



FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 74

[MB Docket No. 18-119; FCC 20-141; FRS 17304]

FM Translator Interference

AGENCY: Federal Communications Commission.

ACTION: Final rule; dismissal and denial of petitions.

SUMMARY: In this document, the Federal Communications Commission (Commission) addresses four petitions for reconsideration of a final rule (Petitions) filed by: Charles M. Anderson; the LPFM Coalition; KGIG-LP, Salida, California/Fellowship of the Earth; and Skywaves Communications LLC. The Petitions seek reconsideration of the Commission's report and order in the FM translator interference proceeding (*Report and Order*). The Commission dismisses or denies the arguments set forth in the Petitions and amends a rule to correct a cross-reference.

DATES: The filing of the Petitions was published at 84 FR 37228 on July 31, 2019. The Commission adopted the Order on Reconsideration dismissing and denying the Petitions and amending part 74 on October 6, 2020. The dismissals and/or denials of the Petitions will be effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. The rule amendment adopted in the Order on Reconsideration will be effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

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SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order on

Reconsideration (*Reconsideration Order*), MB Docket No. 18-119; FCC 20-141, released October 6, 2020. The full text of the *Reconsideration Order* is available electronically via the FCC's Electronic Document Management System (EDOCS) website at http://fjallfoss.fcc.gov/edocs_public/ or via the FCC's Electronic Comment Filing System (ECFS) website at <http://www.fcc.gov/ecfs>. (Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.) Alternative formats are available for people with disabilities (braille, large print, electronic files, audio format), by sending an e-mail to fcc504@fcc.gov or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

SYNOPSIS

1. *Introduction.* In this *Reconsideration Order*, adopted and released on October 6, 2020, the Commission addresses petitions for reconsideration (Petitions) of the Report and Order, published at 84 FR 27734 (June 14, 2019) (*Report and Order*) in the FM translator interference proceeding. The Commission dismisses or denies the arguments raised in the Petitions. It also corrects a cross reference contained in the rules established by the *Report and Order*.

2. *Background.* In the *Report and Order*, the Commission adopted new rules to improve the FM translator interference complaint and resolution process. Specifically, it: (1) gave FM translators the flexibility, upon a showing of interference to or from any other broadcast station, to change channels to any available same-band channel using a minor modification application; (2) standardized the information that must be compiled and submitted by any station claiming interference, including the minimum number of listener complaints proportionate to the signal coverage of the complaining station and undesired-to-desired (U/D) data demonstrating the relative signal strength at each listener location (zone of potential interference); and (3) established an outer contour limit of 45 dBu signal strength of the complaining station within which interference complaints will be considered actionable.

4. *Discussion.* The Commission dismisses or denies the arguments raised in the Petitions, as summarized below. It also corrects a cross reference contained in the rules established by the *Report and Order*.

5. *Channel Changes.* The Commission rejects the argument that it erred in the *Report and Order* by not requiring that low power FM (LPFM) preclusion studies be submitted with each minor change application filed by an FM translator operator to operate on a non-adjacent channel. It affirms its earlier conclusion that neither the plain language of section 5(1) of the Local Community Radio Act of 2010 (LCRA) nor subsequent case law mandates preclusion studies for translator minor change applications, explaining that LCRA section 5 pertains only to the licensing of new rather than existing stations. Moreover, the Commission finds that its previous efforts to preserve LPFM availability in the context of waivers for FM translator long-distance “hops” are not relevant to the channel change applications at issue here. Therefore, the Commission both dismisses this argument as previously raised and considered and denies it on the merits.

6. The Commission also dismisses and, on alternative and independent grounds, denies the argument that the non-adjacent channel change rule violates the *Ashbacker* doctrine. This argument could have been raised earlier in the proceeding. Moreover, the *Ashbacker* right to comparative consideration for mutually exclusive applications does not apply to prospective applicants, as here. Rather, the Commission may promulgate rules that limit the ability of parties to file mutually exclusive applications. The Commission finds that it is in the public interest to do so here by allowing FM translator stations to remediate interference by changing channels and treating changes as minor, thereby foreclosing competing applications. Doing so provides a low-cost way to resolve interference with little or no reduction in service area and help keep translators on the air. The Commission finds that to treat these changes as major, and therefore subject to competing applications, would undermine the Commission’s efforts to provide FM translator stations with an efficient means to remediate interference.

7. *Required Contents of Translator Interference Claims.* The Commission affirms three as the appropriate minimum number of listener complaints that must be submitted by an LPFM station with fewer than 5,000 people within its protected contours, dismissing the argument that this limit should be set at six. This argument was considered and rejected earlier in the proceeding. The Commission also denies this argument on the alternative and independent ground that the three-listener complaint minimum is a targeted and proportionate requirement, which in any case is applicable only to a small subset of LPFM stations.

8. The Commission rejects the arguments that it violated the Administrative Procedure Act (APA) and the petition clause of the U.S. Constitution (Petition Clause) by holding that multiple listener complaints from the same building will not be applied toward the listener complaint minimum. The APA does not prevent the Commission from adopting a final rule that differs from a proposal in an NPRM. To the contrary, the APA requires that, after providing the public with an opportunity to comment, an agency must then consider the relevant matter presented. In this case, although the NPRM proposed to allow multiple complaints from a single building, in the *Report and Order* the Commission agreed with commenters that the new rules should ensure that listener complaints come from multiple, unique, locations to demonstrate a real and consistent interference problem. By carefully reviewing the record and modifying its earlier proposal in response to it, the Commission complied with APA requirements.

9. The Commission also denies the argument that the *Report and Order* denied radio listeners their right under the Petition Clause to petition the government for a redress of grievances. Petitioners do not cite to any court or agency precedent to support the assertion that the Petition Clause requires the Commission to accept and consider all listener complaints of translator interference. To the contrary, the Supreme Court has held that nothing in the First Amendment suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to communications of members of the public on public issues. Moreover, the Commission explains, from a practical standpoint, it is not necessary to obtain

multiple listener complaints from a single location to determine whether that location is experiencing interference. It also clarifies that although multiple listener complaints will not count toward the minimum number of listener complaints, the translator operator must still remediate all valid complaints from the same building if all threshold requirements are otherwise met.

10. Because the *Reconsideration Order* corrects a cross-reference within new §§ 74.1203(a)(3) and 74.1204(f) to refer to § 74.1204(b) rather than previously cross-referenced § 73.313, the Commission dismisses as moot any objection to the new rules based on § 73.313.

11. The Commission upholds the requirement set out in the *Report and Order* that each station submitting a translator interference claim package must include U/D data demonstrating that at each listener location the ratio of undesired to desired signal strength exceeds -20 dB for co-channel situations, -6 dB for first-adjacent channel situations or 40 dB for second- or third-adjacent channel situations, calculated using the Commission's standard contour prediction methodology. The Commission declines to allow listener complaints from anywhere within the complaining station's protected contour, even if the listener location does not satisfy this U/D requirement. The U/D requirement serves as a threshold test to eliminate obvious instances where the translator could not be the source of the alleged interference. Including listener complaints from areas within the complaining station's protected contour that do not satisfy the U/D test would undermine this purpose. Moreover, the Commission explains, the strength of the complaining station's signal within its protected contour makes the likelihood of translator interference within the protected contour exceedingly small. In the rare event that a valid U/D showing could be made for a location within a complaining station's protected contour, the Commission states that it would accept a listener complaint at that location if it otherwise met the complaint requirements set out in the *Report and Order*. Finally, the Commission anticipates that if a real and consistent interference problem caused by a translator should occur, the affected station will be able to readily obtain the required minimum number of

listener complaints from within the zone of potential interference as defined in the *Report and Order*.

12. In response to Skywaves Communications LLC, who points out that the *Report and Order* does not specify F(50,50) or F(50,10) propagation curves with respect to the 45 dBu contour limit and the U/D zone of potential interference test, the Commission makes a technical change to §§ 74.1203(a)(3) and 74.1204(f) to cross-reference § 74.1204(b) rather than § 73.313. Section 74.1204(b) includes guidance on using F(50, 50) curves for protected contours and F(50, 10) curves for interfering contours and is therefore appropriate for the purpose of making a U/D zone of potential interference showing under the new rules.

13. Contour Limit on Translator Interference Complaints. The Commission dismisses as previously raised and considered the argument that existing translator stations will be harmed by the establishment of an outer contour limit of 45 dBu signal strength of the complaining station within which interference complaints will be considered actionable. On alternative and independent grounds, the Commission denies this argument on the merits, noting that under the previous rules, any interference complaint, at any distance from the complaining station, could have forced a translator station to cease operations. Because the new contour limit protects translator stations from specious interference complaints, it reduces the risk to translator stations rather than increasing it. In this respect, the Commission clarifies that the 45 dBu contour limit does not affect any station's existing protected contour under the rules, including LPFM stations. It affirms that the 45 dBu contour limit represents a carefully considered balance between protecting translator stations from specious interference claims on one hand while preserving existing protections for other broadcast stations on the other.

14. The Commission dismisses as already raised and rejected the argument that the Commission relied on misleading data when it determined that there is significant listenership beyond many stations' 54 dBu signal strength contours. In doing so, the Commission considered all arguments on this point and concluded that the data presented in the record formed an

adequate basis for approximating nationwide listenership at various signal strength contours. On alternative and independent grounds, the Commission denies this argument on the merits, noting that the Nielsen data in the record was supplemented and corroborated by independent listenership data submitted by other broadcasters from various markets nationwide. Therefore, while acknowledging that CUME, zip code-based, and home address-based information may be over- or under-inclusive in individual cases (for example, when a zip code centroid is within a certain signal strength contour but the listening occurs outside it), the Commission finds that this data is sufficiently reliable with respect to broad listenership patterns to support the conclusion that a significant amount of FM listening occurs beyond the average 54 dBu contour and that setting a limit on actionable complaints at this signal strength would be economically damaging to many broadcasters.

15. The Commission dismisses as previously raised and rejected the argument that the new rules contravene LCRA section 5(3). The applicability of the LCRA “equal in status” provision was raised by other commenters earlier in the proceeding and addressed in the *Report and Order*. The Commission affirms its conclusion that LCRA does not prohibit the establishment of an outer contour limit on translator interference claims.

16. The Commission denies the argument that it acted with bias against the LPFM services by rejecting objections filed by LPFM advocates to pending translator applications in other proceedings. This complaint ignores the Commission’s longstanding stewardship of this valuable and unique service as well as the fact that many of the measures taken in the *Report and Order* have equivalent rules already applicable to the LPFM service, such as the ability to change channels to resolve interference and the contour limitation on listener complaints. Thus, the new rules do not prioritize translator service over LPFM service but bring the two services into closer harmony with each other. Finally, the Commission explains that improving the translator interference process benefits all parties concerned, including LPFM stations, by providing a clearly defined, expeditious, and fair process for resolving translator interference complaints.

17. *Pending Proceedings.* The Commission affirms the holding in the *Report and Order* that the rules adopted therein apply to any pending applications or complaints that have not been acted upon as of the date the new rules became effective. It rejects the argument that doing so imposes “impermissible retroactive burdens” on those with pending translator interference complaints. None of the three ways in which a rule can be retroactive are demonstrated here. First, applying the new rules to pending translator interference complaints does not increase complainants’ liability for past conduct. Second, applying the new rules to pending translator interference complaints does not impose new duties with respect to transactions already completed. Third, applying the new rules to pending translator interference complaints does not impair rights a party possess when it acted. In this respect, the Commission finds that Petitioners do not demonstrate or provide support for the position that the mere filing of an interference complaint endows the complainant with vested rights, or that such rights, if established, would be impaired by application of the new rules. The Commission explains that the purpose of the interference complaint regime addressed in the *Report and Order* is to resolve complaints that FM translators are causing interference to listeners of FM and LPFM stations. Nothing in the *Report and Order* eliminated the ability of complainants, including those with pending complaints, to avail themselves of the Commission’s processes to resolve such interference concerns. Rather, the rules adopted in the *Report and Order* changed only the way in which these claims are adjudicated by requiring more specific evidence. Moreover, pending complainants were provided with the opportunity to supplement their complaints to meet the new requirements. If a pending complaint is dismissed for failure to comply with the new rules, nothing precludes that same complainant from pursuing a new interference complaint in the future that complies with the new rules. Therefore, the Commission concludes, applying the new rules to pending complaints does not impair rights a party possessed when it acted because both before and after the effective date of the new rules, FM translators are prohibited from causing interference to listeners of FM and LPFM stations and the Commission provides a complaint

process for resolving such interference complaints. It therefore denies the contention that applying the new rules to interference complaints pending against translator stations had an impermissible retroactive effect.

PROCEDURAL MATTERS

18. *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.

19. *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 these rules are “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).

20. *Final Regulatory Flexibility Certification.* The Regulatory Flexibility Act of 1980, as amended (RFA), 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.” The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. 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.

21. This Order on Reconsideration disposes of petitions for reconsideration in MB

Docket No. 18-119. In the *Report and Order* in this proceeding, the Commission issued a Final Regulatory Flexibility Analysis (FRFA) that conforms to the RFA, as amended. 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.

22. In this Order on Reconsideration, the Commission corrects a cross-reference in the rules to direct broadcast applicants and licensees to a more comprehensive set of guidelines for calculating undesired-to-desired (U/D) signal strength ratios in the context of a translator interference claim. Specifically, although both the original cross-reference (47 CFR 73.313) and the new cross-reference (47 CFR 74.1204(b)) accurately describes the Commission's standard contour prediction methodology, the amended cross-reference includes specific instructions for calculating interfering as well as protected contours, both of which are used when calculating U/D ratios. Thus, the amended cross-reference is substantially similar to the original cross-reference but provides additional useful information and is more technically accurate for the type of calculation involved. This change is minor and is not anticipated to have any economic effect on broadcast licensees, including small entities. Therefore, we certify that the requirements of the Order on Reconsideration will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the Order on Reconsideration, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress pursuant to the Congressional Review Act. In addition, the Order on Reconsideration and this final certification will be sent to the Chief Counsel for Advocacy of the SBA and will be published in the **Federal Register**.

ORDERING CLAUSES

14. **IT IS ORDERED** that, pursuant to sections 1, 2, 4(i), 4(j), 301, 303, 307, 308, 309, 319, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 154(j), 301, 303, 307, 308, 309, 319, and 405, and § 1.429 of the Commission's rules, 47 CFR 1.429, this Order on Reconsideration in MB Docket No. 18-119 **IS ADOPTED** and **SHALL BE**

EFFECTIVE 30 days after publication in the Federal Register.

15. **IT IS FURTHER ORDERED** that part 74 of the Commission rules **IS AMENDED** as set forth in Appendix A and that such rule amendment **SHALL BE EFFECTIVE** 30 days after publication in the Federal Register.

16. **IT IS FURTHER ORDERED** that the Petition for Reconsideration filed by Louis P. Vito on July 16, 2019, **IS DISMISSED** in its entirety.

17. **IT IS FURTHER ORDERED** that the Petition for Reconsideration filed by Charles M. Anderson on July 11, 2019, **IS DISMISSED** to the extent set out in paragraphs 9, 17, 20, and 21, *supra*, and **IS DENIED** to the extent set out in paragraphs 9 and 19, *supra*.

18. **IT IS FURTHER ORDERED** that the Petition for Reconsideration filed by the LPFM Coalition on July 15, 2019, **IS DISMISSED** to the extent set out in paragraphs 4, and 21, *supra*, and **IS DENIED** to the extent set out in paragraphs 7, 10-13, 21, and 23-25 *supra*.

19. **IT IS FURTHER ORDERED** that the Petition for Reconsideration filed by KGIG-LP, Salida, California/Fellowship of the Earth on July 15, 2019, **IS DISMISSED** to the extent set out in paragraphs 4 and 8, *supra*, and **IS DENIED** to the extent set out in paragraphs 5-6, 8 and 22, *supra*.

20. **IT IS FURTHER ORDERED** that the Petition for Reconsideration filed by Skywaves Communications LLC on July 15, 2019, **IS DISMISSED** to the extent set out in paragraph 17 and 19, *supra*, and **IS DENIED** to the extent set out in paragraphs 15 and 18, *supra*.

21. **IT IS FURTHER ORDERED** that the Stay Request filed by the LPFM Coalition on July 15, 2019, **IS DISMISSED** as moot.

22. **IT IS FURTHER ORDERED** that, should no further petitions for reconsideration or petitions for judicial review be timely filed, MB Docket No. 18-119 **SHALL BE TERMINATED**, and its docket **CLOSED**.

23. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of

this Order on Reconsideration, including the Final Regulatory Flexibility Certification, 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).

24. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Order on Reconsideration, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION.

Marlene Dortch,
Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR Part 74 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. Amend § 74.1203 by revising paragraph (a)(3) to read as follows:

§ 74.1203 Interference.

(a) * * *

(3) The direct reception by the public of the off-the-air signals of any full-service station or previously authorized secondary station. Interference will be considered to occur whenever reception of a regularly used signal is impaired by the signals radiated by the FM translator or booster station, regardless of the channel on which the protected signal is transmitted; except that no listener complaint will be considered actionable if the alleged interference occurs outside the desired station's 45 dBu contour. Interference is demonstrated by:

(i) The required minimum number of valid listener complaints as determined using Table 1 of this section and defined in § 74.1201(k) of this part;

(ii) A map plotting the specific location of the alleged interference in relation to the complaining station's 45 dBu contour;

(iii) A statement that the complaining station is operating within its licensed parameters;

(iv) A statement that the complaining station licensee has used commercially reasonable efforts to inform the relevant translator licensee of the claimed interference and attempted private resolution; and

(v) U/D data demonstrating that at each listener location the undesired to desired signal strength exceeds -20 dB for co-channel situations, -6 dB for first-adjacent channel situations or 40 dB for second- or third-adjacent channel situations, calculated using the methodology set out in § 74.1204(b).

Table 1 to § 74.1203(a)(3)

Population within Protected Contour	Minimum Listener Complaints Required for Interference Claim
1-199,999	6
200,000-299,999	7
300,000-399,999	8
400,000-499,999	9
500,000-999,999	10
1,000,000-1,499,999	15
1,500,000-1,999,999	20
2,000,000 or more	25
LPFM stations with fewer than 5,000	3

* * * * *

3. Amend §74.1204 by revising paragraph (f) to read as follows:

§ 74.1204 Protection of FM broadcast, FM Translator and LP100 stations.

* * * * *

(f) An application for an FM translator station will not be accepted for filing even though the proposed operation would not involve overlap of field strength contours with any other station, as set forth in paragraph (a) of this section, if grant of the authorization will result in interference to the reception of a regularly used, off-the-air signal of any authorized co-channel, first, second or third adjacent channel broadcast station, including previously authorized secondary service stations within the 45 dBu field strength contour of the desired station.

Interference is demonstrated by:

(1) The required minimum number of valid listener complaints as determined using Table 1 to § 74.1203(a)(3) of this part and defined in § 74.1201(k) of this part;

(2) A map plotting the specific location of the alleged interference in relation to the complaining station's 45 dBu contour;

(3) A statement that the complaining station is operating within its licensed parameters;

(4) A statement that the complaining station licensee has used commercially reasonable efforts to inform the relevant translator licensee of the claimed interference and attempted private resolution; and

(5) U/D data demonstrating that at each listener location the undesired to desired signal strength exceeds -20 dB for co-channel situations, -6 dB for first-adjacent channel situations or 40 dB for second- or third-adjacent channel situations, calculated using the methodology set out in paragraph (b) of this section.

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Editorial note: The Office of the Federal Register received this document on December 16, 2020.

[FR Doc. 2020-28063 Filed: 3/9/2021 8:45 am; Publication Date: 3/10/2021]