

Before the  
 Federal Communications Commission  
 Washington, D.C. 20554

In the Matter of )  
 )  
 Amendment of Parts 73 and 74 of the ) MB Docket No. 03-185  
 Commission’s Rules to Establish Rules for Digital )  
 Low Power Television and Television Translator )  
 Stations )

**FIFTH NOTICE OF PROPOSED RULEMAKING**

**Adopted: June 6, 2022**

**Released: June 7, 2022**

**Comment Date: (30 days after date of publication in the Federal Register)**  
**Reply Comment Date: (45 days after date of publication in the Federal Register)**

By the Commission:

**I. INTRODUCTION**

1. In this *Fifth Notice of Proposed Rulemaking (NPRM)*, we seek comment on the operation of analog FM radio services by channel 6 digital low power television stations (FM6 operations). The Commission has been considering this issue since 2014, when, in the *LPTV DTV Third NPRM* in this proceeding,<sup>1</sup> it sought comment on whether to allow analog channel 6 low power television (LPTV) stations to provide FM6 operations after they converted to digital operations on July 13, 2021 – the LPTV digital transition deadline. The Commission asked if LPTV stations operating on digital channel 6 could be allowed to continue their FM6 radio operations on an ancillary or supplementary basis.<sup>2</sup>

2. The LPTV digital transition is now complete, with analog television operations terminated and channel 6 LPTV stations operating in digital.<sup>3</sup> However, as noted below, the Commission has granted STAs to 13 channel 6 LPTV stations to continue providing analog FM6 service. In these circumstances, we seek comment on whether allowing continued FM6 analog radio operations by existing digital channel 6 LPTV stations serves the public interest. In addition, we seek comment on whether to eliminate or revise the television channel 6 (TV6) distance separation rules for low power FM (LPFM),

<sup>1</sup> See *Amendment of Parts 73 and 74 of the Commission’s Rules to Establish Rules for Digital Low Power Television and Television Translator Stations*, Third Notice of Proposed Rulemaking, MB Docket No. 03-185, 29 FCC Rcd 12536, 12554-56, paras. 47 (2014) (*LPTV DTV Third NPRM*). The Media Bureau subsequently sought to refresh the record in this proceeding in 2019. See *Media Bureau Seeks to Update the Record on the Operation of Analog Radio Services by Digital LPTV Stations as Ancillary or Supplementary Services*, Public Notice, 34 FCC Rcd 11162 (MB 2019) (*Refresh PN*). A list of parties that filed comments in these proceedings is included in Appendix A.

<sup>2</sup> See *LPTV DTV Third NPRM*, 29 FCC Rcd at 12554-56, para. 47.

<sup>3</sup> We note that some analog channel 6 LPTV stations have not yet completed their digital facilities and have been granted additional time to do so. Analog television operations are no longer permitted and channel 6 LPTV stations, therefore, must remain silent until such time as they complete construction of their digital facilities. See 47 CFR § 74.731(m). We note that a small number of TV translator stations licensed to the State of Alaska remain operating in analog pursuant to waivers of the analog termination date. See *State of Alaska - Request for Waiver of Section 74.731(m) of the Commission’s Rules*, 36 FCC Rcd 10765 (2021); see also Letter to State of Alaska from Barbara A. Kreisman, Chief of the Video Division (Jan. 26, 2022), a copy of which is available at LMS File Nos. 0000179529, 0000179531, 0000179528, 0000179535, 0000179536, 0000179527, 0000179526, 0000179534 and 0000179533.

noncommercial educational (NCE) FM, Class D (10 watt) FM, and FM translator stations operating on reserved band FM Channels 201-220.<sup>4</sup> Through this *NPRM*, we seek to bring finality to these outstanding questions.<sup>5</sup>

## II. BACKGROUND

### A. History of FM6 Operations

3. Prior to the July 13, 2021 LPTV digital transition deadline, a number of analog LPTV stations licensed on channel 6 operated with very limited visual programming and an audio signal that was programmed like a radio station (FM6 stations).<sup>6</sup> FM radio listeners were able to receive the audio portion of these LPTV stations at 87.75 MHz, which is adjacent to noncommercial educational (NCE) FM channel 201 (88.1 MHz).<sup>7</sup> When these LPTV stations converted to digital, however, they were unable to continue providing such radio service because the digital audio portion of their signal could no longer be received by standard FM receivers.<sup>8</sup>

4. FM6 stations have sought to maintain service to their existing audiences by being able to continue their FM6 operations after the LPTV digital transition deadline. For example, in 2014, Venture Technologies Group, LLC (Venture) proposed to use an ATSC 1.0 digital television transmitter on channel 6, and a separate analog radio transmitter tuned to 87.75 MHz to simultaneously operate a digital LPTV station on channel 6 and an analog FM radio-type service.<sup>9</sup> Under this proposal, Venture requested that the Media Bureau (Bureau) treat the analog FM audio transmission as an “ancillary or supplementary” service offering under the Commission’s rules.<sup>10</sup>

5. *2014 Rulemaking.* In the 2014 *LPTV DTV Third NPRM*, the Commission sought comment on Venture’s proposal.<sup>11</sup> Specifically, the Commission sought comment on “whether a digital LPTV station can provide an analog FM radio-type service as an ancillary or supplementary service consistent with the Communications Act and the (Commission’s) rules.”<sup>12</sup> The Commission was particularly concerned with the provision of section 336(b)(1) of the Communications Act of 1934 (Act), as amended, that the Commission may only permit ancillary or supplementary services “if the use of a designated frequency for such services is consistent with the technology or method designated by the

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<sup>4</sup> In the *LPFM NPRM*, initiated in July 2019, the Commission proposed elimination of the TV6 interference protections entirely as of the July 13, 2021 LPTV digital transition deadline and sought comment on whether the proposed elimination of channel 6 television protection by FM radio stations would be compatible with FM6 operations if such operations were allowed to continue. *See Amendments of Parts 73 and 74 to Improve the Low Power FM Radio Service Technical Rules*, MB Docket No. 19-193, Notice of Proposed Rulemaking, 34 FCC Rcd 6537, 6541, paras. 8-13 (2019) (*LPFM NPRM*). The Commission subsequently adopted a Report and Order in 2020 deferring consideration of the interference protection issues to a future proceeding finding that it “will be in a better position to reach an informed decision by addressing TV6 issues in a separate proceeding with a more developed record on this issue.” *See Amendments of Parts 73 and 74 to Improve the Low Power FM Radio Service Technical Rules*, MB Docket No. 19-193, Report and Order, 35 FCC Rcd 4115, 4126-27, para. 34 (2020).

<sup>5</sup> In considering the comments filed in response to this *NPRM*, we will also consider the comments submitted in response to the 2014 *LPTV DTV Third NPRM* and the 2019 *Refresh PN* to the extent they are not superseded.

<sup>6</sup> *See LPTV DTV Third NPRM*, 29 FCC Rcd at 12554, para. 47.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *LPTV DTV Third NPRM*, 29 FCC Rcd at 12554, para. 48.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 12554, para. 49.

Commission for the provision of advanced television services.”<sup>13</sup> It also noted an existing rule requiring that a digital LPTV station transmit an over-the-air *video* program signal at no direct charge to viewers.<sup>14</sup>

6. The Commission also sought comment on whether a digital LPTV station would be able to operate an analog transmitter without interfering or derogating its co-channel ATSC 1.0 digital operation as required by section 336(b)(2) of the Act.<sup>15</sup> In addition, the Commission sought comment on the potential of interference from FM6 operations to primary licensees such as NCE FM radio licensees and whether it should adopt rules to prevent such interference.<sup>16</sup> The Commission also asked whether FM6 operations are “analogous to other services subject to regulation by the Commission” within the meaning of section 336(b)(3) of the Act and, if so, whether the Commission’s Part 73 FM radio rules should apply to FM6 operations.<sup>17</sup> Finally, the Commission sought comment on whether FM6 operations should be subject to the five percent fee that, pursuant to the Communications Act, digital television stations must pay annually from gross revenues derived from all ancillary and supplementary services which are feeable.<sup>18</sup>

7. A coalition of FM6 broadcasters supported the Commission’s proposal in the 2014 *LPTV DTV Third NPRM* to allow FM6 operations to continue as ancillary or supplementary services, noting the diverse local programming that they provide.<sup>19</sup> FM6 supporters pointed out that there had not been any complaints of interference emanating from FM6 station operations.<sup>20</sup> Further, FM6 supporters maintained that there are no statutory or legal obstacles to FM6 stations operating as an ancillary service.<sup>21</sup>

8. FM radio broadcasters, including National Public Radio (NPR) and other noncommercial educational FM broadcasters, and full power television stations licensed on channel 6, opposed the proposal, concerned primarily with the potential interference risk to their stations.<sup>22</sup> NPR argued that the fact that, to date, there have been no reports of interference from FM6 stations to FM radio stations “is likely because NCE FM station(s) have been required by Commission rule to limit their facilities to avoid interference to full power TV channel 6 stations, a circumstance which also limited the interference to the

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<sup>13</sup> *Id.* at 12554-55, para. 49, *citing* 47 CFR § 74.790(g)(3) and 47 U.S.C. § 336(b)(1).

<sup>14</sup> *Id.* at 12555, para. 49, *citing* 47 CFR § 74.790(g)(3).

<sup>15</sup> *Id.* at 12555, para. 50, *citing* 47 U.S.C. § 336(b)(2). That section provides that the Commission shall “limit the broadcasting of ancillary or supplementary services on designated frequencies as to a void derogation of any advanced television services, including high definition television broadcasts, that the Commission may require using such frequencies . . . .”

<sup>16</sup> *Id.* at 12555, para. 51.

<sup>17</sup> *Id.* at 12555, para. 52, *citing* 47 U.S.C. § 336(b)(3). That section provides, in pertinent part, that the Commission shall “apply to any other ancillary or supplementary service such of the Commission’s regulations as are applicable to the offering of analogous services by any other person . . . .”

<sup>18</sup> *Id.* at 12555-56, para. 53, *citing* 47 U.S.C. § 336(e) and 47 CFR § 73.624(g).

<sup>19</sup> *See, e.g.*, comments filed in MB Docket No. 03-185 by Electronic Media Foundation at 2 (Jan. 9, 2015); George Flinn at 4 (Jan. 9, 2015); Venture at 3-4 (Jan. 9, 2015); Signal Above LLC (Signal) at 5-6 (Jan. 12, 2015); MetroTV, Inc. at 1 (Jan. 12, 2015); Murray Hill Broadcasting, LLC (Murray Hill) at 1-3 (Jan. 9, 2015); One Ministries, Inc. (OMI) at 1 (Jan. 12, 2015); Island Broadcasting, LLC (Island) at 6 (Jan. 9, 2015); Joint Commenters at 1 (Jan. 9, 2015); and LPTV Spectrum Rights Coalition (LSRC) at 12 (Jan. 14, 2015); and reply comments by Venture at 2-3 (Feb. 2, 2015); Signal at 3-4 (Feb. 2, 2015); OMI at 2-3 (Jan. 27, 2015); Joint Commenters at 4-6 (Feb. 2, 2015); and LSRC at 6 (Feb. 4, 2015).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *See, e.g.*, comments filed in MB Docket No. 03-185 by NPR at 3-9 (Jan. 9, 2015); and reply comments by ABC, Inc. at 1-3 (Feb. 2, 2015); NPR at 3-8 (Feb. 2, 2015); and REC Networks at 1-8 (Feb. 2, 2015).

NCE FM station.”<sup>23</sup> This may not always be the case, NPR maintained, if FM6 was allowed to continue to operate on an ancillary or supplementary basis without any formal interference protection rules.<sup>24</sup> FM6 opponents also contended that FM6 operations should be prohibited under the Act because they are not consistent with the technology or method designated by the Commission for the provision of digital television services.<sup>25</sup>

9. The Commission in the 2015 *LPTV DTV Third R&O* declined to decide the question of whether to permit FM6 operations as ancillary or supplementary services, deferring it to a later date.<sup>26</sup>

10. 2019 “Refresh” Public Notice. In December 2019, with the LPTV digital transition deadline set to occur in approximately eighteen months, the Media Bureau (Bureau) released a public notice seeking to refresh the record in this proceeding.<sup>27</sup> The Bureau noted that a group of licensees of FM6 stations including Venture (the Channel 6 Commenters), along with the Preserve Community Programming Coalition (PCPC), had submitted *ex parte* filings since the Commission’s 2015 decision deferring action on the question of whether to permit FM6 operations as ancillary or supplementary services.<sup>28</sup> In their filings, these parties argued that LPTV licensees should be allowed to make “the most efficient use of spectrum” by providing FM6 services, and that the provision of independent aural and visual carriers are allowed under the rules. Therefore, they maintained, the Commission should allow those LPTV stations currently licensed and operating in analog on channel 6 to continue transmitting FM6 radio-type services after they transition to digital operations on channel 6.<sup>29</sup>

11. The Bureau sought specific comment on whether, and how, the Commission could legally limit the number of stations eligible to offer FM6 services and the basis for any such limitation.<sup>30</sup> In particular, the Bureau asked whether eligibility should be limited to only those analog channel 6 LPTV stations “currently operating,” and whether to define “currently operating” as those stations providing FM6 radio-type services as of the release date of the *Refresh PN*.<sup>31</sup>

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<sup>23</sup> See reply comments filed in MB Docket No. 03-185 by NPR at 18 (Feb. 2, 2015) (emphasis in original).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* FM6 opponents were also concerned that allowing continued FM6 operations after the July 13, 2021 LPTV digital transition deadline would prevent the expansion of new noncommercial educational (NCE) FM and LPFM services. See, e.g., comments filed in MB Docket No. 03-185 by NPR at 12-13; comments filed in MB Docket No. 03-185 by REC Networks at 7 (Jan. 12, 2015). We note that Media Bureau’s Audio Division conducted a filing window for new NCE full service FM stations in November 2021 and that constructions permits for several new stations have already been granted. See *Media Bureau Announces Close of NCE FM New Station Filing Window and Temporary Filing Freeze on Amendments to Applications Submitted in the November 2021, Filing Window*, Public Notice, DA 21-1408 (rel. Nov. 10, 2021).

<sup>26</sup> See *LPTV DTV Third R&O*, 30 FCC Rcd at 14930, n.12 (“We intend to issue a decision on whether to permit digital LPTV stations to operate analog FM radio type services on an ancillary or supplementary basis at a later date.”).

<sup>27</sup> See *Refresh PN*, *supra* n. 1.

<sup>28</sup> *Id.* at 11163, n.2, *citing* comments filed in MB Docket No. 03-185, Letter from Ari Meltzer, Esq., Wiley Rein, LLP, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 03-185, et al. (filed June 10, 2019) (Channel 6 Commenters June 10 *Ex Parte*); informal comments by Preserve Community Programming Coalition (PCPC) (filed Jul. 3, 2019) (PCPC Informal Comments); and Letter from Peter Tannenwald, Esq., Fletcher, Heald, & Hildreth, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 03-185 (filed Aug. 1, 2019) (Cal State *Ex Parte*).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 11165, para. 5.

<sup>31</sup> *Id.*

12. Given competing *ex parte* filings from the Channel 6 Commenters, PCPC and Cal State, the Bureau also sought comment on the possibility of interference from FM6 operations to digital television stations and to FM radio.<sup>32</sup> Specifically, the Bureau sought comment on the question of whether analog FM-radio type services operated by ATSC 1.0 digital LPTV channel 6 stations would cause impermissible interference to other services, and the Bureau requested the submission of more recent technical studies demonstrating the feasibility of transmitting analog audio signals within a digital television station's spectrum.<sup>33</sup> The Bureau noted the Commission rule that FM stations proposing operations on FM reserved band channels 201 through 220 must protect television stations operating on TV channel 6.<sup>34</sup>

13. In the *Refresh PN*, the Bureau also sought to update the record on the remaining unresolved issues first raised in the *LPTV DTV Third NPRM*, including whether FM6 operations are "consistent with the technology or method designated by the Commission for the provision of advanced television services" as required by section 336(b)(1) of the Act.<sup>35</sup> The Bureau once again sought comment on whether FM6 operations should be subject to the Part 73 rules applicable to FM radio stations,<sup>36</sup> whether the licensees of FM6 stations should be prohibited from transferring their stations,<sup>37</sup> and whether the provision of FM6 services on an ancillary or supplementary basis should be subject to a five percent fee on revenues generated by such service.<sup>38</sup> The record received in response to the *Refresh PN* largely mirrored the split record responding to the *2014 LPTV DTV NPRM*.<sup>39</sup>

## B. Recent Developments

14. The LPTV digital transition was completed on July 13, 2021, as all remaining analog LPTV stations (with the exception of 15 TV translators in Alaska) were required to terminate their analog operations and begin operating in digital on that day. In an effort to preserve FM6 operations post-transition, Venture filed a digital engineering request for special temporary authorization (STA) in March 2021 to convert its San Jose, California channel 6 LPTV station, then analog KBKF-LP, to ATSC 3.0 digital and to operate an ATSC 3.0 transmitter and a separate analog FM radio transmitter on 87.7 MHz.<sup>40</sup> Venture proposed that the separate FM audio transmitter would be used to maintain the station's FM6

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<sup>32</sup> *Id.* at 11164, para. 4, *citing* Channel 6 Commenters *Ex Parte* at 15; PCPC Informal Comments at 9; and Cal State *Ex Parte* at 2.

<sup>33</sup> *Id.* at 11164, para. 4.

<sup>34</sup> *Id.* at 11164-45, paras. 4-5 *citing* 47 CFR §§ 73.525; 73.825; 74.1205.

<sup>35</sup> *Refresh PN*, 34 FCC Rcd at 11166, para. 5, *citing* *LPTV DTV Third NPRM*, 29 FCC Rcd at 12554-55, para. 49; 47 U.S.C. § 336(b)(1) (requiring the Commission to adopt regulations that allow the holders of digital television licenses to offer ancillary or supplementary services, but providing that such regulations shall "only permit such licensee or permittee to offer ancillary or supplementary services if the use of a designated frequency for such services is consistent with the technology or method designated by the Commission for the provision of advanced television services"); and 47 U.S.C. § 336(i)(1) (defining "advanced television services" as "television services provided using digital or other advanced technology as further defined in the opinion, report, and order of the Commission entitled 'Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service,' MM Docket 87-268, adopted September 17, 1992, and successor proceedings").

<sup>36</sup> *Refresh PN*, 34 FCC Rcd at 11166, para. 5, *citing* *LPTV DTV Third NPRM*, 29 FCC Rcd at 12555-56, para. 52.

<sup>37</sup> *Id.* at 11166, para. 5.

<sup>38</sup> *Id.* at 11166, *citing* *LPTV DTV Third NPRM*, 29 FCC Rcd at 12556, para. 53.

<sup>39</sup> See various comments filed January to February 2020 in MB Docket No. 03-185 in response to the *Refresh PN*.

<sup>40</sup> See LMS File No. 0000138107.

operations, in an analog format, as an ancillary service to the station's ATSC 3.0 digital television operations on channel 6.<sup>41</sup>

15. After considering the merits of Venture's new plan for continued FM6 operations, and in light of the impending transition deadline, on June 10, 2021, the Media Bureau granted the six-month STA subject to numerous conditions, in order to maintain the existing service.<sup>42</sup> Specifically, KBKF-LD was required to convert to ATSC 3.0 digital operations; FM6 operations could only be conducted on 87.75 MHz; no interference was permitted to any other licensed user, including but not limited to broadcast television or radio users; the station's audio and video coverage must reach similar populations; the station must submit written reports, 90 days from the date of grant of the STA and again 180 days later detailing any reports of interference and a demonstration that the station's audio and video coverage reach similar populations; the station must provide at least one stream of synchronized video and audio programming on the ATSC 3.0 portion of the spectrum on a full time (24 x7) basis; and the station's technical facilities may not be modified and the station may not be assigned or transferred.

16. Following the grant of the KBKF-LD FM6 engineering STA, the Bureau continued to grant similar STAs, subject to the same conditions, to other channel 6 LPTV ATSC 3.0 digital stations, in order to preserve a pre-existing FM6 service. As of the release date of this *NPRM*, there are a total of 13 channel 6 LPTV ATSC 3.0 digital stations providing FM6 service consistent with the conditions.<sup>43</sup> The subsequent reports have shown no interference incidents, although we note that our rules currently require FM6 stations to protect channel 6 operations.

### III. DISCUSSION

17. In an effort to bring a final resolution to the FM6 question, we seek comment on the following issues:

- Whether FM6 operations serve the public interest and should be authorized to continue in any capacity.
- Should existing FM6 operations be authorized as "ancillary or supplementary" services and, if so, be subject to a rule that contains provisions similar to the conditions contained in the FM6 engineering STAs?

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<sup>41</sup> The Educational Media Foundation (EMF), which provides programming to KBKF-LP, submitted a letter on March 11, 2021 in support of Venture's KBKF-LP proposal. *See* Letter from Educational Media Foundation, MB Docket No. 03-185 (filed Mar. 11, 2021). REC Networks and NPR filed *ex partes* opposing Venture's KBKF-LP proposal. *See* Letter from Michelle Bradley, Founder, REC Networks, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 03-185 (filed Mar. 17, 2021) (REC March 2021 *Ex Parte*) and Letter from Christina H. Burrow, Cooley, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 03-185 (filed Apr. 13, 2021 (NPR April 2021 *Ex Parte*)). NPR repeated arguments it has made throughout this proceeding, and maintained that allowing the continued use of a 6 MHz digital television channel to provide FM6 services is contrary to the statute and the requirements of a 2020 *Report and Order* revising the Commission's ATSC 3.0 rules, as well as poor public policy. NPR April 2021 *Ex Parte* at 2, *citing Promoting Broadcast Internet Innovation through ATSC 3.0*, MB Docket No. 20-145, Report and Order, 35 FCC Rcd 14492, 14509, para. 33 (2020) (*ATSC 3.0 R&O*). In addition, NPR reiterated its support for allowing additional opportunities for existing and prospective radio broadcasters to operate on TV6 spectrum arguing that, rather than allow FM6 operations, the Commission should repurpose this "underused spectrum" for FM service in locations where TV channel 6 is not used to provide "actual television programming." NPR April 2021 *Ex Parte* at 3.

<sup>42</sup> *See* LMS File No. 0000147729.

<sup>43</sup> These stations are KBKF-LD, San Jose, California; WMTO-LD, Norfolk, Virginia; KXDP-LD, Denver, Colorado; WTBS-LD, Atlanta, Georgia; WRME-LD, Chicago, Illinois; KZNO-LD, Big Bear Lake, California; KEFM-LD, Sacramento, California; WEYS-LD, Miami, Florida; WDCN-LD, Fairfax, Virginia; KRPE-LD, San Diego, California; KGHD-LD, Las Vegas, Nevada; WPGF-LD, Memphis, Tennessee; and WNYZ-LD, New York, New York.

- Whether we can or should limit future FM6 operations to only those LPTV channel 6 stations with active FM6 engineering STAs on the release date of this *NPRM*.
- Whether to adopt NPR's proposal to license additional NCE FM radio stations on 82-88 MHz in areas where channel 6 LPTV and full-power stations are currently not operating.
- Whether to eliminate or revise the TV6 distance separation rules for LPFM, NCE, Class D (10 watt), and FM translator stations operating on reserved band FM Channels 201-220.

#### A. Public Interest Benefits of Continued FM6 Operations

18. With the LPTV digital transition complete, we seek comment on whether it is in the public interest to allow continued FM6 operations in the digital LPTV world, and whether it should be authorized to continue in any capacity.<sup>44</sup> Throughout this proceeding, FM6 supporters have trumpeted the merits of FM6 operations by maintaining that they provide diverse, niche, and local programming that is not otherwise available in the stations' communities.<sup>45</sup> The FM6 stations state that "[t]he multi-dimensional use of analog channel 6 has given a voice to diverse constituencies and ethnic groups unable to find a home anywhere else on the FM dial."<sup>46</sup> Importantly, FM6 commenters state that their LPTV television stations provide vital video content including weather, traffic, community event calendars, news and sports tickers and more.<sup>47</sup>

19. Prior to the LPTV digital transition, we estimated that there were close to 30 FM6 stations, based on representations made in the record in this proceeding.<sup>48</sup> Today, we believe that only 13 FM6 stations remain, in light of the impact on digital transition on channel 6 operations.<sup>49</sup> We seek comment on whether this belief is correct and whether the reduction in the number of FM6 stations is the result of stations having to convert to digital last year. In addition, we seek comment on the extent to which in the post-LPTV digital transition world, consumers rely on FM6 programming. We note the Commission's historical reluctance to regulate based upon programming decisions<sup>50</sup> made by

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<sup>44</sup> Below, in Section III-C, we consider whether to limit the future provision of FM6 services to only those stations providing such services through the engineering STAs on the release date of this *NPRM*.

<sup>45</sup> See, e.g., Channel 6 Commenters *Ex Parte* at Exhibit A, p. 5 ("millions of Americans tune to 87.7 FM to listen to programming not available anywhere else, particularly in ethnic and minority communities that are underserved."); comments filed in MB Docket No. 03-185 by Lovcom, Inc. at 1 (Jan. 22, 2020); EMF at 2-4 (Jan. 22, 2020); Seattle 6 Broadcasting Company, LLC (Seattle 6) at 1 (Jan. 22, 2020); Prism Broadcasting Network, Inc. at 3 (Jan. 22, 2020); Kids Television, LLC at 3 (Jan. 22, 2020); Delta Media Corporation at 3 (Jan. 22, 2020); New York Metro Radio Korea, Inc. at 3 (Jan. 21, 2020); David Ponomar at 1 (Jan. 14, 2020); Me-TV Music, LLC at 1 (Jan. 17, 2020); OMI at 1 (Dec. 6, 2019); PCPC at 5-6 and 11 (Jan. 22, 2020); Channel 6 Commenters *Ex Parte* at 3; and reply comments by EMF at 1-2 (Feb. 6, 2020); Hombro Nuevo at 1-3 (Feb. 4, 2020).

<sup>46</sup> The group consisted of Venture, Weigel Broadcasting, Guadalupe Radio, La Nueva/Signal Above, Prism TV, and WLFM-LP/Murray Hill Broadcasting, LLC (Channel 6 Commenters). See Channel 6 Commenters *Ex Parte* at 1.

<sup>47</sup> See PCPC Informal Comments at 5; Channel 6 Commenters *Ex Parte* at 9. In addition to the description of FM6 programming provided by PCPC and Channel 6 Commenters, we note that some of the television programming that FM6 stations reported to be providing in their FM6 engineering STAs include: France 24, Jewelry TV, "Spanish-language religious programming," and "locally-produced minority-oriented programming."

<sup>48</sup> See PCPC Informal Comments at Exhibit A, p. 10 listing 28 stations providing FM6 services as of June 2019.

<sup>49</sup> See *supra* note 43.

<sup>50</sup> See *Changes in the Entertainment Formats of Broadcast Stations*, Memorandum Opinion and Order, 60 F.C.C.2d 858, 863, para. 18 (1976), a copy of which is available at: <https://docs.fcc.gov/public/attachments/FCC-76-744A1.pdf> ("the marketplace is the best way to allocate entertainment formats in radio. . . .").

broadcasters.<sup>51</sup> With that policy in mind, we remind commenters that FM6 station programming can be changed – FM6 stations, like other broadcast stations, are not required to air any particular type of programming. Thus, even to the extent that some of these stations do provide useful programming to local and niche audiences, that could change at any time. We also note that many FM6 stations have longstanding programming with entrenched audiences. We seek comment on whether these programming concerns should enter into our public interest analysis of FM6 services.

20. We ask commenters to weigh the current radio programming benefits of FM6 stations against the lost opportunities from expanded adjacent NCE FM service or digital LPTV service on channel 6. For example, the Channel 6 Commenters maintain that LPTV licensees should be allowed to make “the most efficient use of spectrum” by providing FM6 services on an ancillary or supplementary basis.<sup>52</sup> PCPC argues that allowing digital television stations to offer additional services on existing channels is efficient spectrum use.<sup>53</sup> On the other hand, FM6 opponents contend that FM6 operations are not an efficient use of spectrum - using a full 6 MHz television channel to provide a 200 KHz aural service is not, according to these commenters, maximizing the potential of this scarce resource.<sup>54</sup> In addition, opponents argue that because there are no programming rules for LPTV stations, FM6 stations could, in the absence of such requirements, provide only minimal visual programming. While we note that providing visual programming has been a condition of the current FM6 STAs, we recognize that some FM6 stations have a history of such minimal video service.<sup>55</sup> These opponents also argue that FM6 is at odds with the underlying statutory purpose of permitting ancillary or supplementary services: to enhance the use of existing spectrum, consistent with the Commission’s basic statutory responsibility to manage the radio-frequency spectrum in the public interest.<sup>56</sup> We seek comment on these assertions and whether continued FM6 operation is an efficient use of Commission spectrum. Does allowing continued analog FM6 operations comport with recent Commission efforts to adopt more efficient and innovative use of digital television spectrum?<sup>57</sup>

21. To the extent that FM6 programming is fulfilling a programming need, we seek comment on whether it could be provided through other means of delivery. Specifically, we seek comment on whether FM6 programming could be delivered as a digital audio-only stream on one of the LPTV station’s multicast channels, via a lease of digital subchannels on local FM or LPFM stations, through the Internet, or by entities obtaining an FM or LPFM radio license.<sup>58</sup> Would these alternatives be more

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<sup>51</sup> See *The Public and Broadcasting – Broadcast Programming: Basic Law and Policy*, a copy of which is available at: <https://www.fcc.gov/media/radio/public-and-broadcasting> (“Because the Commission cannot dictate to licensees what programming they air, each individual radio and TV station licensee generally has discretion to select what its station broadcasts and to otherwise determine how it can best serve its community of license. Licensees are responsible for selecting their entertainment programming, as well as programs concerning local issues, news, public affairs, religion, sports events, and other subjects.”).

<sup>52</sup> Channel 6 Commenters *Ex Parte* at 8.

<sup>53</sup> PCPC Comments at 11 (Jan. 22, 2020).

<sup>54</sup> See, e.g., comments filed in MB Docket No. 03-185 by Common Frequency, Inc. (CFI) at 1 (Jan. 23, 2020); NPR at 2-4 and 10-11 (Jan. 23, 2020); and Mark Heller at 1 (Jan. 6, 2020).

<sup>55</sup> See, e.g., comments filed in MB Docket No. 03-185 by CFI at 1 (Jan. 23, 2020); and NPR at 2 (Jan. 23, 2020).

<sup>56</sup> See reply comments filed in MB Docket No. 03-185 by NPR at 13 (Feb. 7, 2020).

<sup>57</sup> See, e.g., *Rules Governing the Use of Distributed Transmission System Technologies; Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard*, MB Docket No. 20-74, Report and Order, 36 FCC Rcd 1227, 1228, para. 2 (2021) (noting that one of the benefits of DTS is the more efficient use of digital spectrum); and *ATSC 3.0 R&O*, 32 FCC Rcd at 9931, para. 1 (stating that the ATSC 3.0 standard promises to allow broadcasters to innovate, improve service, and use their spectrum more efficiently).

<sup>58</sup> See Notice of *Ex Parte* Communications from NPR, MB Docket No. 03-185 (April 12, 2021) at 3 (NPR April 2021 *Ex Parte*).



spectrally efficient? What is unique about FM6 operations that merits continued service through its existing means of delivery?

## **B. FM6 Operations as Ancillary or Supplementary Services**

22. As described above, we have twice sought comment, in the *2014 LPTV DTV Third NPRM* and *Refresh PN*, on whether FM6 operations comply with the ancillary or supplementary provisions in the Act and the Commission's rules,<sup>59</sup> whether the operation of analog FM radio services in conjunction with a digital television service would cause impermissible interference to other licensees, and, if permitted to continue, how best to authorize FM6 operations.<sup>60</sup> We once again seek comment on these issues and whether and how recent developments in the LPTV service should affect our analysis.

### **1. Compliance with the Communications Act and Commission Rules**

23. If we were to permit FM6 operations as an ancillary or supplementary service, we seek comment on whether to adopt a rule to formally authorize such operations and whether such a rule should include provisions requiring FM6 operations be subject to any or all of the conditions that were included in the FM6 engineering STAs. Throughout this proceeding, the Commission has asked whether a digital LPTV station can provide an analog FM radio-type service as an ancillary or supplementary service consistent with the Act and our rules.<sup>61</sup> The Commission specifically focused on the rule requirement that digital LPTV stations, when operating, must transmit an over-the-air *video* program signal at no direct charge to viewers.<sup>62</sup> In addition, the Commission has pointed to section 336(b)(1) of the Act that mandates that the Commission permit ancillary or supplementary services only "if the use of a designated frequency for such services is consistent with the technology or method designated by the Commission for the provision of advanced television services."<sup>63</sup> The Commission questioned whether a digital LPTV station offering FM6 services on an ancillary or supplementary basis would be able to satisfy these requirements.<sup>64</sup>

24. Would adopting a rule for FM6 operations that would codify conditions like those found in the FM6 engineering STAs help satisfy compliance with these rule and statutory provisions? As noted above, the engineering STAs that FM6 stations are currently operating under contain conditions including: (1) a requirement that FM6 operations be conducted in ATSC 3.0 digital format; (2) FM6 operations may only be conducted on 87.75 MHz; (3) no interference is permitted to any other licensed user, including but not limited to broadcast television or radio users; (4) the station's audio and video coverage must reach similar populations; (5) the station must submit written reports, 90 days from the date of grant of the STA and again 180 days later detailing any reports of interference and a demonstration that the station's audio and video coverage reach similar populations; (6) the station must provide at least one stream of synchronized video and audio programming on the ATSC 3.0 portion of the spectrum on a full time (24 x7) basis; (7) the station's technical facilities may not be modified; and (8) the station may not be assigned or transferred. We seek comment on whether to require that FM6 stations operate subject to a similar set of rules, with some modifications and omissions, as outlined in the paragraphs below and in the proposed rule in Appendix B, as a means to resolve the outstanding issues surrounding FM6 operations as an digital LPTV station's ancillary or supplementary service.

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<sup>59</sup> *LPTV DTV Third NPRM*, 29 FCC Rcd at 12555, para. 49; *Refresh PN*, 34 FCC Rcd at 11162, para. 3.

<sup>60</sup> *LPTV DTV Third NPRM*, 29 FCC Rcd at 12555, para. 52; *Refresh PN*, 34 FCC Rcd at 11166, para. 5.

<sup>61</sup> See *LPTV DTV Third NPRM*, 29 FCC Rcd at 12554, para. 49; *Refresh PN*, 34 FCC Rcd at 11163, para. 4.

<sup>62</sup> See *LPTV DTV Third NPRM*, 29 FCC Rcd at 12554-5, para. 49, citing 47 CFR § 74.790(g)(3).

<sup>63</sup> *Id.* at 12555, para. 49, citing 47 U.S.C. § 336(b)(1).

<sup>64</sup> *Id.* at 12555, para. 49.

25. *ATSC 3.0, 87.75 MHz and No Interference Requirements.* We propose that FM6 stations be operating in ATSC 3.0 digital format; that FM6 operations may only be conducted on 87.75 MHz; and that no interference be permitted to any other licensed user, including but not limited to broadcast television or radio users. By adopting a rule that authorizes service pursuant to these requirements, we seek to prevent the types of interference that were a concern for FM6 stations operating in ATSC 1.0. As discussed more fully below,<sup>65</sup> unlike ATSC 1.0, the ATSC 3.0 digital format appears to be more configurable and allows for the digital TV signal to be made narrower purportedly helping to overcome the harmful interference to FM radio stations that FM6 opponents suggest could emanate from FM6 operations. We seek comment on these rule provisions.

26. Separately, we seek comment on whether requiring FM6 services to be conducted only in conjunction with an ATSC 3.0 digital operation also has the benefit of satisfying the requirement of section 336(b)(1) of the Act that the “use of a designated frequency for [ancillary or supplementary] services is consistent with the technology or method designated by the Commission for the provision of advanced television services.”<sup>66</sup> Specifically, commenters should address whether and how analog use of a digital channel is “consistent with” the digital technology mandated by the Commission for the provision of advanced television services.<sup>67</sup> FM6 opponents have maintained throughout this proceeding that a digital LPTV station providing FM6 services was not consistent with existing the ATSC digital standard, which at the time they commented was ATSC 1.0.<sup>68</sup> They contended that a revision to the digital standard would have to be adopted in order for FM6 to be permitted.<sup>69</sup> FM6 stations disagreed, saying digital LPTV stations providing an analog FM radio service would be in compliance with the Commission’s digital broadcast television transmission standard as set forth in section 74.795(b) of the rules that provides that digital transmitters be designed to produce digital television signals that can be “satisfactorily viewed” on consumer receiving equipment based on the digital broadcast television transmission standard in section 73.682(d) the rules.<sup>70</sup> FM6 stations argued that they would provide a ATSC 3.0 digital television signal that would meet the requirements of section 74.795(b) in addition to the separate analog FM radio signal.<sup>71</sup>

27. Has the fact that FM6 services are now being offered via ATSC 3.0 digital stations changed these arguments? We note that the ATSC 3.0 standard also does not have a provision specific to FM6. And, as NPR notes, in the *ATSC 3.0 R&O* released in December 2020, the Commission amended

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<sup>65</sup> See Section III. B. 2. – Potential For Interference

<sup>66</sup> 47 U.S.C. § 336(b)(1). We note that the Commission’s rules permitted an analog LPTV station to convert to digital directly to an ATSC 3.0 digital facility without the requirement to first build an ATSC 1.0 facility (i.e. “transitioning directly to ATSC 3.0”). See 47 CFR § 74.782(c); *Authorizing Permissive Use of the “Next Generation” Broadcast Television Standard*, GN Docket No. 16-142, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 9930, 9941 and 9952-3, paras. 18 and 44 (2107).

<sup>67</sup> See *Comcast Corp.*, Memorandum Opinion, Order and Authorization, 16 FCC Rcd 21661, para. 84 (2001) (stating that “[w]hen preceding the preposition ‘with,’ the courts recognize ‘consistent’ as meaning ‘agreeing’ or according in substance or in a form that is congruous or compatible”) (citing *Environmental Defense Fund, Inc. v. Environmental Protection Agency*, 82 F.3d 451, 457 (D.C. Cir. 1996) and *N.L. Indes, Inc. v. Kaplan*, 792 F.2d 896, 898-899 (9th Cir. 1996)).

<sup>68</sup> See, e.g., comments filed in MB Docket No. 03-185 by NPR at 6; and reply comments filed in MB Docket No. 03-185 by NPR at 6 and 13 (Feb. 2, 2015).

<sup>69</sup> See, e.g., reply comments filed in MB Docket No. 03-185 by NPR at 13 (Feb. 7, 2020).

<sup>70</sup> See PCPC Informal Comments at 7; Channel 6 Commenters *Ex Parte* Exhibit A at 14, citing 47 CFR § 73.682(d) (providing that effective October 11, 2011, transmission of DTV signals shall comply with the standards for such transmissions as established by the Advanced Television Systems Committee (ATSC)).

<sup>71</sup> *Id.* See also 47 CFR § 73.682(f) (listing ATSC 3.0 as an alternative to the standard set forth in 47 CFR § 73.682(d)).

the definition of the minimum standard definition digital television signal for full-power stations, removed all references to the analog standard, and confirmed that it “continue[d] to ‘expect that the fundamental use of the 6 MHz DTV license will be for the provision of free over-the-air television service.’”<sup>72</sup> Given the fact that analog television is now truly a legacy service, does operation of an analog FM radio service on an ATSC 3.0 digital channel meet the requirements of section 336(b)(1) of the Act? Furthermore, should the fact that the number of U.S. households that possess an ATSC 3.0 capable television receiver remains limited affect our determination?<sup>73</sup>

28. *Similar Coverage and One Free Synchronized Stream Requirements.* We propose that FM6 stations comply with the following operational requirements: the FM6 coverage area must be contained within and may not exceed the coverage area of the LPTV station’s synchronized video/audio programming stream; and the LPTV station must provide at least one stream of synchronized video and audio programming on the ATSC 3.0 portion of the spectrum, at any time the station is operating. By requiring that the station’s FM6 coverage not exceed its video coverage, and that stations provide at least one stream of synchronized video and audio programming on the digital portion of the spectrum at any time the station is operating, we seek to ensure that the spectrum is being used efficiently and in the public interest.

29. Conditions similar to these provisions were included in the FM6 engineering STAs. The requirement that the LPTV station’s FM6 and video coverage reach similar populations was imposed to address the concerns of FM6 opponents that FM6 stations would configure their LPTV station’s technical facilities in such a manner that would favor their FM6 operation over their digital TV operation.<sup>74</sup> We propose a similar provision here that would limit the FM6 coverage area to not greater than the LPTV station’s coverage area<sup>75</sup> for similar reasons and we believe this limit will help to allay these concerns and ensure that digital LPTV stations providing FM6 operations continue to focus their attention on the operation of their digital LPTV station - the primary purpose of their station license. We seek comment on this proposal.

30. As for our proposed rule provision requiring that FM6 stations provide at least one stream of synchronized video and audio programming on the ATSC 3.0 portion of the spectrum, at any time the station is operating, a similar condition was included in the FM6 engineering STAs. We propose to adopt a slightly different version in our FM6 rules. The STA condition required that the one stream of synchronized video and audio programming be provided on “a full time (24x7) basis.” Because the Commission’s rules provide that LPTV stations are “not required to adhere to any regular schedule of operation,”<sup>76</sup> we find it more appropriate to propose a revised version of this condition that requires that FM6 stations provide at least one stream of synchronized video and audio programming on the ATSC 3.0 portion of the spectrum “at any time the station is operating.” The reason the synchronized video and audio programming condition was originally imposed on the FM6 engineering STAs was to ensure that digital LPTV stations providing FM6 operations continued to provide adequate television service to viewers. Prior to the LPTV digital television transition in July 2021, when FM6 operations were being

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<sup>72</sup> NPR April 2021 *Ex Parte* at 2, citing *ATSC 3.0 R&O*, 35 FCC Rcd at 14509, para. 33 and n.108 and *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd 12809, 12823 (1997).

<sup>73</sup> ATSC estimates that 3 million ATSC 3.0 capable television sets were sold in 2021 and that 4.5 million more will be sold in 2022. See <https://www.cnet.com/tech/home-entertainment/every-new-2022-tv-with-atsc-3-0-get-ready-for-free-next-gen-tv-broadcasts>.

<sup>74</sup> See, e.g., comments filed in MB Docket No. 03-185 by CFI at 1 (Jan. 23, 2020); NPR at 2 (Jan. 23, 2020); and reply comments filed in MB Docket No. 03-185 by NPR at 6 (Feb. 2, 2015).

<sup>75</sup> Under this approach, FM6 stations would be permitted to configure FM6 operations that covered a smaller area than their LPTV station’s operation.

<sup>76</sup> See 47 CFR § 74.763.

conducted as part of the LPTV station's analog channel 6 operation, most FM6 stations were not offering any type of meaningful television service.<sup>77</sup> Because the audio signal for their analog TV station was dedicated to providing the FM6 service, these stations would often times offer minimal television service on their stations such as community bulletin boards.<sup>78</sup> FM6 stations appeared to be focusing their resources on their radio FM6 operation over their television operation.<sup>79</sup> We seek comment on whether requiring the FM6 stations be subject to the separate synchronized video and audio programming requirement will address the concerns of FM6 opponents and ensure that FM6 stations continue to provide adequate television service to viewers.

31. *Limits on Technical Modifications.* We propose to adopt a rule, similar to the condition contained in FM6 engineering STAs, that would limit LPTV stations providing FM6 operations from modifying their facilities during the time that FM6 operations are being conducted. This condition was placed on FM6 engineering STAs in an effort to "lock" the FM6 station facilities in place while they were being operated pursuant to STA to prevent the station from making changes to their facilities that could impact the potential for interference from FM6 operations to other users. We seek comment on whether codification of such a modification limit could be a useful way to prevent FM6 stations from causing interference. By locking FM6 stations into their existing facilities, that have already been shown to not cause interference, we would seek to preserve the status quo and prevent technical changes that could upset the current interference-free environment. We propose to define "existing facilities" as the FM6 station's licensed technical facilities on the release date of this *NPRM*.<sup>80</sup> While the Commission is required to consider requests for waivers of its rules,<sup>81</sup> we also seek comment on whether to provide for an exception to this rule that would allow for technical modifications if certain criteria are met. We seek comment on such criteria, such as a showing of no potential interference to affected licensees and/or a demonstration that all affected licensees have consented to the modification. We seek comment on these issues.

32. *Transfers.* In the STAs, we limited FM6 stations from being transferred while FM6 operations are being conducted. We seek comment as to whether inclusion of such a limit in our FM6 rules would serve the public interest. The Media Bureau imposed this condition in an effort to prevent parties from seeking to operate an FM6 station without any intention of continuing FM6 operations and for the sole purpose of immediately selling the station to another party. Given the fact that we are proposing to limit FM6 to only those stations that are providing FM6 operations on the release date of this

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<sup>77</sup> See, e.g., comments filed in MB Docket No. 03-185 by CFI at 1 (Jan. 23, 2020); NPR at 2 (Jan. 23, 2020); and reply comments filed in MB Docket No. 03-185 by NPR at 6 (Feb. 2, 2015).

<sup>78</sup> *Id.*

<sup>79</sup> See, e.g., comments filed in MB Docket No. 03-185 by CFI at 1 (Jan. 23, 2020); NPR at 2-4 and 10-11 (Jan. 23, 2020); Heller at 1 (Jan. 23, 2020); and reply comments filed in MB Docket No. 03-185 by NPR at 11-12 (Feb. 7, 2020).

<sup>80</sup> We clarify that the term "release date of this *NPRM*" means the release date of the adopted *NPRM*.

<sup>81</sup> A waiver is appropriate only if both (1) special circumstances warrant a deviation from the general rule, and (2) such deviation better serves the public interest. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008) (citing *Northeast Cellular Telephone Co.*, 897 F.2d 1164, 1166 (1990)). Generally, the Commission may waive any rule if there is good cause to do so and, in making this determination, may take into account considerations such as hardship, equity, or more effective implementation of overall policy on an individual basis. See 47 C.F.R. § 1.3; *Northeast Cellular*, 897 F.2d at 1166 ("[A] waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest. The agency must explain why deviation better serves the public interest and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation"); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) ("The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances.").

*NPRM*, and thereby preventing parties from “speculating” in FM6 stations, we seek comment as to whether inclusion of a limitation on transfer of FM6 stations in our rules would serve the public interest.

33. *Periodic Reporting.* As a condition to their FM6 STAs, FM6 stations were required to submit reports, 90 and 180 days after the grant of their STAs, detailing any reports of interference and a demonstration that the station’s FM6 and video coverage reach similar populations. The Media Bureau included this reporting requirement in the FM6 engineering STAs so that it could monitor the ongoing STA operations of FM6 stations for reports of interference and to see if FM6 stations were complying with the condition that their digital television and analog FM radio operations were serving similar populations. We are now proposing to adopt rule provisions that would mandate that FM6 operations be conducted without interference to other users and that an FM6 station’s FM6 and video coverage reach similar populations. Accordingly, we tentatively conclude that such a reporting requirement is not necessary given the force and effect of our proposed FM6 rule. We seek comment on this tentative conclusion.

## 2. Potential For Interference

34. Throughout this proceeding, concern about the potential for analog FM6 operations to interfere with or disrupt the LPTV station’s digital TV service has been paramount.<sup>82</sup> As noted previously, section 336(b)(2) of the Act provides that the Commission shall “limit the broadcasting of ancillary or supplementary services on designated frequencies so as to avoid derogation of any advanced television services, including high definition television broadcasts, that the Commission may require using such frequencies.”<sup>83</sup> The Commission has also sought comment on whether the analog FM6 radio transmitter could cause interference to FM radio licensees.<sup>84</sup> FM6 opponents previously expressed concern about the potential for interference,<sup>85</sup> citing studies conducted in 2014 by Linley Gumm and Charles Rhodes to support their claims.<sup>86</sup> FM6 stations responded that there had not been a single report of interference from the numerous FM6 stations operating their LPTV stations in analog mode.<sup>87</sup> As noted above, FM6 opponents counter that lack of current interference is not probative given the existence of Commission rules preventing interference.<sup>88</sup>

35. We recognize that previous questions and analysis about the potential for FM6 interference were based on the assumption that the digital LPTV station would be operating in ATSC 1.0. As stated above, all existing FM6 stations are instead operating in ATSC 3.0 digital mode and there have

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<sup>82</sup> *LPTV Digital Third NPRM*, 29 FCC Rcd at 12555, para. 50; *Refresh PN*, 34 FCC Rcd at 11164, para. 4.

<sup>83</sup> *Id.*, both citing 47 U.S.C. § 336(b)(2).

<sup>84</sup> *Id.*

<sup>85</sup> See comments filed in MB Docket No. 03-185 by Linley Gumm at 1-13 (Nov. 14, 2014); NPR at 8-11 (Jan. 15, 2015); NPR at 13-17 (Jan. 23, 2020); and REC Networks at 6-14 (Jan. 21, 2020).

<sup>86</sup> See comments filed in MB Docket No. 03-185 by Linley Gumm at 1-13 (Nov. 14, 2014); NPR at 8-11 (Jan. 15, 2015).

<sup>87</sup> See comments filed in MB Docket No. 03-185 by Channel 6 Commenters at 17 and 20-21 (Jan. 21, 2020); EMF at 2-3 (Jan. 22, 2020); Island at 2 (Jan. 23, 2015); LSRC at 5 (Jan. 22, 2015); LSRC at 4 (Jan. 23, 2020); PCPC Informal Comments at 9; Seattle 6 Broadcasting Company, LLC at 2 (Jan. 22, 2019); Signal Above Ministries, Inc. at 7 (Jan. 20, 2015); Venture at 2-3 (Jan. 20, 2015). PCPC commented in the 2019 record refresh proceeding that “[t]elevision stations have been operating on channel 6 for decades without any unmitigated interference between digital or analog signals (including 87.7 FM audio carriers) and other broadcast stations.” See reply comments filed in MB Docket No. 03-185 by PCPC at 13 (Feb. 14, 2020). PCPC maintains that “[t]his empirical evidence provides the strongest proof that an 87.7 FM audio carrier is unlikely to cause future interference.” *Id.*

<sup>88</sup> See *supra* para. 8 and comments filed in MB Docket No. 03-185 by NPR at 9-10 (Jan. 15, 2015) and 14-15 (Jan. 23, 2020); REC Networks at 2-3 (Jan. 21, 2020); Cal State *Ex Parte* Engineering Statement at 4-5.

been no reports of interference from these stations.<sup>89</sup> The results of a more recent 2019 “Perry Priestly” study submitted by PCPC seem to show that, unlike ATSC 1.0, the ATSC 3.0 digital format is more configurable and allows for the TV signal to be made narrower to reduce that interference and/or have its settings modified to have increased error correction, helping it overcome such interference.<sup>90</sup> Thus, PCPC concludes “stations that transition directly to the ATSC 3.0 standard can provide both the most robust video signals available today and a strong analog audio signal.”<sup>91</sup>

36. In light of this more recent study, we seek comment on whether the fact that FM6 stations are operating in ATSC 3.0 digital mode changes the potential for their analog FM6 operations to interfere with or disrupt the LPTV station’s ATSC 3.0 digital TV service. We seek to determine if an ATSC 3.0 digital LPTV station will be able to operate an analog FM radio transmitter without interfering or derogating its co-channel digital operation. We observe that the Perry Priestly study indicates that an ATSC 3.0 station would typically reduce the width of its digital TV signal and/or increase the level of error correction to make this operation possible, both of which would seem to reduce the amount of available throughput of the ATSC 3.0 signal. We seek comment on whether these changes in configuration constitute a “derogation” of its digital operation. Should we decide to allow FM6 operations, should it be limited to those stations operating in ATSC 3.0? As before, we encourage commenters to study the question of FM6 interference and to provide the results of these studies in their comments.

### 3. Application of Part 73 FM Radio Rules

37. If we decide to permit digital channel 6 LPTV stations to provide analog FM6 services on an ancillary or supplementary basis, we must still resolve the outstanding question of whether such operations should be subject to the Part 73 rules applicable to FM radio stations.<sup>92</sup> Section 336(b)(3) of the Communications Act mandates that the Commission “apply to any other ancillary or supplementary service such of the Commission’s regulations as are applicable to the offering of analogous services by any other person . . . .”<sup>93</sup> Commenters previously maintained that the Commission, as part of its decision in this proceeding, would need to amend its Part 73 and 74 rules to accommodate the FM6 service.<sup>94</sup>

38. We once again seek comment on whether FM6 operations are “analogous to other services subject to regulation by the Commission” within the meaning of section 336(b)(3) of the Act and

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<sup>89</sup> As stated above, as a condition to the grant of their engineering STAs, FM6 stations agreed to report in 90 and 180 days on whether they had received any reports of interference. None of the FM6 stations, in their status reports, have reported any interference. Nor have we received any such complaints.

<sup>90</sup> Reply comments filed in MB Docket No. 03-185 by PCPC at 11-12 and Engineering Statement (Feb. 14, 2020). PCPC maintains that the Perry Priestly study demonstrates that, “not only is ATSC 3.0 compatible with an 87.7 MHz analog audio carrier, but the two signals can operate simultaneously with a almost no degradation to either signal.” *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *LPTV DTV Third NPRM*, 29 FCC Rcd at 12555, para. 52 and *Refresh PN*, 34 FCC Rcd at 11166, citing 47 U.S.C. § 336(b)(3).

<sup>93</sup> 47 U.S.C. § 336(b)(3). Section 73.624(c)(1) of the Commission’s rules contains a similar provision. See 47 CFR § 73.624(c)(1) (digital television stations may offer “audio signals” on a “broadcast basis,” but “DTV licenses that provide ancillary or supplementary services that are analogous to other services subject to regulation by the Commission must comply with the Commission regulations that apply to those services. . . .”).

<sup>94</sup> See comments filed in MB Docket No. 03-185 by Channel 6 Commenters at 27-28 (Jan. 22, 2020); LSRC at 4 (Jan. 23, 2020); Multicultural Radio Broadcasting, Inc. at 6-7 (Jan. 22, 2020); NPR at 17-18 (Jan. 23, 2020); OMI at 1 (Jan 20, 2015); PCPC Informal Comments at 9-10; REC Networks at 14 (Jan. 21, 2020); Venture at 6-8 (Jan. 20, 2015). We note that Signal Above Ministries, Inc. (Signal) was one commenter that maintained that any ancillary analog FM radio-type operation should not be subject to FM rules. See comments filed in MB Docket No. 03-185 by Signal at 8 (Jan. 21, 2015).

the Commission's implementing rules and, if so, which of the Part 73 rules should apply to FM6 operations.<sup>95</sup> In the *LPTV DTV Third NPRM*,<sup>96</sup> the Commission sought comment on whether to apply to FM6 operations the Part 73 rules requiring that an FM radio station file an application for a construction permit and license to operate,<sup>97</sup> that stations be located on channels 88.1 MHz through 107.9 MHz,<sup>98</sup> that primary FM channels be allotted through rulemaking,<sup>99</sup> that such stations maintain a public inspection file,<sup>100</sup> and that the use of such frequencies in border areas be coordinated with Canada and Mexico.<sup>101</sup> We seek comment on whether these questions are still relevant, whether other Part 73 rules, including technical rules, should apply,<sup>102</sup> and whether our analysis should be affected by the fact that we may limit channel 6 LPTV stations providing FM6 services to operating only in ATSC 3.0 digital mode and from modifying their technical facilities while providing FM6 operations.<sup>103</sup>

#### 4. Application of Five Percent Ancillary or Supplementary Fee

39. To the extent we permit digital channel 6 LPTV stations to provide FM6 services on an ancillary or supplementary basis, we must resolve the question of whether FM6 services should be subject to a five percent fee.<sup>104</sup> Our ancillary or supplementary rule provides that digital television stations "must annually remit a fee of five percent of the gross revenues derived from all ancillary and supplementary services . . . which are feeable . . ." <sup>105</sup> "Feeable" services are defined as "[a]ll ancillary or supplementary services for which payment of a subscription fee or charge is required in order to receive the service."<sup>106</sup> "Feeable" services are also defined as "[a]ny ancillary or supplementary service for which no payment is required from consumers in order to receive the service . . . if the DTV licensee directly or indirectly receives compensation from a third party in return for the transmission of material provided by that third

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<sup>95</sup> During this proceeding, commenters have debated whether section 73.653 of the rules, 47 CFR § 73.653, that permits television stations to operate separate audio and visual transmitters, should apply to FM6 stations. *See, e.g.,* NPR Feb 2020 Comments at 5-7 and 9-11; PCPC Feb 2020 Comments at 17-18; Venture Jan 2015 Comments at 4; Since we are proposing that FM6 be considered an ancillary or supplementary service and such services are supposed to be subject to "regulations . . . applicable to . . . analogous services," 47 U.S.C. § 336(b)(3), under our proposal, section 73.653 has no application to a radio service such as FM6 because that rule is applicable on its face to television.

<sup>96</sup> *LPTV DTV Third NPRM*, 29 FCC Rcd at 12556, para. 52.

<sup>97</sup> 47 CFR § 73.201.

<sup>98</sup> *Id.*

<sup>99</sup> 47 CFR § 73.202.

<sup>100</sup> 47 CFR § 73.3526.

<sup>101</sup> 47 CFR §§ 73.204 and 73.504.

<sup>102</sup> For example, among the many Part 73 technical rules that apply to FM radio stations and that we would have to decide whether to also apply to FM6 services are: 47 CFR §§ 73.207 (Minimum distance separation between stations); 73.208 (Reference points and distance computations); 73.209 (Protection from interference); 73.211 (Power and antenna height requirements); 73.315 (FM transmitter location); 73.316 (FM antenna systems); 73.317 (FM transmission systems requirements); and 73.318 (FM blanketing interference).

<sup>103</sup> *See supra* Section III. B. 1. – Compliance with the Communications Act and Commission Rules

<sup>104</sup> *LPTV DTV Third NPRM*, 29 FCC Rcd at 12555-6, para. 53 and *Refresh PN*, 34 FCC Rcd at 11166, *citing* 47 CFR § 73.624(g).

<sup>105</sup> 47 CFR § 73.624(g); *see also* 47 U.S.C. § 336(e).

<sup>106</sup> *See* 47 CFR § 73.624(g)(1)(i); *see also* 47 U.S.C. § 336(e)(1)(A). Moreover, the rules provide that "[t]he fee required by this provision shall be imposed on any and all revenues from such services, including revenues derived from subscription fees and from any commercial advertisements transmitted on the service." *See* 47 CFR § 73.624(g)(1)(i).

party (other than commercial advertisements used to support broadcasting for which a subscription fee is not required).<sup>107</sup> As we previously observed, FM6 operations, thus far, appear to have been available to the general public without subscription. Comments were previously split on this question. Because FM6 services are provided free of charge, some commenters believed that no fee should apply.<sup>108</sup> Other commenters argued that, because the FM6 operation is not available on a DTV receiver, and can be only be received on a separate FM radio receiver, we should view FM6 operations as “point-to-point or point-to-multi point” operation that section 73.624(c) of the rules describes as an “ancillary or supplementary” service.<sup>109</sup> Channel 6 Commenters agreed that “a supplementary 87.7 MHz audio signal qualifies as an ancillary service, which entitles the government to 5% of its revenue.”<sup>110</sup>

40. We seek comment on whether, and under what circumstances, an LPTV station’s ancillary or supplementary FM6 service provided without a subscription fee should be deemed “feeable” and subject to the five percent fee. To the extent an LPTV station leases its spectrum to a third party to provide the programming transmitted using FM6 and receives compensation from that third party, such FM6 operation would be feeable under section 336(e)(1)(B) of the Act because the station “receives compensation from a third party in return for transmitting material furnished by such third party.”<sup>111</sup> In a scenario, however, where the FM6 station does *not* lease its spectrum and instead itself provides a free, over-the-air radio service without a subscription fee, is there any basis to deem such a service “feeable” and thus subject to the five percent fee? We seek comment on this issue.

### C. Limiting FM6 to Existing Operators

41. If we decide to allow FM6 operations to continue in the future, we propose to limit the scope of FM6 operations to only those LPTV channel 6 stations with “active” FM6 engineering STAs on the release date of this *NPRM*.<sup>112</sup> We propose to define “active” as an initial engineering STA that is granted and unexpired or a request for extension of an engineering STA that is granted or pending at the time of the release date of this *NPRM*. We seek comment on this proposal. We assume that stations holding an active FM6 STA or with a pending FM6 STA extension request are actually providing FM6 service to the public. We seek comment on this assumption and whether there are other measures we should take to ensure our rules cover only those stations actually providing FM6 service to the public on the release date of this *NPRM*.

42. The record is filled with examples of local, niche programming being provided by FM6 stations and we seek to minimize disruption to listeners that have come to rely on these services.

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<sup>107</sup> See 47 CFR § 73.624(g)(1)(ii); see also 47 U.S.C. § 336(e)(1)(B). Moreover, the rules provide that “[t]he fee required by this provision shall be imposed on any and all revenues from such services, other than revenues received from a third party in return for the transmission of commercial advertisements used to support broadcasting for which a subscription fee is not required.” See 47 CFR. § 73.624(g)(1)(ii).

<sup>108</sup> See comments filed in MB Docket No. 03-185 by LSRC at 3 (Jan. 23, 2020); NY Metro Radio Korea, Inc., et al. at 3 (Jan. 21, 2020); PCPC at 30-31 (Jan. 22, 2020); Signal at 8 (Jan. 14, 2015).

<sup>109</sup> See reply comments filed in MB Docket No. 03-185 by REC Networks at 2 (Jan. 21, 2020); and Seattle 6 Broadcasting Company, LLC at 1 (Jan. 22, 2020) citing 47 CFR § 73.624(c).

<sup>110</sup> Channel 6 Commenters *Ex Parte* at 6 and 19.

<sup>111</sup> See 47 U.S.C. § 336(e)(1)(B). We note that Venture recently submitted in the Media Bureau’s Licensing and Management System (LMS) an Annual DTV Ancillary/Supplementary Services Report for its FM6 station, KBKF-LD, San Jose, California, wherein it reported that it was providing an FM6 operation on an ancillary or supplementary basis and that it had generated \$157,500 gross revenues from such operations and was submitting a payment of \$7,875 reflecting its five percent Annual DTV Service Fee. See LMS File No. 0000173200.

<sup>112</sup> We clarify that the term “release date of this *NPRM*” means the release date of the adopted *NPRM*.



Limiting the number of FM6 stations to those currently in operation<sup>113</sup> (and that have demonstrated that they do not cause interference to other users) and limiting the technical modifications permitted by these stations could also help to serve our goal of preventing harmful interference to other services. Would such a limitation allay the concerns of some commenters that have opposed FM6 operations?<sup>114</sup>

43. Would this limitation also ensure continued service to consumers who have relied upon this service? With regard to any parity concerns of limiting FM6 authorization to existing FM6 stations, we note that all channel 6 LPTV stations had the opportunity to provide an FM analog service and chose not to do so. Moreover, the Commission's examination of whether to permit the continuation of such services has extended over decade, so we believe that all channel 6 LPTV stations have been placed on adequate notice of a potential change in Commission rules. Further, if a channel 6 LPTV station has not requested that the Commission permit it to continue to provide FM6 operations by now (since terminating analog operations in July 2021), it seems unlikely that there is consumer reliance on the programming. We seek comment on this proposal, other cut-off dates, or alternate ways to limit eligibility to ensure continued service to the established listeners of FM6 operations.

44. We seek comment on whether we should also permit FM6 operations by LPTV stations that, as of the release date of this NPRM, have pending applications for construction permits and that have a significant history of providing FM6 to the public to also be grandfathered. We recognize that there may be a limited number of stations that stopped providing FM6 service in July 2021, at the time of the LPTV digital transition, but intend to resume such service once new facilities are approved and constructed.<sup>115</sup> Would permitting such stations to resume providing FM6 services, subject to the conditions discussed above, be consistent with the rationale discussed above to ensure continued service to consumers who have relied upon this service? Are the conditions discussed above adequate to address any technical concerns? Because such stations are not yet operational, do we need to consider additional technical conditions to address unforeseen potential interference? We seek comment on the implications of expanding the scope of continued FM6 service in this manner.

#### **D. Licensing Additional NCE FM Stations**

45. We also take this opportunity to seek comment on NPR's proposal to repurpose television channel 6 (TV channel 6) spectrum (82-88 MHz) for FM services in locations where the channels are not being used to provide "actual television programming."<sup>116</sup> As previously described,<sup>117</sup> NPR believes that the continued use of a digital TV channel 6 to provide an analog FM radio service (aka

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<sup>113</sup> We note that, in paragraph 44 *infra*, we consider whether to permit FM6 operations by other LPTV stations not currently operating pursuant to an FM6 STA.

<sup>114</sup> We note that, in paragraph 49 *infra*, we seek comment on the potential for interference if we permitted new FM radio services as contemplated by NPR.

<sup>115</sup> See Letter from David D. Oxenford, Esq. counsel for Metro TV., Inc. to Marlene H. Dortch, Secretary, FCC, MB Docket No. 03-185 (filed May 31, 2022) at 3. Metro TV, Inc. is the licensee of channel 6 LPTV station WVOA-LD, Westvale, New York, and it maintains that it provided "FM6 service from 2013 through the 2021 termination of analog LPTV operations" and that it currently has pending a construction permit (LMS File No. 0000186547) that would lead to ATSC 3.0 operations with resumed FM6 service. We note that this application is pending for international coordination.

<sup>116</sup> NPR has been pursuing this proposal since at least July 2020 when it first raised it in *ex parte* communications. See, e.g., Letter from Gregory A. Lewis, Deputy General Counsel, NPR, to Marlene H. Dortch, Secretary, FCC, in MB Docket No. 03-185 (Jul. 9, 2020) at 1 (NPR July 2020 *Ex Parte*); see also NPR April 2021 *Ex Parte* at 3 We note that NPR is not proposing that any legitimate provision of television service on channel 6 be repurposed – only FM6 services as they existed prior to the July 13, 2021 LPTV digital transition.

<sup>117</sup> See *supra* para. 8.

FM6) is contrary to the statute and poor public policy.<sup>118</sup> Instead, NPR contends, “TV channel 6 spectrum is a valuable resource the Commission should use to expand opportunities for existing and prospective radio broadcasters whose demand for spectrum cannot be satisfied in the crowded FM radio band.”<sup>119</sup> Specifically, NPR maintains that the spectrum occupied by a single TV channel 6 station could potentially accommodate up to 30 new FM stations, exponentially increasing the variety of programming available for a diverse audience.<sup>120</sup> Repurposing this spectrum to allow new FM radio stations to be authorized, NPR maintains, would increase the diversity of voices and programming available to the public and be a “far better use of a scarce resource” than the analog audio operations (FM6) that exist in some locations today.<sup>121</sup> NPR also argues that it would increase the opportunities for diverse providers to provide local public interest programming for unserved and underserved audiences, especially in the rural parts of the country.<sup>122</sup> We seek comment on these issues.

46. If we decide to allow new FM stations to operate on 82-88 MHz, we seek comment on whether such stations should be limited to noncommercial educational (NCE) FM stations or whether commercial FM stations should be allowed to operate on these new frequencies as well, consistent with TV6 stations currently occupying this spectrum. We note that the adjacent FM channels 201-220 (87.9 MHz to 91.9 MHz) are reserved for NCE FM station use.<sup>123</sup> We seek to determine whether to adopt a similar restriction were we to allow additional FM stations to operate on 82-88 MHz.

47. We invite commenters to study the current use of TV channel 6 by television broadcasters and the extent to which TV channel 6 could accommodate additional FM radio stations without causing interference to existing TV channel 6 licensees. We also seek comment on the technical feasibility of NPR’s proposal. First, we note that, although there are in theory 30 available 200 kHz FM radio channels in the band that comprises TV channel 6, in practice, it would not be possible to use all 30 channels in one place given interference considerations. Practically speaking, the number of channels for use by new FM radio stations in any one area would be significantly less.<sup>124</sup> We seek comment on whether this technical reality should affect our consideration of NPR’s proposal. Furthermore, we seek comment on whether NPR’s argument, that FM6 is not an efficient use of spectrum, would be allayed by our proposal to limit FM6 operations to only the limited number of TV channel 6 LPTV stations that are currently providing such services and to further require that such stations provide a separate video offering at all times they are providing FM6 operations.

48. In addition, we seek comment on whether radio listeners will be able to receive new FM radio stations on the frequencies that NPR suggests should be allowed for new FM radio station operations – 82-88 MHz. We note that FM radio receivers currently only receive the top-most portion of the 82-88 MHz band (87.7 or 87.9 MHz) of the 6 MHz channel that comprises TV channel 6. Today’s FM radio receivers cannot tune down to the rest of the spectrum - 82.1-87.5 MHz. We invite comment on how this technical roadblock should influence our consideration of this issue. We also seek comment on

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<sup>118</sup> See NPR April 2021 *Ex Parte* at 3. NPR has consistently maintained throughout this proceeding that FM6 is not an efficient use of spectrum. See, e.g., NPR Comments at 3-6 (Jan. 22, 2020); NPR Reply Comments at 11-15 (Feb. 6, 2020). It contends that TV channel 6 is currently underutilized by television broadcasters and much of the spectrum is laying fallow especially in the rural parts of the country. *Id.*

<sup>119</sup> NPR April 2021 *Ex Parte* at 3.

<sup>120</sup> See NPR July 2020 *Ex Parte* at 1 (emphasis in original).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> See 47 CFR § 73.501.

<sup>124</sup> For example, in New York City, there are only 7 full-power radio stations licensed to the top 6 MHz of the FM radio band. The other 23 frequencies are licensed to stations on Long Island, New Jersey, and Connecticut, and areas of New York north of New York City to avoid interference.

whether changes would need to be made to the Domestic Table of Frequency Allocations (Table) to reflect this change.<sup>125</sup> We note that the 76-88 MHz band is generally allocated as “Broadcasting” but seek comment on whether the Table contemplates radio uses at 82-88 MHz. In addition, should we adopt NPR’s proposal, we seek comment on whether there are other technical issues to consider such as the establishment of separation distances for co-channel operations.

49. Finally, we seek comment on the benefits of expanding FM radio service to all of TV channel 6 to create new FM radio stations versus the costs of precluding existing TV stations from using the currently unused locations where TV channel 6 is viable and foreclosing new TV stations on channel 6. We also seek comment on how allowing additional FM radio stations on the 82-88 MHz band would affect other entities that use these frequencies including wireless microphones and white space device users.<sup>126</sup> Finally, we note that one of our concerns about authorizing the continued provision of FM6 services is the interference potential they may pose. We address this concern through our proposal of limiting any technical modifications by these FM6 stations.<sup>127</sup> We seek comment on the potential for interference if we permitted new FM radio services as contemplated by NPR. Would such services pose the threat of interference with existing services in this band? If so, how should these concerns be mitigated to extent we pursue such an expansion?

#### **E. Elimination of TV6 Interference Protection**

50. We seek comment on an issue that the Commission first raised in the *LPFM NPRM* and that is related to our consideration of whether to permit continued FM6 operations. That is the question of whether to completely eliminate the television channel 6 (TV6) distance separation (interference protection) rules for Low Power FM radio (LPFM), NCE FM radio, Class D FM radio (10 watt), and FM translator stations operating on reserved band FM channels 201-220, or to alternatively revise and update them for a post-digital transition world.<sup>128</sup> The Commission last considered this issue in the context of its efforts to improve the LPFM technical rules based on suggestions made by REC Networks in a 2018 petition for rulemaking.<sup>129</sup> We seek comment on this issue now that the LPTV digital transition is complete and all TV6 stations are no longer operating in analog, and in light of our proposals related to FM6 in this proceeding.

51. To provide LPFM stations relief from TV6 protection rules, the Commission, in its *LPFM NPRM*, proposed to eliminate TV6 protections entirely on July 13, 2021 – the date of the LPTV digital transition.<sup>130</sup> The Commission noted that it had been requiring FM stations on channels 201 to 220 to protect television stations operating on TV6 since 1985.<sup>131</sup> The Commission cited to REC Networks arguments that the LPFM TV6 protection rules “significantly overprotect TV6 stations and could be reduced with little impact.”<sup>132</sup> REC Networks pointed out that this was because the rules were designed

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<sup>125</sup> See 47 CFR § 2.106.

<sup>126</sup> Wireless microphones and unlicensed devices are permitted to use the 82-88 MHz band on a secondary, non-interference basis. See 47 CFR §§ 15.707(b) (white space devices); 15.236 (unlicensed wireless microphone); and 74.802 (licensed wireless microphone).

<sup>127</sup> See *supra* para. 31.

<sup>128</sup> The TV6 interference protection provisions under consideration here are contained in 47 CFR §§ 73.525 and 73.825.

<sup>129</sup> See *LPFM NPRM*, 34 FCC Rcd at 6541-4, paras. 8-13; REC Networks Petition for Rulemaking, RM No. 11810 (June 13, 2018)(REC Networks Petition).

<sup>130</sup> *LPFM NPRM*, 34 FCC Rcd at 6541-4, paras. 8-13.

<sup>131</sup> *Id.* at 6541, para. 8.

<sup>132</sup> *Id.* at 6542, para. 9.

when television was operating with analog technology.<sup>133</sup> The Commission also noted studies performed by NPR in conjunction with the 2009 digital television transition that showed that newer digital television technologies have better filters and synchronous detection to reject unwanted FM signals.<sup>134</sup> The Commission tentatively accepted NPR's conclusion that digital television receivers are substantially less vulnerable to FM-induced TV6 interference than analog sets.<sup>135</sup> The Commission sought comment on whether this conclusion was still valid "after so many additional years of experience with digital broadcasts."<sup>136</sup> The Commission sought comment on its expectation that the proposed elimination of LPFM/TV6 spacing requirements will not result in any interference to TV6 stations and it tentatively concluded, upon July 13, 2021, to eliminate the distance separate requirement between LPFM stations and all television stations operating on TV6.<sup>137</sup>

52. A limited number of commenters weighed in on the Commission's proposal and were evenly split for and against elimination of the TV6 protections.<sup>138</sup> For instance, in response to support from petitioners, Disney posited that that the record did "not provide actual evidence demonstrating that the full-power Channel 6 Protections are unnecessary," and that the TV6 protection rules "have functioned quite well to protect full-power television stations from interference, and have done so without imposing significant burdens on FM reserved band stations."<sup>139</sup> The Commission in its 2020 Report and Order deferred consideration of this issue to a future proceeding finding that it "will be in a better position to reach an informed decision by addressing TV6 issues in a separate proceeding with a more developed record on this issue."<sup>140</sup>

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<sup>133</sup> *Id.*, citing REC Networks Petition at 27-28.

<sup>134</sup> *Id.* at 6542, para. 10 citing NPR Labs, Interference Rejection Thresholds of Consumer Digital Television Receivers on Channel 6 with FM Broadcast Signals (Dec. 17, 2007) (NPR 2007 Report); NPR Labs, Comparison of FM Broadcast Signal Interference Areas with Current Digital Television Receiver on Channel 6 to Analog TV Receivers Assumed in 47 CFR 73.525 (Sept. 5, 2008) (NPR 2008 Report) (rec. Sept. 15, 2008 in MM Docket No. 99-325, MB Docket No. 87-268).

<sup>135</sup> *Id.* at 6542, para. 10.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> NPR, REC Networks and other LPFM entities supported REC Network's original proposal to sunset the TV6 protections with the July 13, 2021 digital transition, reciting largely the same arguments that REC Networks raised in its 2018 petition for rulemaking. *See* comments filed in MB Docket No. 19-193 by REC Networks at 49 (Oct. 21, 2019); NPR at 4-5 (Oct. 21, 2019); Jeff Siebert at 5 (Oct. 22, 2019); Four Rivers Community Broadcasting Corp. at 2 (Oct. 22, 2019); Cal State at 2 (Oct. 21, 2019); EMF at 3 (Oct. 21, 2019); reply comments filed in MB Docket No. 19-193 by NPR at 1-4 (Nov. 4, 2019). *See also* Letter from Amanda Huetinck, Assistant General Counsel, National Public Radio, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 03-185 (filed May 20, 2022) at 1 (expressing continued support for elimination). ABC, Inc. (ABC); Gray Television, Inc. (Gray) and PCPC, licensees of channel 6 television stations, however, were opposed to elimination of the TV6 protections. They argued that the record in this proceeding supporting sunset of the protections is "primarily based upon blanket statements that the Channel 6 Protections are no longer required." Letter from Susan L. Fox, Vice President, Government Relations, The Walt Disney Company, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 19-193 (filed Mar. 19, 2020) at 6-8 (ABC March 2020 *Ex Parte*); *see also* Letter from Robert J. Folliard, III, Vice President, Government Relations and Distribution, Gray Television, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 19-193 (filed March 19, 2020) at 1-2 (Gray March 2020 *Ex Parte* (wholeheartedly supporting ABC's comments extolling the importance of preserving interference protections for channel 6 television stations); comments filed by PCPC at 2 and 9 (Oct. 22, 2019) (the record does not present enough evidence to justify removing protections).

<sup>139</sup> ABC March 2020 *Ex Parte* at 6, 7.

<sup>140</sup> *See* Amendments of Parts 73 and 74 to Improve the Low Power FM Radio Service Technical Rules, MB Docket No. 19-193, Report and Order, 35 FCC Rcd 4115, 4126-7, paras. 34-35 (2020) (*LPFM R&O*).

53. Since that decision, events have occurred that could affect our previous analysis as to the continued need for TV6 protection rules. The post-Incentive Auction transition was completed in July 2020 and repacked stations have settled into their new post-auction channel assignments. And, given the digital transition, analog television is now truly a legacy service. With the completion of the Incentive Auction and the LPTV digital transition, we now have experience with respect to TV6 and whether interference has been occurring with respect to digital TV6 stations and FM radio stations.

54. Therefore, we seek comment on the continued need for TV6 interference protection rules. Specifically, we seek comment on whether the interference protection provisions, adopted while television stations were operating in analog mode, continue to be necessary in light of the fact that all TV6 stations have now converted to digital. We invite commenters to analyze the number of current TV6 stations, their current locations and the potential for TV6-FM radio cross-service interference. As stated above, we have not received reports of interference to either TV or radio services from stations in their counterpart services. Does the lack of reports indicate the protections are no longer necessary, or that they are fulfilling their purpose? Alternatively, we seek comment on whether to preserve the existing protections but revise and update them for digital TV6 operations, and if so, how to update them. In that circumstance, we seek comment on whether those protections should apply to currently authorized channel 6 stations or to future channel 6 stations or to both.

55. We note that retention or revision of the TV6 interference protection rules could potentially be impacted by our decision whether to permit continued FM6 operations. Given this, we seek comment on whether the elimination of TV6 protection by LPFM and other FM radio stations would be compatible with FM6 operations if we determine to permit such operations to continue. That is, if FM6 and LPFM and NCE FM stations are allowed to come into closer proximity if the TV6 protection rules are eliminated, would that increase concerns about interference from FM6 to LPFM/NCE FM stations – an important factor in our FM6 considerations? We note that one of the conditions we are seeking to impose on continued FM6 operations is that the LPTV station not be permitted to modify its facilities while providing FM6 operations, thus locking into place the technical facilities by which the LPTV station provides its FM6 operations. If we limit station modifications in this manner, would this impact our analysis of whether elimination of TV6 protection by LPFM and other FM radio stations would be compatible with FM6 operations?

56. Our goal in this proceeding, as with any proceeding involving interference protection, is to ensure that licensees can operate in an environment in which the potential for interference is minimized. We stress that interference protections are essential to spectrum usage rights to prevent licensees from unduly affecting other licensees in terms of system operation or cost. Nonetheless, we attempt to establish rules that are no more restrictive than necessary to achieve our goals in order to provide maximum flexibility to our licensees. Therefore, commenters suggesting that the existing interference provisions be retained, revised or updated should demonstrate that their proposed restrictions are necessary to achieve these goals.

#### **F. Cost-Benefit and Diversity, Equity and Inclusion Analysis**

57. Finally, we seek comment on the benefits and costs associated with adopting the proposals set forth in this *NPRM*. In addition to any benefits to the public at large, are there also benefits to industry through adoption of any of our proposals? We also seek comment on any potential costs that would be imposed on licensees and regulatees if we adopt the proposals contained in this *NPRM*. Comments should be accompanied by specific data and analysis supporting claimed costs and benefits.

58. As part of our continuing effort to advance digital equity for all,<sup>141</sup> including people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who are or have been historically underserved, marginalized, or adversely affected by persistent poverty or inequality, we invite comment on how the proposals set forth in *the NPRM* can advance equity in the provision of broadcast services for all people of the United States, without discrimination on the basis of race, color, religion, national origin, sex, or disability.<sup>142</sup> Specifically, we seek comment on how our proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility, as well the scope of the Commission’s relevant legal authority.

#### IV. PROCEDURAL MATTERS

59. *Ex Parte Rules - Permit-But-Disclose*. The proceeding this Notice initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>143</sup> Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

60. *Filing Requirements—Comments and Replies*. Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS). See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.

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<sup>141</sup> Section 1 of the Communications Act of 1934, as amended, provides that the FCC “regulat[es] interstate and foreign commerce in communication by wire and radio so as to make [such service] available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex.” 47 U.S.C. § 151.

<sup>142</sup> The term “equity” is used here consistent with Executive Order 13985 as the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality. See Exec. Order No. 13985, 86 Fed. Reg. 7009, Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (January 20, 2021).

<sup>143</sup> 47 CFR §§ 1.1200 *et seq.*

- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing.
- Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
  - Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street, NE, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19.<sup>144</sup>
- During the time the Commission's building is closed to the general public and until further notice, if more than one docket or rulemaking number appears in the caption of a proceeding, paper filers need not submit two additional copies for each additional docket or rulemaking number; an original and one copy are sufficient.

61. *Initial Regulatory Flexibility Act Analysis.* The *LPTV DTV NPRM* in this proceeding included an Initial Regulatory Flexibility Analysis (IRFA) pursuant to 5 U.S.C. § 603, exploring the potential impact on small entities of the Commission's proposal to allow FM6 services to operate as ancillary or supplementary services and related issues.<sup>145</sup> In the *Refresh PN*, the Media Bureau noted this IRFA and invited parties to file comments on the IRFA in light of the Bureau's request to refresh the record.<sup>146</sup> In light of the fact that this NPRM asks for additional comment on the matters first raised in the *LPTV DTV Third NPRM*, we invite parties to once again file comments on the IRFA contained in the *LPTV DTV Third NPRM*. In addition, because this NPRM contains new proposals, an IRFA is contained in Appendix C. Written public comments are requested on the new proposals outlined in the IRFA and must be filed in accordance with the same filing deadlines as comments on this NPRM, with a distinct heading designating them as responses to the IRFA. In addition, a copy of this NPRM and the IRFA will be sent to the Chief Counsel for Advocacy of the SBA and will be published in the Federal Register.

62. *Initial Paperwork Reduction Act Analysis.* This document proposes new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens and pursuant to the Paperwork Reduction Act of 1995, Public Law 104-13, invites the general public and the Office of Management and Budget (OMB) to comment on these information collection requirements. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

63. *People with Disabilities.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer and Governmental Affairs Bureau at (202) 418-0530.

64. *Additional Information.* For additional information on this proceeding, please Shaun Maher, Video Division, Media Bureau at (202) 418-2324 or [Shaun.Maher@fcc.gov](mailto:Shaun.Maher@fcc.gov).

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<sup>144</sup> *See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy*, Public Notice, 35 FCC Rcd 2788 (2020).

<sup>145</sup> *LPTV DTV Third NPRM*, 29 FCC Rcd at 12565-71, Appendix C.

<sup>146</sup> *Refresh PN*, 34 FCC Rcd at 11166, para. 10.

**V. ORDERING CLAUSES**

65. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained in sections 1, 4(i), 4(j), 303, 307, 316, 336, and 403 of the Communications Act, 47 U.S.C §§ 151, 154(i), 154(j), 303, 307, 316, 336, and 403, this Fifth Notice of Proposed Rulemaking **IS ADOPTED**.

66. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Notice, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary



## APPENDIX A

## LIST OF COMMENTERS

Comments Filed in Response to 2014 NPRM, FCC 14-151

Advanced Television Broadcasting Alliance  
Block Communications, Inc.  
Byron W. St. Clair  
Central Park Church of God, Inc. (Central Park)  
Centro Cristiano de Vida Eterna (Centro Cristiano)  
Channel 5 Public Broadcasting, Inc. (Channel 5)  
Cohen, Dippell and Everist, P.C. (Cohen)  
Consumer Electronics Association (CEA)  
CTV Broadcasting, LLC (CTV)  
Daniel Gomez (Daniel Gomez)  
De Mujer a Mujer International (De Mujer)  
DTV America Corporation (DTV America)  
Educational Media Foundation (EMF)  
George S. Flinn, Jr. (Flinn)  
Hispanic Family Christian Network, Inc. (Hispanic Family)  
Hosanna Apostolic Ministries Broadcasting Corporation (Honsanna)  
Iglesia Jesucristo es mi Refugio, Inc. (Iglesia Jesucristo)  
International Communications Network, Inc. (ICN)  
Island Broadcasting LLC and Richard D. Bogner (Island)  
Jenifer Juarez  
Jose Salas (Salas)  
La Mega Mundial, LLC (La Mega)  
Linley Gumm (Gumm)  
LMO Christian Media, Inc. (LMO)  
Lotus Communications Corp. (Lotus)  
LPTV Spectrum Rights Coalition (LPTV Coalition)  
Mako Communications, LLC (Mako)  
Metro TV, Inc. (Metro TV)  
Murray Hill Broadcasting, LLC and WLFM, LLC (Murray Hill)  
National Association of Broadcasters (NAB)  
National Public Radio, Inc. (NPR)  
National Religious Broadcasters (NRB)  
National Translator Association (NTA)  
Nickolaus E. Leggett (Leggett)  
One Ministries, Inc. (One Ministries)  
Pacific Mountain Network (PMN)  
PBS, CPB, and APTS (APTS/CPB/PBS)  
Roy William Mayhugh (Mayhugh)  
Signal Above, LLC (Signal)  
Sinclair Broadcast Group, Inc. (Sinclair)  
Spectrum Evolution, Inc. (SEI)  
Venture Technologies Group, LLC (Venture)  
WatchTV, Inc. (WatchTV)  
Weigel Broadcasting Co. (Weigel)

**Reply Comments Filed in Response to 2014 NPRM, FCC 14-151**

ABC, Inc. (ABC)  
Adrienne J. Weiss (Adrienne Weiss)  
Advanced Television Broadcasting Alliance  
Capitol Broadcasting Company, Inc. (CBC)  
Central Park  
Centro Cristiano  
Cohen  
DC Broadcasting, Inc. (DC Broadcasting)  
White  
Flinn  
Island  
La Mega  
LPTV Coalition  
Mako  
Media Vista Group, LLC (Media Vista)  
Multicultural Media, Telecom and Internet Council (MMTIC)  
NAB  
National Cable & Telecommunications Association (NCTA)  
NPR  
NTA  
One Ministries  
Prism Broadcasting Network, Inc. (Prism)  
Randall A. Weiss (Randall Weiss)  
REC Networks (REC Networks)  
Roderick A. Payne (Payne)  
Signal  
Syncom Media Group, Inc. (Syncom)  
Venture

**Comments Filed In Response to 2019 Refresh PN, DA 19-1231**

Aaron Read  
AlmaVision Hispanic Network, Inc. (Almavision)  
B Communications Joint Venture (B Communications)  
California State University Long Beach Research Foundation (Cal State)  
Common Frequency (CF)  
David Ponomar (Ponomar)  
Delta Media Corporation  
Educational Media Foundation (EMF)  
Kid's Television, LLC (Kid TV)  
Lovcom, Inc. (Lovcom)  
LPTV Spectrum Rights Coalition (LPTV Coalition)  
Mark Heller (Heller)  
Me-TV Music LLC (Me-TV)  
Michael Reynolds  
Multicultural Radio Broadcasting, Inc. (MRBI)  
National Public Radio, Inc. (NPR)  
NY Metro Radio Korea, Inc. (NY Metro)  
Omega Media Broadcasting (Omega)  
One Ministries, Inc. (OMI)

Preserve Community Programming Coalition (PCPC)  
Prism Broadcasting Network, Inc. (Prism)  
REC Networks (REC Networks)  
Robert Lee, QXZ MediaWorks LLC  
Seattle 6 Broadcasting Company, LLC (Seattle 6)

**Reply Comments Filed In Response to 2019 Refresh PN, DA 19-1231**

Cal State  
EMF  
Hombre Nuevo d/b/a Guadalupe Radio (Hombre Nuevo)  
Listener Letters  
NPR  
PCPC  
REC Networks  
Signal Above, LLC (Signal)

**APPENDIX B****Proposed Rules**

Part 74 of Title 47 of the U.S. Code of Federal Regulations is proposed to be amended to read as follows:

1. The authority citation for part 74 continues to read as follows:

Authority: 47 U.S.C. 154, 302a, 303, 307, 309, 310, 336, and 554.

2. Section 74.790 is revised by adding a new subsection (j) as follows:

**74.790 - Permissible service of digital TV translator and LPTV stations.**

\* \* \*

(j) Provision of analog FM radio operations by digital LPTV channel 6 stations (FM6). LPTV stations operating on television channel 6 may provide analog FM radio operations (FM6 operations) on an ancillary or supplementary basis subject to the following:

(1) The LPTV station must have been providing FM6 operations pursuant to an active engineering special temporary authority on the release date of the Fifth Notice of Proposed Rulemaking in MB Docket No. 03-185;

(2) The LPTV station must be operating in ATSC 3.0 digital format;

(3) FM6 operations may only be conducted on 87.75 MHz;

(4) no interference is permitted to any other licensed user, including but not limited to broadcast television or radio users;

(5) the LPTV station's FM6 coverage area must be contained within and may not exceed the coverage area of the LPTV station's synchronized video/audio programming stream;

(6) the LPTV station must provide at least one stream of synchronized video and audio programming on the ATSC 3.0 portion of the spectrum, at any time the station is operating; and

(7) while FM6 operations are being conducted, the LPTV station's technical facilities may not be modified from those that existed on the release date of the Fifth Notice of Proposed Rulemaking in MB Docket No. 03-185.

\* \* \* \*

## APPENDIX C

## Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> The Third Notice of Proposed Rulemaking in this proceeding included an Initial Regulatory Flexibility Analysis (IRFA) pursuant to 5 U.S.C. § 603, exploring the potential impact on small entities of the Commission's proposals.<sup>2</sup> Because this Fifth Notice of Proposed Rulemaking (NPRM) contains new proposals, the Commission requests written public comments on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments specified in the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>3</sup> In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.<sup>4</sup>

**A. Need for, and Objectives of, the Proposed Rules**

2. The NPRM seeks comment on whether to permit digital low power television (LPTV) stations on channel 6 to continue to operate analog FM radio-type services and, if so, how to authorize these services. Prior to the July 13, 2021 LPTV digital transition deadline, a number of analog LPTV stations licensed on channel 6 operated with very limited visual programming and an audio signal that is programmed like a radio station (FM6). FM radio listeners were able to receive the audio portion of these LPTV stations at 87.75 MHz, which is adjacent to noncommercial educational (NCE) FM channel 201 (88.1 MHz). When these LPTV stations converted to digital, however, they would be unable to continue providing such radio service because the digital audio portion of their signal could no longer be received by standard FM receivers. Currently, some digital channel 6 LPTV stations have converted to ATSC 3.0 digital format and are operating pursuant to engineering special temporary authority (STA) with a separate analog FM radio transmitter.

3. In an effort to bring a final resolution to the FM6 question, the Commission seeks comment on whether FM6 operations serve the public interest and should be authorized to continue in any capacity. The NPRM also seeks comment on whether FM6 should be authorized as "ancillary or supplementary" services as suggested previously in this proceeding. The NPRM seeks comment on whether the Commission can and should limit future FM6 operations to only those LPTV channel 6 stations with active FM6 engineering STAs on the release date of the NPRM.

4. The NPRM alternatively seeks comment on whether to license additional FM radio stations on 82-88 MHz in areas where channel 6 LPTV and full-power stations are currently not operating.

5. Finally, regardless of whether it decides to permit continued FM6 operations or license additional FM radio stations on 82-88 MHz, the NPRM seeks comment on whether to eliminate or revise the TV6 distance separation rules for LPFM, NCE, Class D (10 watt), and FM translator stations operating on reserved band FM Channels 201-220.

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<sup>1</sup> 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

<sup>2</sup> NPRM, 29 FCC Rcd at 12565-71.

<sup>3</sup> 5 U.S.C. § 603(a).

<sup>4</sup> *Id.*

**B. Legal Basis**

6. The proposed action is authorized under Sections §§ 151, 154(i), 154(j), 303, 307, 316, 336, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303, 307, 316, 336, and 403.

**C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply**

7. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rule revisions, if adopted.<sup>5</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>6</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act (SBA).<sup>7</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>8</sup> Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

8. *Television Broadcasting.* This industry is comprised of “establishments primarily engaged in broadcasting images together with sound.”<sup>9</sup> These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.<sup>10</sup> These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA small business size standard for this industry classifies businesses having \$41.5 million or less in annual receipts as small.<sup>11</sup> 2017 U.S. Census Bureau data indicate that 744 firms in this industry operated for the

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<sup>5</sup> 5 U.S.C. § 603(b)(3).

<sup>6</sup> 5 U.S.C. § 601(6); *see infra* note 7 (explaining the definition of “small business” under 5 U.S.C. § 601(3)); *see* 5 U.S.C. § 601(4) (defining “small organization” as “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register”); 5 U.S.C. § 601(5) (defining “small governmental jurisdiction” as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register”).

<sup>7</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632(a)(1)). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” *Id.*

<sup>8</sup> 15 U.S.C. § 632(a)(1)-(2)(A).

<sup>9</sup> *See* U.S. Census Bureau, *2017 NAICS Definition, “515120 Television Broadcasting,”* <https://www.census.gov/naics/?input=515120&year=2017&details=515120>.

<sup>10</sup> *Id.*

<sup>11</sup> *See* 13 CFR § 121.201, NAICS Code 515120.

entire year.<sup>12</sup> Of that number, 657 firms had revenue of less than \$25,000,000.<sup>13</sup> Based on this data we estimate that the majority of television broadcasters are small entities under the SBA small business size standard.

9. The Commission estimates that as of March 2022, there were 1,373 licensed commercial television stations.<sup>14</sup> Of this total, 1,280 stations (or 93.2%) had revenues of \$41.5 million or less in 2021, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on June 1, 2022, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission estimates as of March 2022, there were 384 licensed noncommercial educational (NCE) television stations, 383 Class A TV stations, 1,840 LPTV stations and 3,231 TV translator stations.<sup>15</sup> The Commission however does not compile, and otherwise does not have access to financial information for these television broadcast stations that would permit it to determine how many of these stations qualify as small entities under the SBA small business size standard. Nevertheless, given the SBA's large annual receipts threshold for this industry and the nature of these television station licensees, we presume that all of these entities qualify as small entities under the above SBA small business size standard.

10. *Radio Stations.* This industry is comprised of “establishments primarily engaged in broadcasting aural programs by radio to the public.”<sup>16</sup> Programming may originate in their own studio, from an affiliated network, or from external sources.<sup>17</sup> The SBA small business size standard for this industry classifies firms having \$41.5 million or less in annual receipts as small.<sup>18</sup> U.S. Census Bureau data for 2017 show that 2,963 firms operated in this industry during that year.<sup>19</sup> Of this number, 1,879 firms operated with revenue of less than \$25 million per year.<sup>20</sup> Based on this data and the SBA's small business size standard, we estimate a majority of such entities are small entities.

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<sup>12</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Sales, Value of Shipments, or Revenue Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEREVFIRM, NAICS Code 515120, <https://data.census.gov/cedsci/table?v=2017&n=515120&tid=ECNSIZE2017.EC1700SIZEREVFIRM&hidePreview=false>.

<sup>13</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. We also note that according to the U.S. Census Bureau glossary, the terms receipts and revenues are used interchangeably, see [https://www.census.gov/glossary/#term\\_ReceiptsRevenueServices](https://www.census.gov/glossary/#term_ReceiptsRevenueServices).

<sup>14</sup> Broadcast Station Totals as of March 31, 2022, Public Notice, DA 22-365 (rel. April 5, 2022) (*March 2022 Broadcast Station Totals PN*), <https://www.fcc.gov/document/broadcast-station-totals-march-31-2022>.

<sup>15</sup> *Id.*

<sup>16</sup> See U.S. Census Bureau, *2017 NAICS Definition, “515112 Radio Stations,”* <https://www.census.gov/naics/?input=515112&year=2017&details=515112>.

<sup>17</sup> *Id.*

<sup>18</sup> See 13 CFR § 121.201, NAICS Code 515112.

<sup>19</sup> See U.S. Census Bureau, *2017 Economic Census of the United States, Selected Sectors: Sales, Value of Shipments, or Revenue Size of Firms for the U.S.: 2017*, Table ID: EC1700SIZEREVFIRM, NAICS Code 515112, <https://data.census.gov/cedsci/table?v=2017&n=515112&tid=ECNSIZE2017.EC1700SIZEREVFIRM&hidePreview=false>. We note that the US Census Bureau withheld publication of the number of firms that operated for the entire year.

<sup>20</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. We note that the U.S. Census Bureau withheld publication of the number of firms that operated with sales/value of shipments/revenue in the individual categories for less than \$100,000, and \$100,000 to \$249,999 to avoid disclosing data for individual companies (see Cell Notes for the sales/value of shipments/revenue in these categories). Therefore, the number of firms with revenue that meet the SBA size standard would be higher

(continued...)

11. The Commission estimates that as of September 2021, there were 4,519 licensed commercial AM radio stations, 6,682 licensed commercial FM radio stations and 4,211 licensed noncommercial (NCE) FM radio stations.<sup>21</sup> The Commission however does not compile, and otherwise does not have access to financial information for these radio stations that would permit it to determine how many of these stations qualify as small entities under the SBA small business size standard. Nevertheless, given the SBA's large annual receipts threshold for this industry and the nature of radio station licensees, we presume that all of these entities qualify as small entities under the above SBA small business size standard.

12. We note, however, that in assessing whether a business concern qualifies as "small" under the above definition, business (control) affiliations<sup>22</sup> must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, another element of the definition of "small business" requires that an entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific radio or television broadcast station is dominant in its field of operation. Accordingly, the estimate of small businesses to which the rules may apply does not exclude any radio or television station from the definition of a small business on this basis and is therefore possibly over-inclusive. An additional element of the definition of "small business" is that the entity must be independently owned and operated. Because it is difficult to assess these criteria in the context of media entities, the estimate of small businesses to which the rules may apply does not exclude any radio or television station from the definition of a small business on this basis and similarly may be over-inclusive.

#### **D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

13. As a condition to be allowed to continue their FM6 operations on an ancillary or supplementary basis, the Commission seeks comment on whether FM6 stations should be required to submit written reports, every 90 days, detailing any reports of interference and a demonstration that the station's FM6 and video coverage reach similar populations. The NPRM tentatively concludes that such a reporting requirement is not necessary. Should the Commission ultimately decide to adopt this requirement, this proposed reporting requirement would result in a new paperwork obligation. If adopted, the Commission will seek approval and the corresponding burdens to account for this reporting requirement.

#### **E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

14. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather

(Continued from previous page) \_\_\_\_\_  
that noted herein. We also note that according to the U.S. Census Bureau glossary, the terms receipts and revenues are used interchangeably, see [https://www.census.gov/glossary/#term\\_ReceiptsRevenueServices](https://www.census.gov/glossary/#term_ReceiptsRevenueServices).

<sup>21</sup> Broadcast Station Totals as of September 30, 2021 Press Release (MB Oct. 4, 2021) (September 30, 2021 Broadcast Station Totals), <https://docs.fcc.gov/public/attachments/DOC-376230A1.pdf>.

<sup>22</sup> "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has the power to control both." 13 CFR § 21.103(a)(1).



than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>23</sup>

15. The NPRM seeks to determine if continued provision of FM6 services by digital LPTV channel 6 stations serve the public interest and should FM6 be authorized to continue in any capacity. All of the licensees of FM6 stations are licensees of LPTV stations and most if not all are considered small entities by SBA definitions. Therefore, by allowing FM6 operations to continue, the Commission is seeking to help small entities and to preserve their current programming offerings. The alternative would be to force these entities to discontinue FM6 operations that have proved to be a source of additional income for these small entities that have struggled to operate LPTV stations and that have operated with a disadvantage to their full power television brethren. Unlike full power television stations, LPTV stations operate without mandatory cable carriage rights and with secondary interference rights that can result in their operating channel being displaced and their having to find a new frequency.

16. The NPRM seeks comment on whether to permit FM6 operations as “ancillary or supplementary” services. This approach is an attempt to authorize existing FM6 operations in the easiest and least costly manner to reduce the administrative and financial burden on FM6 stations, all of which are LPTV and most if not all are small entities. Using existing rules and procedures will enable FM6 stations to easily become authorized through familiar and low cost measures.

17. The Commission must balance the positive financial benefits for small entities of allowing all channel 6 LPTV stations to provide FM6 operations against the possible negative effects of impermissible interference that could result between FM6 operations and other FM radio operators. Although it recognizes the positive benefits for small entities that may accrue from FM6 operations, the Commission proposes that it must limit FM6 operations to only those stations providing such services on the release date of the NPRM in order to limit the universe of FM6 stations that could potentially interfere with other users. The Commission notes that all channel 6 LPTV stations had the opportunity to provide an FM analog service and their failure to do so by now demonstrates that it was not in their interest to do so.

18. Similarly, the Commission must balance whether to allow channel 6 LPTV stations to continue providing FM6 operations versus entities interested in providing new FM radio service to operate on TV channel 6 in areas where television service is currently not being offered. There are small entities in both the LPTV and FM radio services especially NCE FM stations whose operation is limited to only noncommercial educational entities most if not all of which are small entities. The Commission will have to consider the benefits and costs of allowing additional FM radio operations and whether it will negatively affect future TV operations on low VHF channels such as channel 6 that have technical limitations and that are not favored by television operators.

19. The Commission also proposes to eliminate or modify a current protection for television stations operating on Channel 6 which are also small entities, a proposal which seeks to assist low power FM (LPFM), noncommercial educational (NCE), and FM translator stations. The Commission believes that any potential negative impact on such television stations is minimal because full power TV6 stations transitioned to digital operations in 2009; LPTV stations in 2021; and there has been a lack of interference complaints from these stations since their transitions. Further, digital television receivers are more selective than the analog the equipment that existed when the Commission adopted the TV6 protection requirement. The Commission is open to consideration of alternatives to the proposals under consideration including but not limited to alternatives that will minimize the burden on FM broadcasters, many of whom are small businesses, as well as TV6 broadcasters that are small entities. There may be unique circumstances these entities may face, and the Commission will consider appropriate action for small broadcasters when preparing a *Report and Order* in this matter.

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<sup>23</sup> See 5 U.S.C. § 603(c).

**F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule**

20. None.