

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Creation of a Low Power Radio Service)	
)	MM Docket No. 99-25
Media Bureau Invites Applicants to Select)	
FM Translator Applications for Voluntary)	
Dismissal to Comply with Processing Cap)	
)	

**OPPOSITION TO PETITIONS FOR RECONSIDERATION
OF PROMETHEUS RADIO PROJECT**

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SUMMARY

In the Commission's *Third Report and Order in Creation of a Low Power Radio Service*, the Commission took positive steps in promoting and preserving the public's interest in localism and diversity. The Commission has recognized the vital role that low power radio stations play in promoting localism and diversity. However, the LPFM service has been subject to the unintended consequences of Commission action.

First, the Commission opened a translator filing window, in which the Commission received more than 13,000 applications, approximately four times the number of applications as the number of translator stations authorized during the entire history of the translator service. If the Commission were to process all the applications, the large volume of applications would have a preclusive impact on communities to gain an LPFM service. Second, the Commission adopted a streamlined procedure for full-power stations to change their community of license. Without any relief, a number of LPFM stations would either suffer from excessive interference or be completely knocked off the air.

The Commission has recognized the role translators play in extending the signals of incumbent broadcasters to unserved and underserved communities. However, the Commission correctly noted that the processing of all the translator applications would have the unintended effect of precluding opportunities for local communities to receive LPFM stations. In balancing the interests of the public, translator applicants, and the LPFM service, the Commission limited translator applicants to ten applications.

The Commission has also continued to recognize the priority of full-power stations. However, the Commission has taken modest steps in protecting local communities from losing their local outlets for expression. In recognizing the unintended effect of the new streamlined procedure

in granting community of license changes for full-service stations, the Commission has adopted flexible rules and policies to save LPFM stations from displacement. To limit the number of LPFM stations that would be displaced, the Commission modified its interference standards and adopted processing policies that would allow LPFMs flexibility in staying on air.

Some parties have filed *Petitions for Reconsideration* disputing the Commission's ability to adopt the ten application cap. These parties contend: (1) the Commission did not have the authority to adopt the application limit and the Commission's action somehow amounts to a retroactive rulemaking; (2) the Commission's provided inadequate justification for the limit; and (3) the Commission arbitrarily selected ten as the appropriate limit on the pending translator applications.

Other parties seek reconsideration of the Commission's attempt to protect LPFM stations from being displaced. The parties contend they did not have adequate notice to comment. They further contend the revision of 47 C.F.R. §73.809's interference standards and the adoption of interim processing policies for full-service applications seeking to modify their facilities are not justified.

The Commission's actions were taken pursuant to sound legal authority. Its action is supported by the record and consistent with Commission precedent. Thus, the *Petitions for Reconsideration* must be denied.

TABLE OF CONTENTS

SUMMARY ii

TABLE OF CONTENTS iv

I. INTRODUCTION AND BACKGROUND 1

II. THE COMMISSION PROPERLY LIMITED APPLICANTS TO TEN TRANSLATORS. 2

 A. The Commission Appropriately Exercised its Administrative Authority in Adopting the Application Limit.. 2

 B. The Commission’s Action is Justified and Supported By the Record. 9

 C. The Commission Did Not Act Arbitrarily in Limiting Applicants to Ten Translator Applications. 13

III. THE COMMISSION’S RULE CHANGE AND PROCESSING POLICY TO PREVENT LPFM STATIONS FROM BEING DISPLACED IS JUSTIFIED. ... 17

 A. The Commission Provided Adequate Notice Before Adopting the Modification to 47 C.F.R. §73.809. 18

 B. The Commission’s Displacement Policies Are In the Public Interest.. 21

IV. CONCLUSION 25

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**OPPOSITION TO PETITIONS FOR RECONSIDERATION
OF PROMETHEUS RADIO PROJECT**

Prometheus Radio Project (“Prometheus”) respectfully submits this Opposition to the various *Petitions for Reconsideration* that have been filed in this proceeding. These parties have not demonstrated that reconsideration should be granted. Despite the parties’ contentions, the Commission’s action was taken pursuant to sound legal authority. Its action is further supported by the record and consistent with Commission precedent. Thus, the *Petitions for Reconsideration* must be denied.

I. INTRODUCTION

To preserve the viability of the LPFM service and support its growth, the Commission has taken modest action to ensure local communities have the chance to obtain an LPFM station. The Commission has preserved a local community’s opportunity to gain an outlet for local expression by limiting the number of translator applications an entity can submit for processing. Additionally, rather than displace the LPFM station, the Commission has protected local expression by modifying its interference rule to allow LPFMs to operate in situations involving predicted interference on a second adjacent channel. To limit further displacement of LPFM stations by full-power stations, the Commission is also allowing for waivers of the second adjacent limitation and waiver of the LPFM/full-power station priority rules. Several parties are seeking reconsideration of the Commission’s actions.

II. THE COMMISSION PROPERLY LIMITED APPLICANTS TO TEN TRANSLATORS.

A number of Petitioners¹ seek reconsideration of the Commission's decision to "limit further processing of applications submitted during the Auction No. 83 filing window to ten proposals per applicant."² Essentially, these Petitioners seek reconsideration on the basis that: (1) the Commission did not have the authority to adopt the application limit and the Commission's action somehow amounts to a retroactive rulemaking; (2) the Commission provided inadequate justification for the limit; and (3) the Commission arbitrarily selected ten as the appropriate limit on the pending translator applications. Another Petitioner, CSN International, agrees that a limit is necessary, but disagrees with the ten application limit adopted by the Commission.³

A. The Commission Appropriately Exercised its Administrative Authority in Adopting the Application Limit.

Petitioners assert the Commission somehow violated their procedural rights by modifying the filing window's processing guidelines and applying those guidelines retroactively.⁴ Petitioners also claim that the cap somehow creates a change in the substantive rights of translators.⁵ Moreover, Petitioners claim the Commission's action violates Petitioners' *Ashbacker* rights. None of these

¹See Educational Media Foundation, *et al.*, *Petition for Reconsideration* ("EMF, *et al.*, *Petition*"), filed February 19, 2008; National Religious Broadcasters, *Petition for Reconsideration* ("NRB *Petition*"), filed February 15, 2008; Positive Alternative Radio, Inc., *Petition for Reconsideration* ("PAR *Petition*"), filed February 19, 2008.

²*Third Report and Order and Second Further Notice of Proposed Rulemaking, Creation of a Low Power Radio Service ("Third Report and Order")*, 22 FCCRcd 21912, 21934 (2007).

³See CSN International, *Petition for Reconsideration*, filed February 4, 2008.

⁴See EMF, *et al.*, *Petition* at 9-11; PAR *Petition* at 5.

⁵See EMF, *et al.*, *Petition* at 10; NRB *Petition* at 10.

arguments have any merit.

1. *The Commission Retains Authority to Revise the Processing Guideline.*

The *Third Report and Order* modified the Commission's processing guideline with regard to translator applications filed in the filing window for Auction No. 83. Initially, the Commission had not determined or considered whether an application limit was necessary,⁶ but later determined that an application limit of ten was necessary to serve the public interest.⁷ Although the application limit was adopted after the applications had been filed, the Commission continued to have the authority to adopt an application limit if it determined a limit was necessary to serve the public interest.

It has long been recognized that the Commission has the "authority to change license allocation procedures midstream."⁸ So long as there is a reasoned explanation, the Commission "is entitled to reconsider and revise its views as to the public interest and the means needed to protect that."⁹ Thus, the Commission may revise the processing guidelines in Auction No. 83's filing window based on a determination as to whether the guideline will serve the public interest.¹⁰

Here, the Commission's goal is to act "consistent with statutory requirements and competing

⁶See *Public Notice, FM Translator Auction Filing Window and Application Freeze*, 18 FCCRcd 1565 (February 6, 2003).

⁷*Third Report and Order*, 22 FCCRcd at 21934.

⁸*Bachow Communications, Inc. v. FCC*, 237 F.3d 683, 686 (D.C. Cir 2001), citing *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551 (D.C. Cir. 1987); *DirecTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997).

⁹*Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 411 (D.C. Cir. 1983).

¹⁰See *Washington Association for Television and Children v. FCC*, 665 F.2d 1264, 1268 (D.C. Cir. 1981).

Commission goals.”¹¹ To that end, the Commission is required to ensure that the grant of applications serve the “public interest, convenience, and necessity,”¹² and the Commission itself has recognized localism and diversity as essential goals to promoting the public interest.¹³ In the *Third Report and Order*, the Commission noted the volume of applications filed in the filing window had a negative impact on the opportunities for local communities to receive LPFM stations.¹⁴ Thus, in recognizing that the 7,000 remaining applications would have a negative impact on the Commission’s efforts to promote localism, the Commission chose to exercise its authority to modify the application procedure.¹⁵ In doing so, the Commission specifically noted that it believed that processing the remainder of the translator applications “would frustrate [the Commission’s] efforts to promote localism.”¹⁶

In modifying the application guidelines, the Commission made no determination or change in the substantive rights of translators. Indeed, the Commission noted the value that translators provided to communities and specifically stated the Commission would not “reach the merits of the priority” between LPFMs and translators.¹⁷ Moreover, the Commission explicitly recognized the “equitable

¹¹*Third Report and Order*, 22 FCCRcd at 21935.

¹²47 U.S.C. §309(a).

¹³*See Further Notice of Proposed Rulemaking, 2006 Quadrennial Regulatory Review*, 21 FCCRcd 8834, 8837 (2006).

¹⁴22 FCCRcd at 21933.

¹⁵*See Maxcell Telecom Plus*, 815 F.2d at 1554 (where the Court upheld the Commission’s decision to change from a comparative application procedure to a lottery).

¹⁶*Third Report and Order*, 22 FCCRcd at 21933.

¹⁷*Id.* at 22 FCCRcd at 21932.

interests” of the Petitioners, but reasonably concluded, “on balance...the public interest requires a bar on the processing of more than ten applications per filer.”¹⁸

2. *The Commission’s Action Was Not Impermissibly Retroactive.*

Despite the Commission’s authority to adopt the application limits, Petitioners nonetheless contend that the limit is impermissibly retroactive. The Commission’s processing guideline is only impermissibly retroactive if “it, *inter alia*, ‘impair[s] rights a party possessed when it acted.’”¹⁹ Petitioners claim they have been deprived “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).”²⁰

Petitioners cannot claim that the Commission’s action somehow impairs their substantive rights. The fact is, the filing of an application does not vest any substantive rights on Petitioners.²¹ The filing window in Auction No. 83 merely set out the Commission’s plan to distribute translators; it did not guarantee that any Petitioner had a right to the processing or granting of any, much less all, of its applications. While Petitioners may have expected that their applications would get processed, a new policy is not retroactive “merely because it...upsets expectations based on prior” guidelines.²²

In fact, despite Petitioners’ assertion to the contrary, Courts have long upheld Commission’s ability to adopt guidelines and rules that may disrupt a party’s expectations in how license applications

¹⁸*Id.* at 21933-35.

¹⁹*Chadmoore*, 113 F.3d at 240.

²⁰EMF, *et al.*, Petition at 9. *See also*, NRB Petition at 9-10; PAR Petition at 3-4.

²¹*Chadmoore*, 113 F.3d at 241.

²²*Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994).

would be processed. For instance, in *United States v. Storer Broadcasting Co.*, the Commission amended its broadcast ownership rules in an effort to avoid over concentration in the broadcasting market. As a result, the Commission dismissed Storer's pending application for a television license since grant of the application would have been in violation of the amended rule. The Supreme Court affirmed the Commission's decision that pending applications may be dismissed due to a change in processing rules.²³

In *DirectTV*, the Commission reversed its initial position of allocating reclaimed satellite channels to preexisting licensees to auctioning the reclaimed channels. Appellants asserted that the Commission's decision to auction the channels was impermissibly retroactive because the Appellants had a right to a share of the reclaimed channels pursuant to the Commission's earlier decision to allocate the reclaimed channels. In finding that the Commission's action was not retroactive, the Court noted that "a new rule or law is not retroactive 'merely because it...upsets expectations based on prior law.'"²⁴

In *Maxcell Telecom*, the Commission chose to employ a lottery procedure to award cellular licenses even though the Commission initially had decided to employ a comparative hearing and comparative applications had already been filed. Portaphone asserted that the Commission's decision to include Portaphone's previously pending comparative application in the lottery was an invalid retroactive application of the lottery procedure. The Court determined that the Commission had the authority to apply the new lottery procedure to the pending applications because of the Commission's legitimate concern with the efficient processing of a large number of applications for the cellular

²³*United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956).

²⁴*DirectTV*, 110 F.3d at 826, citing *Landgraf*, 511 U.S. at 269.

licenses.²⁵

Finally, EMF, *et al.*, attempt to rely on *Bachow Communications, Inc. v. FCC*, to suggest that while the Commission has the authority to apply the modified processing guidelines to the pending translator applications, it can only do so after the Commission grants singleton applications “as well as those that could be made ready for grant through an engineering amendment or agreement reached during a settlement window.”²⁶ This is an overly narrow and misleading interpretation of the Court’s finding.

In *Bachow*, because of the great interest and increase in applications for licenses in the 39 GHz band, the Commission considered adopting new licensing rules. Rather than using a comparative application process, the Commission sought to adopt a competitive bidding system. Prior to adopting the new licensing procedure, the Commission implemented an application freeze and an interim licensing procedure. The Commission dismissed all applications not filed 30 days prior to the freeze date (the “ripeness period”) and all mutually exclusive applications within the 30 days of the ripeness period. Appellants challenged the Commission’s dismissal of their pending applications and to the 30 day ripeness period.

In upholding the Commission’s decision to dismiss the pending applications, whether because they were mutually exclusive or fell outside of the ripeness period, the Court “recognized the Commission’s authority to change license allocation procedures midstream.”²⁷ The Court’s determination did not rest solely on the Commission’s decision to allow the processing of nonmutually

²⁵815 F.2d at 1555.

²⁶EMF, *et al.*, Petition at 9.

²⁷*Bachow*, 237 F.3d at 686.

exclusive applications. Rather, the Court upheld the Commission's action on the recognized notion that the Commission has the authority to apply new or modified rules to pending applications "even though it disrupts expectations and alters the competitive balance among applicants."²⁸

3. *The Commission's Action Does Not Violate Petitioners' Ashbacker Rights.*

EMF, *et al.*, seem to suggest that the processing guideline somehow violates their *Ashbacker* rights because they have a right "to grant of their applications free from competition from new applicants."²⁹ However, the *Ashbacker* doctrine is simply not implicated or relevant in this context.

In *Ashbacker*,³⁰ the Supreme Court held that in cases in which there are mutually exclusive applications for a license, the Commission must provide a hearing for each applicant. In other words, the Commission cannot grant one license among mutually exclusive applications without competition. Instead, the Commission must provide fair and equal treatment among competitors to determine spectrum allocation between competitors; there was no presumption that an application would be granted. Here, all applicants are being treated equally. Further, there is nothing to suggest that *Ashbacker* was intended to supercede the Commission's ability "to adopt reasonable classifications and amendments in order to effectuate" the granting of license applications.³¹ Thus, despite EMF, *et al.*'s, attempt to raise the *Ashbacker* doctrine as a bar to the Commission's authority to adopt an application limit, in actuality, the *Ashbacker* doctrine is not even implicated.

²⁸*Bachow*, 237 F.3d at 687-88, citing *Maxcell*, 815 F.2d 1551 and *DIRECTTV*, 110 F.3d 816.

²⁹EMF, *et al.*, Petition at 7.

³⁰*Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 (1945).

³¹47 USC §309(g).

B. The Commission’s Action is Justified and Supported By the Record.

Petitioners claim that the Commission “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.”³² Petitioners main issue seems to rest on whether the application limit will foster the LPFM service, whether the application limit is in accordance with the Commission’s obligation under 47 U.S.C. §307(b) to distribute licenses in “a fair, efficient, and equitable” manner, and whether less “drastic” solutions could have been adopted.³³

1. The Commission Has Provided a Sound Legal Basis for Its Action.

The Commission’s processing guideline, even though it does not meet Petitioners’ expectations, “may be sustained ‘if it is reasonable,’ *i.e.*, if it is not ‘arbitrary’ or ‘capricious.’... The Commission ‘is entitled to reconsider and revise its views as to the public interest and the means needed to protect that interest,’... if it gives a reasoned explanation for the revision.”³⁴

Here, the Commission gave a detailed and reasoned explanation for its decision to adopt a limit on applications filed during the filing window in Auction No. 83. The Commission specifically considered whether it had fulfilled its “goal to provide both LPFM and translator applicants reasonable access to limited FM spectrum in a manner which promotes the ‘fair, efficient, and equitable distribution of radio service....”³⁵ In this context, the Commission balanced and recognized the

³²EMF, *et al.*, Petition at 11. *See also* NRB Petition at 5, PAR Petition at 5-6.

³³*See* EMF, *et al.*, Petition at 13-14; NRB Petition at 10; PAR Petition at 9-10.

³⁴*DirectTV*, 110 F3d at 826, quoting *Black Citizens for a Fair Media*, 719 F.2d at 411.

³⁵*Third Report and Order*, 22 FCCRcd at 21932.

“equitable interests of the remaining 20 percent of filers”³⁶ and the public interest, and on balance, found that the public interest would be best served by adopting an application limit.

In reaching its decision, the Commission expressed the following concerns and made the following observations and factual findings:

- the Commission expressed concern over the “sheer volume” of the translator applications;³⁷
- the Commission expressed concern over the potential preclusionary impact of the translator applications on fostering the LPFM service based on a national study submitted in the record and protecting the LPFM service based on the experience of the Media Bureau, while acknowledging that “precise preclusionary calculations are not possible;”³⁸
- the Commission noted that because of different licensing standards, translators could preclude LPFMs from licensing opportunities, while LPFMs will not affect translator licensing options. “Thus the next LPFM window may provide the last meaningful opportunity to expand the LPFM service in spectrum-congested areas. In contrast, [the Commission] expect[s] significant filing activity in many future translator windows;”³⁹
- the Commission noted that “[e]ven if lawful, it is fair to question whether the acquisition of unprecedented numbers of FM translator authorizations by a handful of entities...promotes either diversity or localism.”⁴⁰ Thus, in an effort to promote localism, the Commission found it necessary to take action.⁴¹ In doing so, the Commission explicitly recognized the “equitable interests” of the Petitioners, but reasonably concluded, “on balance...the public interest requires a bar on the processing

³⁶*Id.* at 21935.

³⁷*Id.* at 21933

³⁸*Id.*

³⁹*Id.* at 21932.

⁴⁰*Id.* at 21934.

⁴¹*Id.*

of more than ten applications per filer.”⁴²

These observations are much like the observations the Commission made in *DirectTV* which were later upheld by the D.C. Circuit. In *DirectTV*, the Commission switched from a policy to assign reclaimed DBS channels *pro rata* to the other DBS providers to a competitive bidding process to distribute the channels. In addition to finding that the new rule was not retroactive, the Court also found that the Commission provided a reasoned explanation for the new rule. Specifically, the Court found the Commission’s action reasonable since the Commission seriously considered the interests of all the parties.⁴³ Here, too, the Commission balanced the “equitable interests” of the Petitioners and the preclusive impact on communities to gain an LPFM service.⁴⁴ Additionally, the Court in *DirectTV* noted that the Commission reasonably concluded that its decision would better serve the public interest.⁴⁵ Similarly, the Commission here has provided a reasoned basis as to why the application limit will better serve the public interest.

Nevertheless, Petitioners question whether the Commission’s decision will open up spectrum for the LPFM service, especially in urbanized and larger non-urbanized areas. Petitioners also question whether the Commission’s action is consistent with 47 U.S.C. §307(b), which requires the Commission to “make such distribution of licenses...among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service.” These arguments are self-serving and fail to recognize the Commission’s reasonable balance in protecting all the affected parties as well as ensuring

⁴²*Id.* at 21933-35.

⁴³*DirectTV*, 110 F.3d at 827.

⁴⁴*Third Report and Order*, 22 FCCRcd at 21933-35.

⁴⁵*DirectTV*, 110 F.3d at 827.

that communities will benefit from radio service.

There is no mandate that the Commission exactly quantify and specify the spectrum that will become available for and allocated to LPFMs. As the Commission has already recognized, there is no way to predict the number of LPFMs that will benefit by these actions; there is no way to predict which frequencies will open up and how many applications for LPFMs will be submitted. In part, this uncertainty is due to the flexibility that the Commission has granted the Petitioners in choosing their ten preferred applications. However, there is an obvious overwhelming demand for low power stations, as is clearly indicated in the record of this proceeding.⁴⁶

Moreover, EMF, *et al.*, contend the Commission's action is not consistent with §307(b). EMF, *et al.*, appear to show great concern for rural and un/underserved communities. While providing service to these communities describes the true intent of the translator service, it does not necessarily reflect the reality. For many years, given the lack of spectrum space in major urban areas for new full power stations, some entities have been establishing full power stations in rural areas, and using translators to get coverage in urban areas.

Furthermore, EMF, *et al.*, claim that the Commission's action will not be helpful because pursuant to the application cap, applicants will choose applications in larger population areas, rather than servicing those communities that most need radio service. While this may be the true intent of EMF, *et al.*, thus raising doubts as to their actual concern for rural and un/underserved communities, the claim is also pure speculation. Regardless of the scenario, in actuality, the Commission's action is more than consistent with §307(b). That is, a well regulated and consistent process of translator

⁴⁶See, e.g., *Ex Parte* Submission of Prometheus Radio Project, *In the Matter of Creation of Low Power Radio Service*, MM Docket No. 99-25 (filed December 7, 2007) (where approximately 175 citizens of and around Chicago expressed their desire to obtain an LPFM service).

allocations will better serve the public than a ramshackle distribution of rural licenses to a handful of entities.

C. The Commission Did Not Act Arbitrarily in Limiting Applicants to Ten Translator Applications.

Petitioners assert the Commission acted arbitrarily and capriciously in limiting applicants to ten translators. While Petitioners argue the number is “plucked out of the air,” in fact, the Commission’s decision is based on reasonable line-drawing. Moreover, the application limit can also be justified based on Commission precedent and submissions in the record.

The Commission’s decision is reviewable under the arbitrary and capricious standard of the Administrative Procedures Act. “But the scope of review is particularly limited when the FCC engages in the process of drawing lines, of making judgmental decisions.”⁴⁷ The Commission “has wide discretion to determine where to draw administrative lines” and therefore, the court will reverse that choice only for abuse of discretion.⁴⁸ The Courts have stated that they are “generally unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn ... are patently unreasonable, having no relationship to the underlying regulatory problem” and that “the relevant question is whether the agency’s numbers are within a zone of reasonableness, not whether its numbers are precisely right.”⁴⁹ As such, the courts have consistently deferred to the Commission’s expertise in making such decisions.

⁴⁷*Health and Medicine Policy Research Group v. FCC*, 807 F.2d 1038, 1043 (D.C. Cir. 1986).

⁴⁸*See AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000).

⁴⁹*Worldcom Inc. v. FCC*, 238 F.3d 449, 462 (D.C. Cir. 2001) (internal quotation marks and citations omitted).

In *Home Box Office*,⁵⁰ the D.C. Circuit upheld the Commission's anti-siphoning regulations pertaining to subscription broadcast television programming. Specifically, the Court refused to find unreasonable the Commission's decision to allow subscription broadcasters to air feature films that were either less than three years old or greater than ten years. In spite of evidence that this line-drawing was somewhat crude,⁵¹ the Court explained that it would only review line-drawing that is "patently unreasonable, having no relationship to the underlying regulatory problem."⁵²

Similarly, in *Cassell*,⁵³ the Court upheld the Commission's decision to institute a benchmark which stated that specialized mobile radio system licensees would be presumptively in substantial accordance with their license requirements so long as the stations were constructed within 1.6-kilometers of the licensee's authorized coordinates. The court rejected the challengers' contention that the Commission did not provide a rational basis for choosing 1.6 km over any other distance. The court again expressed its hesitancy to review the Commission's line-drawing decisions, and held that the Commission's findings that the 1.6-kilometer benchmark was: (1) reasonable in relation to the stations' normal range of at least 20 miles; (2) consistent with the Commission's previous experiences; and (3) had been used as a successful benchmark in the context of geographic coordinates near mountain peaks.⁵⁴

⁵⁰*Home Box Office Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977).

⁵¹*Id.* at 60 (citing evidence presented by a challenger that 23 percent of films the Commission had designated as available for subscription airing because they were more than ten years old would nevertheless be suitable for traditional broadcasting).

⁵²*Id.*

⁵³154 F.3d 478 (D.C. Cir. 1998).

⁵⁴*Id.* at 485.

Although in *Sinclair*⁵⁵ the Court held that the Commission's order limiting common ownership of television stations in a local market to those with eight independent voices was arbitrary and capricious, the court did not do so on the basis that the number was "plucked out of the air."⁵⁶ In fact, the Court recognized the Commission's wide discretion in determining where to draw administrative lines, and instead struck down the order on the basis that the Commission failed to explain the apparent inconsistency between its definition of "voices" given in the cross-ownership rules and the more restrictive definition at issue in that proceeding.

Here, the Commission did not abuse its discretion in drawing the administrative line. The Commission considered all the parties' interests and concluded "on balance...the public interest requires a bar on the processing of more than ten applications per filer."⁵⁷ This "line-drawing" was especially reasonable considering that the ten application limit would affect a minimum number - only 20% - of the filers.⁵⁸

Moreover, the Commission's action is especially reasonable since the Commission has adopted an application cap of ten in other broadcast application filing windows. For instance, the Commission recently determined that applicants in the NCE FM filing window would be limited to ten applications.⁵⁹ Additionally, precedent for a ten application limit also exists in the LPFM context. The

⁵⁵*Sinclair Broad. Group Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002)

⁵⁶*Id.* at 162 ("We leave for another day any conclusion regarding the Commission's choice of eight").

⁵⁷*Third Report and Order*, 22 FCCRcd at 21935.

⁵⁸*Id.* at 21934.

⁵⁹*Public Notice*, FCC Adopts Limit for NCE FM New Station Applications in October 12 - October 19, 2007 Window, 22 FCCRcd 18699 (October 10, 2007).

Commission initially adopted a phased approach regarding national ownership limits, limiting an applicant from owning initially one station and at the most ten stations.⁶⁰ This effectively limited applicants from submitting no more than ten applications in a filing window. Moreover, the Commission has imposed a much more stringent limit in another proceeding. In the 1987 filing window for low power television, the Commission imposed a limit of only five applications per applicant, together with geographical restrictions and an application fee.⁶¹

Finally, despite EMF, *et al.*'s, great, yet unwarranted, issue with the false belief that “not even LPFM advocates suggested a limit” of ten translator applications,⁶² this is a misrepresentation of the record in this case. Ten is exactly the number of translator applications that Prometheus Radio Project, National Lawyers Guild, and Future of America Coalition believed was reasonable for any one entity to apply for.⁶³

III. THE COMMISSION’S RULE CHANGE AND PROCESSING POLICY TO PREVENT LPFM STATIONS FROM BEING DISPLACED IS JUSTIFIED.

Petitioners Ace Radio Corporation (“Ace”), *et al.*, also seek reconsideration of the *Third Report and Order* on the basis that the Commission’s revision of 47 C.F.R. §73.809’s interference standards and the interim processing policies for full-service applications seeking to modify their

⁶⁰See 47 C.F.R. §73.855(b).

⁶¹See Low Power Television and Translator Service (Filing Window Procedures), 2 FCC Rcd 1278 (1987).

⁶²EMF, *et al.*, Petition at 19. See also NRB Petition at 7-8.

⁶³See Comments of Prometheus Radio Project, *et al.*, *Creation of a Low Power Radio Service*, MM Docket No. 99-25, Appendix B (August 22, 2005).

facilities “are unjustified and thwart the fair distribution of radio service,”⁶⁴ and the parties did not have adequate notice to comment. However, the Commission’s modification to §73.809 and its processing policies, which were implemented to protect and preserve the LPFM service, is supported by the record .

A. The Commission Provided Adequate Notice Before Adopting the Modification to 47 C.F.R. §73.809.

Ace, *et al.*, argue the “Commission has failed to provide the Parties with adequate notice of the true scope of its overhaul of the LPFM service rules.”⁶⁵ However, although Ace, *et al.*, chose not to participate earlier in this proceeding, the parties cannot claim a lack of ability to comment on the modification. Moreover, the Commission provided more than ample notice that it was considering a modification of §73.809.

In seeking reconsideration, Ace, *et al.*, first complain that they did not have an opportunity to comment on the Commission’s proposal to modify §73.809. However, by taking advantage of the reconsideration process, Ace, *et al.*, are now able to state their grievances and comment on the modification. Ace, *et al.*, believe that a modification of the rule is not justified because the risk of interference or displacement is minimal and may lead to an increase of LPFM stations operating within a full-service station’s 70 dBμ contour.⁶⁶

Despite Ace, *et al.*’s contention, the Commission provided more than ample notice that it was considering a modification of §73.809. Generally, in response to a rulemaking, the Commission is

⁶⁴Ace Radio, *et al.* (“Ace, *et al.*”), *Petition for Reconsideration* at 2, filed February 19, 2008.

⁶⁵Ace, *et al.*, *Petition* at 7.

⁶⁶Ace, *et al.*, *Petition* at 6.

entitled to adopt a final rule as long as it is a “logical outgrowth” of the proposed rule.⁶⁷ Here, it is apparent the Commission provided more than adequate notice to interested parties that it was considering a change to §73.809. In the *Second Report and Order*, the Commission explicitly raised the issue of “encroachment,” the displacement of LPFM stations by full-power stations, and whether a lift on the second adjacent interference restriction found in §73.809 was necessary to prevent LPFM stations from being displaced.

Specifically, the Commission stated that

it would be useful to consider whether to limit the Section 73.809 interference procedures to situations involving co- and first-adjacent channel predicted interference, where the predicted interference areas are substantially greater than for second- and third-adjacent channel interference. Although the effective service area of an LPFM station could be diminished as a result of a second- or third-adjacent channel full service station “move-in,” the predicted interference area to the full service station would be limited to a small area in the immediate vicinity of the LPFM station transmitter site. In these circumstances, the public interest may favor continued LPFM second- and third-adjacent channel operations over a subsequently authorized upgrade or new full service station.⁶⁸

Thus, the Commission sought “comment on whether to amend Section 73.809.”⁶⁹ Specifically, the Commission asked, “[s]hould an LPFM station be permitted to continue to operate even when interference is predicted to occur within the 70 dBu contour of an ‘encroaching’ second- or third-

⁶⁷See *Shell Oil Co. v. EPA*, 950 F.2d 741, 750-51 (D.C.Cir.1991); *Northeast Maryland Waste Disposal Auth.*, 358 F.3d at 952 (final rule is a “logical outgrowth” of a proposed rule if interested parties “‘should have anticipated’ that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period”).

⁶⁸*Second Order on Reconsideration and Further Notice of Proposed Rulemaking* (“*Second Order*”), Creation of a Low Power Radio Service, 20 FCCRcd 6763, 6780-81 (2005).

⁶⁹*Id.* at 6781.

adjacent channel full service station?”⁷⁰ By modifying §73.809, the Commission essentially answered the question it posed for comment.

The Commission adopted the modification based on a valid concern that LPFM stations were being threatened by community of license changes by full-power stations. On numerous occasions, after the issue was exacerbated once the Commission adopted a streamlined procedure for change in community of license applications,⁷¹ Prometheus supplemented the record with a list of threatened stations and recommendations for addressing the encroachment problem.⁷² In its recommendations, Prometheus listed the affected LPFM stations and urged the Commission to fulfill its statutory obligation to promote localism by preserving and protecting LPFM stations which are inherently local in nature.⁷³ Further, the Commission itself noted that it had identified approximately 40 LPFM stations that could be displaced.⁷⁴ Thus, in response to the Commission’s concern that so many LPFM stations could face displacement and its commitment to localism, the Commission appropriately modified the interference rule.

Ace, et al., also complain the modification will allow LPFM stations to operate within a full-service station’s 70 dBμ contour, resulting in interference holes, other wise known as the “swiss

⁷⁰*Id.*

⁷¹*Report and Order*, In the Matter of Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services 21 FCCRcd 14212 (2006).

⁷²*See* Prometheus Radio Project Letter, MM Docket No. 99-25 (April 26, 2007); Prometheus Radio Project, Notice of Oral *Ex Parte* Presentations, MM Docket No. 99-25 (March 5, March 8, May 18, June 1, June 14 and June 19, 2007).

⁷³*Id.*

⁷⁴*Third Report and Order*, 22 FCCRcd at 21938.

cheese” effect. However, Ace, *et al.*’s diagram to demonstrate the alleged calamity of this “swiss cheese” effect is misleading and meaningless in the context of this proceeding. This diagram is not a diagram of interference caused to full-power stations. Rather, it merely demonstrates the relative scale of full power stations (which are enormous) to low power stations (which are tiny).

The fact that an LPFM station has a 60 dB μ contour on a second or third adjacent channel inside the 70 dB μ contour of a full power station does not imply that the LPFM is causing interference to that station. Ace, *et al.*, have skillfully misrepresented the phenomenon at play by describing interference as similar to “swiss cheese” and providing a diagram that looks like “swiss cheese.” In actuality, though, the diagram does not portray the potential interference caused by LPFMs inside the contour of a full power stations, but rather portrays the full 60 dB μ contour of the stations.

Further, the idea that there would be 118 low power stations inside a Class C station’s 70 dB μ contour is absurd. The Commission did not, in its modification of §73.809, remove the second adjacent restriction for the general allocation process for LPFMs. Rather, the Commission allowed a full-power station that is moving into new territory to disregard existing LPFMs on the second adjacent channel. In reality, the modification of §73.809 is a benefit to full-service stations, because it eliminates the possibility of holding up a move-in over an insignificant possibility of second adjacent channel interference. Any interference possibly received by the full power station would be only in the immediate vicinity of the low power transmitter site.

B. The Commission’s Displacement Policies Are In the Public Interest.

Ace, *et al.*, suggest the Commission’s waiver guidelines for 47 C.F.R. §73.807 and for the rule determining priority between LPFMs and full-power stations are substantially and procedurally

flawed.⁷⁵ *Ace, et al.*, suggest that the policies do not serve the public interest, the Commission has departed from prior policy relating to priority, and the policies are impermissibly retroactive. However, the Commission's policies are in the public interest, are consistent with current policy, and are not impermissibly retroactive.

1. *The Commission's policies are in the public interest and consistent with current policy*

The Commission has the authority to issue waivers based on the "good cause" standard.⁷⁶ Under this standard, the Commission will grant a waiver when the party pleads with particularity the facts and circumstances that warrant the waiver, and the granting of a waiver is in the public interest.⁷⁷ The Commission's interim policies effectively reflects the "good cause" standard.

For instance, to seek a waiver of §73.807, an LPFM station must make several particular showings to ensure that the waiver is in the public interest. It must show: (1) a new or encroaching full-service station "would result in the full-service and LPFM stations operating at less than the minimum distance separations set forth in Section 73.807" and (2) "implementation of the full-service proposal must result in either an increase in interference caused to the LPFM station or result in the displacement...."⁷⁸ Additionally, the Commission recommends "it will be advantageous to an LPFM

⁷⁵See *Ace, et al.*, Petition at 7.

⁷⁶See, e.g., *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1968).

⁷⁷See *Columbia Communication Corp. v. FCC*, 932 F.2d 189, 192 (D.C. Cir. 1987). In fact, the Commission has already granted similar waivers under the "good cause" standard. See, e.g., *Letter to John Snyder from Peter H. Boyle, Chief, Audio Division, Media Bureau*, 21 FCCRcd 11,945 (2006).

⁷⁸*Third Report and Order*, 22 FCCRcd at 21939.

applicant's waiver showing to propose modifications that minimize the area of predicted interference...."⁷⁹ Furthermore, "the Commission must balance the new interference to the full-service station against the potential loss of an LPFM station."⁸⁰ Thus, the Commission will only grant a waiver if the LPFM station can demonstrate the circumstances warrant a waiver. Moreover, the Commission continues to have the discretion to deny such a waiver request if it is not in the public interest.

Further, the Commission noted it is seeking further comment on whether to codify the §73.807 waiver policy.⁸¹ As such, the Commission specifically noted it "will withhold final determination of [a] waiver request until action on the *Second Further Notice* proposals."⁸² Thus, before any waiver of §73.807 is finalized, the Commission will be considering comments submitted in the *Second Further Notice*.

Similarly, the Commission has made clear that the waiver of the LPFM/full-power station priority rules can only be granted if the facts demonstrate the waiver would be in the public interest. An LPFM station must make a showing that "a community of license modification would result in the displacement of the LPFM station or result in such a significant increase in caused interference to the LPFM station such that continued operations are infeasible."⁸³ Furthermore, the LPFM must show

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹*Id.* at 21942.

⁸²*Id.* at 21940.

⁸³*Id.*

“that it has regularly provided at least eight hours per day of locally originated programming.”⁸⁴ These requirements provide the basis for an LPFM station to make a showing with particularity the facts and circumstances that can justify a “good cause” waiver. The policy also ensures the public interest is being served because it requires the LPFM station to show it is providing substantial local programming. Thus, the Commission’s displacement policies are simply an extension of Commission’s current authority to grant waivers.

Nonetheless, *Ace, et al.*, believe that the Commission’s action is a departure from the Commission’s priority rules. However, although a presumption exists that the complete displacement of an LPFM station is not in the public interest, “the presumption is rebuttable and does not bind the Commission to a particular result.”⁸⁵ Furthermore, the *Third Report and Order* warns LPFM stations, “that even if the required showing is made, the Commission in the exercise of its discretion may conclude that denial of the full-service station application...would not serve the public interest.”⁸⁶ It is especially evident the Commission has not made any changes or judgement with respect to the issue of priority since the Commission is seeking further comment on whether it should make such changes.⁸⁷ Thus, full-power stations continue to have a priority right over LPFMs.

Ace, et al., also suggest that the interim LPFM station displacement policy will prevent a

⁸⁴*Id.*

⁸⁵*Id.* at 21941.

⁸⁶*Id.*

⁸⁷*Id.* at 21943.

community from receiving its first local service.⁸⁸ This argument, however, fails to recognize that a potentially displaced LPFM station would already be providing local service to such a community. Furthermore, the Commission has established already other priorities when considering allowing a full-service station to change its community of license.⁸⁹ Most notably, “a proposal which would reduce the number of communities enjoying local service is presumptively contrary to the public interest.”⁹⁰

That is, the “public has a legitimate expectation that existing service will continue, and this expectation is a fact we must weigh independently against the service benefits that may result from reallocating a channel from one community to another”⁹¹ Thus, contrary to *Ace, et al.*’s, implication, full-service stations do not automatically receive a change of community of license when requested. Full-service stations are already obligated to make a §307(b) showing, and the Commission’s policy merely ensures that such a showing does in fact reflect a benefit to the public.

2. *The Commission’s action is not impermissibly retroactive.*

Ace, et al., claim the Commission’s displacement policies are impermissibly retroactive because “full-service broadcasters with pending minor change applications did not have the benefit of knowing

⁸⁸*Ace, et al.*, Petition at 8-9.

⁸⁹*Memorandum Opinion & Order*, Amendment of the Commission’s Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, 5 FCCRcd 7094, 7097 (1990).

⁹⁰*Id.*

⁹¹*Id.*

about the new policy before filing their applications.”⁹² As discussed above,⁹³ the mere filing of an application does not vest any substantive rights on a party.⁹⁴ The filing of a minor change application does not guarantee the applicant has a right to the granting of its application. Thus, the policy is not retroactive “merely because it...upsets expectations based on prior” guidelines.⁹⁵

IV. CONCLUSION

The Commission’s actions were taken pursuant to sound legal authority. Its action is supported by the record and consistent with Commission precedent. Thus, the *Petitions for Reconsideration* must be denied.

Respectfully submitted,

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⁹²*Ace, et al.*, Petition at 9.

⁹³*See supra*, Section IIA at 4-8.

⁹⁴*Chadmoore*, 113 F.3d at 241.

⁹⁵*Landgraf*, 511 U.S. at 269.

CERTIFICATE OF SERVICE

I, Parul P. Desai, hereby certify that on this 25th day of March, 2008, the foregoing Opposition to Petition for Reconsideration was served by first-class mail, postage paid, on the following:

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