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

In the Matter of:	)	
	)	
Proposed Application Limit for NCE	)	MM Docket No. 95-31
FM New Station Applications in October,	)	
12-19, 2007 Window	)	
	)	

To: The Commission, Office of the Secretary

COMMENTS
OF EDUCATIONAL MEDIA FOUNDATION

Educational Media Foundation ("EMF"), by its attorneys, hereby files its comments in response to the FCC Public Notice in the above-referenced proceeding, which proposes to limit applicants in the upcoming noncommercial window to filing a maximum of 10 applications for new stations.[1] As set forth in more detail below, EMF, as a licensee anxious for the opportunity to receive FCC authority to construct new stations to expand its service to the public, sympathizes with the objectives of the FCC in proposing this limit – the speeding of service to the public. However, the FCC must recognize that this same objective also demands that parties have the opportunity to file for new stations throughout the country, without having to delay some applications until a later window which, despite the best intentions of all concerned, may well be some time in the future. EMF submits that the 10-station limit may be too restrictive and may result in areas of the country that might otherwise receive noncommercial services not getting new stations, as applicants may choose to file their limited applications in larger, more attractive markets. Moreover, the nature of the filing window and the selection process itself

[1] Public Notice, FCC 07-145, MM Docket No. 95-31, released Aug. 9, 2007.

may restrict the number of applications a single party can file without the need for the FCC to impose an artificial cap. Thus, EMF believes that the 10-station limit is inadequate, and it also proposes an exception to any limit that may be adopted, which will allow an applicant to file additional applications in areas where the applicant can demonstrate an existing commitment to provide service through its current operation of an FM translator there – thus eliminating any possibility of the speculative applications that the Commission seems to fear.

Background

In its August 9 Public Notice, the FCC suggests that a 10 station limit is "an appropriate procedural safeguard to deter speculation and permit the expeditious processing of the window-filed applications with limited Bureau resources."[2] In reaching that conclusion, the Commission noted that it feared the potential for speculative applicants based on several reasons including the fact that there is no filing fee, and no ownership limit on noncommercial stations, that there has been a freeze on filings for new noncommercial stations for over seven years, and that full power stations are more valuable than translators (for which numerous applications were filed in the last translator filing window).

However, the Commission overlooks several important differences between those services where a large number of speculative filings were made, and the nature of the service at issue here. First, when filing for FM translators (and for LPTV stations and TV translators, services on which the FCC previously imposed an application limit during a window filing), applicants need only submit a "short-form" application, in essence identifying the owners of the applicant and setting out a minimal technical proposal. Not only is the application to be filed in this window more complicated – the necessary preconditions to filing are even more substantial. Here, unlike any other commercial or noncommercial window that has occurred since the

[2] Public Notice at 2.

Commission has gone to a filing window system, applicants must complete the entire FCC Form 340, including the determination of their entire technical proposal and obtaining reasonable assurance of transmitter site availability, before submitting their application. An applicant must also complete its comparative points showing, including the full 307(b) review of all noncommercial services available in the area for which it is applying. The need for complete long-form applications, exhaustive technical showings, and reasonable assurance of site availability, will combine to limit speculative applications.

Moreover, unlike the previous windows, the authorizations being awarded are not subject to auction. An auction gives any applicant, even a speculator, the opportunity to obtain a license simply by deciding to pay enough for it. Here, the existing point system that will decide between mutually exclusive applicants will itself deter speculative applications. That point system favors local applicants with no other media interests – with a tie breaker favoring the applicant who has the fewest pending *applications*. Thus, the point system itself will deter speculative applicants, and will favor the local applicant if there are mutually exclusive applications.[3]

Finally, the Commission does not address the *Ashbacker* concerns implicit in any cap on the filing of applications.[4] *Ashbacker* does not allow the Commission to award licenses without giving all potential applicants the opportunity to submit applications for the channel on which that license will operate. The window system is assumed to provide that opportunity to file a competitive application, as all potential applicants theoretically have the opportunity to file for

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[3] Thousands of form-letter emails and virtually identical short pleadings have been submitted to the FCC in the last month supporting the 10 application limit, each arguing that the limit is necessary for the preservation of localism in the noncommercial media. None address the point system which was designed to promote that very goal by favoring the local applicant. The point system has the added advantage over a strict application limit of still allowing applicants to file for and provide service to areas where no service is proposed by local applicants – and thereby serving the public who would otherwise receive no service at all, which cannot be in the public interest.

[4] *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) ("*Ashbacker*").

any channel for which they are eligible. However, by capping the applications that can be submitted in a window to an artificially low number, especially if there are just a limited number of reserved noncommercial channels for which noncommercial stations can apply, applicants are denied their *Ashbacker* rights to file for channels in which they might be interested. It is important to note that here the Commission is not proposing to limit the number of stations that a noncommercial operator can own (nor could the Commission do so without a rulemaking proceeding), it is only proposing to limit the number of applications that an applicant can submit. By doing so, it precludes applicants from filing for stations that they would have the legal right to operate. An arbitrarily low limit on applications thus has the effect of denying some applicants the right to submit applications for channels that they are legally qualified to own and operate.

Thus, for the reasons set forth above, EMF believes that the fear of an avalanche of applications in response to this window may well be overstated. Moreover, the process itself promotes local ownership and further reduces speculation. Finally, an arbitrarily low limit on applications may deny applicants their *Ashbacker* rights. Thus, given the legal concerns with limiting applications for scarce frequencies, EMF questions whether any application cap is justified.

Proposal

EMF understands and supports the Commission's desire to speed the processing of applications, and does not support speculators filing for stations that they do not intend to construct. However, as set forth above, EMF does not believe that a cap on the number of applications that one party can file is necessarily needed or appropriate in this situation. Thus, EMF finds it difficult to propose one arbitrary number for another as a limit on applications. If

the Commission nevertheless decides to adopt a limit, however, it should be one that imposes as minimal a burden as possible on the abilities of applicants to exercise their *Ashbacker* rights. An application limit of 20 or 25 may be more appropriate to meet this goal. Moreover, there is another suggestion that EMF here offers that could allow certain filings in excess of any numerical limit, where applicants can demonstrate conclusively that they are interested in providing and enhancing service to the public and prove that they are not speculators.

EMF suggests that, in addition to the exclusion of major change and already pending applications from any numerical limit that may be imposed by the FCC, the Commission should also exclude applications by applicants who are seeking to replace existing, operating translator stations with full-service stations in this window.[5] By constructing and operating a translator, an applicant has proved that it is not a speculator, but is instead serious about serving a community. Allowing that applicant to apply to convert its existing translator into a full-service station does not in any way encourage speculation, and will not unduly burden the Commission's processes.[6] To further restrict the applicability of this proposal, the Commission could limit the exception to only those translators that have operated for at least two years. This would further demonstrate that the applicant is not a short-term speculator, and further reduce the number of eligible parties and thus the burden on the Commission.

In fact, the Commission has already recognized that there is a class of noncommercial translator licensees who will be seeking to convert their operations to full-service facilities in the upcoming window. The Commission has further recognized the benefit of doing so, agreeing

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[5] EMF suggests that the proposed new station must cover at least 50% of the 1 mv/m service area of the existing translator to qualify for this exception. Only one application per translator would be permitted.

[6] EMF would propose that the applicant pledge to terminate the translator operation upon the initiation of full-service with the station for which it applies.

that a current translator would not be held against an applicant in a point system analysis if the applicant promised to divest it upon commencement of full-power operations.[7] This is an exception to the rule that divestitures must be completed by the end of the filing window to avoid having the broadcast interest count against the applicant. Thus, EMF's proposal would merely allow more applicants to take advantage of a process that the Commission has already recognized offers public service benefits.

This proposal does not somehow give applicants who have translators some preference in obtaining a full service station, as the comparative point system will still apply to evaluating any application that is filed. The proposal would only give the applicant seeking to replace its translator with a full-service station the opportunity to *file* for a station in the same area as its translator. The applicant has no guaranty of receiving that station, as it may well not be the preferred applicant in any point system analysis if there are other applicants for the same channel. But the applicant would at least have the opportunity to seek to enhance existing service to the public by potentially providing service to an area in which they already demonstrated their commitment to serve the public.[8]

There may be other cases where applicants can demonstrate that they are not speculators and do not pose the possibility of mass filings. EMF will leave the specification of such criteria to other commenters. But the FCC should be open to allowing more service to the public by

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[7] *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Memorandum Opinion and Order, 16 FCC Rcd 5074, 5102-03 (2001) ("We will recognize an exception to [the translator attribution rule], however, for any radio translator licensee that, in the particular application involved, is seeking a full service station to replace its existing translator station(s). Such applicants may exclude, on that application, any existing translator station that will cease operating when the proposed full service station commences operation."). *See also*, FCC Form 340 (Feb. 2007) at page 6.

[8] The applications would, of course, be subject to the full technical rules applicable to full-service stations. As translators are often able to be constructed in areas in which a full-service stations could not be operated, technical considerations will limit the number of applicants who can take advantage of this proposed exception.

allowing applicants who are realistically committed to serving a community to file for new stations. Thus, as set forth above, they should adopt this exclusion from any numerical limit on applications that may be adopted by the Commission.

Conclusion

For the reasons set forth above, EMF suggests that the 10-station limit improperly restricts the number of applications for which an applicant can apply. It suggests that, if the FCC decides to impose a limit, that the limit be substantially higher then 10. EMF also suggests that the Commission exclude from any limit applications from applicants who propose to replace an existing, operational translator with a full-service station. Such an exclusion enhances the potential for service to the public, without encouraging speculative filings or unduly burdening the resources of the Commission.

Respectfully submitted,

EDUCATIONAL MEDIA FOUNDATION

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