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*Via Electronic Mail*

September 27, 2010

Marlene H. Dortch  
Federal Communications Commission  
Office of the Secretary  
Room TW-A35  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: LPFM Proceeding, MM Docket No. 99-25

Dear Ms. Dortch:

This letter concerns the *ex parte* filing regarding the LPFM Proceeding submitted by Educational Media Foundation and Prometheus Radio Project (the "Parties") on July 8, 2010 and modified on September 22, 2010. The Parties proposed a Memorandum of Agreement in which they addressed the processing of the remaining translator applications from Auction No. 83 in relation to future LPFM filings. The proposed solution was an alternative to a ten translator application processing cap discussed in the LPFM Proceeding.

Common Frequency, a nonprofit advocating for community and college radio, submits this letter to supply important supplementary information regarding the Commission's decision whether to implement a ten application cap or seek an alternative to balance the needs of translators and LPFM service. The attached report provides insight into why a cap policy may not lead to the Commission's intended outcome concerning translator and LPFM ownership. Our conclusion is that a ten application or similar cap may not be effective in its goal of ensuring localism and diversity of ownership while balancing the needs of translators and LPFM.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Jeff Shaw", written over a light blue horizontal line.

Jeff Shaw  
President,  
Common Frequency, Inc.

CC: Julius Genachowski, Michael Copps, Robert McDowell, Mignon Clyburn, Meredith Baker, William Lake, Peter Doyle, Sherrese.Smith, Joshua Cinelli, Rosemary Harold, Eloise Gore, Bradley Gillen

*Note: Report attached. Report appendices can be referenced separately in the ECFS filing under the LPFM Proceeding (due to large volume of data).*

## Translator Study with Commentary Demonstrating the Shortcomings of a Ten Application Processing Cap

### Introduction

There have been suggestions that the FCC may commence processing the remaining translators from Auction No. 83 prior to opening an LPFM application window. Processing at present would be contingent upon the approval of a *ten application processing cap*, as prescribed in the *Third Report and Order and Second Further Notice of Proposed Rulemaking of Creation of A Low Power Radio Service*, MM Docket No. 99-25 (“LPFM Order”) and issuance of DA 09-496 inviting translator applicants to provide their selection list.<sup>1</sup> The LPFM Order suggested several reasons that such a cap would be necessary, stating that “processing all of the approximately remaining 7,000 translator applications would frustrate the development of the LPFM service and our efforts to promote localism.”<sup>2</sup>

Although we agree that remedial measures to limit the preclusive impact of Auction No. 83 filings should occur, the FCC has provided no data whatsoever regarding the proposed efficacy of the ten application cap. LPFM availability is primarily but not exclusively a problem in urban areas, in which issue translators and LPFM channels share the airwaves. The cap of ten applications may have been intended to weed out speculators, ensure localism, and provide of diversity of ownership. However, regarding the analysis used to derive this processing policy, the FCC stated that “precise preclusionary calculations are not possible.”<sup>3</sup> This report supplies substantial evidence in the form of *precise preclusionary calculations* that the ten application cap falls short of accomplishing what it intended. Based on the evidence provided, **we urge the FCC to modify its ten application cap agenda** to the type of terms endorsed by Prometheus Radio Project and Educational Media Foundation, as neither LPFM nor translator service will benefit from the FCC’s ten application cap proposal.

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<sup>1</sup> *Media Bureau Invites Applicants to Select FM Translator Applications for Voluntary Dismissal to Comply with Processing Cap*, DA 08-496, March 4, 2008.

<sup>2</sup> See para 53. *Third Report and Order and Second Further Notice of Proposed Rulemaking of Creation of A Low Power Radio Service*, MM Docket No. 99-25, December 11, 2007.

<sup>3</sup> *Ibid.*

## Executive Summary

The prescribed ten application cap is a leap of faith to balance the needs of LPFM and translator applicants. Prior to conducting this study, it was not known whether that cap would be a success or failure for both translator and LPFM applicants. In order to know what would happen under the ten application cap, we studied how the selection of a maximum of ten applications by each applicant (from the remaining translator pool) would affect the frequencies available nationwide for LPFM in urban areas. In order to derive that result, we determined the precise mutually exclusive Auction No. 83 groupings across the country. In our report, MXs in the top 150 radio markets are clearly delineated and linked with data regarding a simulation in which each applicant picks a maximum of ten applications.

Our results demonstrate that of **782 MXs**, which chiefly comprise the open frequencies in the top 150 radio markets, **759—or 97%—would be claimed by translator applicants under the ten application cap.** This means that the ten application processing could result in virtually the **same amount of total translator frequencies being licensed in the top 150 market as would be licensed with no cap in place. The result calls into question the efficacy of the cap proposed in the LPFM Order and suggests strongly that it should be modified.**

## Study

We constructed a “real world” simulation of what could actually happen if the FCC were to allow each applicant from Auction No. 83 to select ten applications of their choice for FCC processing. Within this study, we used the following information and methods:

- All the applications within the top 150 metros were placed into actual FM engineering-based MX groups dependent upon their proposed contours as they pertain to methods in Section 74.1204.<sup>4</sup> The MXs are labeled according to a nonofficial reference number (column 2) in **Appendix A.**

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<sup>4</sup> Data regarding mutually exclusive groupings was provided to Prometheus Radio Project and Common Frequency courtesy of World Radio Link Incorporated for research purposes.

- All the pending applications were researched and listed in **Appendix B** and grouped according to applicant name in alphabetical order.
- For each applicant listed in **Appendix B**, we picked ten applications to protect as if under the FCC’s proposed ten application cap. Note that this grouping selected for each applicant is one of many possible permutations that may be selected in actuality. Protected applications were selected in our study in a manner intended to (A) to spread an applicant’s applications out channel-wise (if an applicant has several applications in one MX, only one application needs to be selected for saving in that MX), and (B) gravitate to more populated areas (based on the premise that applicants will realize frequencies in densely populated areas are less likely to be available in future translator filing windows).
- In **Appendix A** within the MX information, we indicate in the column labeled “10 Pick” if each choice is one of the applications picked in an applicant’s hypothetical list of ten applications they want to be processed. If an application has “#NA” in the “10 Pick” column that is because the application apparently has been dismissed.<sup>5</sup>
- Because the FCC is concerned successful translator applicants may assign their licenses, **Appendix C** includes a list of all such assigned (or “sold”) translators derived from Auction No. 83 to date.
- We assumed in this study that LPFM will be utilizing contour-based methodology in the future and not distance spacing placement. Essentially this means an LPFM facility could be placed in a channel that could be used by a translator.

This simulation serves as one real world outcome of what translator applicants could claim for each frequency in the top 150 markets. To understand the results:

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<sup>5</sup> Data used for Appendix B was fresh application data as of September 2010. The MXs in Appendix A were determined at an earlier date before certain applications apparently were dismissed. In some cases in possible two-way MXs a singleton may be possible upon dismissal of one application. In certain MXs an application may appear twice (as seen by duplicate facility number), but the duplicate application(s) in a redundant set was not counted.

- *First*, view the applicant list in **Appendix B**, which details still-pending translator applications from Auction No. 83. As you scroll down this list, you will see a “1” in the eighth column labeled “10 Limit Simulation”, denoting that in this simulation *that application was one of ten chosen by the applicant for the ten application cap*. All applicants have been allotted a maximum of ten applications to protect. The seventh column shows the market name (if in the top 150 markets), “#N/A” if outside the top 150 markets, or blank if it is outside the top 150 yet attached to a top 150 market MX.
- *Second*, view the MXs in the top 150 markets in **Appendix A**. Each MX is delineated with lines in between the application groupings by metropolitan area starting with market number 1 (New York, NY). The eighth column is labeled “10 pick”. If a “1” appears in this column, that means *that application was among an applicant’s “ten applications picked” in this simulation per the ten cap guidelines*. Only one protected application is needed per MX to make that MX frequency unavailable for LPFM in that city. To be clear: (A) All applicants in the original MX before the “10 pick” are listed in each MX; (B) the protected applications remaining in the MX after all the applicants have selected *ten to save* have “1”s next to them denoting that the applicant has protected that particular application.
- *Third*, view the tenth column in **Appendix A**. This column labeled “MX with known [translator] seller” indicates that the MX contains an applicant with a “10 pick” application and that the applicant was previously a permittee/licensee of another granted Auction No. 83 translator later assigned to another entity.<sup>6</sup>

## Outcome

Of the 782 MX's that comprise the channels of the top 150 metros, only 23 MXs in this simulation did not include an application marked as “one of ten applications saved” by any applicant.<sup>7</sup> That would mean 97% of the MX's in the urban areas would be

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<sup>6</sup> According to FCC CDBS.

<sup>7</sup> The 23 MXs that were not taken by a translator contain all “0”s in the “ten pick” column in Appendix A.

claimed by translator selectees.<sup>8</sup> Therefore, implementing the ten application cap would result in leaving roughly 3% of the channels available for LPFM in the top 150 markets. Of course, that is just 3% more than would have gone to translators if there was no cap at all, and if all MXs were resolved in favor of the thousands of still-pending translator applications.

The following table shows which channels this study predicted could be left for LPFM under the this particular ten translator application cap simulation, listed below according to market ranking.

Top 10	None		Top 90	AR Little Rock	CH 297
Top 20	None			AR Little Rock	CH 251
Top 30	None			AR Little Rock	CH 281
Top 40	None			AR Little Rock	CH 229
Top 50	FL Jacksonville	CH 234	Top 100	IA Des Moines	CH 284
	FL Jacksonville	CH 248		WA Spokane	CH 268
Top 60	None			AL Mobile	CH 266
Top 70	MI Grand Rapids	CH 285		AL Mobile	CH 246
	MI Grand Rapids	CH 279		AL Mobile	CH 270/272
	MI Grand Rapids	CH 235	Top 110	KY Lexington-Fayette	CH 253
	MI Grand Rapids	CH 243		LA Lafayette, LA	CH 288
Top 80	LA Baton Rouge	CH 270	Top 120	None	
			Top 130	None	
			Top 140	TX Corpus Christi	CH 250
				TX Corpus Christi	CH 270
			Top 150	IA Quad Cities	CH 282
				IA Quad Cities	CH 291

**Figure 1: Metro Channels Not Claimed by Translators**

<sup>8</sup> The study relied on a generalized assumption that in top 150 markets full power radio stations are primarily staggered with roughly three vacant channels in between. Translator applicants then applied for the second adjacent channels in each market, leaving staggered MXs that correlate to the possible remaining secondary service channels in each market. These secondary service channels could either be used for translators if selected by a translator applicant, or used for LPFM if not selected by a translator applicant. In smaller markets, previous singleton grants explain the difference for showing fewer total MXs, arising at similar channel availability scenarios.

## Discussion

*Wasn't the cap supposed to balance the needs of translator applicants and potential LPFM applicants? Whatever the intent of the ten application cap was meant to be, the following illustrates the problem with that assumption:*<sup>9</sup>

<b>Total MXs in Top 150 Markets</b>	<b>782</b>
<b>Total Applications Pending in MXs (all)</b>	<b>5426</b>
<b>Total Pending with Ten Cap (all)</b>	<b>2365</b>
<b>Total Pending in Top 150 MXs</b>	<b>3319</b>
<b>Total Pending in Top 150 MXs with <i>Ten Cap</i></b>	<b>1460</b>

For this scenario, there were 782 MXs in the top 150 markets and a total of 1460 urban applications selected for processing with the *ten cap* implementation simulated here.<sup>10</sup> One could almost conclude, if applications are (hypothetically) evenly distributed across MXs, that there are 1.87 translator applications (1460/782) per each urban MX competing for each urban frequency. The simulation strengthens this hypothesis, showing almost every available channel taken. The prediction is somewhat skewed, however, when the more coveted channels are selected by multiple applicants, and the less coveted channels are selected only by one remaining applicant.

*Does this mean there should be a tighter cap? Lets check. Hypothetically, then, what would happen if the FCC were to adopt instead a cap of three applications per applicant?*

<b>Total Pending in Top 150 MXs with Three Cap</b>	<b>817<sup>11</sup></b>
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**Answer: Each applicant selecting a maximum of three applications for FCC processing would yield a total of 817 applications distributed across the 782 MXs in the top 150 markets. Assuming the applications are evenly distributed across MXs (i.e., 817 applications distributed at a rate of roughly 1 ( $817/782 = 1.045$ ) per MX), many of the top markets could still be locked out for LPFM applicants with a**

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<sup>9</sup> See Appendix D for calculations. Please note: Total number of pending translator applications in the top 150 markets is different than total applications in MXs primarily in the top 150 because urban MXs may extend outside the urban boundary to include some rural applications.

<sup>10</sup> Note: The top 150 metros do not have sequentially labeled MX's from 1 to 782; thus some identification numbers run into the 1000's.

<sup>11</sup> *Supra.* Footnote 9.

**cap of three (once again, using the generalized assumption described above in footnote 8).**

The FCC also should take into account the fact that 67% percent of applicants *who already have assigned/sold a 2003 translator permit or license* still have applications pending in a top 150 market MX (see **Appendix D** for calculation). The *three cap* model, in theory, cannot be expected to preserve substantial LPFM availability in the highest-ranked urban markets. Moreover, it is unlikely that translator auctions would raise funds because the MXs primarily would end up as singletons under this scenario and the granted translator applications could be sold after grant for between \$100,000 to \$500,000 by a permittee/licensee. Under the aforementioned cap scenarios LPFM availability would be poor at best, and localism and diversity of ownership would not be maximized.

#### The Shortcomings Of Caps In Practice

We understand that the *ten cap* was an attempt to level the playing field between LPFM and translator applicants, but there are some unforeseen side-effects of caps. A cap (1) incentivizes resellers to concentrate on urban areas, and (2) drives down the auction price of these desired urban channels. For instance:

*Consider a hypothetical applicant with 30 applications, consisting of 10 in a top 30 market and 20 in rural areas. With a cap of ten applications per applicant, if there are 782 urban MXs with a total of 1460 applications (as stated above), that's an average of 1.8 applicants per MX (sometimes one, sometimes two, and occasionally three). Knowing that rural frequencies are plentiful, and could be procured in the next translator auction, it would be in an applicant's best interest to choose 10 urban applications for processing rather than any of the rural applications.*

Even a cap of three applications per applicant leaves, in our estimation, 818 urban applications for 782 MXs in the top 150 markets. In this scenario, to avoid costly auctions, the applicants of an MX just could discuss amongst each other which application each applicant wants to claim, thereby eliminating mutual exclusivity and

obviating the need for auctions. With either of the caps, therefore, the FCC could be inadvertently handing a select few applicants some of the best urban market channels before even reaching an auction.

### The Shortcoming Of Caps In Dealing With Speculators

The FCC has stated that “the rapid flipping of hundreds of permits acquired through the window process for substantial consideration does suggest that our current procedures may be insufficient to deter speculative conduct.”<sup>12</sup> The FCC also noted with disapproval that the largest of Auction No. 83 filers were flipping translator licenses for profit. For that reason, the goal of curtailing license assignments by the largest of filers played a significant part in the FCC’s decision to propose a ten translator application processing limit.

The perceived intention behind caps is that legitimate broadcast entities with actual translator needs—and not speculative purposes—may have only filed for ten translators or less, and the largest of filers may have applied for speculative purposes. Yet even with the proposed cap, the FCC did not adequately take into account what entities other than the large-number filers may be doing with their translators. But in fact, the applications submitted by applicants other than the top ten filers comprise **61% of the applications that are still MX’d**.<sup>13</sup> In addition, 59% of the applicants that have assigned (sold) an Auction No. 83 translator still have ten or fewer applications pending.<sup>14</sup> **In our simulation we systematically determined that after limiting each applicant to ten translators each, 42% of the MXs in the top 150-market would be predicted to contain a probable selectee or competitor that has previously assigned an Auction No. 83 translator.**<sup>15</sup> The number of actual intended translator sellers could be significantly higher since we have no data on the applicants that have not been granted a translator yet from Auction No. 83.

The ten application cap only appears to reduce some potential speculation by a select group of applicants—the largest of filers—without addressing any of the intentions

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<sup>12</sup> Para 55, LPFM Order.

<sup>13</sup> Using filing numbers shown in Appendix D.

<sup>14</sup> Extracted from data on-hand from CDBS on translator assignments, calculated in Appendix D.

<sup>15</sup> For proof, see Appendix A. In the “MX with known sellers” column, count the number of shaded boxes (326) and divide by 782 total MXs, which yields 42%.

of possible speculators among single and double-digit translator application filers. Even with the *ten cap*, larger filers could still be rewarded for filing multiple applications in congested urban areas. If CSN International had not filed 71 pending applications, for example, it would have not be able to systematically pick its “10 best” applications in the most non-competitive MXs in densely populated areas. In our simulation in **Appendix A**, CSN comes out with a probability of obtaining singleton grants for **five channels** in Chicago, two in Dallas, one in Oklahoma City, one in Omaha, and one in Spokane, all of which it would add to its network of several hundred licenses. **In fact, the top ten largest filers combined, each picking ten applications, could lead to winning a maximum 100 of the 782 urban MXs, amounting to 12.8% of the prime urban channel MXs in the top 150 markets before any LPFM applicant has a chance at them in a future filing window.**

The FCC originally believed that competition and bidding might deter speculation:

Most fundamentally, it appears that our assumption that our competitive bidding procedures would deter speculative filings has proven to be unfounded in the Auction No. 83 context.<sup>16</sup>

Indeed, the prospect of bidding against other filers within each MX must prove a special deterrent to mass filers, while the ten application cap could once again favor speculators who submitted single- or double-digit numbers of applications. Instead of competing against many applicants in an MX, for example, such applicants may find themselves competing with zero to three other entities for each frequency in a top 10 market with a *ten cap* model adopted. Hypothetically, for the small-time speculator, this allows less upfront investment, allowing for more procurement of urban channels at a smaller price, and in turn leading to more net profit on the translator resale. But the effect on these smaller speculators of adopting the ten application cap or not is irrelevant for LPFM for the most part, as adoption of such a cap—or even adoption of a three application cap—will virtually wipe out LPFM opportunities in every large metro market. The FCC should adopt more effective procedures for balancing translator and LPFM priorities that is based upon pragmatic research (statistics, real world circumstances, filing data on-hand, etc).

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<sup>16</sup> Para 55, LPFM Order.

## The Ten Cap Could Inadvertently Turn Well-Intentioned Applicants Into Translator Sellers

Because more than 250 separate Auction No. 83 applicants have not been granted any translator license from that auction, we do not know these applicants' intent in regards to retaining or assigning any future translator licenses. Since we are assuming in our model that the applicants that have not been granted a translator yet are *not sellers*, the actual number of sellers could be well over 50% when all is said and done. Some applicants may not be translator sellers, but due to a side-effect of the *ten cap* may become translator sellers. Take for instance Houston, Market 6, in our ten application simulation:

### **Example 1 Houston, Market 6:**

<b><u>MX</u></b>	<b><u>Will be granted to one of:</u></b>
450	FRED R AND EVELYN K MORTON, ALELUYA CHRISTIAN BROADCASTING, INC.
451	GERALD R. PROCTOR, SAM HOUSTON STATE, HOUSTON CHRISTIAN BROADCASTERS, IGLESIA EVANGELICA APOSTOLES, FRED R AND EVELYN K MORTON
743	FAITH PLEASES GOD CHURCH CORP., IGLESIA EVANGELICA APOSTOLES
824	ALELUYA CHRISTIAN BROADCASTING, INC., IGLESIA EVANGELICA APOSTOLES
945	STARBOARD MEDIA FOUNDATION, INC., GERALD R. PROCTOR
967	ALELUYA CHRISTIAN BROADCASTING, INC., GERALD R. PROCTOR (2), WENDOLYNN TELLEZ
968	<b>ALELUYA CHRISTIAN BROADCASTING, INC.</b>
969	<b>ALELUYA CHRISTIAN BROADCASTING, INC.</b>
970	<b>ALELUYA CHRISTIAN BROADCASTING, INC.</b>
978	<b>ALELUYA CHRISTIAN BROADCASTING, INC.</b>
979	<b>ALELUYA CHRISTIAN BROADCASTING, INC.</b>
980	<b>ALELUYA CHRISTIAN BROADCASTING, INC.</b>
1014	HOUSTON CHRISTIAN BROADCASTERS, INC., AMERICAN FAMILY ASSOCIATION
1062	<b>ALELUYA CHRISTIAN BROADCASTING, INC.</b>
1094	HOUSTON CHRISTIAN BROADCASTERS, INC.
1096	HOUSTON CHRISTIAN BROADCASTERS, INC.

Employing the FCC's ten application cap in Houston, under our simulation, Aleluya Christian Broadcasting, Inc. ("Aleluya"), an incumbent AM licensee, could end up with **six to ten translators in the sixth largest US metro** (and Houston Christian broadcasters a maximum of three), **while LPFM would be locked out of Houston**. The FCC should consider the possibility of such situations and ask questions about the likely outcome before adopting caps that would permit such results. For instance, *would Aleluya really need to broadcast on ten Houston radio channels? Is it possible Aleluya*

could use four and sell six? What could be Aleluya's original intent in filing redundant applications?

Common Frequency cannot speculate about Aleluya's intentions in particular, but it may be that **some applicants submitted redundant applications not expecting to be granted ten translators in one city, but because they knew they might be in ten different very competitive MXs and they might prevail in one. The ten cap reduces all that competition.** If an applicant instead receive ten licenses, such applicants would have no reason to object, and will have every reason for seeking to assign the excess channels.

**The FCC should step-in and preserve the public interest, adopting guidelines based upon hard data and intent to promote localism and diversity.**

The Aleluya case is not an isolated incident of one filer submitting many applications in one market; there are *many* other examples. For example, applicant Robert J. Connelly, Jr. ("Connelly") submitted 97 applications (which amount to 99% of his total number of applications in Auction No. 83) in the Fresno/Visalia-Tulare-Hanford area (two adjacent California markets). In such scenarios, there could be incentives for applicants to obtain multiple applications and then lease or sell off excess channel, or for applicants within an MX to coordinate their protected application intentions prior to the resolution phase.

**Example 2 Los Angeles, Market 2:** Lets look at what could happen to the Los Angeles market in our ten application cap simulation in Appendix A:

<b><u>MX</u></b>	<b><u>Will be granted to one of:</u></b>
228	<b>MT. WILSON FM BROADCASTERS, INC.,</b> LIVING WAY MINISTRIES, INC. ADVANCE MINISTRIES, INC. LAKE HAVASU CHARTER SCHOOL, INC.. <b>GOLDEN RULE CONSULTING.</b> LIVING WAY MINISTRIES, INC.
233	<b>GOLD COAST BROADCASTING LLC</b>
237	CALVARY CHAPEL OF COSTA MESA, INC., <b>GOLD COAST BROADCASTING LLC,</b> UNIVERSITY OF SOUTHERN CALIFORNIA, CALVARY CHAPEL OF COSTA MESA, INC., CALVARY CHAPEL OF COSTA MESA, INC.
292	<b>1400 INC</b>
293	<b>1400 INC.,</b> LIVING WAY MINISTRIES, INC.
301	<b>1400 INC.,</b> FAITH PLEASES GOD CHURCH CORP.

415	LIVING WAY MINISTRIES, INC., <b>HIGH DESERT BROADCASTING LLC, GOLDEN RULE CONSULTING</b> , ADVANCE MINISTRIES, INC. D/B/A NEW LIFE CHRISTIAN SCHOOL
436	LIVING WAY MINISTRIES, INC., <b>GOLD COAST BROADCASTING LLC, 1400 INC., MT. WILSON FM BROADCASTERS, INC.</b>
448	<b>GOLD COAST BROADCASTING LLC.</b> LIVING WAY MINISTRIES, INC.
726	<b>HIGH DESERT BROADCASTING LLC.</b> RADIO BILINGUE, INC.
746	LIVING WAY MINISTRIES, INC.. <b>GOLD COAST BROADCASTING LLC</b>
1019	<b>HIGH DESERT BROADCASTING LLC</b> , THE ASSOCIATION FOR COMMUNITY EDUCATION, INC.
1058	LIVING WAY MINISTRIES, INC.. <b>GOLD COAST BROADCASTING LLC</b>
1025	<b>GOLD COAST BROADCASTING LLC</b> , LIVING WAY MINISTRIES, INC.
1147	LIVING WAY MINISTRIES, INC. <b>GOLD COAST BROADCASTING LLC</b>
1431	<b>GOLD COAST BROADCASTING LLC</b>

*So how do the MXs in the second largest market fare?* Each MX goes to auction except 1431, 292, and 233. Since the rest go to auction, the commercial applicants proceed to the next round. Outcome: 1400 Inc, a documented translator assigner, **could obtain at least two channels** under our simulation, Gold Coast Broadcasting could obtain **six to nine licenses**, Mt. Wilson could obtain zero to two, High Desert could obtain zero or one, and Golden Rule could obtain zero to two. While several Auction No. 83 filers could end up with multiple translator channels in this market, **potential LPFM applicants would get zero.**

Combing through the data in Attachment A, one quite logically may deduce that in every market there are possible speculators and/or networks all in competition for the last remaining larger metro market frequencies. If the FCC were to implement the ten application cap, many translator speculators and other such entities would prevail in all cases, all but destroying LPFM opportunities in urban areas.

The FCC asked in the LPFM Order “whether the acquisition of unprecedented numbers of FM translator authorizations by a handful of entities through our window filing application procedures promotes either diversity or localism.”<sup>17</sup> The cap itself was intended to address this issue and promote diversity and localism. But in the several cases in which translator applicants have a multitude of applications pending in a single urban market, the cap does nothing to improve upon the practical result that would follow from allowing “a handful of entities” to obtain “unprecedented numbers” of licenses instead.

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<sup>17</sup> Para 55, LPFM Order.

### The Cap May Result in Lack of Local Service in Rural Areas

As shown above and in the study data within the Appendices, the ten application cap does not achieve a balance of LPFM and translator service. Furthermore, it also could end up hampering potential rural service by translators. All Auction No. 83 applicants, when picking their ten translators to protect under the *ten cap* approach, are more likely to pick the best channels in **urban, not rural areas**. The largest of filers would understandably dump all their rural service applications and attempt to pursue the larger population coverage channels. For example, approximately 70% of Radio Assist's pending applications are in non-top 150 markets. When forced to choose ten, the rural applications likely would be discarded in favor of urban translators. Across all translator applicants, prospective rural service would suffer.

The FCC has noted in prior orders that the purpose of a translator is to be a “station [that] provides a service to the public which it would not otherwise receive”<sup>18</sup>—and additionally, to “allow FM stations to provide supplementary service to areas in which direct reception of radio service is unsatisfactory due to distance or intervening terrain barriers (e.g., a mountain).”<sup>19</sup> Ironically, and contrary to the spirit of the translator service, licensees of rural full power stations are now competing for urban translator channels to extend the reach of their own services that may already be available in the city. The result in many scenarios is that the ten application cap could indeed be the reverse of what the FCC intended for translators. Regardless, FCC precedent makes clear the importance of translators for balancing service needs in specific areas. Whether it is providing a service to the public “which it would not otherwise receive”,<sup>20</sup> or accommodating with waivers those who provide relay service to white areas,<sup>21</sup> both traditional uses of translators comply with the letter and the spirit of 47 USC Section 307(b). On the other hand, the likely results under the proposed ten application cap

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<sup>18</sup> *Amendment of Part 74 of the Commission's Rules and Regulations to Permit the Operation of Low Power FM Broadcast Translator and Booster Stations*, 20 RR 2d 1538.

<sup>19</sup> From “FM Translator and Booster Stations”, FCC website:  
<http://www.fcc.gov/mb/audio/translator.html>

<sup>20</sup> *Supra* see footnote 18.

<sup>21</sup> See para. 69 of Report and Order of *Amendment of Part 74 of the FM Commission's Rules Concerning Translator Stations* (MM Docket No. 88-140).

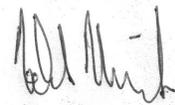
would not comply with this statute's mandate to "provide a fair, efficient, and equitable distribution of radio service" to all states and communities.

In sum, balancing LPFM and translator opportunities is important now in order to maintain equilibrium of transmission and reception services in all areas. Implementing the ten application cap for pending applications from Auction No. 83 would at best allow LPFM service in a very limited number of smaller urban markets and in some rural areas, and likely would concentrate new translators in larger urban areas while limiting them in rural areas. This seems to be an issue for the FCC to address now in order to preserve the fair distribution of FM services in all areas.

## **Conclusion**

While the proposal of a ten application cap was well intended in the FCC's quest to balance translator and LPFM services, this study and discussion demonstrates the final product does not succeed in achieving such balance. In our simulation, in the top 150 metropolitan radio markets, only 3% of translator MXs do not contain final ten pick applications, leaving an extreme deficiency of channels for LPFM service. In addition, the byproducts of processing applications with the ten application cap in place could result in concentrated ownership of secondary service licenses among select licensees, and in an imbalance between rural and urban service. The cap also does nothing to address translator speculation, other than perhaps by the largest of filers. We suggest the FCC adopt a more reasoned proposal, such as the criteria outlined in Educational Media Foundation/Prometheus' joint proposal, that may allow for the preservation of LPFM opportunities in urban areas, and also preserve translator service to rural areas.

Report & Analysis By:



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