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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)
)
Media Bureau Invites Applicants to)
Select FM Translator Applications for)
Voluntary Dismissal to Comply with)
Processing Cap)

MM Docket No. 99-25

**REPLY TO OPPOSITION TO REQUEST FOR STAY OF
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**

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TABLE OF CONTENTS

	<i>Page</i>
EXECUTIVE SUMMARY	ii
I. BACKGROUND	2
II. PETITIONERS SATISFY THE STANDARD FOR GRANTING A STAY	4
A. Likelihood of Success on the Merits.....	5
B. Balance of Harms and Public Interest Benefits	9
III. CONCLUSION.....	12

EXECUTIVE SUMMARY

As set forth in the Reply nothing in the Opposition to Request for Stay (“Opposition”) of Prometheus Radio Project (“Prometheus”) undermines the showing made in support of staying the April 3, 2008, deadline requiring participants in Auction No. 83 to “voluntarily” dismiss all but ten of their pending FM translator applications. *Media Bureau Invites Applicants to Select FM Translator Applications for Voluntary Dismissal to Comply with Processing Cap*, DA 08-496 (MB March 4, 2008) (“*Public Notice*”). Enforcement of the deadline, which the *Public Notice* established to implement the ten-application limit adopted in the Third Report and Order in *Creation of a Low Power Radio Service*, 22 FCC Rcd. 21912 (2007) (“*Third R&O*”), would irreparably harm applicants, like Petitioners here, that raised meritorious challenges to the *Third R&O*, but would be unable to obtain full relief on reconsideration or further review if the limit takes effect before such further proceedings reach finality. Nothing in the Opposition diminishes the *Third R&O*’s deficiencies that Petitioners cite on reconsideration, nor overcomes the demonstration made by Petitioners that a balance of harms overwhelmingly favors staying forced dismissal of potentially thousands of pending FM translator applications.

Whereas Petitioners have shown they likely will prevail on the merits of reconsideration or further review, that they will suffer irreparable harm absent a stay, that a stay will not harm others, and that it will serve the public interest, the Opposition is non-responsive to most of the merits arguments, and pays lip service to the other stay factors. Reconsideration is necessary because the *Third R&O* did not justify the ten-application limit – especially given the mismatch between fostering low power FM (“LPFM”) opportunities in urban and mid-sized communities, and the fact that FM translator proposals subject to dismissal mainly seek to serve rural and terrain-challenged areas – and the selection of ten as the number of permitted proposals was unexplained and applied retroactively to cut-off applicants, without a showing it will serve its

stated objective. In response, Prometheus in many places simply summarizes the *Third R&O*, which cannot rebut Petitioners' exposure of its deficiencies, and in others merely sets out, but does not apply to the case at hand, general legal propositions regarding the bounds of FCC authority. In doing so, Prometheus overlooks that the *Third R&O* forsakes all "singleton" FM translator applications now ready for grant as well as those that can be readied via engineering amendment or settlement. Further, its citation of instances where the FCC adopted changes that lead to applications not being granted arose – unlike here – from reasoned policy shifts (*e.g.*, new ownership rules, legislation mandating new methods of selecting winning applicants), and they applied to all pending applicants rather than resulting from arbitrary decisions retroactively applying new rules to a select group of applicants.

Prometheus defends the *Third R&O* on grounds the FCC need not exactly quantify and specify the spectrum the LPFM service may gain from a ten-application limit. Petitioners never claimed such exactitude is required, but rather, that failure to explain at least generally how the limit will foster LPFM opportunities, and at least to predict the degree it will do so, makes the *Third R&O* arbitrary and capricious. The Opposition's attempt to dispute Petitioners' showing that the record does not support ten as a number of permissible FM translator proposals per applicant, and that the *Third R&O* did not offer any explanation for it, is no more than revisionist history of Prometheus' own comments in this proceeding, which is unmasked not only by any fair reading of that filing, but by Commissioner McDowell's interpretation of it as well.

Regarding the brief attention the Opposition pays the remaining stay factors, Prometheus misunderstands and/or mischaracterizes the showing of irreparable harm. As to harm to others, it unwittingly supports the showing that no harm will occur, by confirming not only that the class of entities a stay may affect is speculative, but that any delay opening an LPFM application window has causes other than any stay that may be granted, including FCC resolution of the Second

Further Notice of Proposed Rulemaking in this docket. Similarly, Prometheus claims a stay would impede communities from receiving LPFM stations, but given the causes apart from reconsideration and a possible stay that are holding up such service, and the public interest benefits FM translators offer, a stay will not harm, but rather will serve, the public interest.

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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 (“Petitioners”), all of which collectively sought reconsideration of the limitation in the Third Report and Order in the captioned proceeding that FM translator applicants may pursue only ten of their now-pending proposals,¹ and sought a Stay of the Commission’s Public Notice requiring that Auction No. 83 participants select, by April 3, 2008, which of their pending applications to “voluntarily” dismiss so they have no more than ten on file,² hereby reply to the Opposition to Request for Stay (“Opp.”) of Prometheus Radio

¹ *Creation of a Low Power Radio Service*, 22 FCC Rcd. 21912 (2007) (“*Third R&O*”). See *Petitions for Reconsideration of Action in Rulemaking Proceeding*, Report No. 2853 (rel. March 4, 2008), 73 Fed. Reg. 12733 (March 10, 2008).

² *Media Bureau Invites Applicants to Select FM Translator Applications for Voluntary Dismissal to Comply with Processing Cap*, DA 08-496 (MB March 4, 2008) (“*Public Notice*”). Petitioners’ reconsideration request (“*Pet. for Recon.*”) was attached to their Request for Stay (“*Req. for Stay*”) as Exhibit 1 and was incorporated by reference therein.

Project ("Prometheus"). The Opposition, dated March 20, 2008, was not served on Petitioners, but rather was discovered only by their March 21, 2008, review of filings in this docket.

The Opposition does not in any way undermine the basis of Petitioners' request for a stay. As set forth in greater detail below, the Opposition is non-responsive to the vast majority of points Petitioners raised on the merits, and does not undermine Petitioners' likelihood of prevailing on reconsideration (or judicial review). Nor does the Opposition, in paying lip service to the other factors of the test, undercut Petitioners' showings as to why they are entitled to a stay. Specifically, Petitioners have shown they likely will prevail on the merits, that they will suffer irreparable harm absent a stay, that a stay will not harm other interested parties, and that it will serve the public interest.³ Consequently, a stay should issue to preserve the status quo until the Commission or a court rules with finality on Petitioners' request for relief from the *Third R&O*.

I. BACKGROUND

Analyses of the relevant portions of the *Third R&O* and the challenged directive in the associated *Public Notice* appear in Petitioners' Request for Stay and Petition for Reconsideration and need not be repeated here.⁴ In short, however, in furtherance of the *Third R&O*'s attempt to maximize the prospects of the low power FM ("LPFM") service, the FCC sought to address the impact of the Auction No. 83 FM translator filing window opened in 2003, which yielded over 13,000 applications, with approximately 7,000 still pending. These remaining applications are alleged to have a "preclusive effect" on LPFM opportunities. *Third R&O* ¶¶ 43-57. Claiming its actions will improve the prospects for LPFM applications, the Commission ordered that Auction

³ See, e.g., *Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them*, 15 FCC Rcd. 7051, 7054 (1999) (citing *Biennial Regulatory Review*, 14 FCC Rcd. 9305, 9307 (1999) (citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958))). See also *Washington Metro. Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 842-43 (D.C. Cir. 1977).

⁴ See Req. for Stay at 2-7; Pet. for Recon. at 2-6.

No. 83 applicants could continue to process only ten pending applications, and that all others would be dismissed. While it also directed the Media Bureau to open a settlement window, *id.*, ¶ 56, the *Third R&O* requires applicants to select from their still-pending proposals the ten they wish to preserve before the window opens.

Petitioners sought reconsideration of this limit, and raised a number of meritorious challenges to it, including that the *Third R&O* did not justify the necessity of a cap on FM translator proposals, especially given the mismatch between its intent of fostering LPFM opportunities in urbanized areas in particular, and the fact that the FM translators proposals largely seek to serve rural and terrain-challenged areas.⁵ Petitioners also showed the ten-application limit is arbitrary and capricious and wholly unexplained, that the number ten was plucked from thin air, and made to apply retroactively to cut-off applicants, all without any showing it will serve its stated objective.⁶ Petitioners showed the mandate to dismiss all but ten still-pending FM translator applications was an unexplained departure from the decision to open the filing window without such a restriction, and that the FCC ignored less drastic solutions.⁷

However, the Commission issued the *Public Notice* to effectuate the *Third R&O*'s limit on still-pending FM translator applications before the clock even started on the pleading cycle on petitions for reconsideration of the *Third R&O*.⁸ The *Public Notice* set an April 3, 2008, date for Petitioners to identify for "voluntary" dismissal all but ten of their FM translator applications, after which proposals in excess thereof are subject to dismissal by the Bureau on a last-in/first-

⁵ Req. for Stay at 11; Pet. for Recon. at 11-13.

⁶ Req. for Stay at 12-14; Pet. for Recon. at 8-10, 12-13, 16-19.

⁷ Pet. for Recon. at 7-8, 14-16.

⁸ See *supra* notes 1-2 (*Public Notice* issued March 4, 2008, whereas notice of petitions for reconsideration did not appear in the Federal Register until March 10, 2008).

out basis.⁹ At the same time, the Commission ensured the pleading cycle, let alone an FCC decision, on Petitioners' request for reconsideration will not be complete before their applications become subject to dismissal. Petitioners thus filed the Request for Stay to avoid the unnecessary forced dismissal of potentially thousands of pending FM translator applications, and to ensure that relief granted on reconsideration or judicial review will not be too late to have any meaning.

II. PETITIONERS SATISFY THE STANDARD FOR GRANTING A STAY

The Prometheus Opposition corroborates key points Petitioners raised in seeking a stay, and otherwise does not undermine their showing that a stay is warranted under the four-factor test used to analyze such requests. For example, Prometheus agrees that LPFM opportunities are limited primarily in "urban and densely populated areas" that are the "most desirable and sustainable" for LPFM, and notes the FCC "has been able to license LPFM stations ... in rural and less densely populated areas,"¹⁰ such as those sought to be served by the majority of FM translator proposals that the *Third R&O* and *Public Notice* subject to dismissal. This confirms a central premise of Petitioners' stay and reconsideration requests, *i.e.*, that forced *en masse* dismissal of FM translator applications likely will have little impact where LPFM opportunities allegedly are precluded, and that "failure to consider [this] important aspect of the problem undermines the validity" of the challenged portion of the *Third R&O*.¹¹ Similarly, Prometheus' filing supports Petitioners' showing that the ten-application limit on FM translators was retroactively applied.¹²

⁹ See *Public Notice* at 1 ("should [an] applicant take no action," the "Bureau will retain the ten first filed applications and dismiss all later-filed applications").

¹⁰ Opp. at 2 & n.6.

¹¹ Pet. for Recon. at 10; Req. for Stay at 11 (both quoting *Prometheus Radio Project v. FCC*, 373 F.3d 372, 421 (3d Cir. 2004); *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 455 (2d Cir. 2007)) (internal quotation and alteration omitted).

¹² See Opp. at 4-5 (arguing "the Commission had not determined" that such "limit was necessary, but later determined [...] an application limit ... was necessary" and that such "change[s] in] license application procedures *midstream*" are permitted) (footnote omitted, emphasis added).

Even where the Opposition does not bolster points made in the stay request, it does not undercut the need for, or propriety of, staying the dismissal deadline that the Public Notice established.

A. Likelihood of Success on the Merits

Prometheus does not raise in opposition anything that seriously undermines Petitioners' specific showings that the *Third R&O* is vulnerable on a variety of legal and equitable grounds. In many cases, Prometheus simply reiterates or summarizes the Commission's decision and discussion of its motivations in the *Third R&O*.¹³ This, of course does nothing to respond to Petitioners' unmasking of the *Third R&O*'s deficiencies. Elsewhere, the Opposition sets out general propositions of law regarding what the FCC may be empowered to do, but does not specifically apply those principles. For example, Prometheus dedicates several pages to the proposition that the FCC has the authority to revise processing guidelines in the public interest, and to the FCC's asserted motivations for making such a change here, Opp. at 4-6, but does not address that that change was made despite a lack of factual predicate or reasoned basis, or that the Commission has not and cannot show the change will serve its underlying objective.¹⁴ Prometheus similarly has no response to the showing that the action in the *Third R&O* that Petitioners challenge is at odds with 47 U.S.C. § 307(b),¹⁵ other than to label that point "self-serving," Opp. at 13, which if by so arguing Prometheus means to suggest it supports Petitioners' case, we cannot but agree.

Other parts of the Opposition are simply *seriatim* case briefs on retroactive FCC action that summarize points of law in each, but do not apply them to the present case,¹⁶ such as to the

¹³ See, e.g., Opp. at 11-12, 16.

¹⁴ Req. for Stay at 11-14; Pet. for Recon. at 10-14, 16-19.

¹⁵ Pet. for Recon. at 10, 13-14; Req. for Stay at 12.

¹⁶ Opp. at 7-9. Nor does the Opposition even attempt to address the extent to which Petitioners distinguished in their reconsideration and stay requests the cases Prometheus summarizes in the Opposition. See, e.g., Pet. for Recon. at 10-11 (distinguishing *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1554 (D.C. Cir. 1987), from the present case).

overlooked point that the decision in the *Third R&O* forsakes all “singleton” applications now ready for grant, as well as those that could be made ready via engineering amendment or agreement during a settlement window. Moreover, in each of the cases cited in the Opposition, the rule change that lead to applications not being granted was the result of a reasoned policy shift at the FCC – e.g., a change in multiple ownership rules rendering some applications ungrantable, or a change resulting from Congressional action from lottery to auction as a method of selecting winning applicants. In each cases, the rule changes applied to all applicants and/or FCC licensees equally. Here, applications continue to be processed and granted under exactly the same rules that were previously applicable to the processing of translator applications, but – suddenly – numerous applications, of Petitioners and other similarly situated parties, are rendered nullities, with no demonstration as to why only a limited subset of all applications are subject to the new policies, or of how this draconian action will advance the Commission’s policies or further the public interest.

Prometheus fares no better in the few areas in which it does attempt to engage on specific issues at stake on reconsideration and in Petitioners’ stay request. For example, the Opposition states “[t]here is no mandate that the Commission exactly quantify and specify the spectrum that will become available for and allocated to LPFMs.” *Id.* But Petitioners never claimed the FCC is constrained by any such degree of exactitude. It is required, however, in order to get its decision over the arbitrary and capricious threshold, to explain in at least general terms beyond the *ipse dixit* in the *Third R&O* how its decision will foster LPFM opportunities,¹⁷ and to at least

¹⁷ See *Illinois Public Telecoms. Ass’n v. FCC*, 117 F.3d 555, 564 (D.C. Cir. 1997); *Central Florida Enters., Inc. v. FCC*, 598 F.2d 37, 50 (D.C. Cir. 1978) (“intuitional forms of decision-making, completely opaque to judicial review,” such as decisions “based on administrative ‘feel,’” fall “somewhere on the distant side of arbitrary”).

predict the degree to which it will do so,¹⁸ especially given the extent to which, on its face, what the Commission hopes to achieve and the means it has chosen to do so are in serious tension.¹⁹

Prometheus also fails to refute Petitioners' showing that "[n]othing 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 [of] how the Commission arrived at that number,"²⁰ and that this "violates the long-standing mandate [for the FCC to] provide rational explanations when it sets numerical limits to implement the Communications Act and effectuate policy."²¹ It cites several cases that generically afford the FCC not insignificant latitude "when [it] engages in the process of drawing lines." *Opp.* at 14-16. But there is no doubt such "line-drawing exercises" require the FCC to examine relevant data and articulate a satisfactory explanation for any action taken, including a rational connection between the facts found and choices made. *United States Telecom Ass'n v. FCC*, 227 F.3d 450, 461 (2000). Prometheus has no answer for the *Third R&O*'s deficiencies in this regard.

It is significant that, in response, the best Prometheus can do in hoping to find record support for setting ten as the limit on FM translator applications in Auction No. 83 going forward, is to offer a skewed reading of its own filing in this docket. Specifically, as Petitioners noted, the only place the record referred to ten FM translator proposals as a significant number was Prometheus' comments, in an appendix, in which it requested that the Commission "investigate all

¹⁸ *Missouri Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1070 (D.C. Cir. 2003) ("when [an agency] finds it necessary to make predictions or extrapolations from the record, it must fully explain the assumptions it relied on to resolve unknowns and the public policies behind those assumptions") (internal quotation omitted).

¹⁹ *See, e.g., Clement v. SEC*, 674 F.2d 641, 646 (7th Cir. 1982). *See also* *Pet. for Recon.* at 11-13; *Req. for Stay* at 11 (both examining mismatch between geographic areas where LPFM opportunities are wanting and FM translators typically seek to serve, and/or for which applications will be dismissed).

²⁰ *Pet. for Recon.* at 16-19; *Req. for Stay* at 12-14.

²¹ *Id.* (citing *Fox Television Stations v. FCC*, 280 F.3d 1027, 1043-44 (D.C. Cir. 2002)).

applicants that filed more than ten (10) translators to ensure [they] were filed with the intent to build, rather than to speculate.”²² However, this clearly is not an argument that all applicants should be limited to ten translator proposals, but rather a request that, if any filed applications for purposes other than building the proposed facilities, that activity should be staunch. No fair reading of this request can yield an interpretation that, for FM translator applicants proposing to actually obtain licenses for and build more than ten stations, that intent should be frustrated. Indeed, the very next line in Prometheus’ appendix urged that “[a]ny translator applicants ... found participating in the window for the purpose of speculation should have all applications dismissed[.]” *Id.* The negative implication of this is that applicants with more than ten proposals, whom the FCC investigates at Prometheus’ invitation and are found not be to have engaged in speculation, should be allowed to pursue their applications. Accordingly, though Prometheus accuses Petitioners of “misrepresenting” the record in claiming not even LPFM advocates suggested a limit of ten translator applications,²³ it is Prometheus that has engaged in revisionist history by attempting to bolster an FCC decision that lacks adequate record support. Indeed, Petitioners’ view is shared by Commissioner McDowell, who observed in partially dissenting from the *Third R&O*, that the limit of ten “is lower even than the numbers suggested by LPFM advocacy groups.” *Third R&O*, 22 FCC Rcd. at 21974 (Statement of Comm’r McDowell).

The failure of Prometheus’ attempt to recast its comments to provide *post hoc* support for the *Third R&O* leaves only its attempt to justify the Commission’s setting ten as the limit for FM translator proposals per applicant going forward in Auction No. 83, by citing other instances in which the Commission, in filing windows for other services, set a ten-application limit. Opp. at 17. As a threshold matter, in none of those cases did the Commission first decide, as it did here,

²² Pet. for Recon. at 19 (citing Comments of Prometheus Radio Project *et al.*, MM Docket No. 99-25, Aug. 22, 2005, App. B at 3).

²³ Opp. at 17 (citing Pet. for Stay at 14).

to open a filing window without imposing any limit on the number of submissions per applicant, then later reverse course and significantly ratchet down the number of permissible filings. Indeed, in the NCE FM filing window Prometheus cites, the Commission proposed a limit in its initial rulemaking, proposed and sought comment by public notice on a limit of ten, then adopted it after receiving comments supporting that figure.²⁴ More importantly, in that proceeding there was record support for the ten-application limit, *see* 22 FCC Rcd. at 18699 (“More than 10,000 comments were filed,” the “overwhelming majority of [which] supported the proposed limit”), whereas here no party requested a ten-application limit, or offered any calculations in support.²⁵

B. Balance of Harms and Public Interest Benefits

Given the short shrift Prometheus dedicates to the remaining factors of the test for granting a stay, its points may be quickly and summarily rebutted. Regarding irreparable harm, Petitioners showed that, absent a stay of the *Public Notice*, by being forced to identify their ten FM translator proposals each deems most important and to subject the rest to “voluntary” dismissal, they will suffer irreparable harm from two disadvantages in Auction No. 83, even if they prevail on reconsideration or further review.²⁶ First, even if at that point the Commission somehow restores Petitioners’ applications to the posture they now occupy, disclosure of their ten most preferred proposals to competing applicants gives the latter an unfair advantage negotiating with Petitioners in any settlement window, and bidding at auction. *Id.* In fact, the disclosure of these applications runs directly counter to the requirement of the auction anti-collusion rules, to which

²⁴ *See Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 15 FCC Rcd 7386, 7422 (2000); *FCC Seeks Comment on Proposed Application Limit for NCE FM New Station Applications*, 22 FCC Rcd. 15910 (2007); *FCC Adopts Limit for NCE FM New Station Applications*, 22 FCC Rcd. 18699 (2007) (cited in Opp. at 17).

²⁵ *See supra* at 8 (citing Comments of Prometheus Radio Project *et al.*, MM Docket No. 99-25, App. B at 3; *Third R&O*, 22 FCC Rcd. at 21974 (Statement of Comm’r McDowell)).

²⁶ *See, e.g.*, Req. for Stay at 14-17.

the applications are subject.²⁷ Second, allowing a settlement window, an auction, the award of licenses and, possibly, new station construction to go forward while reconsideration or review is pending means that, even if successful, Petitioners will realize no relief since each of the above steps cannot easily be undone and Petitioners' applications returned to their present status.

Nothing Prometheus offers undercuts this irreparable harm, because its Opposition not only mischaracterizes the harm in claiming it does not exist, it suffers the overarching problem of presuming Petitioners will not prevail on the merits. As to the former, the Opposition describes the irreparable harm Petitioners claim as "not be[ing] able to receive all the translators they seek to have," then dismisses it as something to which Petitioners "never had a substantive right." Opp. at 18. But Petitioners never claimed the irreparable harm they face is not acquiring all the translators for which they applied. Rather they will be denied the right to compete fairly, on a level playing field, for translators they seek, if reconsideration or review succeeds but disclosure of their ten most preferred proposals undermines settlement or auction opportunities, or dismissal of their applications allows others to irretrievably proceed to auction, licensing, and/or construction. Prometheus' argument in this regard is thus a straw man, and is utterly non-responsive to Petitioners' showing of irreparable harm. It also assumes away the harm on the notion that, if Petitioners do not prevail on reconsideration or review, disclosure of their ten most highly

²⁷ Prometheus claims that merely disclosing which of their ten respective applications each Petitioner values most does not run afoul of the anti-collusion rules, as it does not constitute communication about "bids, bidding strategy, or settlements." Yet identifying the ten most important applications clearly is a communication about bidding strategy and priorities, far more directly than other communications that the Commission has found to be collusive and prohibited. See, e.g., *In re Application of Mercury PCS II, LLC*, 13 FCC Rcd. 23755 (1998) (even indirect communication of bidding intentions through use of "trailing numbers" in bid value is collusive under 47 C.F.R. § 1.2105(c)(1)). See *id.* at 23757-58 (the "spirit and intent of [the] rule" is to prevent action having "potential to affect other auction participant's bidding strategy," including that of opponents, and "admonishes ... participants to refrain from disclosing *in any manner* the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements with other bidders") (emphases added).

desired translator proposals cannot harm them. But this misunderstands the purpose of irreparable harm showings under the four-factor test – the whole point is that even prevailing on review of the merits will not afford full relief, unless the *status quo* is maintained until that can occur.²⁸

Next, in its brief attempt to show harm to others will result from a stay, *see* Opp. at 19, Prometheus unwittingly supports Petitioners' showing that no such harm will occur. It contends a stay will harm unnamed parties holding "LPFM interests," because "the next filing window [which will be for LPFM stations] will not be opened until the Commission [resolves] all issues that will affect the availability of spectrum for LPFM applicants." *Id.* But those issues extend well beyond the petitions for reconsideration of the *Third R&O*, but also resolution of the Second Further Notice of Proposed Rulemaking associated therewith, comments on which have not even been filed.²⁹ The reconsideration petitions, and the related stay, if granted, consequently would not be what holds up the opening of an LPFM window. Accordingly, not only does Prometheus' argument confirm that "[t]he class of entities a stay might affect is ... entirely speculative at this time," but also that "a stay ... would at worst only temporarily delay implementation of the ten-proposals-per-applicant limit," not the licensing of LPFM stations. Req. for Stay at 18.

On the same note, while Prometheus bases its claim that "a stay would harm the public interest" on the notion that it "will foreclose communities from receiving ... an LPFM station," Opp. at 19, it is other causes, apart from reconsideration of the *Third R&O* and a possible stay, that are holding up such service, including resolution of the Second Further Notice of Proposed Rulemaking. While Prometheus suggests Petitioners' request for a stay to preserve the status quo pending reconsideration is the same as requesting that "the Commission do nothing," *id.*,

²⁸ See, e.g., *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir. 2003) (*pendente lite* relief seeks "to protect the status quo and prevent irreparable harm during the ... lawsuit ultimately to preserve the [] ability to render meaningful judgment on the merits").

²⁹ See *Third R&O*, 22 FCC Rcd. at 29142-46; *Creation of a Low Power FM Radio Service*, 73 Fed. Reg. 12061 (Mar. 6, 2008).

this confuses Petitioners' desire to see their applications preserved in their current status so that, if reconsideration or further review is successful, they can pursue them, with the belief that Petitioners seek some kind of freeze in Auction No. 83. Petitioners do not object to the settlement window in that auction opening, or even having the auction proceed, provided that those steps transpire without regard to the ten-application limit on FM translator proposals.³⁰

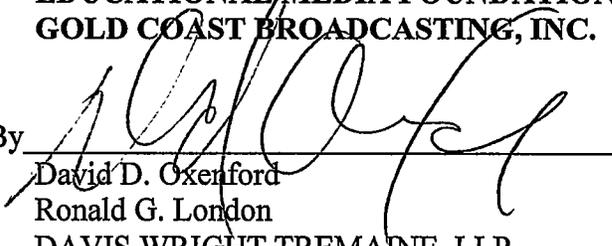
III. CONCLUSION

For the foregoing reasons, the Commission should stay the *Public Notice's* April 3, 2008, deadline for applicants in Auction No. 83, including Petitioners here, to designate for dismissal all but ten of their still-pending FM translator proposals, until the Commission issues a decision on Petitioners' request for reconsideration of the *Third R&O* pursuant to which the *Public Notice* issued, and/or until the *Third R&O* attains finality.

Respectfully submitted,

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³⁰ Prometheus' further public interest argument – that having Auction No. 83 go forward under a ten-proposal-per-applicant limit could somehow “benefit ... Petitioners' desire to obtain translators,” by allowing the “Commission [to] proceed to conduct regular filing windows for all services,” ostensibly including FM translators – is a red herring. As Petitioners have shown, “the next opportunity to file new FM translator proposals is likely years away, given the six-year period between the Auction No. 83 window and the FM translator filing window last opened prior to that.” Req. for Stay at 17 (citing Pet. for Recon. at 3, 15-16). Moreover, allotments that Petitioners seek in *this* auction already will be encumbered by prevailing applicants, so there is no merit to suggesting future opportunities can compensate for those lost in Auction No. 83.

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Dated: March 25, 2008

CERTIFICATE OF SERVICE

I, Rhea Lytle, a secretary with the law firm of Davis Wright Tremaine LLP, do hereby certify that I have this 25th day of March 2008, mailed by first-class United States mail, postage prepaid, copies of the foregoing **"REPLY TO OPPOSITION TO REQUEST FOR STAY"** to the following:

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Andrew J. Schwartzman
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1625 K Street, N.W.
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Kevin J. Martin, Chairman*
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Michael J. Copps, Commissioner*
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Jonathan S. Adelstein, Commissioner*
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*Via Hand Delivery and Email