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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEB 19 2008
Federal Communications Commission
Office of the Secretary

In the Matter of:

Creation of a Low Power Radio Service

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MM Docket No. 99-25

**PETITION FOR RECONSIDERATION OF
POSITIVE ALTERNATIVE RADIO, INC.**

Positive Alternative Radio, inc. ("PAR"), by counsel and pursuant to Section 1.429 of the Commission's rules, hereby seek reconsideration of the *Third Report and Order* in the above-captioned proceeding,¹ and in particular, the decision therein to "limit [the] processing of applications submitted during the Auction No. 83 filing window [for FM translator stations] to ten proposals per applicant." *Id.* ¶ 56.

INTRODUCTION AND SUMMARY

The Commission has not justified that any cap on FM translator proposals is necessary, and its seemingly random selection of ten as the number of permissible applications is an arbitrary and capricious limit "plucked out of thin air." *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 162 (D.C. Cir. 200) ("notwithstanding the substantial deference ... accorded the Commission's line drawing, [it] cannot escape the requirement ... that it provide a reasoned explanation for its action"). Retroactive imposition of this arbitrary limit to pending applications, including applications not

¹ *Creation of a Low Power Radio Service*, 22 FCC Rcd. 21912 (2007) ("*Third R&O*").

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mutually exclusive with any other, and grantable but for a processing freeze and new limit on FM translator applications, violates principals of retroactive rulemaking and the *Ashbacker* doctrine, which gives “cut-off” applicants a presumption their applications will be granted.

PAR submits that nothing in the record establishes that the benefit to be obtained by an arbitrary limit on FM translator applications outweighs the harm it imposes on already pending applicants, such as PAR, who have spent substantial sums in preparing and prosecuting their applications. Nor does the record establish that such benefits could not be substantially achieved through other mechanisms at the Commission’s disposal, that would effectively reduce the number of pending FM translator applications, without resorting to the most drastic measure of forced dismissal of long-pending applications.

When PAR submitted its FM translator applications during the Year 2003 filing window, careful consideration was given to the proposed transmitting location for each new facility. Unlike some other applicants, PAR did not submit dozens of applications around the country. In fact, at this point in time, PAR has only nineteen pending FM translator applications that are the subject of this proceeding – all of which could be put to good use by PAR should they be granted. As the Commission’s records will clearly indicate, PAR has a strong reputation for building what it applies for.

For these reasons, as fully detailed below, PAR respectfully requests that the Commission reconsider its ten-application cap on the processing of FM translator applications.

BACKGROUND

This proceeding involves the potential forced dismissal of thousands of pending FM translator applications filed by many applicants, including parties seeking reconsideration herein. The applications subject to forced dismissal were filed in 2003, based on rules that were then in effect. The 2003 translator window was the first opportunity any party had to file for new FM translators in the commercial band since 1997, as the Commission had effectively precluded applications for new translators since it adopted an auction framework for the translator service.

Now, five years after the fact, and with no likelihood of a new FM translator window opening any time in the foreseeable future, the Commission has decided to retroactively limit applicants to processing ten of their pending translator applications, even though some of the applications may not be mutually exclusive with any others, and are ready for grant but for the current processing freeze. Moreover, the Commission is forcing the applicants to make their decisions as to which ten applications to process, even before any settlement window is opened during which they might be able to amend their applications to remove technical mutual exclusivity, or otherwise determine which of their applications could actually result in authority to construct new stations.

The Commission initiated the current phase of the instant proceeding “as part of its ongoing efforts to promote ... expansion of the low power FM (‘LPFM’) service,”² by “maximizing the value of [] LPFM ... without harming the interests of full-power FM stations or other Commission licensees.” *Id.* (emphasis added). Unfortunately, the

² *Creation of a Low Power Radio Service*, 20 FCC Rcd. 6763 (2005).

Commission is proposing just the opposite. Since the Commission has determined that spectrum for LPFM stations is increasingly scarce in particular in urbanized areas and many mid-sized communities, *id.* ¶ 50, FM translator applications are being sacrificed retroactively and in apparent contradiction to the Commission's previous public interest support of the FM translator service. As the record in the proceeding reflects:

FM translator stations are an indispensable means by which public and nonprofit entities, such as ... EMF, NPR and other networks, as well as state and local public radio entities, serve rural communities that are often unable to receive full power service or are ignored by commercial full power radio stations. As noted ... , FM translator stations are critical in delivering essential news, weather, and emergency information, particularly in rural and terrain challenged areas. In fact, FM translator stations are often the only cost effective way to provide regional and state-wide programming to many small communities that cannot directly receive the signals of full power radio station due to mountainous terrain, for example, or that cannot support their own full power radio stations.

Reply Comments of Edgewater Broadcasting, Inc., *et al.*, MM Docket No. 99-25, Sept. 19, 2005, at 2 (citing comments; footnotes omitted). *See also Amendment of the Commission's Rules Concerning FM Translator Stations*, 5 FCC Rcd. 7212, [¶ 48] (1990) (translators help licensees serve "areas in which direct reception of signals from FM broadcast stations is unsatisfactory due to distance or intervening terrain obstructions").

Over the past decade, PAR has made substantial investments in the FM translator service in an effort to respond to listener-submitted needs for, and interest in, PAR's specialized programming. PAR now operates forty-seven (47) FM translator stations in Virginia, West Virginia, North Carolina, Ohio, Indiana and Tennessee. There is a substantial, real audience that relies upon PAR's service from these stations, and PAR continues to receive calls, letters and emails seeking an expansion of its service.

However, despite the indisputable public interest benefits that FM translators deliver, the Commission opted to resolve what it concluded was a “preclusive effect” on LPFM licensing opportunities from Auction No. 83 applications, by limiting further processing of applications submitted during that filing window to ten proposals per applicant. *Id.* ¶ 56. As a result, PAR would have to dismiss ten of its remaining nineteen pending FM translator applications, and key areas of Virginia, North Carolina and Ohio would be forever deprived of receiving PAR’s service so as to accommodate a juggling of spectrum amongst competing interests, regardless of the arbitrary and capricious manner in which this is done. This is simply not acceptable to PAR and the thousands of supporters of the PAR radio network.

FORCED DISMISSAL OF ALL BUT TEN APPLICATIONS VIOLATES THE PROCEDURAL RIGHTS OF TRANSLATOR APPLICANTS

The decision to limit applicants to further processing of ten applications fundamentally offends the procedural rights of applicants who filed proposals in the 2003 window under one set of processing rules, and who were entitled to processing of those applications under legitimate expectations created by processing rules the Commission created, and under which the applicants had expended the time and resources necessary to file.

The ten-application limit on FM translator proposals is an unexplained departure from past Commission decision-making. The decision to force participants in Auction No. 83 to select no more than ten proposals to keep on file constitutes a change in prior agency policy – i.e., that no such limit on FM translator proposals were necessary – for which the Commission must provide a reasoned analysis. See Fox Television Stations,

Inc. v. FCC, 489 F.3d 444, 456-57 (2d Cir. 2007), and cases cited therein. See also *Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (agency “failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making”) (internal quotes omitted).

When the Commission opened the filing window for Auction No. 83, it not only placed no numerical limits on FM translator application filings, it affirmatively stated its position that no limits were necessary, based on an “assumption that ... competitive bidding ... would deter speculative filings.” See *Third R&O* ¶ 55. The Commission now has abandoned that assumption based solely on bare observations about the number of applications filed, and its concerns about the *bona fides* of a single applicant. See *id.*

If the Commission had allowed its original process to continue, it could be expected that many currently pending applications will be dismissed, either voluntarily during the settlement window or later during the auction process, dramatically reducing the pool of currently pending applications. The mere fact that the Commission received more initial applications than expected, when it has not even allowed to play out the auction process it expected to weed out many applications, falls well short of the nuanced, reasoned explanation that “flip flops” on agency position require. See *Fox Television*, 489 F.3d at 456-57.

Requiring FM translator applicants to dismiss all but ten of their otherwise valid proposals is impermissibly retroactive. Related to the Commission’s unexplained departure from opting to open the Auction No. 83 FM filing window over four years ago without a limit on the number of proposals each applicant could submit, is that implementing a ten-proposal limit in the *Third R&O* effectuates a retroactive restriction

on that filing window. It is well-established that FCC “authority to change rules that affect pending applications is bounded by principles of retroactivity.” *Bachow Communications, Inc. v. FCC*, 237 F.3d 683, 688 (D.C. Cir. 2001). In this regard, “the APA requires that legislative rules ... adopted pursuant to notice and comment procedures ... be given future effect only,”³ while “retroactive enforcement of a rule is improper [] if the ill effect of [] retroactive application ... outweighs the mischief of frustrating the interests the rule promotes.” *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1554 (D.C. Cir. 1987) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)) (internal quotes omitted).

Not only is the Commission’s action retroactive, this deprivation outweighs the uncertain benefit that it hopes to realize from capping FM translator proposals at ten per applicant, as the Commission has no idea how many, if any, LPFM applications will be permitted by this action. Given that the Commission has not allowed its own processes which it initially believed to be adequate to deter unnecessary filings to work, it also has deprived applicants of rights to have uncontested applications granted free of future competition in subsequent filing windows, all for an unquantifiable benefit. This kind of retroactive rulemaking, based on such flimsy public interest grounds, simply is not sustainable under the principals of the Administrative Procedure Act (“APA”) and precedent applying it.

³ *Chadmoore Communications, Inc. v. FCC* 113 F.3d 235, 240 (D.C. Cir. 1997) (quoting *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757 (D.C. Cir. 1997)).

THE COMMISSION HAS NOT JUSTIFIED ANY FORCED DISMISSAL OF FM TRANSLATOR APPLICATIONS

The *Third R&O* provides neither the factual predicate nor a reasoned basis for imposing a directive as severe as requiring that all FM translator applicants dismiss all but ten of their applications, in the name of attempting to increase opportunities for would-be LPFM applicants. Rather, it appears the Commission focused on the sheer number of FM translator applications, without regard to the communities they seek to serve or the underlying reasons why licensees use FM translators in the first instance, to conclude that the herd of Auction No. 83 applications must be drastically thinned. But while it is not at all clear from the record that limits on FM translator applications will have the effect on LPFM opportunities the Commission seeks, it is apparent the Commission has overlooked other, less drastic steps that would advance its objective.

The problem of limited LPFM filing opportunities the Commission has identified is one that persists largely in urbanized and larger non-urbanized communities. Conversely, FM translators are utilized – and applications for new FM translator licenses seek to provide service – in predominantly rural and terrain challenged areas. Limiting FM translators in these areas will not impact limitations on LPFM opportunities in urbanized and larger non-urban communities. It is thus hardly surprising the *Third R&O* offers no explanation of how each applicant's dismissal of all but ten FM translator applications that generally seek to serve rural, sparsely populated areas will remedy the problem of limited LPFM opportunities. Such "fail[ure] to consider an important aspect of the problem" undermines the validity of any FCC action that adversely affects the interests of FM translator applicants. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 421 (3d Cir. 2004). See also *Fox Television Stations*, 489 F.3d at 455 .

A stringent limit on FM translator applications to only ten per licensee also unnecessarily creates conflict with Section 307(b) of the Act. 47 U.S.C. § 307(b). Section 307(b) establishes a statutory mandate for the Commission to “make [the] distribution of licenses [and] frequencies ... among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service.” *Id.* However, if licensees with more than ten FM translator applications on file are required to abandon all but ten of them, many – and likely many of those with many more than ten on file, in particular – would be expected to preserve their applications to serve the largest populations and geographic areas. Why would any rational applicant choose to prosecute those applications that bring about the least return by serving the fewest people? As a consequence, applications for the most sparsely, underserved areas are those that FM applicants will most likely forego. This undermines the original purposes that “[t]he Commission authorized FM translators for the specific ... purposes of providing FM radio service to unserved areas [and] extending additional FM service to underserved areas,”⁴ and thus results in anything but “fair, efficient, and equitable distribution of radio service.” 47 U.S.C. § 307(b).

Before the Commission orders massive mandatory self-dismissals of perfectly legitimate FM translator proposals, it should consider – and execute – less intrusive means of eliminating applications that may stand in the way of LPFM filing opportunities. First, to the extent it can winnow down the number of FM translator applications that may impede LPFM filing opportunities by “mov[ing] vigorously against alleged ... filing

⁴ *Amendment of Part 74 of the Commission's Rules to Provide for Satellite and Terrestrial Microwave Feeds to Noncommercial Educational FM Translators*, 4 FCC Rcd. 6459 (1989).

abuses, speculators, and deficient application filings,”⁵ the Commission should do so, to the extent it can demonstrate any applicant violated Commission rules or policies, and/or to the extent that it can justify retroactive rules that limit speculative filings. But it should not punish all applicants, including those who may have legitimate needs to reach new audiences with niche programming, to reach the perceived few who may have committed violations (if their actions are in fact violations at all). Indeed, if the number of applications filed in Auction No. 83 truly leaves the Commission with “concern” about the “integrity” of the applications on file, *id.* ¶ 55, it should resolve those concerns first, and in doing so ascertain the impact on the number of applications remaining, before leaping to forced dismissal of applications filed by reputable parties such as PAR.

Next, the Commission should direct the Media Bureau to open the settlement window under Sections 73.5002(c) and (d) of the rules, *see id.* ¶ 56, but allow that process to play out – and review the number of FM translator applications remaining thereafter – *before* determining if there is any need for the drastic procedure of forced dismissals. Many pending applications may disappear through the process. The fact that many applications are mutually exclusive itself guarantees that many of the pending applications will not result in new stations with preclusionary effect, as only one of potentially many mutually exclusive applications can be granted. Thus, the process itself will necessarily greatly reduce the number of applications on file.

Given the alternatives available to the Commission, of letting its processes play out to reduce the number of applications, of geographically limiting applications in areas

⁵ *Third R&O* ¶ 48; *see also id.* ¶ 55 (citing concerns over possible speculation).

perceived to be of more interest to LPFM applicants, and of weeding out abuses if they can be proved, the Commission was not justified in adopting the Draconian retroactive rule adopted here.

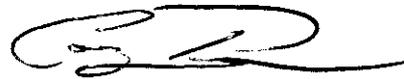
CONCLUSION

For the foregoing reasons, the Commission should reverse its decision in the *Third R&O* to limit the processing of applications submitted during the Auction No. 83 filing window for FM translator stations to 10 proposals per applicant. Instead, it should on reconsideration decline to impose any such forced dismissals of FM translator applications, allow the application and auction process to work to limit applications as it had initially believed would be adequate, or adopt other more restrained means to accomplish its objectives – but only after making a clear determination that such steps would in fact advance those objectives..

Respectfully submitted,

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