

AM-FM Duplication
AM-FM Relationship

Action eliminates limits on duplication of programming on AM and FM stations that are co-owned in the same local area. (Section 73.242 of the Commission's rules eliminated.) In view of changes in the radio industry and market in recent years, the program duplication rule is no longer necessary.
—*Amendment of Sec. 73.242*
MM Docket No. 85-357

FCC 86-132

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

Amendment of Section 73.242 of the
Commission's Rules and Regulations in
Regard to AM-FM Program Duplication

MM Docket
No. 85-357
RM-5076

REPORT AND ORDER

(Proceeding Terminated)

Adopted: March 26, 1986; Released: April 4, 1986

BY THE COMMISSION:

Introduction

1. By this action, the Commission is eliminating Section 73.242 of its rules which limits duplication of programming on AM and FM stations that are co-owned in the same local area. On the basis of the record in this proceeding and its own experience in this area, the Commission has determined that the program duplication rule is no longer necessary. This action is expected to foster expanded radio hours of operation and, thereby, to promote improved radio service to the public. This action also provides licensees of AM-FM combinations with full discretion to make decisions concerning program duplication in accordance with market forces.

Background

2. Section 73.242 of the Commission's rules currently specifies that if either station of an AM-FM combination is licensed to a community of more than 25,000 population, the FM station may not devote more than 25 percent of the average program week to duplicated programming.¹ Stations in communities with less than 25,000 population are not subject to program duplication limits.

3. The Commission first adopted program duplication limits in 1964, in the *Report and Order* in Docket No. 15084.² Section 73.242, as originally promulgated, prohibited FM stations from duplicating more than 50 percent of their programming from a co-owned AM station in the same local area. In adopting this rule, the Commission sought to further two objectives. The first was to foster development of the FM service. To achieve this goal, the Commission believed it was necessary for FM stations to offer programming that was separate from that of co-owned, co-located AM stations. The Commission also believed that increased separate programming of FM stations would encourage consumers to buy and use FM receivers. The second objective was to reduce the inefficiency with respect to spectrum usage that results from duplication of the same programming on two co-located radio stations.³

4. In 1974, the Commission observed that there had been increases in the number of independent FM stations, the revenues of FM stations, and the number of FM receivers. In view of these developments, the Commission initiated a new proceeding, Docket No. 20016, to consider updating Section 73.242. In the 1976 *Report and Order* in that proceeding, the Commission strengthened the rule and widened its application.⁴ The new rule limited the FM station of an AM-FM combination to not more than 25 percent duplication if either station served a community of more than 25,000 population. No substantive change has been made to the rule since the 1976 *Report and Order*.

5. On June 13, 1985, AGK Communications, Inc. (AGK) filed a Petition for Rule Making requesting that the Commission exempt the late night period, midnight to 6 a.m., from the calculation of

¹ Section 73.242 defines duplicated programming as "the simultaneous broadcasting of a particular program over both the AM and FM stations or the broadcasting of a particular program by one station within 24 hours before or after the identical program is broadcast over the other station." See, 47 CFR 73.242.

² See, *Report and Order* in Docket No. 15084, 45 FCC 1515 (1964).

³ *Id.*, at 1531.

⁴ See, *Report and Order* in Docket No. 20016, 59 FCC 2d 147 (1976).

time under the program duplication rule. In response to the AGK petition, the Commission adopted a *Notice of Proposed Rule Making (Notice)* on November 20, 1985, to consider the AM-FM program duplication matter.⁵ In the *Notice*, the Commission proposed to eliminate Section 73.242 in its entirety.

6. Ten parties filed comments and two parties filed reply comments in response to the *Notice*. In addition, a number of parties filed informal comments by letter. A list of the parties filing comments and replies is provided in Appendix A.

Discussion

7. In the *Notice*, the Commission indicated that in view of the significant changes in structure and market conditions that have occurred in the radio industry in recent years, the program duplication rule no longer appears necessary or desirable. The commission observed that there is abundant evidence that FM stations are now fully competitive in the radio industry and that, on this basis, it no longer appears necessary to foster FM development through a requirement for separate programming. The Commission also indicated that the radio industry structure and market conditions are now such that to permit increased program duplication likely would have only minimal effects in terms of spectrum efficiency. It further indicated that to permit licensees to exercise full discretion with respect to program duplication now offers public interest benefits. In particular, the Commission indicated that elimination of the program duplication rule would be expected to result in expanded service from AM-FM combinations. It also observed that elimination of this rule would provide licensees of AM-FM combinations increased flexibility to respond to the current economic conditions faced by the AM service.

8. The majority of the commenting parties support the Commission's proposal to eliminate the program duplication rule. However, two parties, Osborn Communications Corporation (Osborn) and Press Broadcasting Company (Press) oppose any change in the current rule.

9. *FM Development.* The commenting parties addressing the issue of FM development agree that the FM service is now a fully competitive and viable component of the radio industry and that the program duplication rule is no longer necessary for the purpose of promoting an independent FM service. In this regard,

⁵ See, *Notice of Proposed Rule Making* in MM Docket No. 85-357, 50 FR 49863.

commenters point to FM's 70+ percent share of the total listening audience as evidence that FM is now the dominant radio service.⁶ Great Trails Broadcasting Corporation (Great Trails) submits that FM's lead in audience share is even more significant because AM stations still outnumber FM stations by 4963 to 4236. Great Trails also notes that the number of FM stations has increased significantly over the years and, in fact, has more than tripled from the approximately 1300 stations that were on the air in 1964, when the program duplication rule was originally adopted.

10. We conclude that the record supports our initial assessment of the development of the FM service as it pertains to the program duplication rule. Accordingly, we find that it is no longer necessary to retain this rule for the purpose of promoting FM development.

11. *Spectrum Efficiency.* In the *Notice*, the Commission indicated that it believed that to permit increased program duplication now would not result in inefficient use of the spectrum. The Commission observed that economic changes in the radio industry have made it less attractive for AM-FM combinations to engage in full-time program duplication. It stated that in cases where the potential audience is of sufficient size and diversity to support separate programming of two stations, market forces can be expected to lead licensees to provide that programming to reach the maximum number of listeners. By doing so, stations would tend to increase both their revenues and profits. On the other hand, where it is not economically desirable to program combined stations separately, it seems preferable to allow stations to duplicate programming rather than have one of the stations go off the air to comply with the non-duplication requirement and deny service to a portion of the potential audience. The Commission also recognized that the service areas of combined stations often do not fully coincide. If one of the stations in such a combination went off the air as a result of the program duplication limit, some additional listeners would be denied service they might otherwise receive. In view of these considerations the Commission tentatively concluded that elimination of Section 73.242 could be expected to result in increased hours of operation by stations in AM-FM combinations and, thereby, in expanded service from the radio industry.

⁶ In the *Notice*, the Commission indicated that the Spring 1985 RADAR Survey by Statistical Research, Inc. estimates that FM's share of all radio listening (7 days, 24 hours, all persons 12+) is 70.6 percent.

12. Parties supporting elimination of the rule also agree with the Commission's initial assessment that in most instances program duplication is not economically beneficial to AM-FM combinations. In this respect, Great Trails states that the potential audience for a given program format is finite. It explains that a licensee who transmits the same programming on two stations in the same community is merely fragmenting its own audience — with the result that neither of the two stations can achieve the audience levels of which each would be capable if programmed separately. In statements similar to those of AGK in its Petition for Rule Making, KLOK Radio Ltd. (KLOK) comments that market and service considerations will lead AM-FM combinations to offer separate programming where there is sufficient audience to sustain that programming. As an example, KLOK states that in some of the markets in which it operates combined stations there is sufficient audience in the 6 a.m. - 7 p.m. time period to justify separate programming. However, it relates that after 7 p.m. the potential audience in these markets drops to one-third of the daytime level and that it then is not profitable to operate the stations separately.

13. Most of the commenting parties believe that elimination of the program duplication rule would actually improve spectrum efficiency. The consensus of their statements is that the rule inhibits, rather than promotes efficient use of the spectrum. They submit that the rule encourages stations to shut down operation during certain parts of the day in order not to exceed the duplication limit. These parties also agree that elimination of the program duplication limit would lead to expanded operation by those stations that now leave the air to comply with the rule. In this respect, Cox Communications, Inc., *et al.* (Joint Commenters) states that it believes the Commission's interest in promoting separate programming is better served by the marketplace than an inflexible rule. The National Association of Broadcasters (NAB) comments that where the financial capacity of an AM-FM combination cannot support independent programming during the entire period of operation authorized by the FCC, one of the stations, usually the AM, may be forced to operate under a curtailed schedule. The American Legal Foundation (ALF) submits that the restriction on program duplication also is unjustified in view of the increased number of radio stations now available to the public.

14. Commenting parties supporting elimination of the rule also state that there are situations in which it is desirable, from a public interest viewpoint, to engage in program duplication and that such situations highlight the problems with using regulations to supplant the operation of market forces. For example, Great Trails submits that some AM-FM combinations may duplicate in order to be able to provide unique programming.

15. We continue to believe that program duplication limits are no longer necessary to promote the goal of spectrum efficiency. We believe the record on this issue demonstrates that the economic relationships and conditions within the radio industry are now such that market forces tend to direct licensees of AM-FM combinations to program their stations in a manner that is consistent with spectrum efficiency and the interests of radio listeners.⁷

16. *Other Considerations.* In the *Notice*, the Commission noted that many heretofore profitable AM stations are now experiencing economic difficulties as a result of the shift of listeners to FM stations. The Commission stated that in many AM-FM combinations, it now appears that the viability of the AM station may depend on its association with a stronger FM facility. The Commission suggested that elimination of Section 73.242 could facilitate a significant reduction in costs for such marginal AM stations.

⁷ In this context, we note that pursuant to existing policy, a comparative demerit may be assessed against an applicant who engages or intends to engage in, program duplication unless the applicant demonstrates substantial countervailing benefits. See e.g., *Victor Broadcasting v. FCC Jones T. Sudbury*, 8 FCC 2d 360 (1967). The assessment of a demerit was based on the Commission's assumption that program duplication was "inherently wasteful and inefficient." See *Memorandum Opinion and Order* in Docket No. 15084, 45 FCC 2092, 2094 (1965). The record in this proceeding demonstrates that such a presumption is no longer appropriate. As observed previously, the development and growth of the information marketplace in general, and the radio marketplace in particular, has attenuated our concerns with program duplication as it may relate to "wasting" spectrum. We also note that program duplication may have positive economic benefits for certain combined AM stations. Most important, however, is our finding that marketplace forces, and an applicant's decision in response to such incentives, are in this context, a superior mechanism for determining spectrum efficiencies. We also note that the First Amendment concerns expressed *infra* also arise when program duplication issues are raised in the comparative context. In light of these conclusion, we believe it is inconsistent to assume that program duplication is presumptively inefficient and will not do so in the future. See e.g., *CJL Broadcasting Inc.*, 88 FCC 2d 750, 761-762 (1981) (Blumenthal & Marino, concurring).

17. Most of the commenting parties believe that to permit increased program duplication would serve to improve the economic outlook for many AM stations that are part of AM-FM combinations. In statements representative of those supporting elimination of the rule, ALF submits that reducing AM expenses through program duplication may permit marginal AM stations to survive and to continue serving their communities. However, the two parties opposed to elimination of the program duplication rule base their positions on concerns relating to the AM service. Osborn believes the rule should be retained in order to encourage a revitalization of the AM service through the same policy that was applied to the FM service. It argues that if FM programming is simulcast on AM, there will be no need for listeners to tune to AM. Osborn contends that a rule change to permit increased program duplication would cause the collapse of the AM service. Press expresses a different viewpoint in its opposition. It is concerned that increased program duplication will permit marginal AM stations to remain on the air at the expense of independently programmed AM stations that can offer a unique service.

18. While we do not consider program duplication to be desirable as a long term solution to the difficulties confronting the AM service, we recognize that such operation may be appropriate for some AM-FM combinations under the current economic conditions in the radio market. While we do not wish to interfere with normal market forces by adopting regulatory policies specifically to support or maintain the viability of AM stations, we do believe it is incumbent upon us to remove regulations that may unnecessarily impede the ability of AM stations to compete in the radio market. In this respect, we believe the program duplication rule, by constraining possible efficiencies and desirable economic options in particular contexts, imposes an unnecessary artificial restriction on the abilities of licensees of AM-FM combinations to operate their stations in manners that are responsive to market forces. Thus, elimination of Section 73.242 will provide increased flexibility for licensees of AM stations that are part of AM-FM combinations to respond more effectively to economic forces and conditions within the radio industry.

19. A number of the parties supporting elimination of the program duplication rule raise the issue that the current limit on program duplication infringes on their First Amendment rights to free speech and expression. Their general view on this issue is that programming decisions should be left to broadcasters and should not be determined by the government. In view of the other

considerations discussed above that indicate that the rule need not be retained, we do not believe that it is necessary to determine whether the program duplication rule is an unjustified intrusion on the First Amendment rights of broadcasters. Nonetheless, we are sensitive to such concerns and believe it is appropriate to minimize the impact of our rules on licensee discretion, especially in the area of programming, whenever possible.

Procedural Matters

20. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final regulatory flexibility analysis is:

I. *Need for and purpose of the rule:* The Commission has determined that the AM-FM program duplication rule is no longer necessary to serve its original purposes of promoting FM development and spectrum efficiency. The Commission, therefore, has eliminated this rule. Elimination of the program duplication rule is expected to provide public interest benefits by contributing to expanded radio service and by providing licensees of AM-FM combinations with increased flexibility to respond to market conditions.

II. *Summary of issues raised by public comments in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result:*

A. *Issues raised:* No issues or concerns were raised in response to the initial regulatory flexibility analysis.

B. *Assessment:* The Commission considers the absence of comments discussing adverse impact of its proposal to eliminate the AM-FM program duplication rule to be indicative of this proposal's lack of potential for negative or harmful effects on small business entities. We believe that elimination of this rule will have a positive effect on licensees of AM-FM combinations by permitting them to expand their service and to reduce, where necessary, the cost of their operations.

C. *Changes made as a result of such comments:* None.

III. *Significant alternatives considered and rejected:* The principal alternatives to the proposal to eliminate the AM-FM program duplication rule were: 1) to retain the rule in its current form, or 2) to modify the rule to eliminate the midnight to 6 a.m. time period from the calculation of time under the duplication limit. The Commission determined that the rule no longer serves any regulatory purpose and, therefore, decided to eliminate it in its entirety.

21. Accordingly, IT IS ORDERED, that Part 73 of the Commission's rules IS AMENDED as set forth in Appendix B effective May 12, 1986. In addition, IT IS ORDERED, that this proceeding IS TERMINATED.

22. Authority for this action is provided in Sections 2, 4(i), and 303 of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

Parties Filing Comments

1. American Legal Foundation
2. Century Broadcasting Corporation
3. Joint Comments of Cox Communications, Inc., Manning Broadcasting, Inc., Multimedia, Inc., and TETCO, Inc.
4. Great Trails Broadcasting Corporation
5. Joint Comments of KLOK Radio and Voice of the Orange Empire, Inc., Ltd.
6. M-3-X, Inc.
7. National Association of Broadcasters
8. Osborn Communications Corporation
9. Press Broadcasting Company
10. Summit Communications, Inc.

Parties Filing Replies

1. Greater Mansfield Broadcasting Company
2. National Association of Broadcasters

APPENDIX B

Part 73 of Title 47 of the Code of Federal Register is amended as follows:

A. Part 73 - Radio Broadcast Services

1. The authority citation for Part 73 continues to read as follows:
Authority: 47 U.S.C. 154 and 303.
2. 47 CFR 73.242 is eliminated in its entirety.