Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Creation of a Low Power Radio Service	)	MM Docket No. 99-25
	)	
Amendment of Service and Eligibility	)	MB Docket No. 07-172
Rules for FM Broadcast Translator Stations	)	RM-11338

To: Office of the Secretary

COMMENTS OF EDUCATIONAL MEDIA FOUNDATION ON THIRD FURTHER NOTICE OF PROPOSED RULE MAKING

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SUMMARY

Educational Media Foundation ("EMF") offers its comments on the Third Further Notice of Proposed Rulemaking in the above-referenced proceeding (hereinafter the "NPRM"). As set out herein, EMF supports the Commission's tentative conclusion to determine on a market-by-market basis whether or not to process the remaining pending applications from the 2003 FM Translator Window. While EMF generally supports the recommendations of the Commission, it suggests several minor tweaks in the methodology proposed, which might allow the processing of additional translators in some markets.

EMF is particularly supportive of the Commission's decision to abandon its determination to allow the prosecution of only 10 applications by any one translator applicant. This rule did little to preserve LPFM availability, but did much to undercut what should be a priority of the Commission – the provision of new program services to rural areas. If applicants like EMF were limited in the number of applications that they could prosecute, rural areas, where there is no spectrum shortage for LPFM opportunities, would be denied the service that might otherwise be made available. EMF is concerned that the Commission did not recognize this important policy reason as another basis for its decision to reconsider the cap of 10.

While EMF believes that the proposals set forth in the NPRM are consistent with the Local Community Radio Act, it believes that the NPRM proposals come close to being too favorable to the processing of applications for new LPFM stations at the expense of opportunities for new translators – both of which are to be encouraged under the provisions of the LCRA.

Given the fact that the pending translators have been on file for more than 8 years, the Commission must provide at least some flexibility in the selection of transmitter sites, as

circumstances may well have changed in many markets, making original sites unavailable. An ability to move limited distances while staying on the same channel must be provided to all translator applicants. In addition, in markets where a channel change by an FM translator would not unduly preclude LPFM opportunities, channel changes as part of a settlement should also be permitted.

Finally, the Commission should not re-impose application processing limitations as a part of an effort to stop speculative applications. An application processing cap is no more rationally related to the prevention of speculation than it is to preserving LPFM opportunities. Instead, if the Commission believes that it needs to deter speculation in translator applications, it should do so directly, either through prohibitions on translator sales or by limits on compensation that can be received in connection with such sales.

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Educational Media Foundation ("EMF"), by its attorneys, hereby submits its comments on the Third Further Notice of Proposed Rulemaking in the above-referenced proceeding (hereinafter the "NPRM"). EMF has been a very active participant in this proceeding, commenting throughout on what it believes to be the appropriate relationship between translators and LPFM stations. EMF is the licensee of hundreds of translator stations across the country, and has several hundred applications still pending from the FM Translator Filing 2003 Window (the "2003 Window"). As such, it has a very real and direct interest in the outcome of this proceeding. EMF's interest in this proceeding is based on its desire to construct and operate the translators for which it has applied, in order to serve the public interest. Its interest is not in any financial return that it could recognize from the sale of such stations. Its interest in operating translators can be seen from the fact that, from applications filed in the 2003 Window, EMF has already constructed approximately 150 new translator stations that are on the air and serving the public.

One of EMF's primary concerns in this proceeding was the FCC's 2007 decision to limit to 10 the number of applications from the 2003 Window that one party could continue to prosecute.[1] EMF was the lead party in filing Petitions for Reconsideration[2] and for a Stay[3] of that decision, pointing out that the decision did not serve the public interest nor accomplish the objectives sought by the FCC. As demonstrated by EMF, that decision would have resulted in the dismissal of hundreds of applications intended to provide service to areas where there is little spectrum congestion, depriving rural areas of program options that they might not otherwise receive. At the same time, limiting applications that can be prosecuted to only 10 would no doubt center the interests of the applicants on the largest markets where their proposed translators are likely to serve the biggest populations. These applications for larger markets are the ones most likely to have an adverse impact on LPFM opportunities.

EMF is relieved to see that the Commission, in its NPRM, has proposed to drop the cap of 10 applications, but it is concerned that the sole reason provided by the FCC for abandoning that cap is that the cap did not do enough to protect LPFM opportunities. EMF submits that the cap of 10 also violated the Commission's mandate to regulate in the public interest, and its obligation under Section 307(b) of the Act to provide "a fair, efficient and equitable distribution of radio service" "among the several States and communities." The cap of 10 would have deprived many rural areas of the benefits that would be provided by new service from translator stations, as many applications for translators that would serve such areas would have been dismissed. Many of these applications propose service to locations that the Commission itself

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[1] *See, Creation of a Low Power Radio Service, Third Report and Order and Second Further Notice of Proposed Rulemaking in Docket 99-25*, 22 FCC Rcd 21912 (2007)("*Third R&O*" or "*Second Further NPRM*").

[2] Petition for Reconsideration of Educational Media Foundation, et. al., filed February 19, 2008. ("EMF Petition for Reconsideration")

[3] Request for Stay of Educational Media Foundation, et. al., filed March 13, 2008. ("EMF Request for Stay")

acknowledges are not spectrum-congested areas where the demand for LPFM channels cannot be met.[4] Thus, the wholesale dismissal of these applications would have been contrary to the Commission's mandate to regulate in the public interest.

As set forth in more detail below, EMF is concerned, however, that the Commission on one hand proposes to abandon the cap of 10 as a means to protect LPFM opportunities, but at the same time it suggests that it might be appropriate to adopt a cap of some higher number to prevent the prosecution of "speculative applications." If the Commission concludes that it must somehow fight speculative applications, which we take to mean applications that are filed without the applicant having the intent to build the station they propose, then there are far more direct ways in which to combat such speculation that do not involve compromising the public interest goal of providing service to rural areas as set out above. Thus, no cap on the number of applications that can be prosecuted from the 2003 Window should be adopted.

While EMF has filed many pleadings in this proceeding to demonstrate the value of the service provided by FM translator stations, and to ensure that translator licensees, permittees, and applicants can continue to provide such service and can expand their reach, EMF has also been sensitive to the desires of the LPFM community to expand opportunities for new LPFM stations. To foster LPFM opportunities without unduly harming translator interests, EMF has engaged in a series of negotiations with Prometheus Radio Project ("Prometheus"), one the principal proponents of LPFM. Together, EMF and Prometheus have filed several joint proposals with the FCC in an attempt to craft solutions to the multiple issues identified in this proceeding. EMF and Prometheus worked hard to set out proposals that would be acceptable to each side in the debate. Additionally, EMF worked with many other interested parties to try to resolve the contentious issues that remain. EMF applauds the FCC's receptivity to the proposals that have

[4] *See*, e.g., *Third R&O* at ¶50.

been advanced, and it is sincerely appreciative of the efforts of the FCC in crafting the detailed proposals advanced in the NPRM. EMF believes that the framework proposed by the Commission is a very workable one. As detailed below, EMF supports the general framework with some very specific modifications that it offers in the spirit of crafting a proposal that maximizes the opportunities for all stakeholders in this proceeding. With these preliminary thoughts in mind, EMF offers the following comments on the specific proposals offered in the NPRM.

DISCUSSION

EMF Supports the FCC's Proposal to Process Translators on a Market-By-Market Basis

Throughout this proceeding, EMF has argued that not all markets are alike, and that the pending translator applications do not necessarily preclude opportunities for new Low Power FM stations. In studies submitted as informal comments in this proceeding (and incorporated herein by reference), EMF has shown that in the vast majority of radio markets, the pending translator applications from the 2003 Window do not preclude LPFM opportunities.[5] As set forth in those studies, in markets where there are few opportunities for new LPFM stations, those opportunities are in most cases precluded by existing full-power stations, not by the pending translator applications filed in the 2003 Window.

EMF has also been firm in its belief that any numerical cap on the processing of the remaining translator applications from the 2003 Window would be arbitrary and capricious, as it would not further the objectives of the FCC of making more channels available for new LPFM stations. We applaud the tentative decision in the NPRM to abandon the cap of 10. Dismissing all but an arbitrary number of applications would not meaningfully contribute to LPFM

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[5] *See*, Ex Parte filings of EMF on February 4, 2011 and February 28, 2011.

availability in large markets as, even where translator applications do block LPFM opportunities, those applications are unlikely to be dismissed by those who filed them. In most cases, the translator applications that will have the most preclusive effect on LPFM availability will be those that propose to serve the larger markets, and those will be the applications that will be the most likely to be protected by any translator applicant to preserve their potential to serve the most people. In the NPRM, the Commission has accepted the premise that the cap of 10 will not make more LPFM stations available, and EMF believes the Commission's conclusion is correct.

Moreover, as EMF has set out in many of its pleadings in this proceeding, there is an independent public interest basis for not setting an arbitrary cap on the number of applications that can be processed.[6] In the many Arbitron markets, and in the even more numerous smaller communities outside of the rated radio markets, there simply is no shortage of spectrum available for new LPFM stations. An arbitrary cap would result in the dismissal of many translator applications that would otherwise bring service to areas most in need of additional programming options. As the Commission recently recognized in its Rural Radio proceeding, many of these areas need more choices in programming – choices taken for granted in larger markets.[7] While parties to this proceeding may disagree as to the relative value of service from translators as compared to service from LPFM stations, no one will disagree that both do provide service and value to their listeners, and some service is better than none. In rural areas with low demand for LPFM service and plenty of spectrum availability, an arbitrarily set limit on the number of applications that can be processed from the 2003 Window will result in a decrease in the diversity of the programming that these residents might otherwise enjoy, as translator applicants

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[6] See, e.g. EMF Petition for Reconsideration and Request for Stay, supra.

[7] See, *Rural Radio Service, Second Report and Order in MM Docket No. 09-52*, 26 FCC Rcd 2556, 52 CR 718, at ¶21-22 (2011).

will likely choose to protect the applications that serve more populous areas, and allow for the dismissal of those that serve less populous areas. This loss of service to rural areas cannot be found to be in the public interest. This provides yet another reason to support the NPRM's proposal to reject the cap of 10 on applications from the 2003 Window.

The Commission's tentative conclusion to adopt a market-by-market approach to 2003 Window application processing is the correct one. Only by looking at the actual circumstances in each market can the Commission get it just right – not too many dismissals from an arbitrary cap on application processing, but not too few to preclude LPFM opportunities in those markets where 2003 Window applications truly do preclude such opportunities.

That is not to say that the FCC's model is perfect, but EMF supports its use. EMF offers here some proposals to remedy problems that, from a facial review, appear apparent in the Commission's model. However, EMF understands that it may be impossible to take into account every issue and eventuality, and that a simple model like that used by the FCC may be the best way for all competing interests to be balanced. Nevertheless, it is worth considering that several assumptions made by the Commission's model appear, after review by EMF, to be subject to a ready fix that would not entail an inordinate amount of effort and which would bring greater precision to the process of getting it just right as to which translator applications to dismiss and which to retain.

Two seemingly simple fixes seem evident from the very description of the FCC's model. First, to determine potential LPFM availability, the FCC's model is stated to have used a grid that was uniformly sized at 30 minutes of latitude by 30 minutes of longitude.[8] This grid was applied to all markets, no matter what their actual size. That grid yielded a uniform number of

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[8] NPRM at fn. 20.

931 points which were studied in each market to determine whether sufficient spectrum was available for enough new LPFM stations to meet the FCC's proposed "Service Floor" for LPFM stations. EMF can see no reason why that grid could not have been expanded to include the entire metro area of each Arbitron market to get a true picture of LPFM availability. These metro maps are readily available, and were used by EMF in conducting its studies referenced above. The grid can be overlaid on the boundaries of each market, and the grid system extended to take into account points in any expanded area. EMF sees no significant logistical impediment to using the actual information for each market to determine LPFM availability in that market, rather than assuming that all markets are of a uniform 30 minute by 30 minute size.

Second, it appears that, in looking at whether or not the LPFM Service Floor was met in a given market, the FCC only looked at the number of LPFM ***channels*** that are available in the market, and not at the total number of potential LPFM ***stations*** that could be located in that market. In looking at Appendix A of the NPRM, it appears in several markets that, through the re-use of channels in a market, looking solely at the number of channels available understates the number of potential LPFM stations that could actually be constructed in the market. For example, there are a number of markets, including Minneapolis, St. Louis and Austin, in which the number of channels that are shown as being available is below the Service Floor, while the number of locations at which new LPFM stations can actually be built is above that floor. This begs the question, if the number of locations available for LPFMs exceeds the Service Floor, why not allow the processing of the translator applications that are currently pending in that market? As LPFM is envisioned as a truly localized service to small populations in neighborhoods or other limited areas, channel re-use within a market is to be expected.

These matters are simply quibbles with details of the methodology employed by the Commission. As stated above, EMF supports the market-by-market approach proposed in the NPRM as best balancing the interests of all parties to this proceeding, and the best way to bring about new service from both LPFMs and FM translators to the public in a reasonable timeframe. EMF urges the Commission to adopt this proposal, and to expeditiously move forward with the processing of these pending applications.

The Framework Proposed By the Commission Comports With the Local Community Radio Act

In the NPRM, the Commission asks for comments on the impact of the Local Community Radio Act ("LCRA") on the proposals set forth by the Commission. The LCRA itself directly says nothing about the processing of applications from the 2003 Window. The act instead sets out three priorities for licensing ***new*** stations. These priorities, for the purposes of the NPRM, can be summarized as follows: (1) making new licenses available for both LPFM and FM translator users, (2) making decisions based on the needs of the local community, and (3) insuring that LPFM and FM translators remain "equal in status." The LCRA does not explicitly state that LPFM licenses must be made available in every market, or in any individual market, instead saying only setting as a priority that such licenses "are available." Nor does the statute, in requiring that "new" stations be made available, restrict that requirement to insuring that only new LPFM licenses be made available. Instead, the statute requires that "new" licenses for both translators and LPFMs be made available. Thus, the Commission must be careful to not overly favor the making available of new LPFM stations over the opportunities for new translators. As set forth above, translators provide an important service, especially in rural areas (but in Urban areas as well), because they contribute to the public interest by increasing the diversity of programming options available to the people that they serve.

The second priority, requiring that the allocation of new licenses be based on the needs of the local community, might suggest to some that there be some element of localism involved in the determinations of where stations are made available. But even if that is the case, there is nothing that requires any numerical parity between LPFM stations and those of any other service. The language in the third priority, that these stations are to be "equal in status," is clearly talking about their legal status as secondary stations, not that there must be any sort of numerical equivalency. A plain reading of this language in the statute, that FM translators and LPFM stations "remain equal in status", simply means that neither service has a licensing priority over the other – not that they be equal in number. This would seemingly mean that applications for such services should be treated by the FCC in the normal manner for stations of equal priority – with neither being entitled to any preference over the other.[9]

There is the suggestion in the NPRM that some might read the language of priority (2) as implying that a local service is to be preferred over a distant one – thus preferring an LPFM applicant over a translator. But that again reads too much into the statute. As EMF has argued before in this proceeding, a determination that the "local" programming to be provided by LPFMs is to be preferred as a legal matter of allocations policy over that provided by a translator, treads on shaky First Amendment grounds.[10] A translator may well provide a needed or highly desired new format or program service to a local market, so a preference that assumes that the LPFM is superior, just because it is locally originated, favors one set of speakers over another with no evidence that the needs of the local community are better met by one or the

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[9] This analysis also suggests that the Commission cannot arbitrarily dismiss applications from the 2003 Window, as that would violate their cut-off protection. If translators and LPFMs are in fact "equal in status" then, under standard Commission processing policies, earlier-filed applications should preclude those that are filed later in time. This language even strengthens EMF's argument, advanced in its Request for Stay of the *Third R&O*, that any wholesale dismissal of its pending applications violates its *Ashbacker* rights and is an impermissibly retroactive change in its rules and processing policies. See, Request for Stay at pp. 9-11.

[10] See, EMF Comments filed on April 7, 2008, at pp.12-18, in response to the *Second Further NPRM*.

other. Any such presumption must be rejected. Moreover, it is clear that local audiences appreciate and value the programming provided by such stations. As set forth in EMF's Comments in this proceeding, EMF's translators have very significant listening – demonstrating the value of this service to the public.[11] If this service was not perceived as valuable, it would not derive the high listenership that it has built up in the areas that it serves.

Thus, the Commission must deal with the issue of how to ensure that "new" licenses are available for both LPFM stations and FM translators, as required by Section 5(1) of the statute, while still treating the services as equal as required by Section 5(3). EMF is concerned that the balance struck by the Commission in the NPRM, through the "Service Floors" for LPFM proposed, may be weighed too much toward making LPFM stations available in major markets, while dismissing virtually all pending translator applications in those markets. It is not entirely clear how the use of noncommercial stations as a proxy for the number of LPFM stations needed by a market was arrived at, [12] so the Service Floors for LPFM established by the NPRM seem somewhat arbitrary. EMF is concerned that these Service Floors may overstate the demand for LPFMs, while resulting in the dismissal of all opportunities for "new" translators, in violation of the Section 5(1) admonition to make channels available for new stations in both services. The Commission is obviously hampered in making any meaningful determination as to the needs of a community for LPFM service, as there is no way to judge what the real demand to provide that service may be at the present.[13] Recognizing the difficulty of assessing the relative needs, EMF

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[11] *Id* at ¶¶ 6-7.

[12] Other than noting that they are both noncommercial services, it is not clear what the relationship between the two services might be. Noncommercial radio is a well-established service that has built up over more than 50 years. To conclude that a relatively new service like LPFM should have opportunities similar in number to this well-established service seems to be somewhat of a stretch.

[13] In contrast, there is clear evidence that there is a need for additional translator service, as shown by the number of pending applications filed in the 2003 Window to provide that service, and the high prices that are being paid for

does believe that the use of a market-by-market analysis is the only way to effectively look at the needs of the various local communities, and the approach suggested by the Commission may be the only practical way to meet the statutory priorities in a timely manner. Thus, despite its concerns about some of the assumptions made in the deriving the specifics of the translator applications that should be dismissed, and with the reservations expressed in the previous section, EMF believes that the compromise expressed in the NPRM, as adjusted in the manner herein suggested by EMF, provides the best means to balance the priorities established by the statute.

Some Flexibility Must Be Provided for 2003 Window Applicants to Amend Their Technical Proposals

In the NPRM, the FCC suggests that no amendments to pending translator applications be permitted in an upcoming settlement window, as such amendments could preclude the opportunities that the Commission identified for LPFM service. EMF believes that such a strict limitation is simply unworkable, given the amount of time that many of these applications have been pending. Since these applications were submitted over eight years ago, with some having been planned and prepared even before that, there have been many changes in the operational landscape for these stations. Antenna locations proposed by pending translator applicants may no longer have any space available for new services, or owners of these locations may have changed and new owners, for one reason or another, may not want a translator antenna at their site. Because of the likelihood of changed circumstances for many of these long-pending translator applications, applicants need to be given at least a minimum degree of flexibility to change transmitter sites, even if such flexibility is limited to only a few miles from the transmitter site proposed in the pending application. Even if channel changes are prohibited,

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translators where there are ones available for sale. If there was not a need for service, there would not be such a demand to provide that service.

allowing site moves of up to 3 miles from an application's currently proposed transmitter location must be permitted.

There may also be situations where, even if alternative channels are proposed by translator applicants, there will be no impact on LPFM availability. If translator applicants can make a showing that a channel change would not affect LPFM availability in a market (e.g. if the proposed new channel could not be used by LPFM applicants because of spacing issues with full-power stations or if there remains sufficient spectrum availability for LPFM), then channel amendments should be permitted. The Commission, in each market, can make available a list of the "points" on its grid at which it found LPFM opportunities, and the translator applicants would have to protect such hypothetical LPFM stations (or at least a sufficient number of potentially available channels or locations to comply with the Service Floor).

Similarly, according to the chart in Appendix A to the NPRM, there are a number of markets where the FCC has identified far more available channels for LPFM stations than there are translator applications pending. In markets such as Richmond, McAllen-Brownsville-Harlingen, Knoxville, Baton Rouge and Madison, even if every single translator applicant were to find another channel (an unlikely occurrence for many reasons including the passage of time as applicants may no longer be interested in applications filed long ago), it would appear that there are still more than an adequate number of channels to meet and exceed the market's Service Floors for LPFM. In these markets, where the number of 2003 Window applicants is small enough so that all can be accommodated while still providing enough open channels to meet the Service Floors, channel amendments should also be permitted.

An Application Processing Cap is Not the Right Way to Deter Speculation

The NPRM expresses an interest in deterring speculation in construction permits, and suggests several options to combat such speculation. While some might question the need for curbs on speculation, assuming that is an appropriate goal of the Commission,[14] the way to achieve that goal is not to impose caps on the number of applications that can be processed by any one applicant. As set forth above, any arbitrary limit on the number of applications prosecuted will necessarily have the biggest impact on the smallest markets – those most in need of the kind of additional service provided by translator stations. Whether the cap that is adopted is 10, 50 or 75, it is still an arbitrary number that does more harm than good. Any cap will harm not only speculators, but those applicants like EMF who are fully committed to constructing the new translators that it seeks.

And a numerical application cap may not even harm speculators, as the number of applications pending does not necessarily correlate with speculative intent. An applicant with 10 pending applications may be planning on selling any construction permits that it obtains just as much as an applicant with 1,000 pending applications. As stated above, EMF, despite having hundreds of pending applications, did not file for speculative purposes, but instead to provide more service to the public.

There are many more direct ways to limit speculative behavior. The Commission can simply bar the sale of unbuilt construction permits, which would impede marketplace flexibility,

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[14] The FCC has had anti-trafficking rules in the past, and has abandoned those rules. Congress itself lifted limitations that had been in the rules restricting profits from the sale of unbuilt construction permits. The Commission's principal concern, and that expressed by other parties, seems to be that some parties are making a profit from the sale of translators. Making a profit from a station sale has never been against the Commission's rules. And, to the extent that translator stations end up in the hands of those that value them the most (in many cases AM licensees who plan to rebroadcast their signals on these translators), where is the harm as the public is served by these rebroadcasts? It would seem that the Commission should be more concerned by applicants who apply for construction permits and don't build at all, rather than those who provide the means for others to construct and operate stations in a timely manner.

but dramatically and directly deter speculation. Alternatively, the Commission can simply adopt some form of an anti-trafficking rule that, for a specified period of time, forbids sales of translators, or prohibits their sale for more than out-of pocket expenses.[15][16] Any of these methods are more directly aimed at limiting speculative applications than any nationwide cap on the prosecution of pending applications. These proposals directly address the perceived problem, without unduly burdening those applicants who truly intend to construct the applications that they filed and to serve markets of all sizes across the country. While EMF does not concede that the Commission needs to be overly concerned with "speculative applications,"[17] if it decides to adopt rules in this regard, it should adopt rules that directly address the perceived problem.

Conclusion

As set forth above, EMF supports the Commission's market-by-market approach to determining which applications from the 2003 FM Translator Window to process, and which to dismiss to preserve LPFM opportunities. While EMF has some quibbles with certain of the Commission's assumptions made in arriving at the particular markets in which translator applications will be dismissed, it believes that, overall, the compromise proposal advanced by the Commission will serve the public interest by making available opportunities for new LPFM stations and new FM translators in a relatively expeditious fashion.

EMF also urges the Commission, which has backed away from a cap on the number of applications from the 2003 Window that can be processed for purposes of ensuring LPFM

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[15] An exception would have to be provided to allow the sale of "fill-in" translators upon the sale of their associated primary station.

[16] A similar ban on sale was adopted in the *Rural Radio* proceeding, supra., at ¶ 18, for the sale of stations granted on the basis of a tribal preference.

[17] See, e.g. *Streamlining of Mass Media Applications*, 13 FCC Rcd. 23056, 14 CR 351. At ¶¶ 26-30 (1998), where the FCC abolished the limits on consideration paid for the sale of unbuilt construction permits finding that the rule was not necessary to preserve the integrity of the FCC application process – especially in a world where permits are awarded in an auction process, as is the case for FM translators.

spectrum availability, not to adopt a similarly troublesome cap to deter speculation. If speculation is indeed a problem that must be addressed by the Commission, it should do so directly, and not through an arbitrary mechanism that may not lead to the intended result, and which will harm other public interest objectives of bringing programming options provided by translators to rural areas. EMF respectfully requests that the Commission take action in accordance with the comments offered above.

Respectfully submitted,

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