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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	MM Docket No. 99-25
)	
CREATION OF A LOW POWER)	RM-9208
FM RADIO SERVICE)	RM-9242

COMMENTS OF SACRED HEART UNIVERSITY, INC.

Sacred Heart University, Inc. ("SHU"), by its counsel, respectfully submits its Comments concerning the Commission's proposal to establish a new low power FM service ("LPFM").

SHU is the licensee of non-commercial educational FM Stations WSHU, Fairfield, Connecticut and WSUF, Noyack, New York. SHU is also the licensee of FM translator stations W211AI, Stamford, Connecticut; W227AJ, Northford, Connecticut; W219BA, Ridge, New York; W217AF, Huntington Station, New York; W277AB, Noyack, New York and W289AD, Selden, New York.

In a *Notice of Proposed Rule Making*, 13 FCC Rcd ___ (1999) ("NPRM"), the Commission proposed the creation of two new classes of LPFM stations, LP100 and LP1000. The LP 100 stations would be secondary services (much like FM translators) that would operate with maximum facilities of 100 watts at 30 meters height above average terrain ("HAAT"). LP1000, on the other hand, would be a *primary* service, superior to all currently licensed translators, and would operate with maximum facilities of 1000 watts at 60 meters HAAT. SHU objects to the creation of the LP1000 class in so far as that class of station will have primary status, a status that is superior to SHU's translators, several of which were authorized only after years of litigation as part of a settlement agreement. SHU then invested additional thousands of dollars in engineering and legal

fees plus tens of thousands of dollars to construct the facilities which provided first non-commercial educational (“NCE”) service to more than 130,000 people.

BACKGROUND

Recognizing a huge area and population on Long Island, New York that did not receive sufficient NCE service, SHU filed applications to construct new NCE-FM Class B-1 stations in Shirley, New York and Noyack, New York (File Nos. BPED-891215MD and BPED-891215MK respectively). When these applications appeared on “cut-off” lists, other applicants filed mutually exclusive applications. Both SHU applications were designated for hearing in 1991 (see MM Docket Nos. 91-157 (Noyack) and 91-206 (Shirley)).

Two years of litigation ensued, which included SHU prevailing in an Initial Decision of Administrative Law Judge Joseph Chachkin in MM Docket No. 91-206 (7 FCC Rcd 3466 (1992)) (“ID”). That ID awarded SHU a construction permit to build a new Class B1 NCE-FM facility to serve Shirley, New York. Appeals of the ID were filed, but before a decision on appeal was reached, a settlement among the competing applicants was negotiated, and the proposed settlement resolved both MM Docket No. 91-157 and MM Docket No. 91-206.

Under the terms of the proposed settlement, SHU dismissed its application for the NCE-FM station in Shirley. As a condition of the dismissal, the parties agreed that SHU’s then-pending applications for translators to serve areas on Long Island that did not receive any non-commercial educational FM service would have to be granted.

These translator applications for Selden, Huntington Station, Ridge and Noyack, New York (file nos. BPFT-910603TU, BPFT-920413TA, BPFT-910603XU and BPFT-910603TV, respectively) were filed pursuant to the Commission's *Report and Order Amending Part 74 of the Commission's Rules Concerning FM Translator Station*, 5 FCC Rcd 7212 (1990) ("R&O"). The R&O provided that the maximum effective radiated power (ERP) for translators would be 250 watts at an HAAT of 107 meters or less. However, the R&O also provided that applicants for NCE-FM translators would be able to request a waiver to operate at more than the prescribed power limitation upon a showing that the 1 mV/m contour would cover NCE-FM "white area" (i.e., an area that is not served by a full-service public radio station, even if there is a full-service commercial station serving the area).

SHU prepared its translator applications to provide first public radio service to white areas. SHU spent more than one full year prosecuting these applications, because it understood the importance of providing first NCE service to listeners on Long Island. It was motivated to continue in its efforts by the positive response it received from listeners who would, upon grant of the translator applications, be able to receive public radio programming for the first time.

On January 29, 1993, the full Commission released a *Memorandum Opinion and Order*, 8 FCC Rcd 672 (1993) ("MO&O") which granted SHU's four translator applications. The MO&O noted that SHU's translators in Huntington Station and Selden would provide first NCE service to 38,859 people. The Ridge and Noyack translators proposed first NCE service to 97,664 people. In fact, the entire service area of the Ridge translator was without NCE service at the time the MO&O was issued. Upon completion of all of the construction proposed in the settlement agreement, SHU

and the other parties to the settlement agreement provide first NCE service to over 159,000 people and almost 1.3 million people would receive new NCE service.

For all of these reasons, the Commission granted SHU's waiver request, allowing SHU's construction of translators that exceeded the power limitations adopted in the R&O. But that only started SHU's journey. SHU had to secure tower sites, construct and then commence operations of each of the new stations. This process took several years, and again, cost SHU a substantial sum of money and a tremendous investment of time, which SHU was willing to spend because of its desire to provide first local NCE service unserved areas on Long Island.

In 1998, the last of the translator license applications was granted. SHU now operates the four translators it proposed, and provides NCE service as it first sought to do in 1991. However, the service that SHU provides by way of its "superpowered translators" is still considered "secondary service" under general translator rules. Therefore, under the Commission's LPFM proposal, the SHU translators could be ordered off the air by any of the new LP1000 stations proposed in the NPRM.

SHU believes that it would be proper policy to protect all existing NCE translators from new LPFM stations, including the proposed LP1000 stations. If the Commission disagrees with that general proposition, then given the time and expense SHU invested in providing first NCE service to more than 130,000 people on Long Island, and the special circumstances surrounding the grant of SHU's translator applications, SHU believes its translators on Long Island should be protected from encroachment by any new LPFM stations.

DISCUSSION

1. Local (Non-Alternatively Fed) NCE Translators Should be Protected from LPFM Stations.

If, as it should, the Commission is looking to promote the availability of *local* radio service, it need look no further than NCE translator operators. Local (non-satellite) NCE translators are providing needed local non-commercial educational programming to many thousands of listeners already. They are operated by public broadcasters deeply rooted in their communities with local boards of directors, community advisory boards and locally originated programming. SHU has garnered many awards and letters of certificates of appreciation for its efforts in serving both Connecticut and Long Island residents with local NCE programming.¹ In fact, SHU would offer much more local origination programming on its translator stations, but FCC rules prohibit the broadcast of programming that differs from what is broadcast over the primary station.²

There is no logical reason to disrupt the services provided by these translators in favor of new LPFM stations that may or may not provide such programming. Listeners have come to expect and rely upon the services provided by many of these local translators, and for that reason alone, existing local NCE translators should be protected from all proposed LPFM stations.

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1. Each of SHU's full power facilities operates as a separate and distinct local service. The full power facilities do not simulcast the same broadcast signal. In fact, if SHU were permitted by FCC rules to do so, it would offer more local programming on its translators.
 2. 47 C.F.R. Sec. 74.1231(f).

The Commission has a long standing policy goal of providing at least one NCE FM service to every listener in the country. Translators have been a relatively inexpensive and efficient means of accomplishing that goal. They are normally less expensive to construct than full power Class A or higher powered stations and can serve small niche areas that are overlooked by full-power NCE-FM stations. SHU does not see the public interest in allowing new LPFM stations to eliminate NCE translator service with new LPFM commercial service, especially in areas which only recently have come to enjoy having the availability of an NCE programming choice.

2. “Superpowered” Translators Should be Protected from All New LPFM Stations.

If the Commission decides not to protect all NCE FM translators from displacement by LP1000 stations, then it should at least protect those stations that are operating pursuant to a waiver of Section 74.1235 of the Rules. In order to obtain a grant of a waiver of that rule, and permission to operate a translator station at a greater ERP than normally allowed under the Rules, an applicant had to demonstrate that it was providing service to a “white area” (i.e., an area that did not receive any aural service). An applicant for a new NCE translator had to demonstrate that it was serving an “NCE white area” (i.e., an area that did not receive any non-commercial educational FM signals). Applicants who were able to pass that hurdle, and took the initiative to provide first service to listeners in furtherance of the Commission’s policy goals should be entitled to continue to operate.

To decide otherwise could create a situation where, upon grant of a license for a new LP1000 station, a “superpower translator” station that served white area would have to turn in its license for

cancellation. Portions of the area served by the translator may not be covered by the new LP1000 station and the result would actually be the *creation* of new white area.

3. SHU's "Superpower Translators" on Long Island Should be Protected.

The grant of SHU's Long Island translator applications came at great expense to SHU, and came with the support of National Telecommunications and Information Administration, Corporation for Public Broadcasting, State University of New York, Long Island University and many Members of Congress. It was an extraordinary effort on the part of many different parties to achieve the goal of providing as many people on Long Island as possible with a first NCE service. It was SHU's agreement to dismiss its application for a full-power station at Shirley (where it had already prevailed in an ID) and to accept translator stations instead that made the settlements (and the prompt initiation of new NCE service to more than 1 million people) possible. Certainly, if SHU had known that only six years after the grant of the translator applications, it would face the prospect of having all of these stations supplanted by new LP1000 stations, its decision might have been different.

SHU recognized that under FCC rules, its translators could be displaced by primary services, but the rules provided that the lowest power facility that could displace its translator stations was a 6 kW station. SHU believed that there was little risk of its Long Island translators being displaced because of the scarcity of available frequencies that would be able to operate at that minimum power level without causing interference. It could not have anticipated that those translators would be subject to displacement by 1 kW facilities.

The last of SHU's translator license applications was granted last October, ending a seven year process to provide first NCE service to a substantial number of people. SHU has developed many loyal listeners during this process. SHU undertook extraordinary expense and devoted substantial resources in order to earn the right to serve underserved communities on Long Island. Its concession to accept translators instead of a full-power facility allowed the settlements to go forward, and its diligent prosecution of the translator applications led to new translator stations that provided more than 130,000 persons with a first NCE service. Because of these extraordinary efforts, SHU's Long Island translators should be protected from any encroachment by new LPFM stations.

4. If "Superpower" Translators are Displaced, the Licensee Should Receive Priority Status in Applying for a New LP1000 Primary Station on Another Frequency.

Should the Commission elect not to afford protection from LPFM to any of the "superpower translators," then at the very least, licensees of such facilities that are displaced by LPFM stations should be given "priority status" in filing for a new LP1000 station on a different frequency, but serving the same or substantially the same area as the displaced translator.

Alternatively, should the Commission adopt the proposed LPFM rules set forth in the NPRM, SHU suggests that the FCC open a filing window for NCE translator licensees to apply to "upgrade" their existing facilities to primary status LP1000 stations. If interference considerations prevent an NCE translator station from operating at the minimum power levels proposed for LP1000 stations in the rules, then SHU proposes that such translator operators be granted waivers to allow

them to have LP1000 (primary station) status at the operating parameters specified in their translator licenses. In addition, SHU proposes that all NCE translators that upgrade to LP1000 be relieved of the restrictions on local origination, so that each translator station can achieve its full potential as a local, smaller powered NCE station.

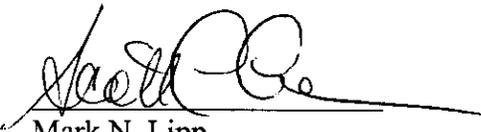
CONCLUSION

While not opposed to the creation of a new LPFM service, SHU is troubled by the proposal to establish a primary class of LPFM stations, LP1000. SHU and other NCE translator operators have expended substantial time and money to provide public radio to areas that might not otherwise have access to such programming.

SHU's translators were authorized as "superpowered translators" pursuant to a rule waiver, because the translators actually served "NCE white areas." Translators that were authorized to serve "white areas" should not be subject to displacement by any new LPFM service. This is especially true for SHU, because its four Long Island translators were authorized pursuant to a settlement

agreement that ended two protracted comparative hearing cases and allowed for the rapid provision of new NCE service to 1.3 million listeners on Long Island.

Respectfully submitted,
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