

Introduction and Summary

National Religious Broadcasters (NRB) submits that its previous Petition for Reconsideration Regarding Order Imposing Cap on Translator Applications (“Petition”) should be granted, and that the cap imposed by the Commission limiting, retroactively, the number of translator applications to the number of ten should be lifted and replaced by a cap of fifty. Prometheus Radio Project has filed its Opposition to the Petition of NRB and to those of other petitioners, urging the Commission not to change its Order.

For the reasons included herein, we believe that the Opposition is without merit and our Petition should be granted.

I. DISCUSSION

A. The Translator Filing Cap Is Arbitrary and Capricious

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

The Commission has not set forth a reasoned basis for the setting of the translator cap at the number ten rather than at fifty (NRB’s proposed cap), and for that reason we filed our Petition for Reconsideration.

Prometheus Radio Project (“PRP”) has filed its Opposition to our Petition for Reconsideration, arguing that the Commission has demonstrated a “reasoned explanation” (Opposition at 9), and cites *DirectTV, Inc. v. FCC*, 110 F.3d 816, 827 (D.C. Cir. 1997) in support. See: Opposition at 11, n. 43. But *DirectTV* illustrates exactly why the Commission’s decision here did not contain a “reasoned explanation.”

In *DirectTV* the Commission had considered a “pro-rata” distribution of DBS channels among named broadcast entities, but later changed its plan and decided on an

open competitive auction as the mechanism to best distribute the available channels. *DirectTV, supra* at 820. Obviously such a plan *expanded*, rather than limited the total scope of possible bids for those new channels, just the reverse situation from the current Order, where the Commission has drastically limited, retroactively, the total number of applications for translators it will entertain.

In *DirectTV* the Commission had reasoned that the pro-rata plan “would result in too few channels divided among six permittees to provide sufficient capacity to operate a viable system by any single permittee at either location and thus would not facilitate service to the public as we had hoped.” *Id.* at 823.

Further, in that case the Commission specified exactly why, regarding the proposed pro-rata distribution plan that would benefit only a total field of just six entities, it had later rejected that plan: it concluded that in the final analysis those six permittees “would not be able to use [the channels] effectively or efficiently ...” *Id.* at 827. In that case, the Court of Appeals upheld the Commission order because the Commission detailed *why* the rejected alternative was unworkable, and *why* it would not serve the public interest.

Here, by contrast, while the Commission indicated generally the need to limit applications, it has not explained why the number ten would be satisfactory, but fifty, for instance, or one hundred, or any other number, would be excessive. As a result, it cannot be said that a reasoned basis was articulated by the Commission, and PRP has not identified one in its Opposition.

2. No evidence in the record substantiates the number selected by the Commission, and the evidence actually supports a higher number

When the Commission decides to engage in “line-drawing decisions” it must do so in a way that “is consistent with the evidence [and] not ‘patently unreasonable.’” *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372, 390 (3rd Cir. 2004). In that case the Court, citing *Sinclair Broadcasting Group, Inc. v. F.C.C.*, 284 F.2d 148, 162 (D.C. Cir. 2002) stuck down the numerical limits set by the Commission regarding cross-media ownership, holding that “no reasonable explanation underlies” its essential quantitative reasoning. Similarly, here the Commission’s own evidence indicates that if it had selected fifty as the cap, then the interests and the applications of an impressive ninety-seven percent of all previous filers could be fully entertained. See: *Petition of National Religious Broadcasters for Reconsideration Regarding Order Imposing Cap on Translator Applications* at 8-9.

Instead, the Commission selected ten as the cap, thus prejudicing seventeen percent of the prior filers and leaving only eighty percent of the filers undisturbed, and without any rationale why that was so. *Id.* Further, the Commission did not explain, as one Commissioner pointed out, why it *failed* to use “a more measured approach” instead of reducing the cap “from 50 to 10.” Statement of Commissioner Deborah Taylor Tate Approving in Part, Dissenting in Part.

Lastly, the record is void of any evidence that a cap of fifty rather than ten would impede the localism mission of the Commission, or would unduly prejudice LPFM broadcasters, or would create a sizable administrative problem for the Commission. And PRP has not suggested any such evidence.

PRP makes two additional points worth addressing. First it advances a kind of number-by-precedent argument, pointing to the number ten as selected by the

Commission regarding the cap for NCE FM new stations applications. Opposition at 15, n. 59. Yet an analysis of the Commission's reasoning there suggests that the Commission at least proposed a number, and then evaluated the wisdom of that number in light of contrasting suggestions of commenters. *Public Notice, FCC Adopts Limit for NCE FM Few Station Applications in October 12-October 19, 2007 Window*, 22 FCCRcd 18699 (October 10, 2007). For instance, in that Notice the Commission observed that during the

Proposed Rulemaking:

Many parties emphasized that the proposed 10 application limit would permit the orderly processing of applications. The overwhelming majority of individual commenters generally argued that the 10 application limit would foster localism and diversity.

Only a few commenters support a lower cap. A few individuals support a cap of one or two applications. Alaska Educational Radio System ("AERS") argued for a limit of five applications.

* * * *

A few commenters support a higher cap. They argue that the proposed limit of ten applications is too low in light of the pent-up demand for new NCE stations, and that a cap of 15 or more applications will help NCE entities file applications to upgrade FM translator stations to full power stations.

Public Notice, supra (internal footnotes omitted).

In our case, however, the Commission never proposed the cap of ten before imposing it in its Order. Unlike the NCE filing cap, commenters were not given an opportunity to address the harsh results of a cap of ten, or the equities and logic of picking a larger number. Further, unlike the NCE Notice cited by PRP, here the Commission *failed to explain why alternative caps, say at fifty, would be improvident and unsuitable*. Clearly, fifty was a number that was entertained by the Commission

during its deliberations, as implied by Commissioner Tate's Dissent. Yet the record leaves us with an unsolved mystery why that number was forsaken for the lower cap at ten, particularly considering the thousands of applications filed, whereas a very slight upward adjustment of the application limit from ten to fifty could have reaped exponentially more equitable benefits to a much larger field of applicants (from 80% to 97%).

Lastly, PRP attempts to argue that it had asked for a cap at ten all along. Opposition at 16 and n.63. That argument is blatantly misleading. We can do no better than simply to restate what our original Petition for Reconsideration stated at pages 7-8, where, unlike PRP's Opposition, we quote verbatim from PRP's actual Comments on that issue, (Comments inaccurately paraphrased by PRP in its Opposition):

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

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

Comments of Prometheus Radio Project et al. (August 22, 2005), Appendix B, Section B. However, *even Prometheus did not argue that this number ten should be a limit on filing; rather, it*

contended it should be a benchmark for Commission scrutiny – any applicant which files more than ten applications, they submit, should be investigated by the Commission to insure that those applicants have an “intent to build” rather than a an “intent to speculate.” Id.

Petition at 7-8 (emphasis added). It is simply not true, as PRP suggests, that it had argued for ten as the “reasonable [and absolute limit] for any one entity to apply for.”

Opposition, 16. Further, PRP is also apparently suggesting that Commissioner McDowell was also mistaken when he indicated, relative to the cap of ten, that “[i]t is lower even than the numbers suggested by LPFM advocacy groups in the record.”

Statement of Commissioner Robert McDowell Approving in Part, Dissenting in Part.

PRP has not bolstered the Commission’s flawed reasoning in any of the respects addressing in NRB’s prior Petition.

II. CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 2nd day of April, 2008, the foregoing Reply was served by first class mail, postage prepaid, on:

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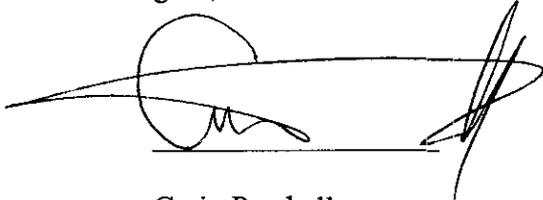
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A handwritten signature in black ink, appearing to read 'Craig Parshall', is written over a horizontal line. The signature is stylized with a large loop at the beginning and a sharp, vertical stroke at the end.

Craig Parshall