

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:)
)
Creation of a Low Power Radio Service) MM Docket No. 99-25
)
)

REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

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”), 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 hereby reply to the oppositions to Petition for Reconsideration. Opposition of Prometheus Radio Project (“Prometheus”); Opposition of REC Networks (“REC”). As set forth below, the Oppositions do not in any way undermine the need for reconsideration, and in fact are non-responsive to the majority of points Petitioners raised. Consequently, the Commission should grant reconsideration.

BACKGROUND

Analysis of the relevant portion of the *Third R&O* appears in the Petition for Reconsideration and need not be repeated. See Pet. for Recon. at 2-6. In short, however, in furtherance of the *Third R&O*’s attempt to maximize the prospects of the low power FM (“LPMF”) service,

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). Petitioners also sought a Stay of the 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. *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*”).

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 that 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 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 on several grounds, 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. *Id.* at 11-13. Petitioners also showed the cap is arbitrary and capricious and wholly unexplained, and 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. *Id.* at 8-10, 12-13, 16-19. Petitioners further 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. *Id.* at 7-8, 14-16.

DISCUSSION

The Prometheus Opposition corroborates key points raised on reconsideration, and otherwise does not undermine Petitioners’ claim to such relief.² As a threshold matter, however, it

² The Opposition of REC, other than essentially adopting Prometheus’s filing, *see* REC Opp. ¶ 7, does not respond to Petitioners’ argument on reconsideration so much as make claims of “alleged abuses of the system” with respect to Auction No. 83. *Id.* ¶ 4. This serves only to reinforce the fact that if there are substantial and material questions of “whether any applicant in Auction 83 abused [FCC] processes,” they should be dealt with “independently of this rule-

should first be noted that, in opposing Petitioners' request for a stay of the *Public Notice* implementing the *Third R&O*'s imposition of a ten-application cap on FM translator proposals in Auction No. 83, Prometheus confirmed a central premise of Petitioners' reconsideration request, *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*.³ In its stay opposition, Prometheus *agreed* that LPFM opportunities are limited primarily in "urban and densely populated areas" that are the "most desirable and sustainable" for LPFM, and noted the FCC "has been able to license LPFM stations ... in rural and less densely populated areas,"⁴ such as those sought to be served by the majority of FM translator proposals that the *Third R&O* and subject to dismissal. Similarly, Prometheus' Opposition here supports the showing that the ten-application limit on FM translators was retroactively applied.⁵

Even where it does not bolster points Petitioners made, Prometheus does not undercut the need for reconsideration. In many cases, it simply reiterates or summarizes the Commission's decision that Petitioners' challenge, and the discussion of motivations underlying it in the *Third*

making, in connection with that applicant," since a "ten-application limit does nothing to resolve this discrete issue, and punishes all applicants without the benefit of due process." Pet. for Recon. at 14-15. Initially, REC does not claim that any of the pending filings violated any FCC rule or policy. To the extent that such a violation did exist, the Commission should deal with such applicants and not punish all applicants for any violations which may have occurred.

³ Pet. for Recon. at 10 (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).

⁴ Opposition to Request for Stay of Prometheus Radio Project, MM Docket No. 99-25, filed March 20, 2008, at 2 & n.6.

⁵ See Prometheus Opp. at 3 (arguing "Commission had not determined" such "limit was necessary, but later determined [] an application limit ... was necessary" and such "change[s] in license application procedures *midstream*" are permitted) (footnote omitted, emphasis added).

R&O.⁶ 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, Prometheus Opp. at 3-5, 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.⁷ 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),⁸ other than to label that point "self-serving," Prometheus Opp. at 12, which if by so arguing Prometheus means to suggest it supports Petitioners' case, we cannot but agree.

Precedential Arguments. 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,⁹ such as to the overlooked point that 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 multiple ownership rule change rendering some applications ungrantable, or changes in method of selecting winning applicants resulting from

⁶ *See, e.g.*, Prometheus Opp. at 10-11, 14.

⁷ Pet. for Recon. at 10-14, 16-19.

⁸ *Id.* at 10, 13-14.

⁹ Prometheus Opp. at 5-7. Nor does the Opposition even attempt to address the extent to which Petitioners distinguished 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).

Congressional action allowing use of auctions rather than lotteries. In each case, the rule changes applied to all applicants and/or licensees equally. Here, applications continue to be processed and granted under exactly the same rules previously applicable to the processing of translator applications, but – suddenly – numerous applications, of Petitioners and similarly situated parties, are rendered nullities, with no showing why only this limited subset are subject to the new policies, or of how this draconian action will advance the Commission’s policies or further the public interest.

With respect to the one case it examines at length, *Bachow Communications, Inc. v. FCC*, 237 F.3d 683, 685 (D.C. Cir. 2001), *see* Opp. at 7, that decision does not give the FCC the kind of broad-ranging power to derail applications through retroactive shifts in policy or procedure that Prometheus cites here. In *Bachow*, which involved a transition from comparative hearings to auctions for allocating licenses among a large number of 39 GHz applicants, the Commission dismissed without prejudice applications not filed by a specified date, as well as mutually exclusive applications, which had not been settled through engineering amendments, by another specified date. These rule changes had the effect of placing on equal footing at auction all parties who filed before the deadline under the old system, along with those who did not file by that date. *Id.* at 686-87. Here, by contrast, the Commission’s retroactive shift has not placed applicants on equal footing, but rather Petitioners (and similarly situated applicants) suffer a total deprivation of the opportunity to pursue certain applications, while other applicants have not been affected at all by this policy change.

As already noted, such “retroactive enforcement of a rule is improper [] if the ill effect ... outweighs the mischief of frustrating the interests the rule promotes.” *Maxcell Telecom. v. FCC*, 815 F.2d at 1554 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)) (internal quotes omitted). Here the balancing equation is dramatically different than in *Bachow* because

the injury inflicted is far more severe. More importantly, the “interests the rule promotes,” *id.*, are totally speculative since the benefit of the dismissals cannot be quantified now, or until the FCC resolves the Further Notice of Proposed Rulemaking in this proceeding. This is not a situation, as in *Bachow*, of FCC implementation of a Congressionally mandated transition from one licensing system to another (from lottery to auction), but instead is a situation where the Commission has decided arbitrarily to single out a subset of applicants for dismissal, while processing all others under the same system used to evaluate all parties who submitted applications during the filing window. Here, the change does not involve any effort to more effectively allocate licenses (as the Court found was the case for auctions in *Bachow*), or that otherwise creates any significant “efficiency gains,” *Bachow*, 237 F.3d at 686, but rather merely “degrades the extent and quality of FM translator service” through harsh restrictions on translator applications. *See* Pet. at 10. The retroactive application of these rules accordingly cannot stand.

Prometheus fares no better in the few other areas it attempts to engage on specific issues at stake on reconsideration. For example, it claims “[t]here is no mandate that the Commission exactly quantify and specify the spectrum that will become available for and allocated to LPFMs.” Prometheus Opp. at 12. 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,¹⁰ and to at least predict the degree to

¹⁰ *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”).

which it will do so,¹¹ 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.¹²

Absence of Record Support. 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,"¹³ 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."¹⁴ It cites several cases that generically afford the FCC not insignificant latitude "when [it] engages in the process of drawing lines." Prometheus Opp. at 13-15. 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

¹¹ *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).

¹² See, e.g., *Clement v. SEC*, 674 F.2d 641, 646 (7th Cir. 1982). See also Pet. for Recon. at 11-13 (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).

¹³ Pet. for Recon. at 16-19.

¹⁴ *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.”¹⁵ 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 staunched.

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 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,¹⁶ 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.

¹⁵ 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).

¹⁶ Prometheus Opp. at 16 (citing Pet. for Recon. at 19).

Prometheus Opp. at 15-16. As a threshold matter, in none of those cases did the Commission first decide, as it did here, 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.¹⁷ 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.¹⁸

CONCLUSION

For the foregoing reasons, and those set forth in the Petition for Reconsideration, the Commission should reverse its decision in the *Third R&O* to limit the processing of applications submitted during the Auction No. 83 filing window for FM translator stations to 10 proposals per applicant. Instead, it should 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.

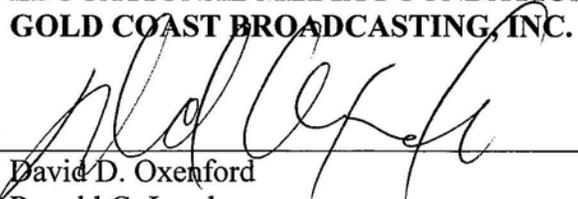
¹⁷ *See Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 15 FCC Rcd 7386, 7422 (2000); *FCC Seeks Comment on Proposed Application Limit for NCE FM New Station Applications*, 22 FCC Rcd. 15910 (2007); *FCC Adopts Limit for NCE FM New Station Applications*, 22 FCC Rcd.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

¹⁸ *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)).

Respectfully submitted,

**EDUCATIONAL MEDIA FOUNDATION
GOLD COAST BROADCASTING, INC.**

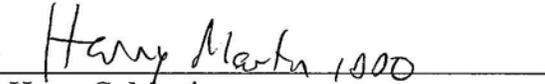
By


David D. Oxenford
Ronald G. London

DAVIS WRIGHT TREMAINE, LLP
1919 Pennsylvania Avenue, N.W. Suite 200
Washington, DC 20006-3402
(202) 973-4200

**BRIDGELIGHT, LLC
CALVARY CHAPEL OF THE FINGER LAKES, INC.
E-STRING WIRELESS, LTD.
LIVING PROOF, INC.**

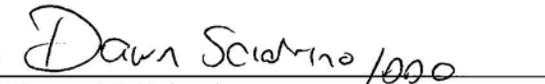
By


Harry C. Martin

FLETCHER, HEALD & HILDRETH, PLC
1300 North 17th Street, 11th Floor
Arlington, Virginia 22209
(703) 812-0400

**EDGEWATER BROADCASTING, INC.
RADIO ASSIST MINISTRY, INC.**

By


Dawn M. Sciarrino

SCIARRINO & SHUBERT, PLLC
5425 Tree Line Dr.
Centreville, VA 20120
(202) 350-9658

**EDUCATIONAL COMMUNICATIONS
OF COLORADO SPRINGS, INC.**

By


Lee Peltzman

SHAINIS & PELTZMAN, CHARTERED
1850 M Street, N.W., Suite 240
Washington, DC 20036
(202) 293-0011

Their Attorneys

EASTERN SIERRA BROADCASTING

By Chris Kidd 1000

Chris Kidd, President
P.O. Box 1254
Alameda, CA 94501
(510) 769-5904

Pro Se

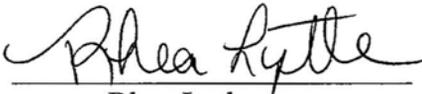
Dated: March 31, 2008

CERTIFICATE OF SERVICE

I, Rhea Lytle, a secretary with the law firm of Davis Wright Tremaine LLP, do hereby certify that I have this 31st day of March 2008, mailed by first-class United States mail, postage prepaid, copies of the foregoing **“REPLY TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION”** to the following:

Parul P. Desai
Andrew J. Schwartzman
Media Access Project
1625 K Street, N.W.
Suite 1000
Washington, D.C. 20006

Michelle A. Eyre, founder
REC Networks
PO Box 40816
Mesa, AZ 85274-0816



Rhea Lytle