affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

• Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law. 5 U.S.C. 804(2).

*B. Submission to Congress and the Comptroller General*

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

*C. Petitions for Judicial Review*

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [*Insert date 60 days from date of publication of this document in the* **Federal Register**]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action pertaining to the $PM_{2.5}$ 2002 base year emissions inventory portion of the West Virginia SIP may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: November 21, 2012.

**W.C. Early,**

*Acting Regional Administrator, Region III.*

40 CFR part 52 is amended as follows:

## PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

### Subpart XX—West Virginia

■ 2. In § 52.2520, the table in paragraph (e) is amended by adding at the end of the table an entry for 2002 Base Year Emissions Inventory for the 1997 fine particulate matter ($PM_{2.5}$) standard to read as follows:

**§ 52.2520 Identification of plan.**

* * * * *

(e) * * *

| Name of non-regulatory SIP revision | Applicable geographic area | State submittal date | EPA approval date | Additional explanation |
|---|---|---|---|---|
| * | * | * | * | * |
| 2002 Base Year Emissions Inventory for the 1997 fine particulate matter ($PM_{2.5}$) standard. | West Virginia portion of the Huntington-Ashland, WV-KY-OH nonattainment area. | 5/28/09 | 12/11/12 *[Insert page number where the document begins]*. | 52.2531(b) |

■ 3. § 52.2531 is amended by revising the section heading, designating the existing paragraph as paragraph (a), and adding paragraph (b). The amendments read as follows:

**§ 52.2531 Base year emissions inventory.**

* * * * *

(b) EPA approves as a revision to the West Virginia State Implementation Plan the 2002 base year emissions inventory for the Huntington-Ashland, WV-KY-OH fine particulate matter ($PM_{2.5}$) nonattainment area submitted by the West Virginia Department of Environmental Protection on May 28, 2009. The 2002 base year emissions inventory includes emissions estimates that cover the general source categories of point sources, non-road mobile sources, area sources, on-road mobile sources, and biogenic sources. The pollutants that comprise the inventory are nitrogen oxides ($NO_X$), volatile organic compounds (VOCs), $PM_{2.5}$, coarse particles ($PM_{10}$), ammonia ($NH_3$), and sulfur dioxide ($SO_2$).

[FR Doc. 2012–29763 Filed 12–10–12; 8:45 am]

BILLING CODE 6560–50–P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

**[MM Docket No. 99–25; FCC 12–144]**

### Implementation of the Local Community Radio Act of 2010; Revision of Service and Eligibility Rules for Low Power FM Stations

**AGENCY:** Federal Communications Commission.

**ACTION:** Denial and/or dismissal of petitions for reconsideration.

**SUMMARY:** In this document, the Commission acts on six petitions for reconsideration of the Fourth Report

and Order, challenging the per-market and/or the national caps adopted in the Fourth Report and Order in this proceeding. In response to the petitions for reconsideration, the Commission modifies the national cap to allow each applicant to pursue up to 70 applications, so long as no more than 50 of them are in the spectrum-limited radio markets identified in the Fourth Report and Order; increases the per-market cap for spectrum-limited markets to allow up to three applications per applicant for each market, subject to certain conditions; and clarifies the application of the per-market cap in ''embedded'' markets.

**DATES:** Effective January 10, 2013.

**FOR FURTHER INFORMATION CONTACT:** Peter Doyle (202) 418–2789.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Fifth Order on Reconsideration in MM Docket No. 99–25, FCC 12–144, adopted November 30, 2012, and released December 4, 2012. The full text of this document is available for inspection and copying during regular business hours in the FCC Reference Center, 445 Twelfth Street SW., Room CY–A257, Portals II, Washington, DC 20554, and may also be purchased from the Commission's copy contractor, BCPI, Inc., Portals II, 445 Twelfth Street SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI, Inc. via their Web site, *http://www.bcpi.com,* or call 1–800–378–3160. This document is available in alternative formats (computer diskette, large print, audio record, and Braille). Persons with disabilities who need documents in these formats may contact the FCC by email: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

*Paperwork Reduction Act Analysis.* This Order on Reconsideration does not adopt any new or revised information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13 (44 U.S.C. 3501–3520). In addition, therefore, it does not contain any new or modified ''information collection burden for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4).

*Report to Congress.* The Commission will send a copy of this Order on Reconsideration to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

**Summary of Fifth Order on Reconsideration**

**I. Introduction**

1. In this *Fifth Order on Reconsideration and Sixth Report and Order,* we take various actions to implement the Local Community Radio Act of 2010 (''LCRA''), safeguard the integrity of our FM translator licensing procedures and modify licensing and service rules for the low power FM (''LPFM'') service. In the *Fifth Order on Reconsideration* we affirm with slight modifications and clarifications the comprehensive plan for licensing FM translators and LPFM stations adopted in the *Fourth Report and Order* (Fourth R&O). In response to petitions for reconsideration, we modify the national cap to allow each applicant to pursue up to 70 applications, so long as no more than 50 of them are in the Appendix A markets. We also increase the per-market cap for radio markets identified in Appendix A of the *Fourth R&O* to allow up to three applications for each market, subject to certain conditions. We also clarify the application of the per-market cap in those Appendix A markets with ''embedded'' markets. In the *Sixth Report and Order* we complete the implementation of the LCRA and make a number of additional changes to promote the localism and diversity goals of the LPFM service and a more sustainable community radio service. When effective, these orders will permit the Commission to move forward with the long-delayed processing of over 6,000 FM translator applications and establish a timeline for the opening of an LPFM window.

**II. Fifth Order on Reconsideration**

*A. Background*

2. On July 12, 2011, the Commission released a *Third Further Notice of Proposed Rule Making* (Third FNPRM) in this proceeding, seeking comment on the impact of the LCRA on the procedures previously adopted to process the approximately 6,000 applications that remain pending from the 2003 FM non-reserved band translator window. There, the Commission tentatively concluded that those licensing procedures, which would limit each applicant to ten pending applications, would be inconsistent with the LCRA's goals. We proposed to modify those procedures and instead adopt a market-specific translator application dismissal process, dismissing pending translator applications in identified spectrum-limited markets in order to preserve adequate LPFM licensing opportunities. At the same time, we tentatively concluded that these new procedures would not be sufficient to address the potential for licensing abuses with respect to the thousands of pending translator applications. Accordingly, we asked for comments on appropriate processing policies for those applications, including a potential national cap of 50–75 applications and a potential cap of one or a few applications in any particular market.

3. The Commission released the *Fourth R&O* on March 19, 2012. The Commission affirmed its decision to reject the prior national cap of 10 translator applications per applicant. It adopted a modified market-specific translator licensing scheme which incorporated a number of commenter proposals. To minimize the potential for speculative licensing conduct, the Commission established a national cap of 50 applications and a local cap of one application per applicant per market for the 156 Arbitron Metro markets identified in Appendix A of the *Fourth R&O.*

1. Rationale for the Translator Application Caps

4. When the Commission opened the March 2003 filing window for Auction 83 FM translator applications, there were 3,818 licensed FM translators. 13,377 translator applications were filed in that window—approximately three times as many applications as the number of FM translators licensed since 1970. From that group, 3,476 new authorizations were issued before the Commission's freeze on further processing of applications from that window took effect. Of those 3,476 authorizations, 926 (more than 25 percent) were never constructed and 1,358 (almost 40 percent) were assigned to a party other than the applicant. Although 97 percent of all filers filed fewer than 50 applications, the remaining three percent accounted for a total of 8,163 applications, representing 61 percent of the total. The two largest filers, commonly-owned Radio Assist Ministries, Inc. and Edgewater Broadcasting, Inc. (collectively, ''RAM''), filed 4,219 applications and received 1,046 grants before the processing freeze took effect. When we adopted the cap of ten applications in 2007, we noted that RAM had sought to assign more than 50 percent of the construction permits it had received and consummated more than 400 assignments of such permits. We based the cap of ten applications on the need to preserve spectrum for future LPFM availability and the need to protect the

integrity of our translator licensing process.

5. In the *Third FNPRM,* when we proposed to replace the cap of ten translator applications with a market-specific processing system, we tentatively concluded that such a processing system would not be sufficient to address the potential abuses in translator licensing and trafficking. We noted that the vast majority of applicants hold only a few applications, but the top 20 applicants collectively account for more than half of the pending applications. Similar imbalances exist in particular markets and regions. For instance, one applicant holds 24 of the 24 translator applications proposing operation within 20 kilometers of Houston's reference coordinates and 73 applications in Texas. Two applicants hold 66 of the 74 applications proposing service to the New York City radio market.

6. We also described a number of factors that create an environment which promotes the acquisition of translator authorizations solely for the purpose of selling them. First, we expect that a substantial portion of the remaining translator grants will be made pursuant to our settlement (*i.e.,* non-auction) procedures. Second, translator construction permits may be sold without any limitation on price. Third, permittees are not required to construct or operate newly authorized facilities before they can sell their authorizations. Collectively, these factors created an incentive for speculative filings and trafficking in translator authorizations. Such behavior damages the integrity of our licensing process, which assigns valuable spectrum rights to parties based on a system that gives priority to applications filed in one filing window over subsequent applications based on the assumption that the applications filed in the earlier window are filed in good faith by applicants that intend to construct and operate their proposed stations to serve the public. The history of the Auction 83 translator applications strongly supports our view that speculative applications delay the processing of *bona fide* applications, thereby impeding efforts to bring new service to the public. These speculative translator applications have also delayed the introduction of new LPFM service pursuant to our mandate under the LCRA to provide licensing opportunities for both LPFM and translator stations.

7. The extraordinarily high number of applications filed in the Auction 83 window, particularly by certain applicants (both nationally and in certain markets), and the significant number of authorized stations that were either assigned to another party or never constructed are strong indicia of applications filed for speculative purposes (either for potential sale or to game the auction system) rather than a good faith intent to construct and operate the proposed stations. Based on these concerns, we sought comment on whether a national cap of 50 or 75 applications would force filers with a large number of applications to concentrate on those proposals and markets where they have *bona fide* service plans. We also asked whether applicants should be limited to one or a few applications in a particular market, noting that such a restriction ''could limit substantially the opportunity to warehouse and traffic in translator authorizations while promoting diversity goals.''

8. The *Fourth R&O* concluded that both a national cap and a per-market cap for the 156 Appendix A markets were appropriate to limit speculative licensing conduct and necessary to bolster the integrity of the remaining Auction 83 licensing. We stated that non-feeable application procedures, flexible auction rules, and flexible translator settlement and transfer/assignment rules ''clearly have facilitated and encouraged the filing of speculative proposals * * *. While we recognize that high-volume filers did not violate our rules (''Rules''), these types of speculative filings are fundamentally at odds with the core Commission broadcast licensing policies and contrary to the public interest.''

9. The *Fourth R&O* rejected other potential anti-trafficking proposals offered by commenters, stating that application caps were the most administratively feasible solution for processing this large group of long-pending applications. We stated that we considered caps to be the only approach that would not only limit trafficking in translator authorizations but also fulfill our mandate under the LCRA to provide the fastest path to additional translator and LPFM licensing in areas where the need for additional service is greatest.

10. We adopted a national cap of 50 additional translators per applicant. We found that this cap, of itself, would affect no more than 20 of the approximately 646 total applicants in this group, and that this was a reasonable number of stations to construct and operate as proposed and would place restraints on trafficking of permits on the open market. We also noted that there was some agreement on such a limit even among translator advocates.

11. We also adopted a per-market cap of one application per market in the radio markets listed in Appendix A to the *Fourth R&O,* consisting of the top 150 Arbitron Metro markets (per the BIA Fall 2011 database, as defined in Appendix A) plus six additional markets where more than four translator applications are pending. We noted that some applicants had filed dozens of applications for a particular market, when it was inconceivable that a single entity would construct and operate so many stations there. We concluded that such applications were clearly filed for speculative reasons or to skew our auction procedures. Given the volume of pending applications, we found that it was administratively infeasible to conduct a case-by-case assessment of these applications to determine whether they could satisfy our rule limiting the grant of additional translator authorizations to a party that can make a ''showing of technical need for such additional stations'' (the ''Technical Need Rule''). Accordingly, we adopted a cap of one translator application per market in the Arbitron Metro markets listed in Appendix A to the *Fourth R&O.* For applications outside those markets, where only a small number of applications will require analysis, we decided to apply the Technical Need Rule on a case-by-case basis.

12. Appendix A to the *Fourth R&O* lists several ''embedded'' radio markets that are part of a larger market also listed in Appendix A: (1) Nassau-Suffolk (Long Island), NY (Arbitron Metro market #18, embedded in the New York Arbitron Metro market); (2) Hudson Valley, NY (Arbitron Metro market #39, partially embedded in the New York Arbitron Metro market); (3) Middlesex-Somerset-Union, NJ (Arbitron Metro market #41, embedded in the New York Arbitron Metro market); (4) Monmouth-Ocean, NJ (Arbitron Metro market #53, partially embedded in the New York Arbitron Metro market); (5) Morristown, NJ (Arbitron Metro market #117, embedded in the New York Arbitron Metro market); (6) Stamford-Norwalk, CT (Arbitron Metro market #148, embedded in the New York Arbitron Metro market); (7) San Jose, CA (Arbitron Metro market #37, embedded in the San Francisco Arbitron Metro market); (8) Santa Rosa, CA (Arbitron Metro market #121, embedded in the San Francisco Arbitron Metro market); and (9) Fredericksburg, VA (Arbitron Metro market #147, partially embedded in the Washington, DC Arbitron Metro market). The *Fourth R&O* stated that the one-per-market cap would apply to all

markets listed in Appendix A but did not explain how this cap would apply to the listed embedded markets.

13. In addition to those embedded markets, there are three more embedded markets that are not listed in Appendix A due to their smaller size: (1) New Bedford-Fall River, MA (Arbitron Metro market #180, embedded in the Providence-Warwick-Pawtucket, RI Arbitron Metro market); (2) Frederick, MD (Arbitron Metro market #195, embedded in the Washington, DC Arbitron Metro market); and (3) Manchester, NH (Arbitron Metro market #196, partially embedded in the Portsmouth-Dover-Rochester, NH Arbitron Metro market). The *Fourth R&O* did not explain whether applications filed in those embedded markets would be subject to the per-market cap imposed on the larger markets within which they are embedded.

2. Petitions for Reconsideration

14. Five petitions for reconsideration were filed following **Federal Register** publication of the *Fourth R&O.* Educational Media Foundation (''EMF'') filed a Petition for Reconsideration (''EMF Petition'') seeking reconsideration as to both the national cap of 50 applications and the per-market cap of one application. The remaining petitions only addressed the latter cap.

15. EMF currently has 292 pending translator applications from the Auction 83 window. EMF received 259 translator grants from that window before we froze the processing of such applications.

16. EMF first contends that the Commission must clarify the definition of the term ''radio market'' as used in the *Fourth R&O.* EMF argues that the term could mean census-designated urban areas, metropolitan statistical areas, Arbitron Metro markets, or some definition connected to the ''grids'' used in determining whether markets are ''spectrum limited'' or not. Additionally, EMF argues that both the national cap and the per-market cap are arbitrary and capricious. EMF argues that the Commission did not adequately explain the ''abusive'' licensing activity relating to Auction 83 filings and did not adequately explain why other ''more direct'' measures to combat speculation are not being used. EMF also argues that the Commission did not adequately explain how the caps square with the Commission's own conclusion that the LCRA requires it to make available licensing opportunities for both translators and LPFM stations ''in as many local communities as possible.''

17. Hope Christian Church of Marlton, Inc. (''Hope''), Bridgelight, LLC (''Bridgelight'') and Calvary Chapel of the Finger Lakes, Inc. (''CCFL'') (collectively, the ''Joint Petitioners'') filed a joint Petition for Partial Reconsideration (''Joint Petition'') seeking reconsideration to revise the one-per-market cap to include a waiver process. Hope is the licensee of WVBV(FM), Medford Lakes, NJ (Philadelphia, PA Arbitron Metro market); WWFP(FM), Brigantine, NJ (Atlantic City-Cape May, NJ Arbitron Metro market); and WZBL(FM), Barnegat Light, NJ (Monmouth-Ocean, NJ embedded market). Hope has 46 pending translator applications from the Auction 83 window, of which 45 are in Appendix A markets and one is outside the Appendix A markets. Hope received 21 translator grants before the processing freeze, primarily in the Philadelphia and Baltimore Arbitron Metro markets. Hope constructed all of those proposed stations. Bridgelight is the licensee of WRDR(FM), Freehold Township, NJ (Monmouth-Ocean, NJ embedded market); and WJUX(FM), Monticello, NY (outside the Appendix A markets). Bridgelight has 16 pending applications from the Auction 83 window. Bridgelight received five translator grants before the processing freeze (primarily in the New York Arbitron Metro market), but assigned all of them to other parties. CCFL is the licensee of WZXV(FM), Palmyra, NY (Rochester, NY Arbitron Metro market). CCFL has 16 pending translator applications from the Auction 83 window, of which eight are in Appendix A markets (five in the Buffalo, NY Arbitron Metro market and three in the Rochester, NY Arbitron Metro market). CCFL received 14 translator grants before the processing freeze (primarily in the Buffalo and Rochester Arbitron Metro markets), but assigned five of those to other parties and cancelled another one.

18. The Joint Petition maintains that the one-per-market cap unfairly harms local and regional applicants that have filed applications in a limited number of markets for the purpose of reaching distant communities in geographically large markets. The Joint Petition argues that the one-per-market cap should be supplemented with a waiver process that allows for waivers (with no limit on the number of authorizations in a market) under three conditions: (1) The 60 dBu contour of the translator application cannot overlap the 60 dBu contour of any commonly-controlled application; (2) the application would not preclude a future LPFM application in the grid for the Appendix A market or at the proposed transmitter site; and (3) the applicant agrees to accept a condition on the construction permit that disallows sale of the authorization for a period of four years after the station commences operation.

19. Conner Media, Inc. (together with the commonly-controlled Conner Media Corporation, ''Conner'') filed a Petition for Partial Reconsideration (''Conner Petition'') of the *Fourth R&O.* Conner is the licensee of WAVQ(AM), Jacksonville, NC (Greenville-New Bern-Jacksonville, NC Arbitron Metro market). Conner states that it filed translator applications in five different locations to serve the Greenville-New Bern-Jacksonville, NC Arbitron Metro market, which comprises ten diverse counties. Conner expresses interest in assigning additional permits from its pending applications to other AM broadcasters who would benefit from the nighttime service available on a translator. Conner argues that any local translator cap should be per-community, not per-market.

20. Western North Carolina Public Radio, Inc. (''WNC'') is the licensee of noncommercial educational (''NCE'') stations WCQS(FM), Asheville, NC; WFSQ(FM), Franklin, NC; and WYQS(FM), Mars Hill, NC (all in the Asheville, NC Arbitron Metro market). WNC filed a Petition for Reconsideration (''WNC Petition'') arguing that its Arbitron Metro market, Asheville, NC, should not be included in Appendix A or, alternatively, that the community of Black Mountain, NC, should not be considered part of that market because it is separated by a mountain range from Asheville and therefore requires its own translator service. WNC notes that Asheville is the 159th Arbitron Metro market, but was included in Appendix A because more than four translator applications are pending in that market.

21. Kyle Magrill (''Magrill'') filed a Petition for Reconsideration (''Magrill Petition''). Magrill is a translator applicant under the corporate name of CircuitWerkes, Inc. and the d/b/a name of CircuitWerkes. Magrill has seven pending translator applications from the Auction 83 window in four Appendix A markets in Florida. Magrill received three translator grants before the processing freeze took effect. Magrill argues that the Commission did not propose per-market caps in the *Third FNPRM,* but instead called for processing all translator applications in non-spectrum limited markets. Magrill argues that the number of translator sales has not been so high as to present a problem. Magrill notes that many

markets are geographically and ethnically diverse and also notes that HD channels have increased the need for multiple translators in certain locations. Magrill argues that the per-market cap particularly hurts local service providers who did not exceed the national cap. Magrill argues that the cap should be revisited and at least eased in markets that are not spectrum limited.

3. Responsive Pleadings

22. Prometheus Radio Project (''Prometheus'') filed an Opposition (''Prometheus Opposition'') to the petitions for reconsideration. Prometheus argues that the Commission properly defined the ''market'' for the one-per-market translator caps as the Arbitron Metro market. Prometheus rejects Magrill's claim about lack of notice, noting that the Commission specifically asked for comments on whether translator applicants should be limited to one or a few applications in any particular market and that this material was published in the **Federal Register**. Prometheus then argues that the caps will prevent speculation and preserve radio market diversity. Prometheus opposes any waiver process that would delay the LPFM application window.

23. REC Networks (''REC'') partially opposes the petitions for reconsideration. REC supports the national cap of 50 applications, but believes the per-market cap may be overly restrictive. REC argues for adoption of a waiver standard that is more stringent than the one proposed in the Joint Petition. REC suggests the following additional criteria: (1) The applicant must accept a condition on its construction permit that for a four-year period after commencing operations, the translator must be commonly owned with the primary station and must rebroadcast the primary analog output of that station; (2) the 60 dBu contour of the translator application must not overlap (i) a 30 kilometer radius around the center of markets 1–20, (ii) a 20 kilometer radius around the center of spectrum limited markets 21–50, or (iii) a 10 kilometer radius around the center of spectrum limited markets 51–100; and (3) applications grantable under this waiver must also comply with the national cap of 50 applications.

24. In reply comments, Conner, the Joint Petitioners and Magrill reiterate their prior positions. Four Rivers Community Broadcasting Corporation filed a reply arguing for a waiver standard similar to the standard suggested by the Joint Petition. One Ministries, Inc. and Life On The Way Communications, Inc. filed reply comments arguing for separation of embedded markets from the core market, particularly in the case of San Francisco, San Jose and Santa Rosa.

*B. Discussion*

25. For the reasons explained below, we will grant the petitions for reconsideration in part and clarify the treatment of translator applications in embedded markets. We will modify the national cap to allow each applicant to pursue up to 70 applications, provided that no more than 50 of them are in the Appendix A markets. We will also modify the per-market cap from one translator application per market to three, subject to two conditions: (1) To avoid dismissal under the cap procedures, the 60 dBu contour of a translator application may not overlap the 60 dBu contour of another translator application filed by that party or translator authorization held by that party as of the release date of this decision; and (2) the translator application may not preclude grant of a future LPFM application in the grid for that market or at the proposed out of grid transmitter site, in accordance with the processing policy delineated in the *Fourth R&O.* In all other respects, we deny the petitions.

1. Market Definitions

26. The *Fourth R&O* adopted ''both a national cap and a market-based cap for the markets identified in Appendix A.'' Appendix A contained a spreadsheet with eight top-level columns. Appendix A also contained a paragraph entitled ''Detailed Column Information'' for which the following information appeared in bold for the spreadsheet's first three top-level columns:

**Arb#/Rank—Arbitron Market Ranking**

**CF#/Rank—Common Frequency Arbitron Market Ranking**

**Fall 2011 Arbitron Rankings—Arbitron Market Name**

27. Appendix A made it clear that we were referring to Arbitron Metro markets rather than non-Arbitron data such as census data. Although we did not describe the markets as Arbitron Metro markets, the only alternative type of Arbitron radio market is an Arbitron Total Survey Area. Appendix A could not be interpreted to mean Arbitron Total Survey Area, however, because there is no Arbitron Total Survey Area for many of the markets listed in Appendix A, particularly the largest radio markets. Accordingly, contrary to EMF's claim, we do not believe there could reasonably have been any confusion over the fact that Appendix A refers to Arbitron Metro markets. In any event, we clarify here that the markets listed in Appendix A are Arbitron Metro markets.

28. EMF also argues that the *Fourth R&O* did not spell out how an application would be deemed to be within an Appendix A market. We disagree. Both the *Third FNPRM* and the *Fourth R&O* consistently referred to the proposed transmitter site as the determining factor for whether an application would be considered to be within a particular market. In fact, the *Third FNPRM* adopted a processing freeze on ''any translator modification application that proposes a transmitter site for the first time within any [spectrum-limited] market,'' while allowing any translator modification application ''which proposes to move its transmitter site from one location to another within the same spectrum-limited market.'' Our detailed market-specific translator processing policy adopted in the *Fourth R&O* specifically refers to the proposed transmitter site as the determining factor, and the translator cap discussion in the *Fourth R&O* likewise refers to proposed transmitter locations. In any event, we clarify here that a translator application is considered within an Arbitron Metro market for purposes of the per-market translator caps if it specifies a transmitter site within that Arbitron Metro market.

29. On the other hand, we agree that we should clarify the treatment of ''embedded'' markets. An embedded market is a unique marketing area for the buying and selling of radio air time. It is contained, either in whole or in part, within the boundaries of a larger ''parent'' market. Most, but not all, embedded markets are among the 156 radio markets listed in Appendix A.

30. Our intent was, and is, to treat each embedded market listed in Appendix A as a separate radio market for purposes of the per-market cap. For example, the San Francisco market (Arbitron Metro market #4) includes the San Jose (Arbitron Metro market #37) and Santa Rosa (Arbitron Metro market #122) embedded markets. Accordingly, the per-market cap would apply to each of three markets: (1) The core San Francisco market (consisting of Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo and Solano Counties); (2) the San Jose market (consisting of Santa Clara County); and (3) the Santa Rosa market (consisting of Sonoma County). Thus, an application for a translator in San Jose would not count against the per-market cap for that applicant in either the core San

Francisco market or the Santa Rosa market. Accordingly, subject to the processing rules described below, an applicant could prosecute three applications in each of those three markets. In contrast, the Washington, DC market (Arbitron Metro market #8) includes one county from the Fredericksburg, VA market (Arbitron Metro market #147, with Stafford County being the embedded portion of that market) and all of the Frederick, MD market (Arbitron Metro market #197). In that situation, an application proposing a site in Stafford County would be treated as an application in the Fredericksburg, VA Arbitron Metro market rather than an application in the Washington, DC Arbitron Metro Market. The per-market cap (as revised below) will apply to all applications proposing a site in the Fredericksburg, VA Arbitron Metro market, because that market is listed in Appendix A. On the other hand, an application proposing a site in Frederick County, MD would be treated as an application in the Frederick, MD Arbitron Metro market rather than the Washington, DC Arbitron Metro market. Because the Frederick, MD Arbitron Metro market is not listed in Appendix A, the per-market cap does not apply to any application proposing a site there. With the exclusion of Stafford County, VA and Frederick County, MD from the Washington, DC market for the purposes of the per-market cap, the cap for the Washington, DC market would apply only to applications proposing operation from a site in the core of that market, which is any part of the market other than those two counties.

2. Notice of Appendix A Per-Market Cap Proposal

31. We next address Magrill's claim that we violated the Administrative Procedure Act's notice and comment requirements by failing to give notice that the per-cap limit would apply to all Appendix A markets rather than just ''spectrum limited'' Appendix A markets. Magrill's comments focus on the Commission's market-specific translator dismissal process, with its distinction between ''spectrum limited'' markets and ''spectrum available'' markets, as delineated in Section III.B of the *Third FNPRM.* However, in Section III.C of the *Third FNPRM,* we then stated our tentative conclusion that this translator dismissal process would not be sufficient to address the problem of speculation among Auction 83 filers. We tentatively concluded that nothing in the LCRA limits the Commission from addressing such speculation through processing policies separate from the dismissal process discussed in Section III.B of the *Third FNPRM.* Based on those tentative conclusions, we asked for comments on processing policies to address the potential for speculative abuses among the remaining translator applications:

> For example, we seek comment on whether to establish an application cap for the applications that would remain pending in non-spectrum limited markets and unrated markets. Would a cap of 50 or 75 applications in a window force high filers to concentrate on those proposals and markets where they have bona fide service aspirations? In addition or alternatively, should applicants be limited to one or a few applications in any particular market?

32. Clearly, the point of Section III.C. of the *Third FNPRM* was to seek comments on potential national caps and per-market caps as a processing policy separate from the market-based translator dismissal policy discussed in Section III.B. We specifically noted that this processing policy could apply to applications in ''non-spectrum-limited'' markets and unrated markets. We received substantial comments on the proposals for a national cap and per-market caps. In fact, Magrill himself commented on the issue by proposing an alternative system that would limit applications in both ''spectrum available'' markets and ''spectrum limited'' markets based on the total number of applications filed nationally by a particular applicant. Accordingly, we reject Magrill's claim that we failed to give adequate notice that per-market caps might apply in ''spectrum available'' markets.

33. Similarly, the Joint Petition claims that a one-per-market cap on translator applications ''had never previously been proposed prior to the *Fourth R&O.''* The language quoted above from the *Third FNPRM* shows that this claim is unfounded. Accordingly, we reject this claim by the Joint Petitioners.

3. The National Cap of 50 Applications

34. EMF is the only party to challenge the national cap of 50 applications. As we noted above, EMF received 259 translator grants from its Auction 83 applications before our processing freeze took effect. Approximately 20 percent of those grants were never constructed and therefore were cancelled. Altogether, 72 out of EMF's 259 grants (almost 30 percent of those authorizations) were sold, were not built and therefore were cancelled, or were otherwise terminated.

35. EMF focuses its challenge to the national cap of 50 translator applications on two claims. First, EMF claims that the cap is based on an erroneous assumption that translator applicants with higher numbers of pending applications do not intend to construct all of those proposed stations. Second, EMF points out that the Commission chose a cap of 50 as the most ''administratively feasible solution for processing this large group of long-pending applications'' instead of ''more direct means'' of curbing speculation, such as limits on sales of new translator construction permits or the prices at which they can be sold.

36. EMF's first objection mischaracterizes our decision on the national cap by treating it as an unverified assumption about the number of stations that applicants could build or wish to build. We acknowledge that we cannot divine an applicant's intentions based on simple statistics, but that is not what we attempted to do. Rather, we developed a processing policy that would reasonably balance competing goals. The cap of 50 does not assume that an applicant could only intend to construct, or be able to construct, 50 new translator stations, but it will require applicants to prioritize their filings and focus on applications in those locations where they have a *bona fide* interest in providing service and on applications that are most likely to be grantable, while deferring their pursuit of other opportunities until a future filing window. In this regard, we reiterate that our conclusion here about speculative filings by high-volume applicants is supported by the data showing that an unusually large number of the translator grants from this filing window were not constructed or were assigned to a party other than the applicant. We believe applicants subject to the cap are likely to choose applications that (1) they expect to be granted, (2) they plan to construct and operate, and (3) will fill an unmet need, thereby improving competition and diversity. EMF has not shown that this expectation is unreasonable.

37. EMF's second argument overlooks many relevant considerations. First, EMF fails to note that most of the applicants subject to the cap received many grants before the processing freeze took effect. EMF itself received 259 grants, so for EMF the cap translates into 259 granted applications, plus as many additional applications that EMF selects that result in grants.

38. Second, as the Commission previously noted, future translator windows will provide additional new station licensing opportunities. With our flexible translator licensing standards, we expressed confidence that ''comparable licensing opportunities

will remain available in a future translator filing window'' with respect to applications dismissed pursuant to the application caps and our market-based processing policy.

39. Third, EMF overlooks our explicit balancing of ''the competing goals of deterring speculation and expanding translator service to new communities.'' In doing so, we selected the number of 50 applications to affect no more than 20 applicants, representing only three percent of the pool of Auction 83 applicants but approximately half of the pending applications. Thus, a national cap of 50 applications would allow 97 percent of applicants to prosecute all of their pending applications, and it will allow approximately 50 percent of all pending applications to be processed, while curbing the excessive number of applications filed by 3 percent of the filers.

40. With respect to the choice of an application cap over other options such as anti-trafficking rules, EMF claims erroneously that our objective was to limit the number of applications we had to process. We chose an application cap ''both [to] deter trafficking and provide the fastest path to additional translator and LPFM licensing in areas where the need for additional service is greatest.'' This approach benefits both translator and LPFM applicants and the public they seek to serve. An application cap provides an immediate solution to the trafficking issue and also ameliorates the impact of translator applications on LPFM service while avoiding the lead time necessary to develop and adopt new anti-trafficking rules or the resources needed to enforce such rules. This is why we described application caps as ''the most administratively feasible solution for processing this large group of long-pending applications.'' Advocates of anti-trafficking rules, such as EMF, have not shown that this conclusion is flawed.

41. We will, however, grant reconsideration with respect to the national cap of 50 applications in order to better ensure equitable distribution of radio service between urban and rural areas. We recognize that parties restricted to 50 applications will tend to choose applications in urban areas, because those applications offer potential service to the greatest number of people. We believe a modest relaxation of this restriction can provide additional service to rural areas without sacrificing the integrity of our licensing process or opportunities for new LPFM service. Accordingly, we will allow applicants to prosecute up to 70 applications nationally, provided that no more than 50 of those are in Appendix A markets. All selected applications outside the Appendix A markets must meet certain conditions. Specifically, the applications outside the Appendix A markets must (1) comply with the restriction against overlap with the applicant's other pending translator applications and authorizations set forth in paragraph 58 below with respect to the per-market cap, and (2) protect at least one channel for LPFM filing opportunities at the proposed transmitter site for each short form application specifying such site, as shown in the type of ''out of grid'' preclusion study described in paragraph 59 below with respect to the per-market cap. In addition, to ensure that these authorizations will not be relocated to Appendix A markets, we will impose a condition restricting their relocation. Specifically, during the first four years of operation, none of these authorizations can be moved to a site from which (calculated in accordance with Section 74.1204(b) of our Rules) there is no 60 dBu contour overlap with the 60 dBu contour proposed in the application as of the release date of this *Fifth Order on Reconsideration.* Our decision to establish a national cap is an exercise in line-drawing that is committed to agency discretion. Our choice of a limit of 70 applications nationally, with no more than 50 applications in the Appendix A markets, reasonably balances competing goals based on a careful evaluation of the record.

4. The Need for a Per-Market Cap

42. EMF characterizes the per-market cap as arbitrary and capricious. However, the record here clearly demonstrates that speculative translator filing activity was not only a national problem but also a local market problem. In the *Third FNPRM,* we described exactly this situation, noting that one applicant held 25 of the 27 translator applications proposing locations within 20 kilometers of Houston's center city coordinates and 75 applications in Texas. We also noted that two applicants held 66 of the 74 applications proposing service to the New York City Arbitron Metro market. EMF has not shown that our analysis as to speculative filings activity within Appendix A markets is incorrect.

43. *Non-top 150 Markets in Appendix A.* Appendix A to the *Fourth R&O* includes six non-top 150 markets, including Asheville, NC, because they have more than four translator applications pending. Such a large number of applications for markets outside the top 150 markets suggests speculative filing activity. Although WNC claims that it filed multiple applications to serve ''various clusters of communities'' in the Asheville market, it has not explained how its proposed service would achieve that result with respect to Black Mountain, NC, which is the focus of the WNC Petition. All of WNC's applications there specify Black Mountain as the community of license and, with only one exception, propose the same transmitter site. In addition, WNC fails to show any error in the Commission's analysis of the need to apply the market cap to those markets listed in Appendix A that are outside of the top 150 markets, or any valid justification for departing from Arbitron Metro market definitions. Arbitron Metro market definitions are based on multiple demographic/geographic factors, including terrain issues. Accordingly, we deny WNC's request to exclude Asheville, NC from Appendix A or in the alternative exclude the community of Black Mountain from the Asheville market.

44. *Proposed Alternative.* Conner argues that any local application cap on translators should be per-community, based on the number of service-restricted AM stations in any given community. Magrill similarly points out that there is increased demand for FM translators, both to rebroadcast AM stations and to rebroadcast HD radio streams. However, we have an obligation to address abusive application conduct, as described above, regardless of the supply/demand balance in the marketplace. In fact, trafficking in translator authorizations could only occur where there is demand, so the existence of such demand supports, rather than undercuts, our rationale for curbing speculation. With respect to Conner's suggested cap based on the proposed community of license rather than the Arbitron Metro market, this would be impractical from an administrative standpoint.

45. The record in this proceeding strongly supports a limit on translator applications within each Arbitron Metro market identified in Appendix A to protect the integrity of our licensing process. We recognize that EMF proposes anti-trafficking restrictions as an alternative approach, but our rationale for rejecting those restrictions in favor of a national cap applies equally to the per-market cap. Accordingly, we reject the claim that a per-market cap is arbitrary and capricious.

5. Revision of the Per-Market Cap

46. Based on the information presented in the reconsideration petitions and responsive pleadings, we conclude that an adjustment of the per-market cap will improve competition and diversity in the Appendix A markets without sacrificing LPFM filing opportunities or the policy objectives behind the per-market cap. As discussed below, we are increasing the per-market cap for radio markets identified in Appendix A of the *Fourth R&O* to allow up to three applications for each market, subject to certain conditions.

47. Although the petitioners do not challenge our conclusion that it is infeasible to apply the Technical Need Rule to the thousands of pending translator applications, they argue that one translator can only serve a small portion of most markets in Appendix A. The Joint Petition focuses on the Joint Petitioners' attempts to build regional networks of translators to rebroadcast the signals of their NCE stations. REC independently analyzed the applications of the Joint Petitioners and agrees that many of these applications propose operations very distant from the center of the Arbitron Metro market. REC agrees that, with appropriate limits, allowing such applications to be processed would improve diversity and competition in underserved areas, without impinging on LPFM filing opportunities.

48. We believe the Joint Petition and the REC Partial Opposition raise a valid point as to whether the one-per-market cap is overly restrictive. The Joint Petition states that the Joint Petitioners are prosecuting their pending translator applications not to speculate in translator permits or to manipulate the auction process, but in hopes of increasing the reach of their NCE stations. Based on its analysis of Joint Petitioners' applications, REC agrees that the Joint Petition demonstrates that the one-per-market cap is overly restrictive.

49. Prometheus urges that the one-per-market cap be retained as ''a crucial way to address the existing disparity'' between the number of authorized translators and the number of authorized LPFM stations. This argument appears to assume that any expansion in FM translator licensing will reduce opportunities for LPFM licensing. Clearly, that is not the case. With our market-based translator processing policy, as well as our national and per-market caps on translator applications, we have put strong limits in place to preserve LPFM filing opportunities. The expansion of the per-market cap will not reduce opportunities for LPFM licensing because, as we explain below, all translator applicants taking advantage of that change will need to protect LPFM filing opportunities when they do so. Our adjustment of the per-market cap in this order will not negatively affect LPFM licensing opportunities.

50. The Joint Petition proposes a waiver process under which the one-per-market cap would remain in place, but waivers would be available for applications meeting certain criteria: (1) The 60 dBu contour of the translator station would not overlap the 60 dBu contour of any commonly controlled application; (2) the application will not preclude the approval of a future LPFM application in the grid or at the proposed facility's transmitter site; and (3) the applicant agrees to accept a condition on its construction permit that disallows the for-profit sale of the authorization for four years after the station begins operation. REC agrees with these conditions, but proposes additional requirements: (1) The translator station, for four years after beginning operation, must be co-owned with the primary station and rebroadcast that station's primary analog signal; (2) the 60 dBu contour of the translator must not overlap the central core of the market; and (3) additional applications being prosecuted under this waiver would remain subject to the national cap.

51. We agree with certain elements of the Joint Petition and the REC Partial Opposition, but our revised per-market cap will vary in certain respects. First, we will not rely on an anti-trafficking condition. As we explained above, we believe such conditions are subject to circumvention, and monitoring compliance with an anti-trafficking condition would be unduly resource-intensive and could delay processing.

52. Second, we believe it is unnecessary to allow parties to prosecute a large number of translator applications within an Appendix A market, as would be possible under the waiver procedures advocated in the Joint Petition. As we have shown above, the Joint Petitioners and other applicants already have received a significant number of translator grants from the Auction 83 application process. Further, our clarification of embedded markets will help these parties prosecute more applications within embedded markets. As we have previously stated, we also expect that translator applicants will not be foreclosed from comparable application opportunities in the next translator filing window.

53. Based on our analysis of pending applications, we believe that a limit of three applications per applicant in the Appendix A markets is appropriate, subject to the conditions described below. With those conditions, we believe this relaxation in the per-market cap will improve diversity and competition in under-served areas of the Appendix A markets without precluding LPFM filing opportunities or increasing significantly the potential for licensing abuses.

54. The relaxed limit of three applications per market will only apply to an applicant that shows that its applications meet the conditions described in paragraphs 58–59. As we indicate below, we instruct the Media Bureau to issue a public notice asking any applicant that is subject to the national cap or the per-market cap to identify the applications they wish to prosecute consistent with the caps and to show that those applications comply with the caps. If a party has more than one application in an Appendix A market but fails to submit a showing pursuant to the public notice, or submits a deficient showing, we will not analyze their applications independently to assess whether they comply with the conditions that there be no 60 dBu overlap with that party's other applications or authorizations and that there be no preclusion of LPFM filing opportunities. Accordingly, in those situations we will process only the first filed application for that party in that market.

55. In deciding on an adjustment to the per-market cap, we are balancing the competing interests of adding new service to underserved areas by translators versus preserving the integrity of our licensing process by dismissing applications filed for speculative reasons or to skew our auction procedures. The factors cited by the petitioners and REC, particularly the limited service area of a translator compared to the size of the Appendix A markets, weigh in favor of allowing more than one translator application in an Appendix A market, provided that each translator would serve a different part of the market than any of an applicant's existing translators or other pending translator applications. On the other hand, the abusive filing conduct described above, combined with the considerations set forth in paragraph 52, suggest that any relaxation be limited to a small number of applications per Appendix A market. In addition, the need to protect LPFM filing opportunities, for the reasons delineated in the *Fourth R&O,* supports a condition that none of the Appendix A translator

applications would preclude an LPFM filing opportunity. We conclude that a limited relaxation of the per-market cap, combined with conditions that will protect LPFM filing opportunities and prevent duplicative translator service areas, would promote competition and diversity in Appendix A markets by expanding translator service to underserved areas without threatening the integrity of our licensing process or precluding LPFM filing opportunities. Thus, we believe that the benefits of our action will outweigh any potential costs.

56. In considering the change in the per-market cap, we analyzed applicants with 1–5 pending applications per market in all Arbitron-rated markets. In doing so, we have not taken certain variables into account because it was not feasible to do so. Those variables are the impact of the national cap on the number of pending applications and the impact of the two conditions proposed in connection with an adjustment of the one-per-market cap. The cap of one would affect two-thirds of those applicants, whereas a cap of three would affect less than one-third of those applicants, meaning that a substantial majority of applicants could prosecute all of their pending applications. Thus, relaxation of the cap from one to three applications per market could benefit a significant number of translator applicants who do not have an excessive number of applications pending in any market (*i.e.,* more than five). However, as indicated above and in the Joint Petition and the REC Partial Opposition, any such relaxation should be subject to certain conditions to preserve LPFM filing opportunities and the integrity of our licensing process.

57. With respect to the Joint Petitioners' proposal to prohibit 60 dBu overlap between commonly-controlled applications, we generally agree that this is an appropriate condition. For the reasons shown above, we believe that multiple translator applications in a single area suggest an attempt to game the auction system or to obtain permits for the purpose of selling them. Such a restriction also would advance the goal of the Technical Need Rule to limit the licensing of multiple translators serving the same area to a single licensee. As we have explained, attempting a case-by-case analysis of the thousands of pending translator applications for compliance with that rule is not feasible.

58. For these reasons, we adopt the following processing policies: The protected (60 dBu) contour (calculated in accordance with Section 74.1204(b) of our Rules) of the proposed translator station may not overlap the protected (60 dBu) contour (also calculated in accordance with Section 74.1204(b) of our Rules) of any other translator application filed by that applicant or translator authorization held by that applicant, as of the date of the release of this *Fifth Order on Reconsideration.* Because our goal is to expedite the processing of applications, we will not accept an alternative contour prediction method study to establish lack of 60 dBu contour overlap. The concern we have about service duplication applies even more strongly when a party already has an existing translator station providing service to the same area proposed by that party in an application. Accordingly, we are expanding the proposed condition to include outstanding authorizations as well as applications. However, we will not extend this condition to limit applications based on parties' attributable interests or common control of applicant and licensee entities. The pending Auction 83 applications lack any information about parties to the applications, and so we lack sufficient information to make determinations about attributable interests in other applications or common control of applicant entities. Asking applicants to amend their applications to provide this information would delay our efforts to ensure expeditious processing of translator and LPFM applications, and resolving disputes over whether an application is commonly controlled with another application or authorization would further delay this effort. Accordingly, consistent with the approach taken in the *Fourth R&O,* we are limiting this condition to applications filed by and authorizations issued to the named applicant entity.

59. We agree with the condition advocated by the Joint Petitioners and REC that the proposed translator station cannot preclude approval of a future LPFM application in the grid for that market, under the processing policy delineated in Section II.B of the *Fourth R&O,* or at the proposed out of grid transmitter site. To satisfy this condition, applicants must submit an LPFM preclusion study demonstrating that grant of the proposed translator station will not preclude approval of a future LPFM application. As we explained in the *Fourth R&O,* 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. This condition is consistent with that broad principle.

60. Under the procedure proposed in the Joint Petition and the REC Partial Opposition, compliance with the conditions described above would not be required for an applicant's first translator application in an Appendix A market, but instead would only be required as part of a showing for additional applications in that market. We believe, however, that it is appropriate to impose these conditions on all of the applications if a party chooses to prosecute more than one application in an Appendix A market so that translator applicants will have an incentive to provide more service to underserved areas of the Appendix A markets.

61. If a party instead elects to prosecute only one application in an Appendix A market, then it need not make a showing that the application complies with the conditions described in paragraphs 58 and 59 when the local cap compliance showings are submitted. (However, if a party prosecutes only one application and it proposes substantial overlap with an existing translator authorization held by that party, the Technical Need Rule and FCC Form 349 will require the party to show a technical need for the second translator when the Form 349 application is due in order to justify a grant of that application.) We are providing this flexibility so that the revised policy is not more restrictive than the original one-per-market cap for any translator applicant. We note that none of the petitions for reconsideration or responsive pleadings argue that the one-per-market policy should be tightened through the imposition of conditions on a single application.

62. REC also proposes that applications grantable under the relaxed per-market standard be subject to the national cap of 50 applications adopted in the *Fourth R&O.* We agree that the national cap should be uniform for all applicants. The relaxation of the per-market cap leaves undisturbed an applicant's obligation to comply with the national cap of 70 applications, with no more than 50 applications in Appendix A markets.

63. With the cap of three-per-market in place, we find it unnecessary to adopt the additional waiver conditions suggested by REC. The principal conditions suggested by REC would not preserve LPFM filing opportunities or, in our opinion, curb speculation by translator applicants. We also believe they would constrain competition in

Appendix A markets without any countervailing public benefit.

64. REC's first additional waiver requirement would not allow more than one translator application to be prosecuted within certain geographic zones around the center of the Appendix A markets. However, we have already adopted a rigorous processing standard for pending translator applications in Appendix A markets, and REC has not shown that this additional constraint is needed. We believe this restriction would limit competition in the Appendix A markets without providing a countervailing benefit. REC's proposal also could be circumvented by modifications to construction permits.

65. REC's second additional waiver requirement would impose a condition on the construction permit that, for four years after beginning operation, the translator must be commonly-owned with the primary station and must rebroadcast that station's primary analog signal. REC claims that this condition is appropriate because translator permittees in some markets have entered into time brokerage deals with commercial broadcasters to air HD radio programming streams on NCE translator stations. We view REC's proposed condition as more of a programming preference than an effort to curb speculation. We also believe diversity and competition would be better served by giving translator applicants the flexibility to prosecute applications that meet the revised per-market application cap described above. We expect those parties to prosecute the applications that are most likely to be granted and most likely to provide a needed service without precluding a future LPFM filing opportunity. Moreover, as indicated above with respect to the Joint Petition's proposed anti-trafficking condition, enforcement of REC's proposed condition and processing waiver requests would be unduly resource-intensive and could delay the processing of applications.

66. As we indicated in the *Fourth R&O,* the burden will be on each applicant to demonstrate compliance with the national and per-market application caps. Any party with (1) more than 70 applications pending nationally, (2) more than 50 applications pending in Appendix A markets, and/or (3) more than one pending application in any of the markets identified in Appendix A (subject to the clarification above as to embedded markets) will be required by a forthcoming public notice to identify and affirm their continuing interest in those pending applications for which they seek further Commission processing, consistent first with the national cap, as revised in paragraph 41 above, and then with the revised per-market cap of three applications. They will also be required to demonstrate that the selected applications meet the conditions described in (1) paragraph 41 above with respect to applications outside the Appendix A markets for purposes of the national cap of 70 applications, and (2) paragraphs 58 and 59 above if they elect to prosecute more than one application in an Appendix A market.

67. The *Fourth R&O* described certain translator amendment opportunities in connection with the market-based processing policy. However, the application caps we describe here will be applied before any such amendment opportunity is available. This approach is consistent with our prior approach in the *Third Report and Order.* This approach also will expedite our processing of the large volume of translator applications, which needs to be done before we can open an LPFM filing window.

68. Both pending long form and short form applications will be subject to these applicant-based caps. In the event that an applicant does not timely comply with these dismissal procedures or submits a deficient showing, we direct the staff to (1) first apply the national cap, retaining on file the first 70 filed applications and dismissing (a) those Appendix A applications within that group of 70 applications that were filed after the first 50 Appendix A applications, and (b) those applications outside the Appendix A markets for which an adequate showing pursuant to paragraph 41 has not been submitted, and (2) then dismiss all but the first filed application by that applicant in each of the markets identified in Appendix A. We believe that this process will give applicants an incentive to file timely and complete showings so that they can maximize their future service to the public procedural matters

*C. Fifth Order on Reconsideration*

69. *Supplemental Final Regulatory Flexibility Analysis.* Appendix A contains a supplemental final regulatory flexibility analysis pursuant to the Regulatory Flexibility Act of 1980, as amended (''RFA'').

70. *Congressional Review Act.* The Commission will send a copy of this *Fifth Order on Reconsideration* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

**III. Ordering Clauses**

*A. Fifth Order on Reconsideration*

71. Accordingly, *it is ordered* that the Petition for Partial Reconsideration filed by Hope Christian Church of Marlton, Inc., Bridgelight, LLC and Calvary Chapel of the Finger Lakes, Inc. on May 8, 2012, the Petition for Reconsideration of Educational Media Foundation on Fourth R&O and Third Order on Reconsideration on May 8, 2012, the Petition for Partial Reconsideration of Fourth R&O and Third Order on Reconsideration filed by Conner Media, Inc. on May 9, 2012, the Comments of Kyle Magrill and Petition for Reconsideration filed by Kyle Magrill on May 7, 2012, and the Petition for Reconsideration filed by Western North Carolina Public Radio, Inc. on May 8, 2012, *are granted in part* to extent set forth above and otherwise denied.

72. *It is further ordered* that the Reply of Four Rivers Community Broadcasting Corporation to Oppositions to Petitions for Reconsideration *is dismissed* to the extent set forth above.

73. *It is further ordered* that pursuant to pursuant to the authority contained in sections 4(i), 301, 302, 303(e), 303(f) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 301, 302, 303(e), 303(f) and 303(r), and the Local Community Radio Act of 2010, Pub. L. No. 111–371, 124 Stat. 4072 (2011), the *Fifth Order on Reconsideration* is hereby *adopted,* effective January 10, 2013.

74. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of the *Fifth Order on Reconsideration,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

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