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SUMMARY

National Religious Broadcasters (NRB) submits that the translator cap of ten-per-applicant imposed in the Third Report and Order and Second Further Notice of Proposed Rulemaking (“Order”) is improper and should be modified to a cap of not less than fifty translator applications per applicant because: (1) the number ten as a cap is not rationally related to the ultimate goal of the Commission to increase the number of LPFM stations, as there is no assurance that such a drastic limit will help accomplish that; (2) the Commission has not described the logic behind the selection of ten as a cap for translator applications, thus making it arbitrary; (3) capping the number of applications at ten, as opposed to fifty, appears only to under-serve a large number of translator applicants, whereas capping applications at fifty will serve 97% of all applicants; (4) this cap is a reversal of prior policy, which is devoid of the necessary justification; (5) there is no evidence that a cap of fifty would impose any undue administrative burden.

INTRODUCTION

NRB is a non-profit association that exists to keep the doors of electronic media open and accessible for religious broadcasters. We have more than 1400 members, many of which are radio broadcasters that produce religious programming. Of those, a significant number are radio broadcasters that utilize translators, and also include applicants for translator approval in the subject window.

In light of our mission to insure ample access of religious broadcasters to the airways, this issue is of great importance to us.

Nevertheless, the imposition of a cap of ten translator applications per applicant will unduly burden, and will inequitably disadvantage, those applicants who have expended time, resources and money to file their applications under the assumption that no cap existed. NRB did not file a Comment during the proposed rule-making period on this issue because there was nothing in the record, nor in the position of the Commission, to signal any potential for an imposition of a translator application cap down to a number of ten. As noted by one Commissioner, the number ten "... is lower even than the numbers suggested by LPFM advocacy groups in the record." Statement of Commissioner Robert McDowell Approving in Part, Dissenting in Part

QUESTION PRESENTED

Should the Commission reconsider its Order limiting the number of translator applications to ten per applicant, and modify its Order to change that to a cap of fifty?

I. DISCUSSION

A. The Translator Filing Cap Is Arbitrary and Capricious

1. No rationale was adduced or articulated for setting the cap for translator applications at the number ten

The Commission is required to set forth an adequate explanation for its establishment of rules that set numerical limits. *Fox Television Stations v. FCC*, 280 F.3d 1027, 1043-44 (D.C. Cir. 2002), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002)(Commission's adoption of a 35% ownership limit was arbitrary and capricious).

Here, the Commission has not set forth a reasoned basis for the setting of the translator cap at the number ten. It recognized that 80% of filers filed ten or less applications, and 20% filed more than ten, and that there were in fact “equitable interests” of those 20% who had expended resources to file their numerous applications in excess of ten. Nevertheless the Commission found that “the public interest requires a bar on the processing of more than ten applications per filer.” Order, ¶ 56. No reasoning is advanced by the Commission, however, as to why the “public interest” is better served by setting the cap at ten than by setting it at fifty. Nor is any reasoning set forth that explains why the “equitable interests” of those 20% of filers should be outweighed by the need to have an application limit established at ten.

The other attempt by the Commission to articulate a basis for the new rule limiting the number of translator applications is this:

In order to further our twin goals of increasing the number of LPFM stations and promoting localism, we find it necessary to take action. Accordingly, we will limit further processing of applications submitted during the Auction No. 83 filing window to ten proposals per applicant.

Order, ¶ 56. However, here the same problem exists. Assuming *arguendo* that the Commission’s “twin goals” of increasing the number of LPFM stations and promoting localism can *only* be achieved by setting limits on the number of FM translators that are *approved*, this does not compel the conclusion that drastically limiting the number of translator that are *applied-for* could actually accomplish this.

The Commission does note that “it is apparent that the translator filings have precluded or diminished LPFM filing opportunities in many communities,” Order ¶ 53. Nevertheless, it does not follow that limiting translator applications down to ten per

applicant would carry with it any hope of curing that situation. A single translator application, if in direct conflict with an LPFM application, could create more of a problem for the Commission's stated "twin goals" than processing a thousand translator applications for locales where no LPFM applications are being sought.

Further, although it has been stated that the Media Bureau's efforts to locate alternate channels for LPFM stations can be "limited ... by the requirement to protect FM translator applications ..." (Order, ¶ 53), again, the actual ratio of translator-applications filed-to-LPFM-applications-frustrated has apparently not been determined by the Commission, nor does it appear in any part of the record. ¹

Without an articulated, reasoned basis for the limitation of translator applications to the number ten as opposed to fifty, the Commission's Order, in so far as it imposes that

¹ The Commission cited the Reply Comments of Prometheus Radio Project which referenced, in the words of the Commission, a "REC national study" that found "that 16 percent of all census designated communities that otherwise *would have LPFM channels available* in their communities have been precluded by the translator filings and that the greatest preclusionary impact has been in the largest such communities." Order ¶ 55 (emphasis added) Nevertheless, this only addresses the alleged preclusionary impact on speculative ("otherwise would have LPFM channels *available* ...") LPFM grants that "would have" been "available" if applications been filed; it does not state that LPFM grants were actually frustrated or prevented by the presence of translator filings, nor does it quantify how many LPFM stations were allegedly prevented by the translator filings. The record does not indicate whether, even in this 16% segment of communities, there had been actual LPFM applicants that would have filed *but for* the impediment caused by translator filings. Further, the Commission's findings do not explain how that 16% segment relates to the translator filings now being placed in limbo. Are all the pending translator applications in excess of ten located in that 16% segment? Are only some of them? Or none of them? The Commission's reasoning does not address these questions. Indeed, it would have been more consistent (at least from an analytical basis, though not from a policy standpoint) for the Commission to have limited translator applications in certain geographical areas or in certain markets deemed to be desirable by the Commission for LPFM expansion. See: Order ¶ 50: "... LPFM stations ... generally require higher population densities to be viable." Instead, the Commission has simply set a small numerical limit nation-wide and forced the applicants to choose which ten applications to pursue.

limitation, should be reconsidered, and modified to a cap of fifty applications per applicant.

2. No evidence in the record substantiates the number selected by the Commission

When the Commission decides to engage in “line-drawing decisions” it must do so in a way that “is consistent with the evidence [and] not ‘patently unreasonable.’” *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372, 390 (3rd Cir. 2004). In the next section we will address the unreasonableness of the Commission choosing a ten-application limit as opposed to a fifty-application cap. In this section we submit that there was simply no evidence to support the cap of ten applications per translator applicant.

We find two relevant sources in the record for the Commission’s use of the 10-application cap number; however, neither provides any *evidence* for the logic of choosing that number. The first is the Commission’s reference to the number ten as a bench mark separating the 80% whose filings for translators did not exceed that number, and the 20% whose filings did. We have already addressed the Commission’s comment in that regard in section 1. above, and have pointed out why it fails to articulate a reasoned basis.

The second source in the record is the Comment of Prometheus Radio Project, clearly the most prodigious of the commenters favoring expansion of LPFM licensing opportunities. Prometheus stated that:

First, the Commission should investigate all applicants that filed more than ten (10) translators to-ensure that these translators were filed with the intent to build, rather than to speculate. Any translator applicants that are found participating in the window for the purpose of speculation should have all applications dismissed and be forced to refund the money to the purchasers of the construction permit.

Comments of Prometheus Radio Project et al. (August 22, 2005), Appendix B, Section B. However, even Prometheus did *not argue* that this number ten should be a limit on filing; rather, it contended it should be a benchmark for Commission scrutiny – any applicant which files more than ten applications, they submit, should be investigated by the Commission to insure that those applicants have an “intent to build” rather than a an “intent to speculate.” Id.

3. The evidence shows that if the Commission had set the cap at fifty a substantially larger number of translator filers would be better served and with no evidence of an adverse outcome for LPFM filers, thus rendering the Commission’s application cap of ten unreasonable

The Commission cannot set numerical limits that are “patently unreasonable,” and is required to avoid “unexplained inconsistency” in its treatment of relevant groups (or categories) that are included and those that are excluded from its determinations.

Prometheus Radio Project v. F.C.C., *supra* (criticizing flawed distinction that permitted different treatment for news and information from cable and that found on the Internet, in Commission’s Diversity Index used for regulating cross- media ownership); *Sinclair Broadcasting Group Inc. v. F.C.C.*, 284 F.3d 148, 163-65 (D.C. 2002) (unexplained inconsistency was arbitrary and capricious).

The Commission’s settling on a ten-application cap is unreasonable. By the terms of its Order, the Commission recognized that “80 percent of filers submitted 10 or fewer proposals. 97 percent [of all translator application filers] filed fifty or fewer proposals.” Order, ¶ 54. By setting the limit at ten, the Commission inexplicably disregarded the interests of seventeen percent of the filers who submitted more than ten but not more than fifty proposals. The Commission could have fairly treated ninety seven percent of all translator filers. Inexplicably, however, it did not do so, and chose instead to leave only

eighty percent of all incumbent filers undisturbed, and pulled the rug out from a full twenty percent of applicants.

Further, there is no evidence in the record to suggest that by modifying the Order to set an application limit at fifty, the Commission would thereby be creating demonstrable harm to LPFM hopefuls. The strongest evidence of this is the fact that not a single LPFM advocate asked for a filing limit that low: “It is lower even than the numbers suggested by LPFM advocacy groups in the record.” Statement of Commissioner Robert McDowell Approving in Part, Dissenting in Part. As another Commissioner also noted, the Commission should have used “a more measured approach, rather than ...[cutting the application limit] from 50 to 10.” Statement of Commissioner Deborah Taylor Tate Approving in Part, Dissenting in Part.

B. The filing Cap Constitutes A Change of FCC Policy, And Under That Applicable Legal Standard the Evidence in the Record is Insufficient

The Commission bears the burden of justifying a change of policy. “The Commission may, of course, change its mind, but it must explain why it is reasonable to do so.” *Fox Television Stations, Inc., v. F.C.C.*, 280 F.3d 1027, 1044-45 (D.C. Cir. 2002) citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57, 103 (1983)(“ ...an agency changing its course must supply a reasoned analysis”).

When the Commission opened the Auction No. 83 window it placed no numerical limits on translator application filings, and relied instead on its “assumption that our competitive bidding procedures would deter speculative filings ...” Order, ¶ 55.

Now that the Commission has “chang[ed] its course” (*Motor Vehicle Mfrs. Ass'n, supra*) it must provide a reasoned basis for that reversal of policy, particularly now that

applicants have expended time and money in developing and filing translator applications, as the Commission itself has noted, Order ¶ 56 (recognizing the “equitable interest of the remaining 20 percent of filers [who filed more than ten applications].” See also: Id., ¶ 57.

What the Commission has offered rather than a reasoned basis, is a generalized rationale that is speculative and not supported by evidence: that the volume of translator applications may deter the filing of LPFM applications, even though the Commission seems to concede that this is conjecture, because “... it is impossible to accurately predict future demand for LPFM stations licenses.” Order ¶ 52. And while the Commission raises questions about the implications of the large number of translator filings, it couches its Order in tentative, and non-committal language: “[translator filings] raise concerns about the integrity of our FM translator licensing procedures ... does suggest that our current procedures may be insufficient to deter speculative conduct.” Id., ¶ 55.

These suggestions, and others, by the Commission on the possible (but unquantified) impact on LPFM licensing is insufficient to justify such a drastic, retroactive diminution of the interests of seventeen percent of the filers who filed more than ten but less than fifty applications.

C. There Is No Evidence That A Modification Of The Cap Upward From Ten To Fifty Would Create Any Cognizable Administrative Inconvenience To The Commission

Throughout the Commission’s Order there is a concern that the volume of translator applications may possibly be detrimental to its goal of promoting the growth of LPFM service. However, nowhere in the Order’s language do we find a determination

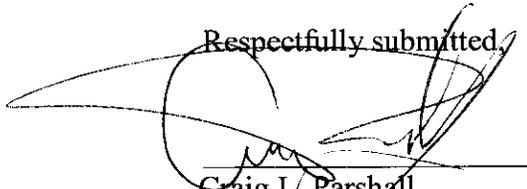
that the processing of the pending seven thousand or so translator applications would be administratively unfeasible.

Nevertheless, we do not suggest that the Commission impose no cap at all. Rather we ask that the Commission impose a cap of fifty applications per applicant. For all practical purposes, this means that those three percent of all the filers whose applications exceeded fifty must decide which fifty they will rely upon. Also, this would mean that the Commission's extra work load by this change in rule would be minimal. The Commission would have to review only a small number of applications more under the fifty cap than it would under the ten application cap: in point of fact, an extra maximum of only forty more applications for each of the filers who comprise the twenty percent of all filers who exceeded ten applications.

II. CONCLUSION

For the foregoing reasons, we request that the Commission reconsider its Order setting the maximum translator application per applicant at ten, and modify it upward to a maximum of fifty translator applications per applicant.

Respectfully submitted,



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