



October 15, 2010

Marlene H. Dortch  
Federal Communications Commission  
Office of the Secretary  
Room TW-A325  
445 12th Street, SW  
Washington, DC 20554

Re: MM Docket No. 99-25 (LPFM Proceeding)

Dear Ms. Dortch:

This letter responds to *ex parte* filings in the above-referenced proceeding submitted by Educational Media Foundation ("EMF") and Prometheus Radio Project ("Prometheus") on September 22, 2010 [EMF/Prometheus Revised Proposal] and by Common Frequency ("CF") on September 27, 2010 ["CF Study"].\*

The *ex parte* filings advocate freezing almost all of the FM translator applications still pending since 2003 until some uncertain future date after a new LPFM filing window when many of the translator applications will likely have been supplanted by new LPFM stations. NPR is compelled to respond because, while we believe granting the proposal would be arbitrary, capricious, and an abuse of discretion, above all else it would be fundamentally

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\* Subsequent to those *ex parte* filings, a group of twenty-one commercial radio broadcasters submitted a letter opposing the EMF/Prometheus proposal as contrary to the public interest and requesting special processing of pending commercial translator applications. See Ex Parte Letter of John F. Garziglia, MM Docket No. 99-25, dated October 7, 2010 ["Garziglia Letter"]. In particular, the Garziglia Letter asks the Commission to initiate a settlement window, auction any mutually exclusive commercial applications remaining thereafter, and retain any remaining noncommercial applications for disposition once the Commission addresses the EMF/Prometheus proposal.

This request is contrary to the Commission's auction rules, however, and should not be granted. Specifically, the auction rules provide for the dismissal of any noncommercial applications in a mutually exclusive group prior to conducting an auction. 47 C.F.R. § 73.5002(b). There is simply no option to defer them. Even if the Commission were permitted to proceed as requested, moreover, it is unclear what difference it would make. Since non-profit educational and governmental entities are free to participate in an auction so long as they do not propose to construct a noncommercial educational facility, many of the pending applicants may well be able to participate in the auction of the remaining mutually exclusive translator applications. See In the Matter of Reexamination of the Comparative Standard for Noncommercial Educational Applicants, 18 FCC Rcd. 6691, 6696 (2003).

unfair to the many applicants that filed one or a few applications to serve the public interest and have already been waiting years for the Commission to complete the 2003 filing window process.

Given how far afield EMF, Prometheus, and CF have attempted to take this matter, it is important to recount what the Commission decided and what it was asked to reconsider when petitions for reconsideration were timely filed more than two and a half years ago. In the Third Report and Order in the LPFM proceeding, the Commission imposed a ten application limit with a specific objective: to address apparent speculation in the filing of translator applications during the 2003 filing window and limit the preclusive impact of the mass filings. In the Matter of Creation of a Low Power Radio Service, Third Report and Order and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 21,912, at 21,934-35 (2007) [hereinafter "Third Report and Order"]. Thus, the Commission sought to "bar[] the processing of thousands of applications filed by a very small number of applicants, without impacting the approximately 80 percent of filers who filed ten or fewer applications." Id. at 21,935.

Following publication of the Third Report and Order in the Federal Register, 73 Fed. Reg. 3202 (Jan. 17, 2008), five entities, including EMF, filed petitions for reconsideration. Four of those petitioners, including EMF, challenged the propriety of limiting the number of pending applications an individual applicant could pursue. None of the petitioners challenged the Third Report and Order on the grounds that it did not go far enough in preserving spectrum for LPFM use.

Indeed, prior to the adoption of the Third Report and Order, Prometheus suggested permitting the processing of as many as 20 translator applications per applicant. See Ex Parte Notice of Prometheus Radio Project, MM Docket No. 99-25, Jan. 17, 2007. In response to the EMF petition for reconsideration, moreover, Prometheus defended the ten application limit as justified by the record in the proceeding. Prometheus asserted that "the Commission gave a detailed and reasoned explanation for its decision to adopt a [ten application] limit on applications filed during the filing window in Auction No. 83." Opposition to Request for Stay of Prometheus Radio Project, MM Docket No. 99-25, at 11, filed Mar, 20, 2008 [hereinafter "Prometheus Opposition to Stay Request"]. In response to the argument that the ten application limit would tend to encourage applicants to pursue applications for service in more urban areas, Prometheus retorted,

[w]hile this may be the true intent of the [EMF] Petitioners, thus raising doubts as to Petitioners' actual concern for rural and un/underserved [sic] communities, Petitioners' claim is also pure speculation. Regardless of the scenario, in actuality, the Commission's action is more than consistent with §307(b) [of the Communications Act].

Id. at 14.

Finally, Prometheus justified the ten application limit based on Commission precedent. *Id.* For instance, Prometheus pointed to other broadcast application filing windows in which application limits had been imposed, including the then-recent filing window for NCE FM applications, featuring a ten application limit, as well as the Commission's initial licensing of LPFM stations. *Id.* at 17. In closing, Prometheus resisted the notion that it had supported a higher application limit, asserting that "[t]en is exactly the number of translator applications that Prometheus Radio Project . . . believed was reasonable for any one entity to apply for." *Id.* at 17-18.

Thus, when it was time to challenge the imposition of a ten application limit, the only entities to do so sought the removal of any limit, and Prometheus amply demonstrated why the ten application limit was legally defensible and perfectly appropriate to achieve the Commission's stated objective in imposing it.

#### The EMF/Prometheus Revised Proposal

The EMF/Prometheus September 22 *ex parte* filing presents a modest variation from what EMF and Prometheus proposed on July 8, 2010, which NPR previously addressed. *See* Ex Parte Letter of NPR, MM Docket 99-25, filed Aug. 10, 2010. As before, EMF and Prometheus propose deferring the pending FM translator applications until after a new LPFM filing window occurs and all of those applications are processed. In response to objections by NPR and others that such a proposal would treat applicants that had filed relatively few FM translator applications the same as rank speculators, Prometheus, but apparently not EMF, has now proposed to allow applicants that had yet to receive any construction permits from the 2003 filing window an opportunity to submit an engineering proposal that would permit the Commission to grant one of the applicant's pending mutually exclusive FM translator applications. It is debatable how meaningful this opportunity would be in practice, and there is no explanation why this variation would treat pending translator applicants genuinely seeking to serve the public interest fairly.

As with the prior proposal, deferring the pending FM translator applications is again justified on the grounds that a ten application limit will encourage applicants to pursue FM translator applications in more urban areas at the expense of rural service. As Prometheus itself previously noted, however, that claim is "pure speculation." Prometheus Opposition to Stay Request at 14. The EMF/Prometheus Revised Proposal supplies no other basis for reducing the ten application limit effectively to zero.

#### The CF Study

As a threshold matter, to the extent CF is asking the Commission to reconsider its 2007 decision and modify the ten application limit, CF Study at 1, it is obviously untimely. 47 C.F.R. § 1.429. Substantively, the CF study relies on a number of incorrect assumptions to produce one possible simulation of the possible results of implementing the ten application

limit, all to achieve an objective different from what the Commission expressly intended. For these reasons, the CF Study affords no basis for further delaying the resolution of the pending FM translator applications.

As discussed above, the purpose of imposing a ten application limit was to address the filing of a disproportionately large number of translator applications by a small number of entities. The Commission sought to reduce the number of those filings to avoid rewarding the apparent speculation, limit the preclusive impact of those filings, and permit the expedited processing of the remaining translator applications. Third Report and Order, 22 FCC Rcd at 21,935. The purpose was not, as CF appears to believe, to "level the playing field between LPFM and translator applicants" as a general matter or preserve opportunities to license new LPFM stations in the top 150 radio markets. CF Study at 2, 7. Indeed, the Commission understood that "very few opportunities for LPFM stations in major markets remained prior to the 2003 translator filing window." Third Report and Order, 22 FCC Rcd at 21,930 (emphasis added). While the Commission clearly intended to limit the preclusive impact of the mass filed applications, it also intended to avoid any impact on the other applicants. Id. at 21,935 ("This limit will not have an adverse impact on the more than 80 percent of those who filed ten or fewer proposals in the Auction No. 83 filing window."). Adopting the EMF/Prometheus Revised Proposal would affect all pending FM translator applications, not just those filed in large numbers by a few applicants and not just those in the top 150 radio markets.

In addition to misreading the Commission's intended purpose in adopting the ten application limit, CF mischaracterizes the underlying record on which the Commission acted. Far from pulling a number out of thin air, the Commission specifically cited the following: approximately half of the filers submitted one or two proposals, approximately 80 percent submitted ten or fewer proposals, and the two most active filers filed almost one-third of all Auction 83 filings. Id. at 21,934. As Prometheus itself has noted, the Commission enjoys wide discretion when drawing administrative lines and, in this case, the ten application limit is reasonable given the record on which the Commission acted and the intended purpose. Prometheus Opposition to Stay Request at 14-15.

Even if preserving opportunities for new LPFM stations in the top 150 radio markets were the overriding consideration, the CF study sheds little light on the subject because it relies on a number of unfounded assumptions. First, it assumes that each FM translator precludes an LPFM station, CF Study at 3, which the Commission has recognized is not the case. See, e.g., In the Matter of Creation of a Low Power Radio Service, Second Order on Reconsideration and Further Notice of Proposed Rulemaking, 20 FCC Rcd 6763, at 6777 (2005) ("Because LPFM and FM translator stations are licensed under fundamentally different technical rules, . . . Prometheus's contention that every new translator 'takes the place' of a potential LPFM station is incorrect.").

Second, the very precise percentages and figures highlighted in the CF Study are the product of a simulation that assumes which ten applications the remaining translator applicants with more than ten pending applications would select. See CF Study at 3. As CF itself concedes, "this grouping selected for each applicant is one of many possible permutations that may be selected in actuality." Id. at 3.

Third, the applications selected by CF for purposes of its simulation were not entirely random, but they ignore any consideration of the circumstances of the individual applicants. Apart from those applicants interested solely in acquiring and selling construction permits, it is unreasonable to assume that every applicant would "gravitate to more populated areas." Id. at 3. Applicants interested in extending service to particular communities or filling in coverage gaps would pursue the applications that would best serve those purposes, which in turn may result in more rural service. To the extent applicants retained applications to serve more rural areas, the preclusive impact on spectrum availability for future LPFM stations in the top 150 radio markets would be diminished. Indeed, the ten application limit could produce myriad variations in actual practice, with far less drastic consequences than the one possibility featured in the CF Study.

Fourth, "[t]he 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." Id. at 5 n.8. On this basis, CF arrives at the striking conclusion that "97% of the MX's [sic] in the urban areas would be claimed by translator selectees." Id. at 4-5. The actual distribution of full power radio stations, combined with the processing of the remaining translator applications, could produce a very different outcome.

Fifth, in purporting to assess the effect of a three application limit, the CF Study assumes an even distribution among the groups of mutually exclusive stations in the top 150 markets. Id. at 6. Since there would be slightly more remaining applications than mutually exclusive groups in this scenario, CF concludes that LPFM stations would be precluded from serving any of these markets, most applications would avoid auction because of prohibited collusion among the applicants, and each construction permit would be sold for between \$100,000 and \$500,000. Id. at 6-8. It may be difficult to predict what consequence a three application limit might actually have, but the CF Study is of no use in making that prediction.

Finally, CF offers various predictions about how individual applicants that filed fewer than ten applications might respond if the ten application limit is finally implemented. Id. at 8-12. Apart from relying on pure conjecture, CF assumes that no applicant would use a new translator station to serve the public interest. In fact, there are a number of public radio broadcasters that filed one or a few applications with the intent of filling coverage gaps or extending service to adjacent areas.

For instance, the University of Washington filed two applications during the filing window. They are in separate mutually exclusive groups and remain pending to this day.

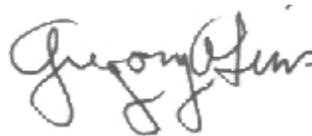
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The Board of Regents of the University of Wisconsin System filed a total of four applications. Two were not in conflict with any other application and were granted. Two remain pending in separate mutually exclusive groups. Iowa State University of Science and Technology filed five applications, two were not in conflict with any other applications and were granted; three remain pending in separate mutually exclusive groups. The CF Study offers no evidence to suggest that these entities and many others were motivated by anything other than a desire to serve the public interest.

In addition, a number of public radio broadcasters also sought funding from the National Telecommunications Information Administration ("NTIA") to construct FM translator stations to extend public radio service. Because of the freeze on the processing of the pending applications, many of these grant applications were denied. NTIA funding and the extension of public radio service remains a possibility for these applicants, but only if the Commission proceeds to resolve the pending translator applications.

For these reasons, the Commission should reject the EMF/Prometheus Revised Proposal. NPR also urges the Commission to direct Commission staff to implement the ten application limit and move forward with resolving the applications still pending from the 2003 filing window.

Respectfully submitted,



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cc: Joshua Cinelli  
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