

November 28, 2006

Marlene Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554



Re: *Ex Parte* Notice  
MM Docket No. 99-25 (LPFM Proceeding)

Dear Ms. Dortch:

On November 27, 2006, Harold Feld, Senior Vice President, Media Access Project, spoke by telephone with Krista Witanowski of the Office of Strategic Planning and Policy Analysis. Ms. Witanowski asked for additional details with regard to the separate rulemaking to resolve FM translator issues proposed at the meeting on November 1, 2006 (*see* Letter of Parul Desai, filed November 2, 2006).

Ms. Witanowski's questions, and Mr. Feld's responses, are given below. It is useful, however, to review the chronology and how these issues have become enmeshed in the pending LPFM rulemaking.

On March 10, 2003, the Commission opened a filing window for FM translators. Applicants filed more than 13,000 applications for translators. This raised considerable concern in the LPFM community. Because LPFM licensees and FM translator licensees are both secondary licensees in the band and operate on a "first in time, first in right" priority against each other, the LPFM community feared that grant of the 13,000 applications would foreclose significant numbers of possible LPFM licenses when the Commission next opened an LPFM window. The LPFM community therefore repeatedly urged the Commission to impose a freeze on grant of the applications and to reevaluate the relative priority given to LPFM and FM translator licensees.

Specifically, Prometheus and other parties represented by MAP did not object to the grant of the applications for FM translators *per se*. Rather, MAP and its clients proposed that the Commission should make new LPFM licensees primary to existing FM translators in the same manner that full power stations are primary to LPFM licensees. Prometheus, *et al.*, argued that because LPFM licensees originate local programming, the Commission should give primacy to LPFM licensees over FM Translators to further the interests of localism and enhance diversity of voices on the FM dial. Unsurprisingly, FM Translator licensees vigorously protested this proposed change.

Throughout 2004, REC Networks tracked the 13,000 applicants from the 2003

“Translator Invasion” and noted a disturbing pattern. Radio Air Ministries (RAM) and Edgewater Broadcasting (Edgewater), two companies with common ownership, accounted for more than 4,000 applications. A handful of other entities had also each applied for dozens or hundreds of applications. Indeed, fewer than ten entities accounted for half the total number of applications.

Further investigation by REC Networks and others revealed that RAM and Edgewater had aggressively marketed and sold naked construction permits, making no effort to engage in construction of the translators themselves. By March 2005, RAM and Edgewater had received more than \$800,000 in exchange for naked construction permits.

These new facts raised grave concerns for Prometheus, REC Networks, and others in the LPFM community with regard to the 2003 Translator Window and the adequacy of the Commission’s rules for preventing trafficking by FM translator applicants. Further, the lack of ownership limits for FM translators was apparently encouraging some applicants to construct virtual low-power FM networks by linking numerous translators – a result never intended by the Commission and contrary to promoting the interests of localism and diversity of voices.

On March 9, 2005, on behalf of Prometheus, REC, and others, MAP filed an *Emergency Petition* asking the Commission to freeze processing any further applications for FM translators pending an investigation into the March 2003 window. Specifically, the *Emergency Petition* asked the Commission to initiate an investigation into whether RAM and Edgewater’s conduct violated the prohibition in Section 309(j) of the Act against trafficking in licenses and unjust enrichments, and to take whatever further action might be necessary to prevent future trafficking in translator licenses or abuse of the FM translator service. *See Emergency Petition of Prometheus Radio Project, et al.*, filed March 9, 2005 at 10 (calling on the Commission to conduct “a comprehensive review of both the pending applications and the general protections employed by the Commission against trafficking”).

Shortly after MAP filed the *Emergency Petition*, the Commission released the pending *Low Power FM FNPRM*. The *FNPRM* did not reference any of the issues raised by MAP in the *Emergency Petition* or purport to address them in any way. Instead, the *FNPRM* discussed the general question of primacy between LPFM licensees and FM translator licensees. The *FNPRM* solicited comment on whether to make LPFM licensees primary to FM translators. The Commission also announced a 6 month freeze on the processing of pending FM translator applications (although not on applications for transfers). The Commission explained that the freeze would allow it to consider the question of primacy while maintaining the status quo.

The language of the *FNPRM* made it clear that the Commission did not purport to address the issues raised by MAP in the *Emergency Petition*, and that the freeze imposed by the Commission was designed to maintain the status quo while the Commission sought to resolve the issue of primacy. Indeed, as best MAP can

determine, the Commission has never acted on this *Emergency Petition* and the Media Bureau continues to process transfer applications filed by RAM, Edgewater, and others. As far as MAP can tell, the Commission has neither commenced an investigation into conduct of specific applicants nor into the rules governing the 2003 window. These issues therefore remain unaddressed.

On September 15, 2005, MAP filed a motion with the Commission to extend the Commission's 6 month freeze, which was due to expire. The *Motion* also urged the Commission to adopt a freeze on transfer applications as well as for initial applications and to address the concerns raised in the *Emergency Petition*.

The *Motion* recognized that entities that filed relatively few applications were unlikely to be speculators and that they had complied in good faith with the rules as they existed at the time. Prometheus, *et al.*, therefore proposed that the Commission should process the applications for entities that had filed 10 or fewer applications. *See Motion To Extend Freeze On Pending FM Translator Applications*, filed September 15, 2005.

The Commission has not formally acted on the *Motion to Extend Freeze*. Nor has the Commission acted on the *FNPRM* or on the *Emergency Complaint*. In an effort to resolve the matter by providing the Commission with a consensus approach, MAP, on behalf of Prometheus Radio Project and REC Networks, met with representatives of private translator applicants to determine if a compromise could be achieved. After considerable discussion, the parties proposed that the Commission should process 20 applications per applicant, but otherwise extend the freeze on applications. *See Letter of Howard Weiss, Counsel for Galaxy Communications*, May 16, 2006.

With this background in mind, Mr. Feld answered the following questions from Ms. Witanowski:

1. *Please provide greater detail for the proposed "FM Translator NPRM" and how that would facilitate resolution of the pending LPFM Further Notice?*

The pending LPFM *FNPRM* addresses a large number of non-controversial issues whose resolution would provide much needed relief to LPFM licensees and those who wish to apply for LPFM licenses in future windows. These issues have become prisoner to the complicated issues surrounding the 2003 FM translator window.

It should be recalled that the LPFM community initially sought a freeze on processing only until the Commission resolved the issue of primacy, which the LPFM community believes the Commission should resolve in favor of LPFM licensees.

Furthermore, it is unclear that this proceeding is the appropriate proceeding for

resolving the issues raised in the 2005 *Emergency Petition*. MAP is aware that Commission may wish to receive broader comment from the public on whether the Commission can, consistent with the limits of due process, dismiss pending applications and require applicants to file again under new rules designed to prevent trafficking and abuse of the FM translator service. The Commission would also need to determine what new rules would be necessary. These matters are best resolved in a separate rulemaking rather than in a rulemaking designed to resolve issues relevant to the LPFM service. Finally, as recorded in the November 2 *ex parte*, there are several other pending requests for rulemaking in the FM translator service.

Accordingly, MAP suggests, as a way of moving forward, that the Commission resolve the matters raised in the *LPFM FNPRM*. Issues pertaining to FM translators, including issues raised by the 2003 FM Translator Window, would be deferred to a new NPRM focusing exclusively on FM translators. MAP hopes that the Commission would have sufficient evidence to resolve the issue of FM translator primacy as part of the resolution of the *LPFM NPRM*. However, if the Commission feels that the issue of FM primacy remains unresolvable until the Commission resolves the other issues raised by the 2003 FM Translator Window, MAP proposes that the Commission sever the issue of primacy from the other issues in the pending *FNPRM* and consider the issue of primacy in the context the broader FM translator NPRM.

In this way, the Commission can resolve the non-controversial issues in the *LPFM FNPRM* expeditiously, while receiving further public comment on the FM translator issues that have arisen in the LPFM context as a result of the 2003 FM Translator Window, or are otherwise pending.

2. *Why did MAP propose an NPRM on whether to process any of the FM Translator applications above 20 that a party had filed? Why didn't MAP propose that the FCC process 20 applications from each party and dismiss the remaining applications?*

MAP believes that the Commission has adequate authority to dismiss the pending applications and require applicants to refile their applications under rules designed to minimize the likelihood of trafficking or other abuses of the FM translator service. It is well established that an applicant has no expectation that the application will be granted, and that a decision by the Commission to dismiss all pending FM translator applications does not violate either due process or the Communications Act. MAP believes this result would best serve the public interest.

Nevertheless, MAP recognizes that the Commission may prefer to seek broader public comment before dismissing these applications. Accordingly, this question would be included in the FM Translator NPRM MAP has proposed the Commission issue.

If the Commission does not dismiss the pending applications, the Commission

should reinstate the freeze on the pending applications until such time as it determines what course of action it will take that properly protects the public interest. Certainly it would be appropriate for the Commission to freeze all applications.

At the same time, however, Prometheus, *et al.*, have sought to balance the concerns of the LPFM community with the needs of FM translator applicants that applied in the window in good faith. The LPFM community wishes to prevent speculators and others trying to game the system from unjustly enriching themselves and from establishing *de facto* low-power networks with hundreds of translators. The LPFM community also wishes to prevent those who have exploited loopholes in the FM translator rules from preempting future LPFM applicants by hogging the spectrum.

Prometheus and REC Networks have therefore suggested that if the Commission is reluctant to dismiss the pending applications or extend an indefinite freeze, that it can provide relief to those applicants that applied in good faith and who, from the number of applications filed, do not appear to have filed for purposes of speculation. Prometheus and REC Networks initially estimated this at 10 applications, on the grounds that an entity that filed ten or fewer applications was almost certainly not a speculator and that grant of these outstanding applications would not have a significant preclusive effect on future LPFM windows. After discussions with representatives from the FM translator applicants, Prometheus and REC Networks agreed that the Commission could up this limit to entities that filed 20 applications while still protecting future LPFM windows.

In conclusion, Prometheus, *et al.*, continue to believe that the Commission has sufficient evidence to decide the primacy question in favor of future LPFM applicants. In that case, Prometheus does not require a freeze to protect the LPFM community – although a freeze would still be desirable until the Commission has addressed the issues of speculation and abuse of the FM translator service. If the Commission chooses to defer the primacy question, or determines to maintain the existing rules, then the Commission should certainly maintain a freeze on applications until it determines how to weed out those seeking to unjustly enrich themselves at the expense of the public in violation of Section 309(j).

Pursuant to Section 1.1206(b), 47 C.F.R. §1.1206(b) of the Commission's rules, this letter is being filed electronically with your office today.

Respectfully submitted,

/s/

Harold Feld  
Senior Vice President

cc: Krista Witanowski