

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
 ) MB Docket No. 13-249  
Revitalization of the AM Radio Service )

**PETITION FOR RECONSIDERATION  
OF PROMETHEUS RADIO PROJECT**

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April 10, 2017

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## SUMMARY

Prometheus Radio Project (“Prometheus”) respectfully petitions the Federal Communications Commission (“FCC” or “Commission”) to reconsider the amendment to 47 CFR §74.1201(g) as adopted in the Commission’s February 23, 2017 order in Docket No. 13-249, *Second Report and Order*, 32 FCCRcd 1724 (2017) (“Order”). Specifically, Prometheus asks that the Commission vacate its Order insofar as it eliminates set distance limitations for translators rebroadcasting AM stations and revert to the restriction proposed in its 2015 FNPRM that would have limited the placement of an FM translator such that the translator’s 1 mV/m contour may not extend beyond a 40-mile radius from the AM station, and to issue a new FNPRM that will address adequately protecting LPFM stations from being boxed in by FM translators.

The removal of the 40-mile limit from the Order vastly increases the geographic area in which AM stations may place FM translators, including far beyond the AM station’s core service area. Countless incumbent LPFM stations that are outside the core service area of AM stations will now be severely limited when seeking to relocate within their communities of service because new and relocated FM translators will inevitably box in or short-space them. Because the FNPRM did not contemplate abandoning the Commission’s commitment to limiting translators to an AM station’s core service area, and in fact reaffirmed its commitment to do so, the Order’s removal of the 40-mile distance restriction is not a logical outgrowth of the FNPRM’s proposal. The Commission’s purported justification for this modification incorrectly conflates “core service area” with “primary service area,” two distinct and drastically different concepts. By failing to give notice of any intent to eliminate set distance limitations, the Commission did not provide opportunity to develop a record as to the impact of this change,

which will inevitably lead to increased vulnerability of countless LPFM stations beyond 40 miles from AM stations.

Moreover, the Commission's Order is arbitrary and capricious because it does not consider, much less resolve, the question of the adverse impact that the Order will have on LPFM raised by Prometheus in its ex parte presentation on February 16, 2017. By removing any set distance limit, the Order will elevate commercial AM interests to the detriment of incumbent non-commercial LPFM stations. This demeans local, diverse, non-commercial broadcasting in a way that is contrary to the Local Community Radio Act. At no point in the Order did the Commission address these inconsistencies or rebut the contention that incumbent LPFM stations will be chained to their current location as the gaps around them are filled by cross-service translators. Finally, the Commission falsely equates the public interest value of smaller commercial AM radio with intensely local non-commercial LPFM service. LPFMs' diverse, locally-focused content that is not subject to commercial interests is vitally important to the listeners in the local communities that LPFM stations serve and cannot be replicated by market-driven commercial AM stations that are likely to be primarily focused upon serving other, relatively distant communities.

The Commission should reconsider and vacate its Order insofar as it eliminates set distance limitations on translators and revert to the restriction proposed in the FNPRM. It should also issue a new FNPRM that will address adequately protecting LPFM stations from being boxed in by FM translators, and should grant all other relief as may be just and equitable.

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Prometheus Radio Project (“Prometheus”)<sup>1</sup> respectfully petitions the Federal Communications Commission (“FCC” or “Commission”) to reconsider the amendment to 47 CFR §74.1201(g) as adopted in the Commission’s February 23, 2017 order in Docket No. 13-249, *Second Report and Order*, 32 FCCRcd 1724 (2017) (“Order”).<sup>2</sup> Specifically, Prometheus asks that the Commission vacate its Order insofar as it eliminates set distance limitations for translators rebroadcasting AM stations and revert to the restriction proposed in its 2015 Further Notice of Proposed Rulemaking (“FNPRM”)<sup>3</sup> that would have limited the placement of an FM translator such that the translator’s 1 mV/m contour may not extend beyond a 40-mile radius

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<sup>1</sup> Prometheus is a group of engineers, media activists and broadcast viewers and listeners that has worked since 1998 to promote diversity in broadcast ownership and service. For example, it has sought to preserve and improve rules limiting concentration of ownership in commercial broadcasting. Its major mission is to build, support and advocate for community radio stations that bring together and empower local participatory voices for social change. It has helped hundreds of its partners in preparing and filing applications for LPFM stations. Prometheus also provides assistance to successful applicants in building organizational and physical infrastructure to get on the air and to continue their operations. In many instances, it has assisted its partners in meeting the engineering and logistical challenges of locating new transmitter sites. Some of Prometheus’ revenue comes from fees that applicants and licensees provide to help reimburse Prometheus’ costs.

<sup>2</sup> Notice of the amendment was published in the Federal Register on March 9, 2017. *Revitalization of the AM Radio Service*, 82 FR 13069 (Mar. 9, 2017).

<sup>3</sup> *First Report and Order, Further Notice of Proposed Rule Making, and Notice of Inquiry*, 30 FCCRcd 12145 (2015)(“FNPRM”).

from the AM station,<sup>4</sup> and to issue a new FNPRM that will address adequately protecting LPFM stations from being boxed in by FM translators. LPFM stations that must, in the ordinary course of operations, relocate will be greatly constrained under the Order because they will have a delimited area in which they can relocate. This can, at the very least, reduce the number of listeners these LPFM stations can serve. If they cannot locate a new transmitter site in the reduced permissible zone, these stations will be forced off the air.

The removal of the 40-mile limit from the Order vastly increases the geographic area in which AM stations may place FM translators, including far beyond the AM station's core service area. Because the FNPRM did not contemplate abandoning the Commission's commitment to limiting translators to an AM station's core service area, and in fact reaffirmed its commitment to do so, the Order's removal of the 40-mile distance restriction is not a logical outgrowth of the FNPRM's proposal. Countless incumbent LPFM stations that are outside the core service area of AM stations will now be severely limited when seeking to relocate within their communities of service because new and relocated FM translators will inevitably box in or short-space them. If, as is frequently the case, LPFM licensees lose their transmitter location and must relocate, they will be forced to shut down or to relocate to a distance that could preclude them from reaching their established community audience. The Order is arbitrary and capricious because it fails to resolve these concerns, which were raised in Prometheus's February 16, 2017 ex parte presentation, and because it is contrary to the goals of the LCRA.

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<sup>4</sup> On April 3, 2017, Prometheus petitioned the Commission to issue an emergency partial stay of the amendment to 47 CFR §74.1201(g) as adopted in the Order, and to impose a processing freeze for any translator applications filed in reliance upon the new decision. Consistent with the concerns expressed in this Petition for Reconsideration, Prometheus does not oppose the grant of applications that would be permitted by the amendment to 47 CFR §74.1201(g) proposed in the FNPRM, which includes the 40-mile limit.

Because the FNPRM did not contemplate abandonment of any limitation of translators to an AM station's core service area, Prometheus could not through the exercise of ordinary diligence have presented the facts and arguments provided herein until after the last opportunity to present them to the Commission during the comment period of this proceeding. Moreover, and in any event, consideration of these facts and arguments is required in the public interest.

Far from contemplating comment and dialog on these questions, the FNPRM reaffirmed the Commission's commitment to adhere to a distance limitation and its "desire to limit cross-service translator use to an AM station's core market."<sup>5</sup> On February 2, 2017, the Commission issued a draft order in this proceeding indicating for the first time that it intended to abandon its previously proposed commitment to preserve the core service area limitation.<sup>6</sup> Notwithstanding the fact that all substantive arguments are required to be submitted during the initial comment period and not in the reply comment period or thereafter, Prometheus expeditiously raised its general concerns in a written ex parte presentation filed on February 16, 2017. However, it was not feasible or possible to conduct the extensive legal and factual research set forth herein prior to the imposition of the so-called sunshine period triggered by the publication of the Commission's meeting agenda on February 16, 2017.

The Commission should therefore grant this petition for reconsideration, which demonstrates that the Order was adopted in violation of the Administrative Procedure Act, and that its legal and factual conclusions are arbitrary and capricious and contrary to the public interest. As explained more fully below, LPFMs' diverse, locally-focused content that is not

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<sup>5</sup> *FNPRM*, 30 FCCRcd at 12174 ¶68.

<sup>6</sup> See *In the Matter of Revitalization of the AM Radio Service*, MB Docket No. 13-249, Draft Second Report and Order, rel. Feb. 2, 2017, [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0202/DOC-343304A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0202/DOC-343304A1.pdf).

subject to commercial interests is vitally important to the listeners in the local communities that LPFM stations serve and cannot be replicated by market-driven commercial AM stations that are likely to be primarily focused upon serving other, relatively distant communities. Thus, the Order will cause serious harm to many of the LPFM licensees Prometheus has advised and assisted and to their listeners, whose rights are “paramount” under the First Amendment.<sup>7</sup>

## **ARGUMENT**

The outright abandonment of a set distance-based limitation to clearly define the core service area of AM stations is not a logical outgrowth of the proposed rule change as described in the FNPRM. Moreover, the change made in the Order was arbitrary and capricious, as it did not address, much less resolve, the adverse impact on LPFM and was wholly inconsistent with the goals of the LCRA.

### **I. The removal from the Order of all set distance limitations was not a logical outgrowth of the FNPRM.**

The outright abandonment of a set distance-based limitation to clearly define the core service area of AM stations is not a logical outgrowth of the proposed rule change. The Commission’s purported justification for this modification incorrectly conflates “core service area” with “primary service area,” two distinct and drastically different concepts. By failing to give notice of any intent to eliminate set distance limitations, the Commission did not provide opportunity to develop a record as to the impact of this change, which will inevitably lead to increased vulnerability of countless LPFM stations beyond 40 miles from AM stations.

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<sup>7</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 391 (1969).



**A. The Order violates the APA because the change from the FNPRM to the Order removing the 40-mile set distance restriction was not a logical outgrowth**

Under the Administrative Procedure Act, an agency must give adequate notice of proposed changes so that affected parties can meaningfully address them in their comments. Changes that are not a “logical outgrowth” of a proposed amendment do not satisfy this requirement.<sup>8</sup> As the D.C. Circuit has said,

[I]n *International Union, United Mine Workers of America v. Mine Safety & Health Administration*, 407 F.3d 1250 (D.C.Cir.2005) (“*International Union*”), we noted: [The APA's n]otice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review. *Id.* at 1259 (citing *Small Refiner Lead Phase–Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C.Cir.1983)).<sup>9</sup>

The outright abandonment of a set distance-based limitation to clearly define the core service area of AM stations is not a logical outgrowth of the proposed rule change. Those opposed cannot be expected to “divine the [agency’s] unspoken thoughts,”<sup>10</sup> and here, Prometheus and others could not have contemplated that the Commission might have used this proceeding to abandon the distance limitation and its commitment to limiting translators to the AM station’s core service area. The Commission’s purported justification for this modification, that it “has already held that the 2 mV/m contour in all cases constitutes an AM station’s primary service area...,”<sup>11</sup> falls far short of the mark, and is irrelevant. Such a statement incorrectly

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<sup>8</sup> See, e.g., *Shell Oil Company v. EPA*, 950 F.2d 741, 750-53 (D.C. Cir. 1991).

<sup>9</sup> *Env'tl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005).

<sup>10</sup> *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991).

<sup>11</sup> *Second Report and Order*, 32 FCCRcd 1724, 1726 ¶4 (2017)(“Order”).

conflates “core service area” with “primary service area,” two distinct and drastically different concepts.

Primary service area “[m]eans the service area of a broadcast station in which the groundwave is not subject to objectionable interference or objectionable fading,”<sup>12</sup> and in most cases is directly defined as a station’s 2 mV/m contour.<sup>13</sup> The Order’s discussion of primary service area is not only irrelevant to the core service area, it is being used to obfuscate the Order’s complete abandonment of the core service area commitment. The core service area, as discussed by the Commission in the FNPRM, was intended to function as a “constraint to prevent high-power AM stations from using fill-in translators in locations outside their core service area.”<sup>14</sup> These definitions are functional and distinct. The Commission has always recognized that, as it said in its 2009 decision modifying its translator rules, the set distance limits were designed to keep translators in that core market, within 25 miles of the AM station.<sup>15</sup> Further, the Commission expressed in the FNPRM its “continue[d] desire to limit cross-service translator use to an AM station’s core market”<sup>16</sup> by maintaining a 40-mile limit.

The Commission’s own citations in the Order directly refute the claim that the core service area is the same as the primary service area. The cited 2009 Order, which originally permitted FM translators of AM stations and established the 25-mile limit, reads that the 2 mV/m

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<sup>12</sup> 47 C.F.R. §73.14.

<sup>13</sup> 47 C.F.R. §17.182 (“The groundwave signal strength required to render primary service is 2 mV/m for communities with populations of 2,500 or more and 0.5 mV/m for communities with populations of less than 2,500. Because only Class A stations have protected primary service extending beyond the 2 mV/m contour....”).

<sup>14</sup> *FNPRM*, 30 FCCRcd at 12174 ¶68 (citing *In the Matter of Amendment of Serv. & Eligibility Rules for Fm Broad. Translator Stations*, 24 FCCRcd 9642, 9649 n.45 (2009)).

<sup>15</sup> *FNPRM*, 30 FCCRcd at 12174 ¶68 (referencing *Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Report and Order, 24 FCCRcd 9642, 9658 (2009)).

<sup>16</sup> *FNPRM*, 30 FCCRcd at 12174 ¶68.

daytime contour depicts the core market area *only* for stations operating on 2.5 kW or less.<sup>17</sup> However, the text then immediately specifies that the 25-mile limit was necessary specifically for more powerful stations because the “extremely large 2 mV/m daytime contours” did *not* constitute the AM station’s core market area.<sup>18</sup> The concept is simple: for AM stations operating on 2.5 kW or less, the 2 mV/m contour defines the core service area; for AM stations operating above 2.5 kW, the 2 mV/m contour exceeds the core service area.

At no point in the FNPRM did the Commission indicate that it intended to destroy the concept of the core service area. In fact, the FNPRM reaffirms the distinction by referring to each concept in their respective contexts.<sup>19</sup> The Commission’s sudden abandonment of this concept, which resulted in a massive increase in the distance and flexibility in which cross-service translators may be placed, could not have been foreseen by any reading of the FNPRM. Without the abandonment of the core service area, which the Commission purported to uphold, the Commission could not have so drastically abandoned the distance rules. Accordingly, the abandonment of the distance rules is not a logical outgrowth of the FNPRM.

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<sup>17</sup>*Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, 24 FCCRcd at 9658 (“While we recognize that AM stations typically have a protected daytime contour of 0.5 mV/m, we believe the 2 mV/m daytime contour more accurately depicts the core market area for the majority of AM stations, operating at an effective radiated power level of 2.5 kW or less.”).

<sup>18</sup> *Id.* (“[w]e also recognize that AM stations operating at a higher power level often have extremely large 2 mV/m daytime contours, and in this situation the 25-mile limit will apply to ensure that fill-in cross-service translators are used in the AM station’s core market area, rather than in a fringe area that may be part of or near another radio market”).

<sup>19</sup> *See, e.g., FNPRM*, 30 FCCRcd at 12169 ¶54 (“The tradeoff appears to be whether we should take steps that would deprive Class A stations of listeners far outside of their primary service areas”); *FNPRM*, 30 FCCRcd at 12169-70 ¶55 (“the areas of reduced coverage would be located at great distances from the transmitter and from the metropolitan area that constitutes the station’s primary service area”); *FNPRM*, 30 FCCRcd 12190, App’x B ¶8 (quoting 47 C.F.R. §73.182, “[Class A] stations are designed to render primary service over a large area protected from objectionable interference”).

**B. Public comment should have been sought on the elimination of a set mile limit, which is a significant change that will have a profound practical impact on LPFM stations**

By failing to give notice of any intent to eliminate set distance limitations, the Commission did not provide opportunity to develop a record as to the impact of this change. It is a practical reality that many broadcasters must sometimes relocate their transmitters. The Commission processes hundreds, if not thousands, of such changes each year. As frequent as this is for full-power commercial broadcasters, the need to move is much more common for LPFM stations. The vastly larger area afforded for AM stations to erect FM translators under the Order will greatly impinge on the ability of LPFM licensees to relocate.

The Order abandons any set distance limit designed to keep FM translators within their core service area, thereby affording AM stations the right to place FM translators anywhere within their station's daytime 2 mV/m contour,<sup>20</sup> which the Commission has acknowledged can be "extremely large."<sup>21</sup> Until now, FM translators have been allowed only, at a maximum, within 25 miles of an AM station's transmitter.<sup>22</sup> In the FNPRM, the Commission proposed extending this 25-mile limit to 40 miles, because this would allow flexibility "while not allowing a cross-service fill-in translator to extend the station's coverage beyond [the AM station's] core service area."<sup>23</sup> Without notice, the Order completely departs from this modest proposed expansion of the core service area and instead completely abandons any set distance limit.

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<sup>20</sup> *Order*, 32 FCCRcd at 1726 ¶4.

<sup>21</sup> *See In the Matter of Amendment of Serv. & Eligibility Rules for FM Broad. Translator Stations*, 24 FCCRcd 9642, 9658-59 (2009) (AM stations operating above 2.5 kW "often have extremely large 2 mV/m daytime contours").

<sup>22</sup> *Order*, 32 FCCRcd at 1724 ¶2.

<sup>23</sup> *FNPRM*, 30 FCCRcd at 12171 ¶68.

The amended rule will give AM stations enormous latitude that was not contemplated in the FNPRM, and as to which no comment was solicited. This will have a broad impact on the LPFM service. According to files available from the FCC’s “AM Query” tool, at least 1,644 stations have a 2 mV/m daytime contour that extends at least in part more than 40 miles from the station, while 1,274 have some part exceeding 50 miles.<sup>24</sup> Of these, 754 stations feature a contour that is more than 50 percent beyond the 40-mile radius, and 462 feature a contour that is more than 50 percent beyond a 50-mile radius. The areas within these contours beyond 40 miles contain countless incumbent LPFMs that, prior to the Order, were safe from the threat of being boxed in by FM translators of distant AM stations.

Because the Commission did not solicit comment on eliminating set distance limitations, it failed to consider the damage that this change would cause to the LPFM service. For example, in the case of one Denver AM station alone, there are at least 12 LPFM stations located beyond 40 miles from the station, but still within its 2 mV/m daytime contour.<sup>25</sup> The ability to locate a translator as far away from Denver as Colorado Springs (63 miles) or Pueblo (104 miles) is precisely the type of translator expansion beyond the “core service area” that set distance limitations were meant to protect against.

The increased area available to AM stations to locate their translators as a result of this illogical outgrowth is exponential. The 25-mile radius that previously defined the “core service

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<sup>24</sup> At the time of the filing of this Petition for Reconsideration, Keyhole Markup Language (KML) map files were available from the FCC’s “AM Query” tool for 3,842 US-based AM stations. These statistics were determined by comparing the distance between each of these AM stations and each of their respective contour points. According to the FCC’s CDBS database, there are 4,579 licensed AM facilities. Therefore, the actual number of stations with 2 mV/m contours extending beyond 40 miles is likely greater.

<sup>25</sup> LPFM stations within KLTT(AM)’s 2 mV/m daytime contour, but outside 40 miles from the station, include KCMJ-LP, KEIM-LP, KKKK-LP, KHYR-LP, KOYC-LP, KTPJ-LP, KWMV-LP, KHEN-LP, KLEV-LP, KYGT-LP, KREV-LP, KHYR-LP.

area” gave a large AM station 1,963 square miles in which to place a translator. Even the modest increase to a 40-mile radius that the Commission proposed would have expanded that area by 156 percent, to 5,026 square miles. The contour of many AM stations exceeds 50 miles, and in some cases far more than that. However, using that conservative standard of a mere 10-mile increase to 50 miles yields an area of 7,854 square miles, tripling the coverage area at a 25-mile radius, and almost doubling the area added by the proposed 40-mile increase. For stations with directional antennae, the percentage change in area is even more drastic. Such a dramatic change was not foreseeable in a proposal where the Commission unequivocally affirmed its continued commitment to limiting translators to the AM station’s core service area.

Exhibits A and B illustrate the inevitable increased vulnerability of LPFMs beyond 40 miles from AM stations. A 10-watt translator situated to reach Fountain, CO and the I-25 highway corridor south toward Pueblo,<sup>26</sup> would cut roughly in half the already small area that one Colorado Springs LPFM station would be able to relocate.<sup>27</sup> This LPFM station, and other stations located beyond 40 miles from AM stations, could not have anticipated that an Order resulting from the FNPRM would have exposed them to such vulnerability.

Exhibits C-E demonstrate that the Order will not only threaten the viability of LPFM stations in Denver or Colorado, but indeed across the entire country. Exhibit E shows the sheer magnitude of the increased area available for AM stations to locate translators without the 40-mile restriction across the country. The fact that many of these newly-available areas overlap indicates that there will be tremendous demand among multiple AM stations to relocate their existing translators, to acquire existing translators and relocate them to these areas, and to apply

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<sup>26</sup> See Exhibit A.

<sup>27</sup> See Exhibit B.

for and demand additional opportunities to build new translators in order to place them in these high demand areas. It is only a matter of time before LPFM stations in these areas are squeezed out.

## **II. The Order is arbitrary and capricious.**

The Order is arbitrary and capricious because the decision to remove the 40-mile restriction and abandon the core service area “entirely failed to consider an important aspect of the problem.”<sup>28</sup> It fails to consider, much less resolve, concerns raised by Prometheus that LPFM stations will be harmed even if they do not experience interference, because the Order is contrary to the goals of the LCRA, and because the Commission falsely equates the public interest value of smaller commercial AM radio with intensely local non-commercial LPFM service.

### **A. The Order does not address the concerns raised in Prometheus’ ex parte letter**

The Commission’s Order is arbitrary and capricious because it does not consider, much less resolve, the question of the adverse impact that the Order will have on LPFM raised by Prometheus in its ex parte presentation on February 16, 2017.<sup>29</sup> Instead, the Commission frames Prometheus’ concerns as only involving immediate broadcast interference.<sup>30</sup> Rather than address the practical harm that the Order will cause incumbent LPFM stations when they are boxed into a single location, the Commission only addresses the separate and unrelated issues of AM stations

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<sup>28</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>29</sup> Ex Parte Letter from Prometheus Radio Project, MB 13-249, Feb. 16, 2017, available at <https://www.fcc.gov/ecfs/filing/102160585211674>.

<sup>30</sup> *Order*, 32 FCCRcd at 1726 ¶4 n.21 (“We reject the position, taken by Prometheus Radio Project (Prometheus), that removing the 40-mile limitation represents such a significant *encroachment* on low-power FM (LPFM) stations that removal of the limitation cannot be considered a ‘logical outgrowth’ of the original proposal.”)(emphasis added).

broadcasting beyond their core service area<sup>31</sup> (which the Commission unexpectedly redefines as a station's entire 2mV/m daytime contour), and contour protection (i.e. interference).<sup>32</sup> The only passing reference to anything spacing-related is a single conclusory sentence stating that "To the extent that Prometheus complains about the greater protection that LPFM stations must provide translators under 47 CFR § 73.807(c) than translators must provide LPFM stations under 47 CFR § 74.1204(a), this issue is clearly outside the scope of the AM Revitalization proceeding,"<sup>33</sup> without offering any explanation.

The concerns raised by Prometheus relate to the problem of translators that will inevitably be tangent to an LPFM, where those translators have contours that nearly touch but do not overlap the LPFM contour. When the LPFM contour is tangent, or near tangent, to the contours of multiple cross-service translators such that it cannot move in any direction, that LPFM station is essentially chained to its current location even if there is no immediate interference. Even if the surrounding cross-service translators do not actually cause any interference to the incumbent LPFM station, they will preclude the LPFM station from moving, even if the LPFM station only needs to move a small distance. Exhibit F illustrates a Houston LPFM station that is currently boxed in by FM translators broadcasting AM stations.<sup>34</sup>

Unlike many full power stations, the ability to relocate is critical for the viability of low power stations. Many full-power, professionally managed stations have the resources to own their own transmitter sites. When they must lease their location, they generally have the benefit

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<sup>31</sup> *Id.*, n.21 (concluding that "other aspects of the revised rule will ensure that the use of FM translators will not extend service beyond an AM station's core service area").

<sup>32</sup> *Id.*, n.21 (noting that "any translator station relocating based on the amended rule must still protect any LPFM stations under the contour protections set forth in 47 CFR § 74.1204(a)").

<sup>33</sup> *Id.*, n.21.

<sup>34</sup> *See* Exhibit F.



of lengthy and stable leases on desirable high-altitude transmitter sites. LPFM stations usually cannot afford to locate on cell towers or established broadcast towers owned by the large tower companies. Instead, LPFMs typically must rent their sites in smaller buildings which are more likely to be torn down or converted to other uses. LPFMs also lack the clout to negotiate long-term favorable leases. Thus, they are subject to the whims of landlords, unforeseen property sales, and zoning issues beyond their control. It is also not uncommon for LPFM stations to need to relocate in order to improve service or to enter into a more affordable or viable leasing situation. Indeed, data from the FCC's CDBS database suggests that LPFM stations relocate much more frequently than full power FM stations. In calendar year 2016, 361 construction permits were filed by the nation's 2,109 licensed LPFM stations, compared to just 640 filed among 11,258 licensed full-power stations. Therefore, the percentage of LPFM stations that underwent modifications, which for LPFMs are mostly relocations, in 2016 was roughly three times higher (17%) than the percentage of full power stations (5.7%).

In this way, tangent cross-service translators that do not currently encroach the LPFM station's contour will nonetheless preclude the LPFM station from being able to move even a small distance in the direction of the translator. By making it easier for numerous cross-service translators to fill these gaps near incumbent LPFM stations, the Order will seal the LPFM station in a box and essentially wait for it to die.

#### **B. The Order is contrary to the goals of the LCRA**

The Commission's action was also arbitrary and capricious because it is inconsistent with the requirements and purposes of the Local Community Radio Act.<sup>35</sup> By removing any set distance limit, the Order will elevate commercial AM interests to the detriment of incumbent

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<sup>35</sup> Local Community Radio Act of 2010, Pub. L. 111-371 (2011).

non-commercial LPFM stations. This demeans local, diverse, non-commercial broadcasting in a way that is contrary to the LCRA. At no point in the Order did the Commission address these inconsistencies or rebut the contention that incumbent LPFM stations will be chained to their current location as the gaps around them are filled by cross-service translators.

Section 5 of the Local Community Radio Act provides that

The Federal Communications Commission, when licensing new FM translator stations, FM booster stations, and low-power FM stations, shall ensure that-

- (1) licenses are available to FM translator stations, FM booster stations, and low-power FM stations;
- (2) such decisions are made based on the needs of the local community; and
- (3) FM translator stations, FM booster stations, and low-power FM stations remain equal in status and secondary to existing and modified full-service FM stations.

The Commission's decision is not consonant with these stated goals and it clearly did not conduct the analysis contemplated by the LCRA. Most notably, despite the mandate of Section 5(2) of the LCRA, the Order is entirely directed at what is good for AM radio station licensees, not what will meet the needs of people in the affected communities. Indeed, the Order does not even contain the statutory word "needs," much less the statutory phrase "needs of the local community," and does not even indirectly address the needs of local communities.

The Order also contravenes the directive of Section 5(1) of the LCRA, which was designed to insure that the Commission's rules not favor translators to the detriment of LPFM.

As the Commission said in 2012,

one of our broad principles for implementation of the LCRA is that our primary focus under Section 5(1) must be to ensure that translator licensing procedures do not foreclose or unduly limit future LPFM licensing, because the more flexible translator licensing standards will make it much easier to license new translator stations in the future.<sup>36</sup>

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<sup>36</sup> Fifth Order on Reconsideration and Sixth Report and Order, 27 FCCRcd 15402, 15422 (2012)(citing Fourth Report and Order, 27 FCCRcd 3364, 3373-74 ¶19 (2012)).

The very premise of the LPFM service is that it can help meet the needs of particular residents of highly localized areas of service. By contrast, AM stations seek to address needs of much larger areas. That is why the Commission said that

[i]n sharp contrast to the translator service...the LPFM service was specifically created to fill a perceived gap in the way that full-power stations meet community needs – “to foster a program service responsive to the needs and interests of small community groups, particularly specialized community needs that have not been well served by commercial broadcast stations.”<sup>37</sup>

The importance of the local community-based orientation of non-commercial LPFM service vis a vis translators is also seen in the fact that the Commission “has historically accorded no weight to translators in assessing the comparative needs of a community radio service under its Section 307(b) licensing policies.”<sup>38</sup>

The removal of any distance limitation for newly-filed FM translator applications will have a dramatic and adverse effect on the listeners of affected LPFM stations. Each LPFM licensee that has gone on the air has done so by navigating what is, for non-professionals, a difficult course of learning how to apply for and obtain a license, recruiting and training local residents to build, manage and operate a station and raising the necessary funds to create and maintain the station. The prospect of losing or impairing these hard-won accomplishments will undermine the rights of these active participants as well as other listeners in the community to have access to the diverse voices and perspectives that LPFM stations provide, notwithstanding the fact that their First Amendment rights “to receive suitable access to social, political, esthetic, moral, and other ideas and experiences” are “paramount.”<sup>39</sup>

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<sup>37</sup> Third Further Notice of Proposed Rulemaking, 26 FCCRcd 9986, 9993 (2011); *see also* Fourth Report and Order, 27 FCCRcd 3364, 3373 ¶18 (2012).

<sup>38</sup> Fourth Report and Order, 27 FCCRcd 3364, 3373-74 ¶18 (2012)).

<sup>39</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 391 (1969).

The goals of the LCRA and benefits of LPFM have been heralded by the Chairman and Commissioners. According to Chairman Pai, the noncommercial nature of LPFM is “critical to advancing the Commission’s diversity goals” and ensuring they continue to serve their local communities.<sup>40</sup> Further, Commissioner Clyburn has stated that “[f]arm workers, tribes, niche ethnic and language communities, community service organizations...all see the LPFM service as a lifeline.”<sup>41</sup> Increasing location options for translators of AM stations while reducing relocation options for incumbent LPFM stations, undermines the goals of the LCRA by favoring expansion of commercial stations at the expense of non-commercial incumbent LPFM stations. This impending demise will irreparably harm these incumbent LPFM stations long before they are forced to cease operations. For instance, stations that are boxed in will have no fallbacks in negotiating a lease renewal.

The harm the Order will cause to an LPFM station’s ability to relocate is an especially daunting prospect. These stations face a constant struggle to remain financially viable and are always looking for ways to reduce costs. The smaller the area to which they can relocate, the less capacity they will have to renegotiate their existing leases or search for more affordable locations. This can force them to cease operations or move so far from their target base as to completely sever the link with their audience.

Despite the Commission’s assurance that encroachment will not occur, Prometheus anticipates the Order will harm LPFM and its listeners by further enabling encroachment and short-spacing. As Prometheus demonstrated in its ex parte presentation dated February 16, 2017, the

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<sup>40</sup> Statement of Commissioner Ajit Pai on Announcement of LPFM Filing Window (Jun. 17, 2013), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-321648A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-321648A1.pdf).

<sup>41</sup> Statement of FCC Acting Chairwoman Mignon L. Clyburn, LPFM Implementation Report, Creation of a Low Power Radio Service, MM Docket 99-25 (Sep. 26, 2013), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-323490A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-323490A1.pdf).

2016 translator filing windows led to a significant increase in short spacing of LPFM stations,<sup>42</sup> and therefore the impact of the Order will be particularly damaging.

The likely impact of the Order's elimination of the 40-mile limit proposal will be the decline of the victories of diverse, locally-focused LPFM radio and the rise of homogenized, commercial programming. If the Commission wants to protect incumbent LPFM service, on which Congress and the FCC have placed a high priority, it must adopt an order that is consistent with the goals of the LCRA, and which does not allow the commercial interests of AM radio to trump the nonprofit, non-commercial interests of LPFM.

**C. Commercial AM broadcasters are not a substitute to achieving the goals of noncommercial LPFM stations**

Finally, the Commission's Order improperly equates the goals of AM radio with those of LPFM by claiming that "smaller Class C and D AM stations...share with the LPFM service a focus on community-based programming."<sup>43</sup> The comparison draws the false equivalence that small stations necessarily achieve the same goals with their local programming. However, as discussed at p. 15, *supra*, "the LPFM service was specifically created to fill a perceived gap in the way that full-power stations meet community needs...particularly specialized community needs that have not been well served by commercial broadcast stations."<sup>44</sup> Unlike translator

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<sup>42</sup> An analysis of CDBS database conducted on January 12, 2017 by Prometheus Radio Project shows 81 translators short-spaced to LPFMs on January 15, 2016 and 270 on December 15, 2016. *See A History of Encroachment on LPFMs, Prometheus Radio Project*, <http://www.prometheusradio.org/history-encroachment-lpfms>; *see also* Ex Parte Letter from Prometheus Radio Project, MB 13-249, Feb. 16, 2017, available at <https://www.fcc.gov/ecfs/filing/102160585211674>.

<sup>43</sup> *Order*, 32 FCCRcd at 1726 ¶4 n.21.

<sup>44</sup> Third Further Notice of Proposed Rulemaking, 26 FCCRcd 9986, 9993 (2011); *see also* Fourth Report and Order, 27 FCCRcd 3364, 3373 ¶18 (2012).

licenses, the service and comparative licensing criteria for the award of LPFM licenses are based on the need to demonstrate that an applicant will advance local community and diversity needs.<sup>45</sup>

Prometheus does not dispute that some AM stations are owned by small businesses, and does not dispute that some of those stations feature local, community-based programming. However, many commercial AM stations are part of large national groups. Moreover, even locally owned stations do not cater to the demographically unattractive segments of the population that are targeted by noncommercial LPFM stations.

Because AM radio is commercial, it is dependent upon the marketplace to determine its programming and survival. The very purpose of non-commercial LPFM is to address the needs of niche groups and other interests that are not demographically attractive to advertisers, and thus whose interests the commercial marketplace does not reflect. Nonprofits, farm workers, tribes, linguistically distinct groups, churches, community benefit societies, and other groups may not create enough economic force to satisfy market demands, or will be overshadowed by larger, more moneyed interests. Market forces are fundamentally at odds with non-commercial radio, and commercial AM radio is absolutely not a substitute for non-commercial LPFM programming. The Commission miscasts this comparison and risks the future of LPFM programming in the process.

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<sup>45</sup> “These criteria include a requirement that licensees be local, a licensing preference for those applicants with an established community presence, and a licensing preference for those applicants that pledge to locally originate at least eight hours of programming per day. In addition, ownership restrictions and time-share rules necessarily result in expanded ownership diversity.” Fourth Report and Order, 27 FCCRcd 3364, 3373 ¶18 (2012)(citing Third Further Notice of Proposed Rulemaking, 26 FCCRcd 9986, 9993 (2011)).

## CONCLUSION

The Commission should reconsider and vacate its Order insofar as it eliminates set distance limitations on translators and revert to the restriction proposed in the FNPRM that would have limited the placement of an FM translator such that the translator's 1 mV/m contour may not extend beyond a 40-mile radius from the AM station. It should also issue a new FNPRM that will address adequately protecting LPFM stations from being boxed in by FM translators, and should grant all other relief as may be just and equitable.

Respectfully submitted,

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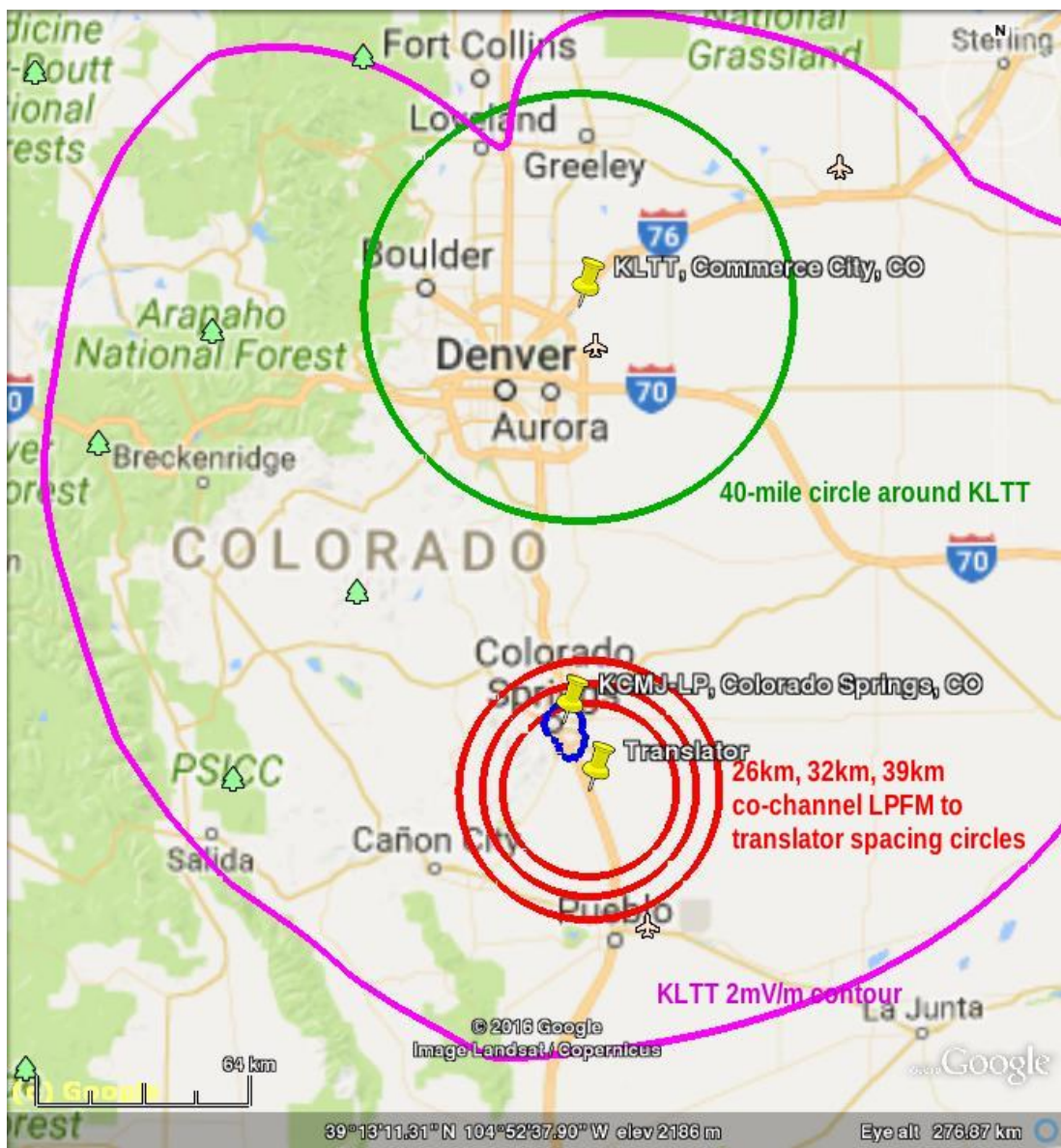
David Houck  
Georgetown Law Student

April 10, 2017

## EXHIBIT A

### Hypothetical Box-in of KCMJ-LP

This map demonstrates the location of KLTT(AM) in Colorado, a 40-mile radius around the station, and the station's daytime 2 mV/m contour. It also shows the possible location of a 10-watt FM translator situated between Colorado Springs and Pueblo, CO to reach audiences to the south along the I-25 corridor. The spacing circles of 26km, 32km, and 39km around the translator represent the required minimum distances that an LPFM station must be from a translator on the same channel as specified in Section 73.807(c). The location of KCMJ-LP would preclude it from relocating southward. See Exhibit B.

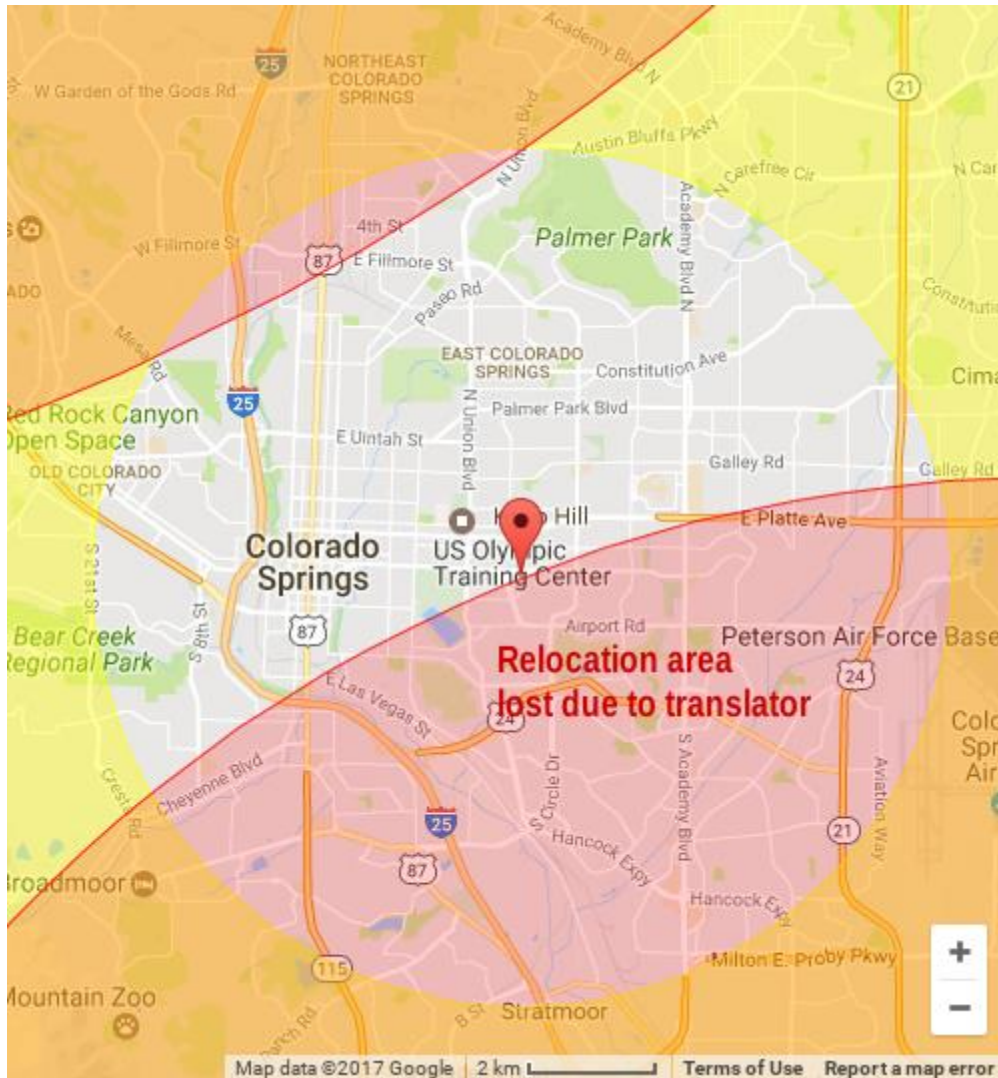




## EXHIBIT B

### Hypothetical Relocation Area Lost for KCMJ-LP

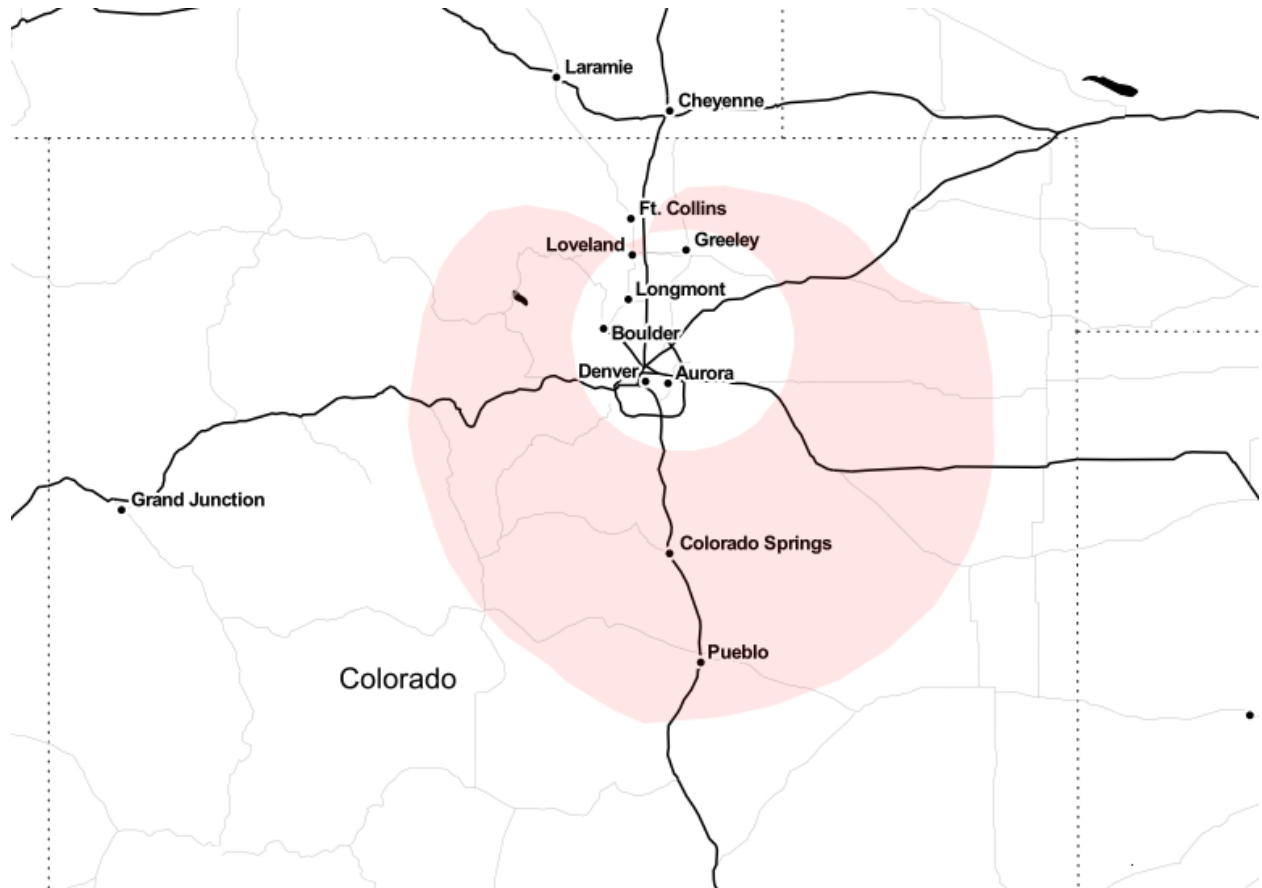
This map demonstrates the area that KCMJ-LP would be precluded from relocating to if a translator was located as described in Exhibit B. The clear circle around KCMJ-LP's location represents the 5.6km distance that the station could relocate its transmitter via a minor modification, absent any waivers. KCMJ-LP would be prohibited under current spacing rules from relocating to the shaded area to the south if a translator was located as described in Exhibit A.



## EXHIBIT C

### Increased Area to Locate Translators for One Colorado AM Station Without the 40-Mile Limit

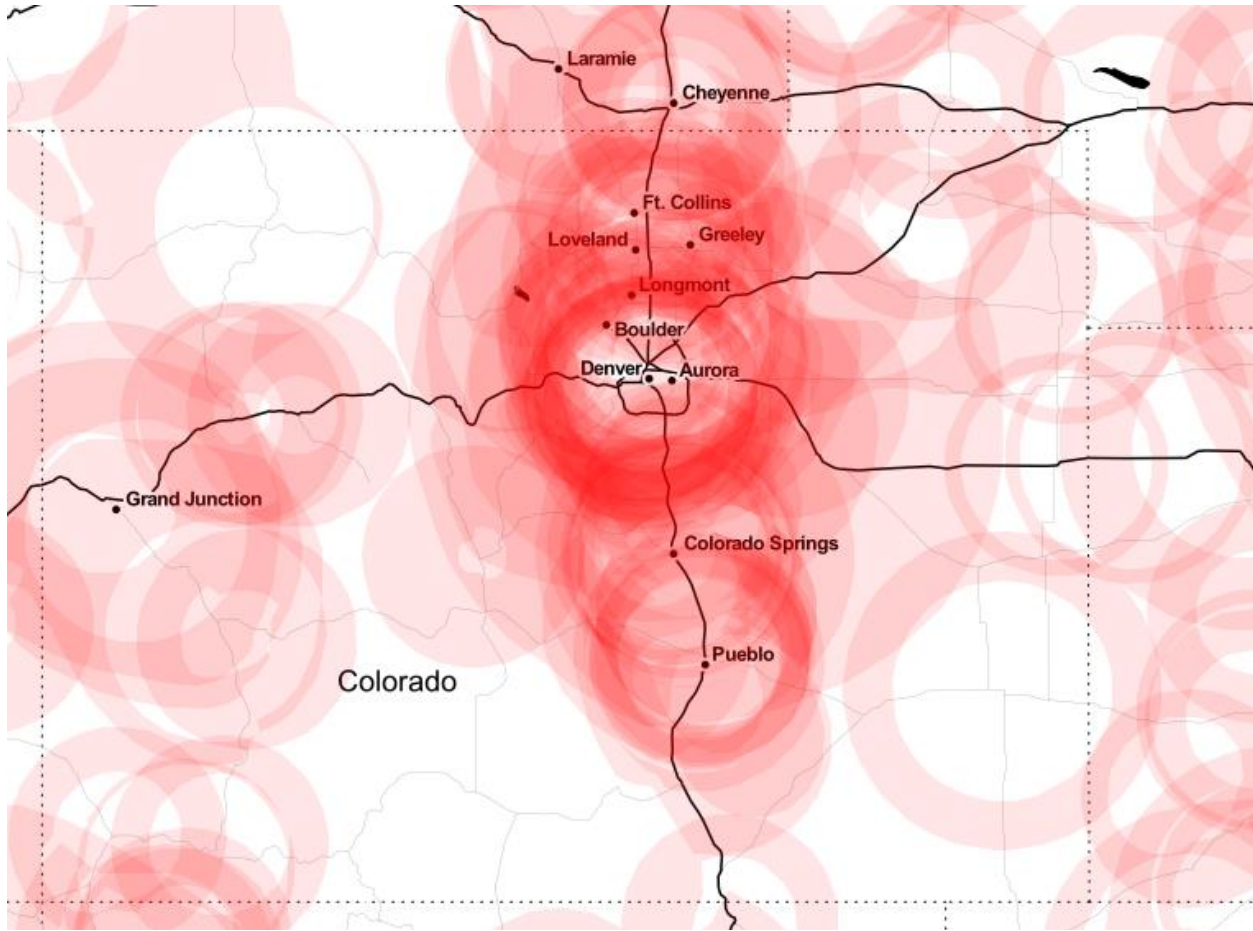
This map demonstrates the area within KLTT(AM)'s 2 mV/m daytime contour beyond 40-miles. Under the FNPRM, KLTT could not have placed FM translators in this area. Under the Order, it may.



## EXHIBIT D

### Increased Area to Locate Translators for Colorado AM Stations Without the 40-Mile Limit

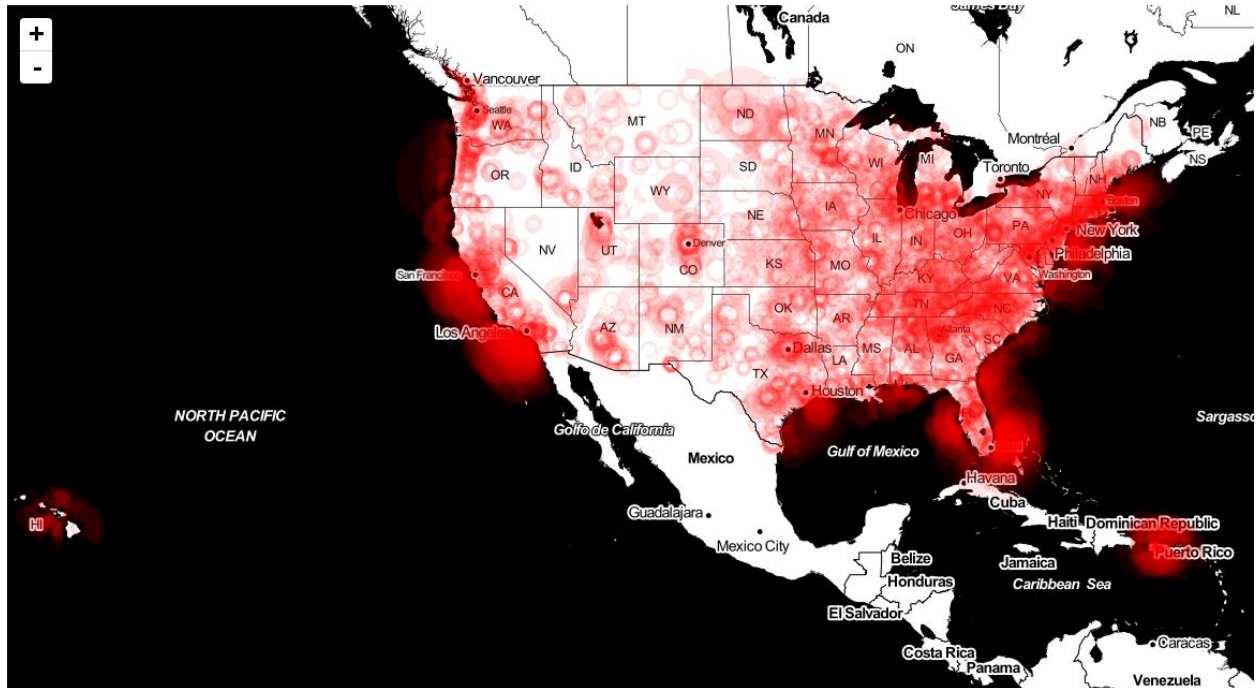
This map demonstrates the areas within the 2 mV/m daytime contours of Colorado AM stations, beyond 40-miles of those stations. Darker areas indicate overlap of contours. Under the FNPRM, respective stations could not have placed FM translators in these areas. Under the Order, they may.



## EXHIBIT E

### Increased Area to Locate Translators for US AM Stations Without the 40-Mile Limit

This map demonstrates the areas within the 2 mV/m daytime contours of US AM stations, beyond 40-miles of those stations. Darker areas indicate overlap of contours. Under the FNPRM, respective stations could not have placed FM translators in these areas. Under the Order, they may.



## EXHIBIT F

### Example of Boxed-in Houston LPFM Station

This map demonstrates the area that KBLT-LP in Houston, TX is precluded from relocating to due to the location of two FM translators, K241CO (rebroadcasting KSHJ(AM)) and K241CM (rebroadcasting KTEK(AM)). The circle around KBLT-LP's location represents the 5.6km distance that the station could relocate its transmitter via a minor modification, absent any waivers. KBLT-LP is prohibited under current spacing rules from relocating to the shaded areas to the northwest (due to KSHJ's FM translator) and southeast (due to KTEK's FM translator).

