procedural matters:
Use a form 314 for assignment (authorization passes to a new entity)
Form 315 for transfer of control (control of license passes to different principles (by principles they mean people), but organization stays the same.
Form 316 for insubstantial transfers of control (abrupt change in governing board)
The basic distinctions they are making follow the pattern established in an old Notice of Inquiry, the "non-stock transfer NOI" from 1989

Ownership limits:
The FCC reinstated the prohibition on ownership of more than 1 station. We have advocated 1 station per owner in LPFM since the very beginning. The original LPFM rules allowed just 1 station per owner for the first 2 years of the service, and then allowed ownership of up to ten stations as of 2002. However, no one had an opportunity to acquire more LPFM stations because you were not allowed to buy or sell them and there were no further LPFM application windows. The FCC reconsidered and permanently allowed just one LPFM per organization. Considering the extremely limited number of LPFM frequencies

available, we agree with the one station per organization rule.
The FCC also reinstated the eligibility restriction in 73.853(b) to only local entities. Similarly to multiple ownership, the local ownership restriction ended in 2002, but no one has had much opportunity to acquire non-local licenses.

Programming that can be counted towards a local origination pledge:
The FCC clarified that repetitious automated programming does not count towards a local origination requirement. A live program can be recorded and can run again later on and be counted towards the 8 hours of local origination per day. Importantly, automation is in no way prohibited. Locally originated programming is not measured by the FCC in any way, but some low power stations elect to pledge that they will create locally produced programming, and those stations who do get preference in the application process over applicants who choose not to have the level of community involvement necessary to have locally produced radio shows. The FCC has not indicated any interest in an enforcement regime to police low power local origination pledges, but did say later in the order that low power stations wanting protection from encroachments by commercial stations should be able to demonstrate their service to the community, local programming and community engagement.

Definition of Local Board members:
Board members may be up to 20 miles from the transmitter site in areas that are outside of the top fifty urban markets. The earlier limit was ten miles, but that limit was set with urban areas in mind. In the smaller towns where many LPFMs are located, people live further apart and Prometheus recommended loosening up the distances at which the board members could live away from the transmitter site.

Involuntary timeshares and settlements
The FCC formerly made a public notice that stations were in competition for the same channel, and gave 30 days for the different applicants to come to a settlement, and then divided the license into successive license terms. In practice, they gave much more time than this.

The period for negotiation of voluntary time shares is extended from 30 to 90 days. Involuntary timeshares become renewable if the parties submit a universal settlement to the FCC. If the applicants still do not settle, the licenses remain non-renewable. A superseding agreement changing successive license terms to a time share shall be a minor change, can be filed at any time.

Universal settlements, as usual, include all parties- not just some of them. Everyone must agree. *Unused airtime can be applied for by new entrants during the next filing window, but not between windows. Existing time share groups can change time shares as a minor modification that can be filed at any time.*

Voluntary timeshare applicants may move facilities farther than the normal limits on distance a LPFM can move in a "minor change" in order to select a central location where facilities can be shared among the groups, as a minor amendment. This can be done before or after their construction permits have been granted.

Extension of construction period:
Up until 2005, the FCC strictly enforced the 18 month construction permit, and dismissed permits that were not built in 18 months. In 2005, the FCC began giving extensions upon request if the LPFM had a good reason for a request, generally circumstances that were beyond their control.
All permittees may seek another 18 months to construct on a showing of good cause. Further extensions will likely be denied.

Third Adjacent Channels:
The FCC reiterated their support for lifting the third adjacent channel ban by congress. The agency has said this repeatedly now. This is a very positive step.

LPFM versus translator priority:
The LPFM service was initiated by the FCC in January of 2000, but limited by Congress in December. Consequently, LPFMs were not allowed to apply in major urban areas. In 2003 the FCC opened a window for applications for repeater stations for full power licensees (called translators), which fit in similar "holes in the spectrum" to the spaces where LPFMs can fit. Speculators put in thousands of applications for translators, essentially taking up all the spaces that low power stations could get in the urban areas. Priority between LPFMs and translators was set by the FCC in 2000 as " first in time, " meaning whoever got an application in first got the channel. Because translators got a chance to apply for the urban channels first, it seemed that LPFMs would never get into the cities. But in 2005 the FCC froze the processing of translator applications in light of the massive speculation, and the matter has sat that way until now. LPFM advocates have suggested various ideas for giving bona fide local groups priority over the speculator groups that applied for thousands of frequencies across the country. The FCC does not decide one way or another on lpfm versus translator priority in this notice, but takes several steps towards resolution.

The FCC concedes that the next lpfm window may be the last meaningful lpfm window- by contrast, there will be many more translator windows because translators use the more flexible contour overlap method for allocations.

The biggest step taken by the FCC was to limit further processing of "auction 83" translator applications to ten applications per applicant. Applications already processed do not count towards that limit. The FCC will, by public notice, open an opportunity to choose which ten. The media bureau will open a settlement window and process those "under ten" applications expeditiously.

Encroachment

Low Power FMs are a “secondary service.” This means that if a full power commercial station wants to use their frequency or move into the low power service areas, they can do so without consideration of the low power station. In the view of Prometheus, we have considered this a grave injustice ever since when the low power radio service was introduced in 2000. The media bureau at the FCC is extremely adamant in their belief that low power FM must be secondary, for a variety of reasons. The most legitimate reason is that sometimes it is possible to improve radio service to the public by forcing stations to move around and accommodate more signals reaching more people—since radio stations are often allocated in places that are not optimal for overall efficiency, but rather based on the convenience of the station owner, there is often room for optimization. In the view of the media bureau, if low power weren’t secondary, cats would lie with dogs, brimstone would rain from the heavens, etc, etc. The status quo up till last month was that if a low power station happened to be in the way of a full power station that wanted to change its facilities to improve the commercial coverage, the LPFM station had to either accept more interference or in the worst cases, would be ordered off the air permanently.

Prometheus has always advocated for full, equal, primary status for LPFMs. However, in an effort to break the impasse and protect the core interests of low power stations beyond the baseline indignity of “ secondary status,” Prometheus suggested that it would be ok to force a low power station to move or switch channels in the interest of overall spectral efficiency, but only if the low power station ended up with a channel of equal quality and coverage, and had their expenses paid associated with the trouble that was caused for the LPFM. If there was no suitable alternative found, the FCC should disapprove the full power move and let the LPFM stay where they were. This solution would allow the spectrum efficiencies that the FCC is required by law to encourage, while preserving the core interests of low power stations- staying on the air with comparable coverage to the coverage that the LPFM started with.

One more key concept is that LPFMs are often originally allocated in places where they will receive substantial interference. Primary stations are not allowed to allocate where they will receive interference, because they have a core obligation to their listeners to provide interference free coverage. The reason many LPFMs are allowed to exist in the first place is this: since they are not primary, they do not have the same core obligation to provide interference-free coverage. So some parties asserted that since lpfms do not have the obligations to provide interference free coverage and are allowed to locate in marginal spots in the first place (where fullpower stations could not locate), the LPFMs should accept any new interference without complaint. Prometheus asserted that while some LPFMs did start up in marginal locations, that is no reason that they should be required to accept more interference than there was when they started.

The actions in the Encroachment issue taken by the FCC are the most complicated actions taken in this proceeding, so hang in there! While it was always unjust, the overall scope of low power stations affecte by the encroachment problem was relatively small until a recent FCC order streamlining “Changes of Community of License” (CCOL) for full power stations went into effect last winter. This made it much easier for full power stations to make the sorts of moves that can displace LPFMs.

Importantly, all the actions taken on encroachment were in the form of a temporary, interim “ processing policy,” not a permanent solution. The FCC felt that they needed further comment before they permanently wrote any of these changes into the rules. So these policies stand for now, and barring a change of course will be written into the rules—but they are not permanent and could still be changed before they are codified into regulations.

The FCC did not shift the fundamental relationship of primary to secondary, but took a number of actions- some mildly ameliorative and some quite substantive- to fix the conflicts between LPFMS and full power stations. Further complicating things, as a result of Administrative Procedures Act concerns, the FCC also took some actions now, tentatively concluded in favor of taking other actions, (but waited to take them until after they had given notice and held another public comment period), and took further comment without a tentative conclusion on some questions.

To start with, the FCC expressed their goal to solve these conflicts in ways that serve the interests of both parties.
73.809 (rule specifying the LPFM remediation requirements) will no longer be applied to second adjacent channel interference-- LPFMs have no obligations to stations that encroach them on second adjacents. This will eliminate some cases where a LPFM would have been forced off the air by a station moving closer to them that is on the second adjacent channel. The FCC has long asserted that the rules they have on 2nd adjacent channel interference are outdated and over-protective, so in this case they relieve LPFM stations from uncalled for encroachments due to the fact that they do not believe real problems will be caused when the move-ins are on the 2nd adjacent channel. When the Congress lifts the third adjacent channel protection, the FCC will also want to modify that.

The FCC found that there were about 40 “potentially fatal” encroachments, but of those there were 32 that could be fixed if the LPFM moved to a new channel. In circumstances where there is no available channel to go to, the FCC will consider waiving the secondary status and denying the modification if the LPFM is demonstrably meeting the 8 hours of local programming standard. In

circumstances where there is another viable channel to go to, the LPFM has to go there or be shut down.

The FCC also encourages (but does not yet require) full power stations to provide technical and financial assistance to stations they are encroaching on, including not just low power stations that they are putting off air but also those that they are merely cutting into their signal area.

Second adjacent waiver standard:
The most common way to get out of being encroached is with a second adjacent channel spacing waiver, as pioneered in LPFM by the KYRS Spokane decision, which was derived from certain decisions made for Class D stations. In that decision, KYRS was required to get permission from the 2nd adjacent channel stations that it was relocating next to. In fact, that permission was refused by the first group they approached, a Clear Channel affiliate. The burden of proof is now shifted away from the LPFM to get permission from the full power station: now the full power station on the 2nd adjacent must show evidence that there will be a problem in order to prevent a LPFM from moving there. *second adjacent waivers will only be granted when:*
1) grant of CCOL would put LPFM and full power at less than 73.807 minimum distance from each other.
2) the change would cause interference or result in displacement of LPFM.
3) waivers can only be used when there is not an alternate fully spaced option.
4. these waivers can only be used on the 2nd adjacent channel. co-channel and first actually would cause interference, and FCC does not have authority for the third adjacent channel.

The FCC will contact low power FMs threatened with encroachment.
LPFM must submit a form 318 minor amendment request with a study that requests a second adjacent channel waiver.
Full power station on the second adjacent channel must "Show Cause" why the waiver should not be granted.
If the Commission determines in favor of the LPFM, an STA (Special Temporary Authority) will be issued for the LPFMs move until the completion of the rulemaking where final decisions are made about codifying these waiver policies permanently.
The media bureau will include a condition, where appropriate, instructing encroaching station to provide tech assistance and financial responsibility for resolving any interference issues.

*Going forward, FCC will favor grant of full power modification proposals**. But, there will be a "rebuttable presumption" against the move-in CCOLs when the LPFMs can demonstrate that they have regularly provided 8 hours of locally originated program service, and there is no other reasonable alternative for the LPFM.***

This presumption applies for displacements and for significant interference to the LPFM. Significant received interference is when the LPFM transmitter site is inside the interfering contour of a co- or first adjacent channel CCOL proposal. The presumption against move-ins does not apply when there is a "suitable" alternate channel the LPFM can move to.
Suitable channels are those that meet the "required" co and first adjacent channel distances in 73.807. **On close reading of the text of the 3RO&2FNPRM, we believe that there may be a loophole in here where a low power station may conceivably be forced to a channel where they accept more interference than they received before.** Sometimes they might be forced to a channel with better coverage—it is somewhat random. But in cases where a channel that is deemed suitable turns out to be worse for the LPFM, this could be a serious drawback. **This is an issue that Prometheus will comment further on and may pursue reconsideration on if it is not addressed in the final order.**

The presumption in favor of the LPFM does not apply where there is improved service to the community of license of the full power station. Prometheus needs to do further research on the extent to which this might be a problem in many cases, or whether this would be a relatively isolated exception.

Second Further Notice of Proposed Rulemaking:

The next lpfm window will be after this rulemaking is completed, processing of the NCE window applications is pretty much complete, and before any other windows for radio licensing are opened.
In the 2FNPRM, the FCC will seek further comment on a number of issues they were not able to resolve yet in this current third report and order (3RO). In some cases they tentatively conclude in favor of a certain course of action, in other cases they simply ask the public for comment.

Encroachement:
The FCC will be taking comment on both main elements of the new rules:
1) The second adjacent waiver standard and processes,
2) The rebuttable presumption against a full power CCOL when the low power station can demonstrate local programming and has no other suitable alternative.
One key area where the FCC asks questions is the issue of compensation for LPFMs having to move- the FCC tentatively concluded that it should be limited to expenses connected with physical transmission—not compensation for re-branding and other expenses caused by the move.

Contour Overlap:
The FCC tentatively concluded that licensing of lpfm stations pursuant to 74.1204 rules (the rules currently used for translators) is in the public interest. They tentatively conclude in favor of the use of some sort of contour overlap

method for allocating LPFM. They tentatively conclude that lpfm stations allocated with the contour method should be required to address all bona fide interference complaints, the same standard used for translators, which is a stricter policy than used for other low power stations which were allocated with minimum distances. They would still also allow low power stations to use the original method of allocations, minimum distances, if they were actually able to find a frequency available that way.

The FCC tentatively concluded that the more sophisticated analytical tools such as the "Lonlgey-Rice method" would not be used for allocating LPFMs.
One key method for allocating translators involves demonstrations of zero population in the extremely small zones where certain forms of interference are predicted to occur. This is called "making D/U showings." D/U stands for desired to undesired signal ratios. This is standard practice for translators. However, the FCC is taking comment about whether they should extend that practice to LPFMs. This is important, because without the ability to make D/U showings, LPFMs will lose many potential opportunities.

The FCC tentatively concluded that stations licensed under the original lpfm rules (minimum distance spacings (73.807) would still be governed by 73.809, which establishes a simple interference remediation regime, but does not require LPFMs to respond to every single bona fide interference complaint. Low Power stations under minimum spacing rules have to remediate interference inside protected contours of full power stations- but do not have to remediate interference outside the full power protected contours. Translators allocated with contour overlap have to remediate any interference, even outside of the full power stations protected contours.

Translators versus LPFM priority:
The FCC seeks comment on LPFM versus translator priority. It does not tentatively conclude in any direction. It does, however, specifically mention one of the Prometheus proposals.

The full set of questions up for comment in the rulemaking start on page 31 of the report and order. Comments are due in 30 days from publication in the federal register, reply comments are due 15 days after that. Sharpen your pencils!