INITIAL VERSION

ORAL ARGUMENT NOT YET SCHEDULED

No. 08-1117

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF BROADCASTERS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of an Order of the
Federal Communications Commission

REPLY BRIEF FOR PETITIONER NATIONAL ASSOCIATION OF BROADCASTERS

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GLOSSARY

2000 Order: Report and Order, *Creation of a Low Power Radio Service*, 15 FCC Rcd. 2205 (2000) [JA __].

2001 Order: Second Report and Order, *Creation of a Low Power Radio Service*, 16 FCC Rcd. 8026 (2001) [JA __].

2005 FNPRM: Second Order on Reconsideration and Further Notice of Proposed Rulemaking, *Creation of a Low Power Radio Service*, 20 FCC Rcd. 6763 (2005) [JA __].

APA: Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*

D/U: Desirable-to-Undesirable, a ratio-based methodology for evaluating radio interference which compares the strength at a given location of the desired and undesired signals.

FCC or Commission: Federal Communications Commission.

FM: Frequency Modulation, a method for transmitting audio information through a radio signal.

JA: Joint Appendix.

LPFM: Low Power FM radio.

MHz: Megahertz.

NAB: National Association of Broadcasters, a trade association that advocates on behalf of more than 8,300 free, local radio and television stations. *See* http://www.nab.org.

Order: Third Report and Order and Second Further Notice of Proposed Rulemaking, *Creation of a Low Power Radio Service*, 22 FCC Rcd. 21,912 (2007) [JA __].

RBPA: Radio Broadcasting Preservation Act of 2000, Pub. L. No. 106-553, div. B, § 632, 114 Stat. 2762, 2762A-111 (2000).

PERTINENT STATUTES AND REGULATIONS

See the addendum to the principal brief.

SUMMARY OF ARGUMENT

Neither the FCC nor its supporting intervenor Prometheus offer any basis for upholding the Order.[1] Implicitly acknowledging the Commission's failure even to address many of the arguments made against its decision, the Commission's brief tries to plug those gaps by supplying new arguments.[2] This Court, however, "may not accept appellate counsel's *post hoc* rationalizations for agency action" as a basis to sustain the Order. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983); *see also SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Likewise, the Commission's plea for deference to its statutory construction must be rejected, since the construction offered by Commission counsel was never adopted, or even discussed, by the agency itself. *City of Kansas City v. Department of Housing & Urban Development*, 923 F.2d 188, 192 (D.C. Cir. 1991).

Leaving aside the *post hoc* nature of many of the Commission's arguments, those arguments are wrong on the merits. *First*, the language, evident purpose, and legislative history of the Radio Broadcasting Preservation Act ("RBPA") make

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1 *Creation of a Low Power Radio Service*, 22 FCC Rcd. 21912 (2007) [JA __] ("Order").

2 The United States – a statutory respondent – apparently does not share Commission counsel's views. In a highly unusual step, it has not joined the FCC's brief and takes no position in this case. *See* Letter from Robert B. Nicholson, filed September 12, 2008.

clear that the Commission cannot reduce the protections full-power stations and their listeners have from LPFM interference.

Second, the Commission's new interference "policy" not only is foreclosed by Congress's contrary judgment but violates the APA. The Commission cited no basis, and its brief proffers none, for its abrupt change in its conclusions about interference to full-power FM service from second-adjacent channel LPFM stations. Similarly, the FCC's "presumption" that LPFM stations with locally-originated programming will serve the public better than full-power stations is wholly inconsistent with prior FCC decisions.

Third, the Commission cannot evade review by characterizing its decision as only involving "interim" waivers and presumptions and claiming that its Order is not ripe for review. The statute does not permit waivers of interference protections. Further, the legal issues NAB raises are fit for review, and the Commission is applying its decision now, resulting in loss of service to listeners of full-power radio. The Order should be vacated.

ARGUMENT

I. The FCC's Order Is Contrary to the Radio Broadcasting Preservation Act.

Although the Commission failed to offer any explanation for how to reconcile its decision to eliminate interference protections with the RBPA,

Commission counsel belatedly proffers an interpretation of the statute in an attempt to justify the Commission's actions. FCC Br. at 17-30. Apart from being impermissibly *post hoc*, Commission counsel's construction of the statute is also wrong. It is both contrary to the text and structure of the statute and demonstrably incompatible with Congress' object and purpose.

A. The RBPA Prevents Elimination or Reduction of Second-Adjacent Protections.

Statutory construction is properly "'a holistic endeavor,' … and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." *United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993)(citation omitted). The Commission's reading of the RBPA fails to account for the full text of the statute, or its structure and subject matter.

Congress enacted the RBPA in direct response to the Commission's creation of the low power FM radio service. *Creation of a Low Power Radio Service*, 15 FCC Rcd. 2205 (2000) [JA __] ("2000 Order"). The Commission had barred interference to full-power service from LPFM stations on co-, first-, and second-adjacent channels, but declined to do so for third-adjacent channels. *Id.* ¶ 104 [JA __]. In the RBPA, Congress reversed the Commission's decision as to third-adjacent channels. In doing so, it took as a baseline the fact that there would be continued protection for stations on co-, first-, and second-adjacent channels. That

is reflected in the statute's text, which requires the Commission to "prescribe minimum distance separations for third-adjacent channels (as well as for co-channels and first- and second-adjacent channels)." RBPA § 632(a)(1)(A). The first portion of the sentence mandates that the Commission reverse its decision and prescribe protections as to third-adjacent channels; the parenthetical ensures that the protections for the other channels will remain in place (an intent that, as discussed below, is undeniably confirmed by the legislative history). At the same time, because Congress recognized that the Commission claimed that protections against third-adjacent channel interference were not necessary, Congress provided a procedure for the Commission to study the technical issues and report to Congress as to the need for such protections. But Congress expressly prohibited any action by the agency to "eliminate or reduce the minimum distance separations for third-adjacent channels required by paragraph (1)(A) … except as expressly authorized by an Act of Congress." *Id.* § 632(a)(2)(A).[3]

The Commission now advances the *post hoc* rationalization that the statute's first subsection simply required the agency to "prescribe" co-channel, first-,

[3] There is no basis for Prometheus' claim that completion of the authorized third-adjacent study somehow caused the RBPA's weight to "diminish." Intervenor Br. at 11. In fact, the Commission has squarely rejected that notion. *See Iglesia Pentecostal Cristo Missionera*, 23 FCC Rcd. 2230, 2231 (2008) ("The Commission's recommendations regarding the LPFM interference study do not have the force of law, and cannot overturn [the statute].").

second-, and third-adjacent protections, and that it fulfilled this obligation when it adopted its 2001 Order. FCC Br. at 18; *see Creation of a Low Power Radio Service*, 16 FCC Rcd. 8026 (2001) [JA __] ("2001 Order"). But, of course, as Congress was well aware, the co-channel, first-, and second-adjacent channel protections were already in place when it acted, and the 2001 Order made no changes to them at all. Thus, there was no need for Congress to require the Commission to "prescribe" such protections. Indeed, under the Commission's construction, the parenthetical clause referring to co-channel, first-, and second-adjacent channel protections has no effect at all, and the statute would have meant the same thing had it been omitted altogether. By transmuting the parenthetical clause into meaningless surplusage, the Commission violates the "cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citation omitted). By contrast, NAB's interpretation makes sense of the parenthetical and renders it significant: it demonstrates Congress' understanding and intent that the Commission leave in place the already-extant co-channel, first-, and second-adjacent channel protections, and reestablish protections from LPFM stations on third-adjacent channels.[4]

[4] The fact that the reference to co-, first-, and second-adjacent channels is set

The Commission's reliance on section 632(a)(2)(A)'s prohibition on eliminating or reducing protections for third-adjacent channels (FCC Br. at 18-19) to justify reducing protection against stations on second-adjacent channels fares no better. The Commission argues that the fact that the prohibition speaks only to third-adjacent channels means that it is free to eliminate altogether protections against greater interference from stations on co-, first-, or second-adjacent channels. But that construction fails to account for the statute's "subject matter" and purpose. *United States Nat'l Bank of Oregon*, 508 U.S. at 455. The evident purpose of the RBPA was to increase interference protections for full-power service from the baseline the Commission had already established, and Congress clearly understood the basic fact that co-, first-, or second-adjacent interference is greater than interference from third-adjacent channels. *See* NAB Br. at 27-28. Thus, it would have made no sense for Congress to have prohibited elimination of third-adjacent channel protection, while permitting elimination of protections for closer channels that would result in *more* interference.

As NAB noted in its opening brief, the Commission's interpretation is like reading an ordinance banning bonfires "30 feet from a campground" to permit fires

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off in parentheses further demonstrates that Congress was distinguishing between the need to "prescribe" new protections against stations on third-adjacent channels and the need simply to maintain the existing protections with respect to co-, first-, and second-adjacent channels.

20 feet away. *See* NAB Br. at 20. The Commission remarkably argues that such a statute would permit bonfires anywhere inside of 30 feet because it uses the preposition "from" rather than "within." FCC Br. at 19. But like its reading of the RBPA, that cramped interpretation is nonsensical and reflects no understanding of the underlying subject matter or purpose: the danger posed by a bonfire decreases with distance, and it would be perverse to read a statute designed to reduce that danger to permit fires closer to the campground. Likewise, here, radio interference decreases with channel distance and it would be both "contrary to common sense" and "demonstrably at odds with the intentions of [the] drafters" to interpret the statute as forbidding the FCC from eliminating third-adjacent protection, while permitting elimination of protections from closer channels that would cause more interference.[5] *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1067-68 (D.C. Cir. 1998) (quotation and internal alterations omitted).

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[5] Because reading the statute to require retention of third-adjacent protection while simultaneously permitting elimination or reduction of protection against more serious second-adjacent channel interference makes no sense, the Commission would lose even if it were entitled to deference under *Chevron* Step Two (which it is not, both because (1) the statute unambiguously supports NAB's reading, and (2) the Commission brief's statutory arguments are entirely *post hoc* rationalizations that appear nowhere in the Order). Under *Chevron*, a court must examine whether a given statutory construction is "a reasonable policy choice for the agency to make." *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 845 (1984). Here, the FCC's interpretation would "produce absurd results" and must be rejected as unreasonable. *See FTC v. Ken Roberts Co.*, 276 F.3d 583, 590 (D.C. Cir. 2001).

Rather, the sensible reading is that Congress specifically foreclosed the elimination of third-adjacent channel protections because the Commission had already demonstrated that it disagreed with Congress's judgment, and Congress wanted to make clear that the Commission was not permitted to reverse Congress's decision on its own, but would need Congressional approval if it continued to disagree after further study. This Court rejected an argument similar to the Commission's in *MPAA v. FCC*, 309 F.3d 796, 805-06 (D.C. Cir. 2002), where the Commission had argued that it could adopt video description rules "because Congress did not expressly foreclose that possibility." The Court found that the agency's position was "entirely untenable," *id.*, because viewed in context, there could be no argument that Congress delegated the authority the FCC claimed. Just as in *MPAA*, there is no rational construction of the RBPA that would require the FCC to maintain protection against third-adjacent channel interference but give it free rein to eliminate protections against more harmful interference from closer stations.

Ultimately, the Commission is left to resort to accusations that NAB is trying to "rewrite the statute" and "ignore the statute's actual language." FCC Br. at 20, 21; *see also id.* at 24. But it is the FCC's *post hoc* interpretation of the statute that ignores the statutory reference to co-, first-, and second-adjacent channel protections. Likewise, it is the Commission's interpretation that ignores

the subject and purpose of the statute, resulting in a reading contrary to Congress's evident purpose and common sense.

B. The Commission Offers No Tenable Explanation for Why the RBPA Would Permit It to Weaken the Cease-Operations Rule.

The Commission's brief claims that, whatever the effect of the statute on the minimum distance rule, 47 C.F.R. § 73.809's cease-operations rule "does not fall within the terms of [the] RBPA at all." FCC Br. at 22. This argument again appears nowhere in the Order. But it is not simply a *post hoc* rationalization formulated by appellate counsel. Instead, it *contradicts* one of the two footnotes in the Order that actually do mention the RBPA. In a one-sentence footnote, the Commission asserted that there was no RBPA problem in changing the cease-operations rule – not because the rule was outside the RBPA's reach (as it now asserts), but because the Commission was not modifying the rule with respect to *third-adjacent* channels, and it believed (incorrectly as we show above) that the RBPA has no application to interference from second-adjacent or closer channels. *See* Order ¶ 63 n.168 [JA __]. The Commission's explanation in the Order therefore constitutes an implicit acknowledgement that, if the RBPA bars changes to the second-adjacent channel minimum distance rule, it bars changes to the cease-operations rule for such channels as well. Having provided one explanation in the Order, the Commission cannot now invoke a different one before the Court. *See, e.g.*, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1244 (D.C. Cir. 2007).

In any event, the Commission's argument also fails on the merits. Here, again, Commission counsel turns the statute on its head by suggesting that it permits the Commission to eliminate or reduce protections and thereby leave full-power FM stations with less interference protection than they had prior to the statute's enactment. The Commission's brief does not explain why Congress would have bothered to mandate a rule preventing *potential* interference (the minimum distance rule) while simultaneously allowing rescission of a rule that requires elimination of *actual* interference. *See* NAB Brief at 24-25, 32. Nor does the Commission explain why a statutory construction that allows the agency to remove protections established in the 2000 Order is consonant with Congress's purpose of increasing the protections in that Order. Congress clearly intended that "LPFM stations which … *cause interference* to new or modified facilities of a full-power station, would be required to modify their facilities *or cease operations*." H.R. REP. NO. 106-567, at 8 (2000)(emphasis added).[6] A court cannot approve a different statutory construction if "it appears from the statute or its legislative

[6] The Commission also cannot identify any reason for differentiating between the reach of Section 73.807's minimum distance rule and the reach of Section 73.809's cease-operations rule. The 2000 Order that initially promulgated these rules did not even discuss such a possibility. This is understandable, because as NAB explained, the rules are designed to work in tandem: the minimum distance requirements establish a prophylactic rule designed to prevent interference, while the cease-operations rule provides a remedy for actual after-the-fact interference. *See* NAB Br. at 31.

history that the accommodation [chosen] is not one that Congress would have sanctioned." *Natural Resources Defense Council v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987)(en banc)(citation omitted).[7]

C. The FCC's Challenge to the Use of Legislative History is Misplaced.

Because the legislative history incontrovertibly supports NAB's reading of the statute, the Commission is left to assert that the Court should not even consider it. The Commission first argues that because the statute is unambiguous and its plain meaning allegedly supports the agency's interpretation, there is no need to consult legislative history. FCC Br. at 26. NAB agrees that the RBPA's text, structure, and purpose yield an "unambiguous" interpretation of the statute – one that requires reversal of the FCC's Order. Moreover, *all* of the traditional tools of

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[7] As NAB explained, the RBPA also bars the Commission from rejecting a full power station's license modification application on the ground that it would result in an existing LPFM station having to go off the air. NAB Br. at 46-48. The Commission misconstrues NAB's argument as suggesting that the RBPA requires the FCC to allow full-power stations to modify their licenses. FCC Br. at 25. The Commission's decision to allow full power station modifications was made in a different order and is not at issue here. But, having allowed full-power stations to modify, the Commission cannot, consistent with the RBPA, reject a modification on the sole basis that it would cause interference to an LPFM station since that would give low-power service priority over full-power service. Indeed, the Commission's Media Bureau rejected an LPFM station's opposition to a proposed modification because "an LPFM station 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." Letter to Deer Creek Broadcasting, LLC, 23 FCC Rcd. 9553, 9555 n.10 (2008) [JA __], *quoting* 2000 Order ¶ 65 [JA __]. The Commission makes no response to that point.

statutory interpretation – *including* legislative history – are properly considered in determining whether a statute is "ambiguous" for purposes of *Chevron* Step One. *See Pharmaceutical Research & Mfrs. of America v. Thompson*, 251 F.3d 219, 224-226 (D.C. Cir. 2001); *Bell Atlantic v. FCC* , 131 F.3d 1044, 1047 (D.C. Cir. 1997); NAB Br. at 19.

As NAB has explained, that legislative history plainly supports its reading. *See* NAB Br. at 24-25, 28-29. The House Committee Report makes clear that (1) Congress intended to preserve every degree of adjacent-channel protection, not just third-adjacent protections; and (2) Congress intended to require cease-operations protections, not just minimum distance separations:

> The Commission is directed to maintain the same level of protection from interference from other stations for existing stations and any new full-power stations as the Commission's rules provided for such full power stations on January 1, 2000, as provided in Section 73 of the Commission's rules … in effect on that date. The Committee intends that this level of protection should apply at any time during the operation of an LPFM station. Thus, LPFM stations which are authorized under this section, but cause interference to new or modified facilities of a full-power station, would be required to modify their facilities or cease operations.

H.R. REP. NO. 106-567, at 8 (2000) ("Committee Report").

The Commission, unable to deny the clear import of the Committee Report, argues that it cannot be considered because the relevant report language is "untethered" to any statutory text. FCC Br. at 27-28. But far from being "untethered," the passage appears in the Committee Report's section-by-section

analysis of Section 632(a)(1)(A), and its relationship to the text of that provision is apparent. In particular, as described above, the parenthetical clause in the text of the statute referring to co-, first-, and second-adjacent protections makes clear that Congress intended the Commission "to maintain the same level of protection" for full-power service as had existed before the Commission's 2000 Order.

The passage above also explains what Congress understood the state of the law would be following the bill's enactment. For example, the statement that any LPFM stations that interfere with new full-power stations must "modify their facilities or cease operations" reflects Congress' ratification of the framework established by the 2000 Order – as supplemented by restoration of the third-adjacent channel protections – requiring that LPFM service be secondary to full-power service. NAB does not claim, as the Commission suggests, *see* FCC Br. at 28, that the Committee Report language has *independent* binding legal effect. Rather, the legislative history demonstrates that NAB's reading of the statutory text is consistent with Congress's intent and purpose, while the Commission's is not.

Finally, the Commission points to floor statements about third-adjacent channel protections as evidence that Congress *only* sought to protect against stations on third-adjacent channels. FCC Br. at 29. But none of the statements cited by the Commission actually supports such a narrow reading. Instead, they

simply reflect the fact that Congress was restoring third-adjacent protections and thus required the Commission to maintain protections for existing stations "*including* protections to third adjacent channels." 146 CONG. REC. 5,619 (remarks of Rep. Ewing)(emphasis added); *see also id.* at 5615 (explaining that "stations must be separated by *at least* three adjacent channels" (remarks of Rep. Lazio)(emphasis added)).

In the end, the Commission is reduced to arguing that "there may be no clear evidence" from the legislative history why Congress adopted a statute that would be, under the Commission's interpretation, ineffective. FCC Br. at 30. As NAB has shown, the opposite is true: the legislative history provides clear evidence of Congress' intent and demonstrates that the Commission's interpretation of the statute is wrong.

II. The Commission's New Interference "Policy" Is Both Impermissible and Unsupported.

The Commission claims that the actions it took in the Order "reflect a reasonable balancing of the interests of LPFM and full-power stations" in light of changed circumstances. FCC Br. at 31. As an initial matter, the Commission cannot substitute its own policy judgment for the one adopted by Congress. After the Commission decided in 2000 that the benefits of third-adjacent protections "would be outweighed by the benefits of new low power FM service," 2000 Order ¶ 104 [JA __], Congress struck a different balance and concluded that the public

interest is better served by protecting full-power service from LPFM interference. Once Congress reached that determination, the Commission cannot adopt a different balance. This Court "cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy" because permitting the FCC "to expand its power in the face of a congressional limitation … would be to grant to the agency power to override Congress." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1976).

Nor can the Commission and Intervenor Prometheus justify the new policy based on the claim that the Order was necessitated by "changed circumstances," namely the adoption of streamlined processing guidelines for requests to modify full-power station licenses. FCC Br. at 36; Intervenor Br. at 3-4, 15. Even if a change in circumstance would permit the Commission to override Congress – which it would not – no such change exists here. The Commission has always allowed for license modifications, and the mere fact that the regulatory process permitting them may now be faster does not affect the balance that the Commission previously struck and Congress approved favoring full-power service over LPFM. Further, the FCC adopted its processing rules over Prometheus'

objection that streamlined processing guidelines would harm LPFM stations.[8] Having rejected Prometheus' concerns, the Commission cannot now claim that its own action justifies reducing interference protections.

Moreover, the Commission's new "balancing" of interests also was contrary to the APA. As discussed below, the interference finding the Commission relies upon in "balancing" the various interests is incorrect and unjustified by the record, as is its newly minted "presumption" that LPFM stations with locally originated programming serve the public interest better than full-power stations.

A. The Commission's Single-Sentence Interference Finding Cannot Be Upheld.

The Commission's brief confirms that in weighing the relative interests between full and low power service, it relied upon the single-sentence conclusion that "in most circumstances [second-adjacent channel] interference would be predicted to extend from ten to two hundred meters from the LPFM station antenna." Order ¶ 65 [JA __]; FCC Br. at 34, 41. But the Commission's finding is entirely unsupported by the record. Thus, even if "adjust[ing] the balance of the competing priorities of interference protection and preserving existing service," FCC Br. at 41, were statutorily permissible (it is not), the Commission's re-

[8] *See Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, 21 FCC Rcd. 14212 (2006); *see also* Reply Comments of Prometheus Radio Project and Media Access Project, filed November 1, 2005 in MB Docket No. 05-120.

balancing is based on an unsupportable factual premise and cannot be upheld "for it provides neither assurance that the Commission considered the relevant factors nor a discernable path to which the court may defer," *Am. Radio Relay League v. FCC*, 524 F.3d 227, 241 (D.C. Cir. 2008).

In 2000, the Commission believed that second-adjacent channel interference from LPFM stations would be "substantial," but now it has concluded the opposite. *See* NAB Br. at 38-40. Commission counsel argues that the Commission's new finding is "not inconsistent" with the 2000 Order, FCC Br. at 35, and asserts that the agency's "engineering judgment did not change," *id.* at 41. But, of course, that is plainly false. There is a change and the Commission has not cited any technical data or studies, new evidence on second-adjacent channel interference submitted by commenters, or any other reason to justify that change. NAB Br. at 40-41. Nor do the Order or the Commission's brief cite to any other Commission decision establishing that second-adjacent channel interference "would be predicted to extend from ten to two hundred meters from the LPFM station antenna." The Commission's conclusion is entirely inexplicable unless it was based on the MITRE Study's conclusion. *See* MITRE Study at xxvi [JA __] (interference might be confined to a radius around the LPFM station "on the order of tens of meters, to one or two hundred meters"). Yet, as NAB explained, the MITRE Study of *third*-adjacent channel interference provides no support for any conclusion about

second-adjacent channel interference, NAB Br. at 41-44, and the Commission properly disavows any reliance upon it, FCC Br. at 35 n.18.

Lacking any record basis to support its conclusion, the Commission complains that "NAB does not offer evidence that the Commission's engineering conclusion is wrong." FCC Br. at 34-35. But, of course, it is the Commission's burden to justify its conclusion, and, in fact, NAB did offer such evidence. NAB explained that the area affected by second-adjacent channel interference would extend further than the "tens of meters, to one or two hundred meters" predicted by the MITRE Study since "radios can generally reject signals on a 3rd adjacent channel that are about six to ten times stronger than signals on 2nd adjacent channels."[9] NAB Br. at 41 n.26. Indeed, the Commission concedes that the effects of second-adjacent channel interference are "somewhat higher" than for third-

[9] *FCC's Low Power FM: A Review of the FCC's Spectrum Management Responsibilities: Hearing on H.R. 3439 Before the Subcomm. On Telecommunications, Trade, and Consumer Protection of the H. Comm. on Commerce*, 106th Cong., at 20 (Feb. 17, 2000) (prepared testimony of FCC witness Bruce Franca).

adjacent channels, FCC Br. at 35, 41, but does not attempt to explain by how much, a concession that the Commission's conclusion in the Order is unjustified.[10]

B. The Commission Has Not Justified Its Presumption that LPFM Stations With Locally Originated Programming Serve the Public Better Than Full-Power Stations.

In the Order, the Commission found that "the public interest would be better served" by granting primary status to LPFM stations that provide eight hours per day of locally originated programming. Order ¶ 68 [JA __]. In addition to violating the RBPA, *see supra* n.7 & NAB Br. at 46-48, the presumption fails because it has no rational basis. Rather than trying to buttress the presumption, the Commission instead downplays the presumption's effect: it notes that the presumption is rebuttable and that the agency would be willing to consider "any other public interest factors" raised in a specific case. FCC Br. at 43.

Although the Commission may wish the Court to believe the presumption is virtually meaningless, it has the very real effect of shifting the burden of persuasion. That is why an agency "may only establish a presumption if there is a sound and rational connection between the proved and inferred facts." *Chemical Mfrs. Ass'n v. Department of Transp.*, 105 F.3d 702, 705 (D.C. Cir. 1997). But the

[10] As discussed further below, the Commission recently granted two waivers of Section 73.807's second-adjacent minimum distance separation rule, and in each case the facts established an interference radius exceeding 200 meters, even using the Commission's disputed "D/U" methodology. *See* KDRT-LP Application, *infra* n.19, at Exhibit 8 [JA __] (interference radius of 0.49 kilometers); WFBR-LP Waiver, *infra* n.18, at 3 [JA __] (interference radius of 270 meters).

Commission cannot provide *any* evidentiary basis for its conclusion, and continues to ignore record evidence that full-power stations serve larger audiences and also provide valuable programming to serve the public interest. NAB Br. at 49-50 & n.35.

The Commission is left to rely on the *post hoc* assertion by counsel that the presumption is "consistent" with the Commission's view that "locally originated programming is a primary benefit of the LPFM service." FCC Br. at 43. But the FCC has never concluded that local origination is necessary to serve the public interest; rather, it has expressly found that programming "that addresses local concerns need not be produced or originated locally to qualify as 'issue-responsive' in connection with a licensee's program-service obligations."[11] This Court has also agreed that licensees can satisfy the needs of their local communities, and the requirements of the Communications Act, by providing responsive programming "whatever its source."[12] Creating the presumption that

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[11] *Broadcast Localism*, 19 FCC Rcd. 12425, 12431 (2004); *see also Deregulation of Radio*, 84 F.C.C.2d 968, 999 (1981), *aff'd sub nom. Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983). The "premise that local needs can be met only through programming produced by a local station has not only been rejected" in numerous decisions, the Commission has declared that "it also lacks presumptive validity." *WPIX, Inc.*, 68 F.C.C.2d 381, 402-03 (1978).

[12] *United Church of Christ*, 707 F.2d at 1430 n.54.

LPFM programming is to be favored solely because it is locally originated is thus *inconsistent* with the Commission's longstanding policies.

III. The Commission Cannot Overcome the Order's Procedural Defects.

The Order implements its change to 47 C.F.R. § 73.807's second-adjacent spacing rule and its change making certain LPFM stations "primary" by adopting a series of "waivers" and "presumptions." Order ¶¶ 64-71 [JA __-__]; NAB Br. at 12-14. As the dissents of two Commissioners explained, these changes are both invalid because the RBPA prohibits waivers and the agency has improperly avoided the APA's notice-and-comment requirement.

A. The RBPA Prohibits Waivers.

The Order attempted to disguise its evisceration of Section 73.807's minimum distance separation rules by casting it as only a waiver. But as NAB explained, the RBPA is an unusually strict statute that prohibits any action to "eliminate or reduce" interference protections "except as expressly authorized by an Act of Congress…." RBPA § 632(a)(2); NAB Br. at 34.[13] The Commission has conceded on multiple occasions – including within the Order itself – that the RBPA deprives it of power to waive *third*-adjacent spacing requirements. Order ¶ 66 n.171 [JA __]; *id.* at ¶ 74 n.178 [JA __]; *see also Iglesia Pentecostal Cristo*

[13] Even *de minimis* exemptions are impermissible in the face of an "extraordinarily rigid" statute such as the RBPA. *Shays v. FEC*, 414 F.3d 76, 114 (D.C. Cir. 2005) (citations omitted); NAB Br. at 35.

Missionera, 23 FCC Rcd. 2230, 2231 ¶ 4 (2008)(denying a third-adjacent channel waiver request because "[t]he Commission does not have the authority to change or waive statutory requirements").

Although Commission counsel briefly asserts in a footnote that "Congress knows how to prohibit the FCC from granting waivers" and that "[t]he RBPA contains no language precluding the Commission from waiving any particular rule," FCC Br. at 40 n.22, those assertions obviously cannot overcome the Commission's own acknowledgement that, where the RBPA applies, waivers are not permitted. Therefore, if the Court agrees with NAB that the statute extends to *second*-adjacent channel protections, *see supra* pp. 3-9, any waivers of Section 73.807's second-adjacent spacing rule cannot be upheld.

Moreover, as a matter of administrative procedure, an agency "should not make rules through waiver policies," as Commissioner McDowell pointed out in his dissent. 22 FCC Rcd. at 21,973 [JA __]. Waivers are a "safety valve" mechanism, *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), and "should only address *aberrant* cases," *Association of Oil Pipe Lines v. FERC*, 281 F.3d 239, 244 (D.C. Cir. 2002) (emphasis added). But the Commission's decision is more than a safety valve: under the waiver standard, any new or modified full-power station confronted with an LPFM station that cannot switch to another channel finds itself effectively without the protection of Section 73.807's second-

adjacent channel minimum distance separations, NAB Br. at 37, subject to a determination of whether the waiver serves the public interest.[14]

B. The Commission Improperly Attempted to Evade the APA's Notice-and-Comment Requirement.

Both the Commission's "waiver" of 47 C.F.R. § 73.807's second-adjacent spacing rule and its "presumption" making certain LPFM stations primary were adopted without notice and comment. NAB Br. at 37, 50-51. The Commission apparently believes this was permissible because they were adopted on an "interim" basis, while seeking comment on whether to codify these "waiver" and "processing polic[ies]" into final rules. Order ¶¶ 64, 71, 74-75 [JA __, __-__]. Commissioners Tate and McDowell rightly objected to this transparent attempt to avoid the APA's notice-and-comment requirement. 22 FCC Rcd. at 21,972-74 [JA __-__]. As Commissioner Tate explained, the Commission "jump[ed] ahead of the rulemaking proceeding" and did not "abide by [its] duties under the Administrative Procedure Act to seek and consider public comment *before* crafting and implementing rules." *Id.* at 21,972 [JA __].

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[14] The Commission claims this is "flatly untrue" and suggests that waivers of Section 73.807 will be subject to a six-factor balancing test. *See* FCC Br. at 41-42. But it misreads its own Order: the six-factor test is in paragraph 69 of the Order, which discusses the licensing "presumption" granting primary status to certain LPFM stations, not the elimination of second-adjacent channel interference protection. *See* Order ¶ 69 [JA __].

The Commission's failure to provide notice of its new "presumption" is particularly striking in light of its rejection of a similar "processing policy" in the 2005 FNPRM. NAB Br. at 50-51. Although the Commission claims that the approach rejected in 2005 was "fundamentally different" from that adopted in 2007, FCC Br. at 44 n.23, that is not true. While the "presumption" actually adopted is limited to a smaller number of stations based on their programming content, the presumption still "effectively … provide[s] primary status" to certain LPFM stations "with respect to subsequently filed applications for new or modified full service station facilities" – the very ground for the Commission's rejection of the similar proposal in 2005. *Creation of a Low Power Radio Service*, 20 FCC Rcd. 6763, 6780 ¶ 38 (2005) [JA __].

The Commission also cannot avoid review by characterizing its decisions as merely "general statements of policy." FCC Br. at 44. In *WNCN Listeners Guild v. FCC*, 610 F.2d. 838 (D.C. Cir. 1979), *rev'd on other grounds*, 450 U.S. 582 (1981), this Court reviewed an FCC statement that set forth how the agency would treat license assignment applications. The Order does precisely the same thing, and, like the decision in *WNCN Listeners Guild*, is a final order subject to this Court's review.

IV. NAB's Challenges to the FCC's Waiver and Presumption Policies Are Ripe.

The Order made three key changes to the protections full-power radio service receives from LPFM interference. The FCC does not assert that the first – elimination of 47 C.F.R. § 73.809's second-adjacent cease-operations rule – is unripe for review. As for the latter two – the adoption of "waiver" standards and "presumptions" regarding second-adjacent channel minimum distance separations and the rule making LPFM stations secondary – the Commission claims that judicial challenges are unripe. FCC Br. at 37-39. But that is incorrect. Whether an administrative action is ripe for judicial review depends on (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration. *See, e.g., CTIA – The Wireless Ass'n v. FCC*, 530 F.3d 984, 987 (D.C. Cir. 2008). NAB's claims easily satisfy these criteria.

A. The Issues Are Fit For Judicial Decision.

"[T]he fitness of an issue for judicial decision depends," among other things, "on whether it is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *Atlantic States Legal Found., Inc. v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2003). Contrary to the Commission's suggestion that the Court is being called upon to decide issues that "are primarily factual rather than legal," FCC Br. at 38, a "claim that an agency's action is arbitrary and capricious or contrary to law present[s]

purely legal issues." *Atlantic States Legal Found.*, 325 F.3d at 284. NAB is not challenging the Commission's decision to grant a waiver in any specific case. Rather, NAB's claims are more fundamental: whether a federal statute, the RBPA, deprives the Commission of the power to enact the waiver rules it has adopted and whether the Commission followed APA requirements in adopting those rules. Those are "purely legal" questions that are fit for immediate judicial resolution.

In addition, the Commission may not rely upon the possibility of further action in its LPFM rulemaking proceeding to argue that NAB's claims are unripe. *See* FCC Br. at 38-39. To be sure, a "claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998)(citation omitted). But the Commission cites no authority explaining why an otherwise-ripe claim becomes unripe solely because of speculation that the agency may issue another order adopting different rules on some future date. The Commission's new waiver policies are operative now (and indeed, as discussed below, have already been applied). Further, while the Commission indicated its intention to adopt rules "within six months," Order ¶ 72 [JA __], more than *ten* months have now elapsed. This Court should not permit the FCC to insulate its actions from judicial review based on a "contingent future event" that has *already failed* to occur within the

promised timeframe, and "may not occur at all."[15] In the interim, the Commission would be free to continue its unlawful policies and keep them in place indefinitely.[16]

B. Withholding Court Consideration Will Result In Hardships To The Parties.

The parties will suffer real hardships if resolution of these issues is delayed. To begin with, the changes under review have gone into effect. Indeed, at least two waivers have now been granted pursuant to the Order. On June 20, 2008, the FCC granted a waiver to an LPFM station in Davis, California to switch its operations to 95.7 MHz, despite "short-spacings" to full-power stations operating on the second-adjacent frequencies of 95.3 MHz and 96.1 MHz.[17] And on September 25, 2008, the FCC granted a waiver to an LPFM station located in Mt. Washington, Kentucky to switch its operations to 95.3 MHz despite "short-spacing" to a full-power station operating on the second-adjacent frequency of 95.7

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[15] Prometheus' claim that "[i]t is more than conjecture that the FCC may change the proposals," Intervenor Br. at 7, rests on sheer speculation.

[16] This Court recently criticized the FCC for keeping "interim" rules in place for many years while never supplying a valid legal justification for those rules. *In re Core Communications, Inc.*, 531 F.3d 849 (D.C. Cir. 2008) (granting mandamus relief after six-year delay in responding to judicial remand).

[17] Letter from James D. Bradshaw, Deputy Chief, Audio Division, Media Bureau, to Davis Community Television, June 20, 2008, FCC Application No. BPL-20080509ADB [JA __] ("KDRT-LP Waiver").

MHz – over the objection of the affected full-power station.[18] In each case, engineering analyses found that people residing within the affected full-power station's protected service area would receive interference from the LPFM station, to say nothing of mobile listeners walking or driving through the affected area.[19]

Although the Commission now claims that it will consider "six specific factors" in deciding whether to grant any particular waiver request, FCC Br. at 41-42, the Media Bureau's treatment of these waiver requests shows otherwise. It granted the waivers based only on its faulty interference calculations without ever mentioning the other factors the Commission's brief suggests would apply. *See* KDRT-LP Waiver at 1 [JA __] ("The staff has tentatively concluded that the KDRT-LP application meets the requirements of the Second-Adjacent Channel Waiver Standard and is otherwise acceptable for filing."); WFBR-LP Waiver at 3 [JA __] ("Based on desired-to-undesired ("D/U") signal strength ratio calculations,

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[18] Letter from James D. Bradshaw, Deputy Chief, Audio Division, Media Bureau, to First Baptist Church, Mt. Washington, Sept. 25, 2008, FCC Application No. BPL-20080229ACI [JA __] ("WFBR-LP Waiver").

[19] *See* Davis Community Television, *Application for Construction Permit for a Low Power FM Broadcast Station*, filed May 9, 2008, FCC Application No. BPL-20080509ADB, Exhibit 8 [JA __] (stating that 1,870 persons in KUIC-FM's service area would receive interference from KDRT-LP) ("KDRT-LP Application"); Letter from Marissa G. Repp to Marlene H. Dortch, Secretary, Federal Communications Commission, May 7, 2008, at 6 [JA __] (stating that 284 persons in WQMF-FM's service area would receive interference from WFBR-LP).

interference is predicted to extend 270 meters from WFBR-LP's site. This predicted interference area is not located near densely populated areas.").

Without judicial review, the FCC remains free to continue approving waivers for LPFM stations that, by causing interference, reduce service to the public from a full-power station. That reduction in service imposes hardships on both NAB's members and the public. Likewise, implementation of the Commission's "presumption" will prevent full-power stations from making changes to improve their facilities that the FCC previously would have permitted, with listeners being denied access to new full-power services reaching larger areas.

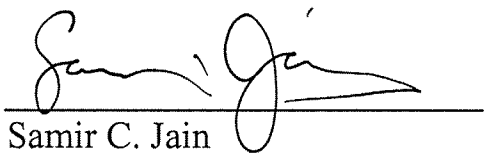
Finally, judicial economy will not be served, nor will agency resources be preserved, by delaying resolution of the questions presented. This Court will have to consider the meaning and effect of the RBPA to determine the validity of the elimination of the second-adjacent cease-operations rule, a challenge that the FCC concedes is properly before the Court. Failing to address the nearly identical – and in some aspects, fully identical – legal questions posed by NAB's challenges to other parts of the Order would therefore serve no purpose but delay. Those arguments would not be different if considered in the context of a specific waiver.

All of the issues before the Court are fit for judicial decision, while the hardship to the parties in delay is very real. NAB's claims are thus ripe for adjudication by this Court.

CONCLUSION

The petition for review should be granted and the challenged Order should be vacated.

Respectfully submitted,



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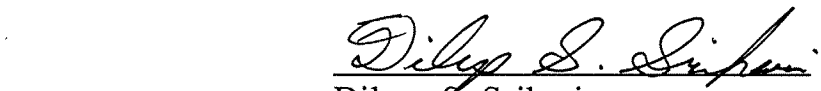

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Dated: October 14, 2008

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