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Dated: March 13, 2008

EXHIBIT 1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FILED/ACCEPTED

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Federal Communications Commission
Office of the Secretary

In the Matter of:)
)
Creation of a Low Power Radio Service)
)
)

MM Docket No. 99-25

**PETITION FOR RECONSIDERATION OF
EDUCATIONAL MEDIA FOUNDATION, GOLD COAST BROADCASTING, LLC,
BRIDGELIGHT, LLC, CALVARY CHAPEL OF THE FINGER
LAKES, INC., E-STRING WIRELESS, LTD., LIVING PROOF, INC.,
EDGEWATER BROADCASTING, INC., RADIO ASSIST MINISTRY, INC.,
EDUCATIONAL COMMUNICATIONS OF COLORADO SPRINGS, INC.,
AND EASTERN SIERRA BROADCASTING**

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EDGEWATER BROADCASTING, INC., RADIO ASSIST MINISTRY, INC.,
EDUCATIONAL COMMUNICATIONS OF COLORADO SPRINGS, INC.,
AND EASTERN SIERRA BROADCASTING**

Educational Media Foundation, Gold Coast Broadcasting, LLC, Bridgelight, LLC, Calvary Chapel of the Finger Lakes, Inc., E-String Wireless, Ltd., Edgewater Broadcasting, Inc., Living Proof, Inc., Radio Assist Ministry, Inc., Educational Communications of Colorado Springs, Inc., and Eastern Sierra Broadcasting, 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 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. As set forth in detail below, this arbitrary decision, made without any evidence that it will accomplish any of the goals stated by the Commission, violates the procedural and substantive rights of applicants who filed and prosecuted their translator applications in full compliance with Commission rules, and further undermines the Commission's long-stated goals of providing the widest possible distribution of broadcast service to the country. Thus, this decision must be reconsidered.

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

I. 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. 2002) (“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 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. Moreover, 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, who have spent substantial sums in preparing and prosecuting their applications and countless hours identifying communities and frequencies suitable for translator service. 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 Draconian measure of forced dismissal of thousands of long-pending applications. For these reasons, as fully detailed below, Petitioners respectfully request that the Commission reconsider its ten-application cap on the processing of FM translator applications.

II. BACKGROUND

This proceeding involves the potential forced dismissal of thousands of pending FM translator applications filed by many applicants, including each of the parties seeking reconsideration herein. The applications subject to forced dismissal were filed in 2003, and were filed

in compliance with the rules established by the Commission for translator applications. This 2003 translator application filing window was the first opportunity any party had to file for new FM translators in the commercial band since 1997, as the FCC had precluded applications for new translators after it adopted an auction framework for the translator service until a filing window was opened. Obviously, with substantial pent-up demand for new translators and uncertainty as to when another window would open, many applications were filed during the window. 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 pending applications which applicants may be forced to abandon may not be mutually exclusive with any others, and are ready for grant but for the current processing freeze.² 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 are best positioned to be granted.

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,” *id* at 6763, by “maximizing the value of [] LPFM ... *without harming the interests of full-power FM stations or other Commission licensees.*” *Id.* (emphasis added). A critical component of this initiative was reconciling demand for both LPFM and FM translator stations that “operate on a substantially co-equal basis.” *Third R&O* ¶ 43. In particular, the Commission sought to address what it called a “potentially preclusive impact” on available LPFM opportunities due to the 2003

² *Creation of a Low Power Radio Service*, 20 FCC Rcd. 6763, 6778 (2005). Notably, despite the freeze expiring on its own terms almost two-and-a-half years ago, *id.*, processing did not resume.

Auction No. 83 FM translator filing window, which the *Third R&O* notes yielded over 13,000 FM translator applications, approximately 7,000 of which remain pending. *Id.* ¶¶ 43-57. The Commission also found that spectrum for LPFM stations is increasingly scarce in particular in urbanized areas and many mid-sized communities, *id.* ¶ 50, citing a single uncorroborated and unconfirmed study indicating the “greatest preclusionary impact” was “in the largest [census designated] communities.” *Id.* ¶ 53. In fact, the study apparently being referred to was of preclusionary effect in unspecific communities, not in the largest radio markets as the Commission implies.³ Regardless of the basis for the Commission’s conclusion, however, any action in this area must consider not only that “LPFM and FM translator services are each valuable components of the nation’s radio infrastructure,” *id.* ¶ 49, but also past FCC recognition that maintaining translator-based delivery of broadcast programming is an “important objective.”⁴

Indeed, as the record in the proceeding reflects:

FM translator stations are an indispensable means by which public and nonprofit entities, such as ... [Educational Media Foundation], 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

³ The Commission’s cites the Reply Comments of Prometheus Radio Project for support for this claim. However, those comments append a study of a single market, showing preclusionary effects of translator applications to LPFM applications that would not be permitted under the current rules unless and until Congress repeals its ban on third-adjacent channel interference from LPFM stations. The Prometheus Reply cites to a different party’s filing in the Localism Docket, *MM Docket 04-233*, for a broader showing of impact in other communities, yet in that “study” no methodology for the asserted conclusions is specified, nor is there any evidence of what communities are precluded by translator filings – and whether there is any interest in LPFM stations in those communities.

⁴ *Creation of Low Power Radio Service*, 15 FCC Rcd. 19208, 19224 (2000).

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, 7219 (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 years, licensees have made substantial investments in the FM translator service in an effort to respond to inadequately addressed needs for, and interest in, their specialized programming, including vital news, weather and community information, as well as a wealth of educational and religious offerings. There is a real – and substantial – audience that relies on service from these stations.

Petitioners here, as well as other noncommercial educational and commercial broadcasters with varying program formats, employ translators to provide listeners with new programming options in rural and other areas, by serving unique niches often overlooked by full-power commercial broadcasters, or by bringing service to areas hampered by terrain from receiving the signal of their local broadcaster. The fact that the translator window in Auction No. 83 drew over 13,000 applications from over 850 filers, *see Third R&O* ¶ 54, attests to the value of translators in providing service to the public, and reflects the belief of many that translators provide an vital means of serving broadcast audiences.⁵ If there were no listeners, or if listeners did not value the service, no one would seek translator licenses or operate these stations. Indeed, as the *Third R&O* reflects, the Commission already has granted approximately 3,500 new construction permit applications from among the singleton filings in Auction No. 83. *Third R&O* ¶ 43.

⁵ *See, e.g.,* Joint Comments of the Named State Broadcasters Associations, MM Docket No. 99-25, Aug. 22, 2005, at 8.

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. It directed the Media Bureau to open a settlement window under Sections 73.5002(c) and (d) of the rules, but required licensees to select, from among their still-pending applications, ten they wish to preserve, before the settlement window opens. *Id.* The Commission did not explain how it concluded that ten was the appropriate number of applications to allow licensees to preserve. Rather, it merely noted that more than 80 percent of participants in Auction No. 83 filed ten or fewer applications, *id.*, in much the same way it noted elsewhere that 97 percent of filers had submitted 50 or fewer applications. *See id.* ¶ 54. Significantly, however, the Commission “recognize[d] the equitable interests of the remaining 20 percent of filers in the processing of all their [] applications,” and “the expenses that translator applicants have incurred” preparing their filings. *Id.* ¶¶ 54, 55.

Petitioners all have more translators pending than now deemed permissible by the Commission. Thus, all accordingly stand to be drastically affected by the mandate in the *Third R&O* to dismiss all but ten of their pending applications.

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

The decision to limit further processing to 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. Moreover, many of the signatories to this Petition have “singleton” applications pending that are ready for grant, but for the processing

freeze the Commission has imposed.⁶ To demand dismissal of some or all of those applications, which are otherwise ripe for grant, based on a subsequent rule change that essentially voids the applicants' rights to grant of their applications free from competition from new applications, violates the *Ashbacker* rights of these applicants.

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 dismiss all but ten of their pending translator applications constitutes a significant 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 a 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 because “competitive bidding ... would deter speculative filings.” *See Third R&O* ¶ 55. The Commission now has abandoned this reasoned position based solely on bare observations about the number of applications filed, and the sale of some construction permits which were granted – neither of which have been shown to have been done in violation of FCC rules. *See id.* Moreover, it was the Commission, not the Auction No. 83 applicants, which created the logjam. The applicants did no more than respond to an agency filing window, the ground rules for which included no restriction as to the numbers of applications any entity could file. *See FM Translator Auction Filing Window and Application*

⁶ For instance, Educational Media Foundation believes that it has about nine such singleton applications ready for grant but for the freeze.

Freeze, 18 FCC Rcd 1565 (MB 2003) (“*FM Translator Filing Window/Application Freeze Notice*”).

The Commission does not allege that any applicant violated its rules by filing multiple applications in Auction 83, *Third R&O* ¶ 55, and offers no cognizable reason for concluding, at this stage in processing of the applications, that a retroactive limit of ten applications is appropriate. 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. *See, infra* at pp. 14-16. The mere fact that the Commission received more applications than expected, when it has not even allowed full implementation of the auction process it expected to weed out many applications, falls well short of the nuanced, reasoned explanation that “flip-flops” on agency positions 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. Implementing a ten-proposal limit in the *Third R&O* effectuates a retroactive restriction on that filing window, since the Commission opted 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. 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,”⁷ while “retroactive enforcement of a rule is improper [] if the ill effect of []

⁷ *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)).

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).

The test courts “commonly use to determine whether a rule has retroactive effect” is whether it, *inter alia*, “impair[s] rights a party possessed when it acted.” *Chadmoore Comms.*, 113 F.3d at 240 (quoting *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997)). In one of the few cases upholding retroactive application of a rule requiring the dismissal of many pending applications, the Commission exercised its authority to change its rules resulting in the dismissal and refiling (subject to increased competition for the dismissed applicants) only after first granting (1) all applications that were “cut-off” and not mutually exclusive with any other application and (2) all applications that were amended in a given time period to eliminate mutual exclusivity. Accordingly, the Commission dismissed only those application that continued to be mutually exclusive, holding they had no right to be free from additional mutually exclusive applicants who might be allowed to file under a new system. *Bachow*, 237 F.3d at 686. Here, the Commission has forsaken all “singleton” applications that are ready for grant, as well as those that could be made ready for grant through an engineering amendment or agreement reached during a settlement window. Applicants in Auction No. 83 who submitted more than ten proposals were well within their rights to do so under the rules and policies in place at the time the window opened. Now, the *Third R&O* reaches back and deems impermissible all but ten of those proposals for each applicant, and requires dismissal of proposals in excess of that number. This deprives applicants from having each of their proposals, no matter how many more than ten they may have filed, considered on their merits (or at least allowed to remain on file until the opening of a settlement window). This is a clearly substantive change in the rights of these applicants who should have their applications processed and granted pursuant to the rules under

which they applied and established their priorities. This is not simply a procedural rule change made to make FCC processing easier.

The ten application limit also seems to be a fundamental shift in Commission policy, concluding that LPFM stations are somehow more valuable than FM translators. However, this is the very issue before the Commission in the *Further Notice of Proposed Rulemaking*, issued as part of the *Third Report and Order*. Thus, in effect, the FCC has made this drastic change in the substantive rights of the translator applicants before it has even decided the fundamental public interest issue on which the change is premised. This retroactive change in substantive rights cannot follow from an as yet undetermined public interest basis.

Not only is the Commission's action impermissibly 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. *See infra* at pp. 11-13. By comparison, while the balance in *Maxcell* tilted heavily toward permitting the Commission to retroactively use a lottery to award licenses, because the harms involved only procedural costs to the applicant while the Commission realized more efficient processing of applications for cellular licenses, the balance here is reversed. Retroactive application of the ten-application cap substantially degrades the extent and quality of FM translator service that the Commission recognized as a "valuable component[] of the nation's radio infrastructure," *see supra* at pp. 4-5, and is inconsistent with Section 307(b) of the Act for reasons explained below, *see infra* at pp. 13-14, as the forced dismissals ordered in the *Third R&O* very well may deprive rural areas of translator service they might otherwise have received had these applications been processed to grant. Given that the Commission has not allowed its processes to play out, which processes it initially believed to be adequate to deter unnecessary filings, it also has deprived applicants of rights to have uncontested applications

granted free of future competition in subsequent filing windows, all for purported benefits that may not even exist. This kind of retroactive rulemaking, which represents a reversal in policy based only on speculative public interest theories, simply is not sustainable. *Fox Television*, 489 F.3d at 456-57; *Ramaprakash v FAA*, 346 F.3d at 1125 (reasoned decision making required to support changes in agency policy or rules).

IV. 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 erroneously conclude that mass dismissal of FM translator applications will open opportunities for LPFM stations. 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. Indeed, the *Third R&O* belies substantial uncertainty that still exists with regard to whether restrictions on FM translator applications will spur development in the LPFM service, as the Commission admits it cannot adequately predict the extent of “preclusionary” effect posed by the Auction No. 83 applications,⁸ and at best can claim “precluded or diminished LPFM filing opportunities” in “many” essentially unidentified

⁸ See *Third R&O*, ¶ 52-53 (noting that “precise preclusionary applications are not possible” and that “future demand for LPFM station licenses” is “impossible to accurately predict”).

communities.⁹ The Commission should reconsider its decision to force dismissal of FM translator applications for several well-founded reasons:

Mismatch between geographic areas where LPFM opportunities are wanting and FM translators typically seek to serve, and/or for which applications will be dismissed. As set forth above, the problem of limited LPFM filing opportunities the Commission has identified is one that persists largely in urbanized and larger non-urbanized communities.¹⁰ 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 improve 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 (same).

In this regard, the comments of Edgewater Broadcasting demonstrate there are no problems locating LPFM stations in rural areas, and the Commission does not refute this showing.¹¹ There, accordingly, is no reason the Commission should not continue to process FM translator

⁹ *Id.* ¶ 53. While the Commission cites impediments to applications to be filed in the state of New Jersey as an example of the preclusive effects of translators, *id.* ¶ 50, the information about the limited number of LPFM applications in New Jersey came from a filing window in 2001, two years before the window at issue here. If anything, this demonstrates it was not FM translator applications that preclude LPFM filings in congested urbanized states, but the very crowded condition of the existing FM dial.

¹⁰ *See Third R&O* ¶¶ 50, 53.

¹¹ Comments of Edgewater Broadcasting, Inc., *et al.*, MM Docket No. 99-25, Aug. 22, 2005, at 4-6 & Exhs. 1-3.

applications in those areas rather than subjecting most of them to mandatory dismissal under an artificial cap imposed on applicants. The Commission itself acknowledges that in rural areas there will be little demand for LPFM stations as they will not be financially viable. *Third R&O* ¶ 50. Indeed, if the Commission's concern truly lies in limitations on opportunities for LPFM filings – *i.e.*, in larger population centers – then any restriction on the number of pending FM translator applications should apply only in such markets. For example, the Commission could have considered limiting applicants to no more than ten applications for translators in larger population centers, with no limits outside those markets, *if* there were actual record evidence to show that translator applications were precluding LPFM opportunities in those larger markets.

Moreover, as the *Third Report and Order*, at ¶ 52, admits, as translators and LPFM stations are governed by different rules concerning mileage separations and interference, many of the translator applications are pending for channels which cannot be used by LPFM stations. If these applications by definition cannot be exclusionary as they cannot be used by LPFM stations, why were these applications nevertheless caught up in the FCC's new limit? The Commission has not explained how dismissing translator applications that could have no effect on LPFM availability fosters any public interest goal.

A stringent limit on FM translator applications to only ten per licensee also unnecessarily violates Section 307(b) of the Act, which establishes a statutory mandate that the FCC “make [the] distribution of licenses [and] frequencies ... among the several States and communities ... a fair, efficient, and equitable distribution of radio service.” 47 U.S.C. § 307(b). The Commission fails to consider the needs of rural communities most affected by these dismissals. By requiring dismissal of all but ten applications the Commission is denying service to hundreds of communities – many of which have few if any reception services, let alone transmission services – in favor of well served urban areas with many transmission and reception services. Moreover, if

licensees with more than ten FM translator applications on file are required to abandon all but ten of them, many – if not most – of those with more than ten on file, can be expected to sacrifice their rural-area proposals in order to preserve, as their remaining ten, only applications to serve larger communities with larger populations. Why would any rational applicant choose to prosecute those application 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,”¹² and results in anything but “fair, efficient, and equitable distribution of radio service.” 47 U.S.C. § 307(b). Moreover, given that translator applicants, forced to choose, will favor proposals for the same densely populated areas the Commission believes are the best prospective locations for new LPFM stations, the Commission’s decision will limit service in areas that most need it – areas which it recognizes have little demand for LPFM service – while frustrating its own goal of promoting LPFM service in populated areas. This further demonstrates the arbitrary, capricious, and counterproductive nature of the ten-application limit.

The Commission has ignored other, less drastic solutions. Before the Commission orders massive mandatory self-dismissals of perfectly legitimate FM translator proposals, if it can conclude on the record that a reduction of translator applications is in the public interest, it should consider – and execute – less intrusive means of eliminating applications that it believes may stand in the way of LPFM filing opportunities. First, to the extent any substantial and material question of fact has been raised over whether any applicant in Auction 83 abused the

¹² *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).

Commission's processes, it can and should deal with such questions independently of this rulemaking, in connection with that applicant. A universal ten-application limit does nothing to resolve this discrete issue, and punishes all applicants without the benefit of due process. Dismissal of any application that was found to be in violation of the rules, after proper administrative procedures, will ensure that the rights of all applicants in the Auction 83 are preserved, and that none are abridged. If this is a true concern, the Commission should resolve that concern first, and in doing so ascertain the impact on the number of applications remaining, before leaping to forced dismissal of applications filed by the all of the applicants whether or not any issue was raised with respect to their compliance with the rules.

Next, the Commission should direct the Media Bureau to open a 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. The Commission announced the settlement window as part of the application process for Auction No. 83,¹³ and if it allows that process to go forward, the multiplicity of translator applications the Commission now seeks to eliminate might well resolve itself.¹⁴ Given the very nature of the Auction 83 filing window and the years that have passed since it opened, there are bound to be applications voluntarily dismissed after the settlement window. Since the Commission had not opened a translator filing window in the six years prior to the time it announced Auction 83, there clearly was much pent-up demand for translator stations. Many applicants who wanted a translator to serve a particular

¹³ *FM Translator Filing Window/Application Freeze Notice*, 18 FCC Rcd. at 1567-68.

¹⁴ Moreover, because the Commission pre-announced the settlement window in this regard, applicants were barred from collaboratively resolving mutual exclusivity and/or engineering conflicts due to FCC anti-collusion rules. *See* 47 C.F.R. § 1.2105(c). To the extent this has contributed to the number of FM translator proposals that remain on file (and it likely has), the inflated figures described in the *Third R&O* may be somewhat illusory.

geographic area applied for multiple channels in these areas, hoping to increase their chances that one or two would be grantable. These applicants may well be satisfied with grant of a channel it desires in the geographic area for which it filed, and may be able to forego other applications in the area. Clearly, once the settlement process runs its course, many of these multiple applications in specific geographical locations will disappear.

Moreover, the auction itself will eliminate applications which may not be dismissed through the settlement process. In virtually every auction, when the Commission calls for tender of minimum payments, applicants disappear. As stated above, since many applicants filed multiple applications, each specifying different channels, in the same geographic area to increase their chances of getting a station in the area that they wanted to serve, these parties are unlikely to bid on more than one channel. Finally, the fact that many applications are mutually exclusive itself guarantees most 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 materially, if not massively, 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 perceived to be of more interest to LPFM applicants, and of weeding out abuses if they can be proven, the Commission was not justified in adopting the Draconian retroactive rule adopted here.

V. THE COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY, AND IN AN IMPERMISSIBLY RETROACTIVE MANNER, IN ADOPTING A "MAGIC NUMBER" OF 10 FOR FORCED APPLICATION DISMISSALS

Apart from the above-cited grounds for reconsidering whether it should impose forced dismissal of FM translator applications in the first instance, reconsideration also is required with respect to the Commission's setting at ten the number of proposals that applicants may keep on file. *Third R&O* ¶ 56. Nothing in the record supports landing on ten as a number of permissible

FM translator proposals per applicant, nor does the *Third R&O* offer any explanation whatsoever as to how the Commission arrived at that number. Consequently, the *Third R&O*'s directive that applicants in the Auction No. 83 filing window dismiss all but ten of the proposals they still have pending, suffers a variety of infirmities under the Administrative Procedure Act.

In this regard, reconsideration of the application cap is required for the further reason that the Commission has violated the long-standing requirement that it provide a rational explanation when setting any numerical limits in implementing the Communications Act and in effectuating policy.¹⁵ The *Third R&O* offers no analysis – even in the most general terms – of how many of the extant 7,000-plus FM translator proposals will remain after the ten-application limit is effectuated, nor of how many presently “precluded” LPFM opportunities will open as a result. Any “line-drawing exercise” in the nature of capping FM translator proposals at ten per applicant that fails to examine relevant data and articulate a satisfactory explanation for any action taken, including a rational connection between the facts found and the choice made, presents a “classic case of arbitrary and capricious agency action.” *United States Telecom Ass’n v. FCC*, 227 F.3d 450, 461 (2000).

In particular, the FCC cannot adopt “arbitrary device(s) ... to winnow the applicant field” in a service. *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 447 (D.C. Cir. 1991). Even where it “has wide discretion to determine where to draw administrative lines” and is thus entitled to “substantial deference” in making such choices, as in attempting to provide for a diversity of opportunities in broadcast services, it must “provide a reasoned explanation for its actions” and

¹⁵ See, e.g., *Fox Television Stations v. FCC*, 280 F.3d 1027, 1043-44, modified on reh'g, 293 F.3d 537 (D.C. Cir. 2002) (35% ownership limit was arbitrary and capricious).

not draw lines “having no relationship to the underlying regulatory problem.”¹⁶ In this regard, the Commission offers in support of the ten FM-translator proposal limit no more than observations that more than 80 percent of participants in Auction No. 83 filed ten or fewer applications, *Third R&O* ¶ 56, without connecting this in any way to how forced dismissal by the remaining applicants would serve the Commission’s goals.

The Commission does not explain, or offer any kind of “number-crunching,” to show why allowing these applicants to keep ten FM translator proposals on file – as opposed to, for example, 25, or 50, or any other number for that matter – is the preferable solution. Nor does it explain why observing that 80 percent of applicants in Auction No. 83 filed ten or fewer applications justifies adopting that figure as a limit, any more than observing that 97 percent of filers had submitted 50 or fewer applications would support setting the limit at fifty. *See Third R&O* ¶ 54. The Commission also fails to explain how limiting the number of FM translators applied-for, rather than the number ultimately approved, is a better remedy for alleged limits on LPFM opportunities. All things considered, the Commission’s arrival at ten as the number of FM translator applications any given licensee may maintain on file, is “intolerably mute rather than tolerably terse on the reasons” for adopting the ten-proposal cap it has enacted.¹⁷

¹⁶ *Sinclair*, 284 F.3d at 162 (quoting *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000); *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, , 463 U.S. 29, 43 (1983)) (internal quotations omitted).

¹⁷ *Telephone & Data Sys., Inc. v. FCC*, 19 F.3d 655, 657 (D.C. Cir. 1994) (*per curiam*) (quoting *Action for Children’s Television v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987)) (internal quotes omitted). The *Third R&O* also is deficient in this regard because it makes no effort to explain the relationship between the geographic locations where FM translator applications are likely to be dismissed and whether such forced dismissals will in fact open new opportunities for LPFM applicants. *See supra* at pp. 12-14 (discussing “mismatch” between the fact that most dismissed FM translator proposals will be in rural and/or sparsely populated areas, while the shortages of LPFM filing opportunities are most prevalent in urbanized and larger non-urbanized areas).

This is particularly critical as there is nothing in the record arguing in favor of the ten FM translator application limit the Commission has imposed. No party to the proceeding – including LPFM advocates urging limits on FM translators – suggested so low a limit. As Commissioner McDowell observed in partially dissenting from the *Third R&O*, the decision to limit further processing of FM translator applications to 10 proposals per applicant “is much too low” and “is lower even than the numbers suggested by LPFM advocacy groups in the record.” *Third R&O*, 22 FCC Rcd. at 21974 (Statement of Comm’r McDowell). In fact, the only place the record refers to ten FM translator proposals as a significant number is in the Comments of Prometheus Radio Project, which suggested “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.”¹⁸ However, it is obvious on its fact that this statement was not an argument that ten FM translators should be a limit on the number of proposals applicants in Auction No. 83 should be allowed to retain.

Absent any request for a ten-application limit, and as there has been no justification for setting such a low number of applications identified by the Commission in the *Third R&O*, this number cannot be allowed to stand. Upsetting the legitimate expectations of pending applicants, and foreclosing new translator service to numerous communities without any specific identified benefits, if permissible at all, demands reasoned decision-making fully explaining the basis for the decisions being made. Pulling a retroactive limit of ten applications, seemingly out of the air, does not provide that reasoned decision making.

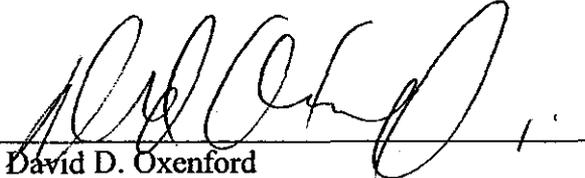
¹⁸ Comments of Prometheus Radio Project *et al.*, MM Docket No. 99-25, Aug. 22, 2005, App. B at 3.

VI. CONCLUSION

For the foregoing reasons, the Commission should reconsider and 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 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.

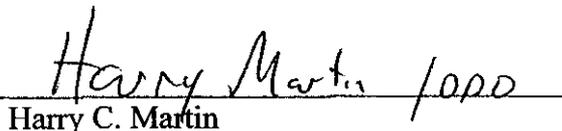
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