

**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

REPLY COMMENTS OF EDUCATIONAL MEDIA FOUNDATION

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Reply Comments of Educational Media Foundation

Educational Media Foundation (“EMF”), by its attorneys, hereby submits these Reply Comments in the above-referenced proceeding. In its initial comments, EMF expressed general support for the FCC’s framework for dealing with the applications filed during the 2003 FM translator filing window in a manner consistent with the Local Community Radio Act (“LCRA”), which also seeks to preserve opportunities for Low Power FM stations. As set forth in EMF’s comments, while it is concerned that the proposal of the Commission in the Third Further Notice of Proposed Rulemaking (“FNPRM”) tilts too far toward preserving opportunities for new LPFM stations, while limiting the opportunities for new FM translators, which is also an expressed goal of the LCRA, given the procedural posture, long delays and unclear wording of the statutory guidance, EMF believes that the Commission’s compromise procedure, with a few tweaks as expressed by EMF, best resolves the long-pending log jam of applications at the FCC and the issues surrounding the relationship between the processing of the pending translator applications and LPFM opportunities.

I. Summary and Introduction

In reviewing the comments filed in response to the FNPRM, it appears that most parties agree with the general framework set out by the FCC. The principal issues addressed by most of the comments deal with the “tweaks” that are appropriate in the system suggested by the Commission. Some suggest that changes be made that will foster more opportunities for LPFM stations (which would entail dismissing more pending FM translator applications), while others favor more processing of the pending translator applications from the 2003 FM Translator Window (which in some, but not necessarily all, cases may involve some limitations on LPFM opportunities). Obviously, balancing these contrasting positions is difficult but, as detailed below, EMF believes that some accommodation to the interests of both sides can be reached to finally bring this process to a close.

Virtually all of the comments agreed that the “Rule of 10” that had been adopted by the Commission in the Second Report and Order in this proceeding, limiting to 10 the number of 2003 FM Translator Window applications that any one party could continue to prosecute, was not a good idea. The Commission and many the LPFM advocates believed that this arbitrary limit would still allow too many translator applications to be processed in larger radio markets, thus precluding LPFM opportunities. EMF reiterated in its comments on the FNPRM that there is another, independent reason that such limits were not in the public interest, *i.e.* the limits would result in the dismissal of too many translator applications in smaller markets, markets where spectrum is plentiful – areas unlikely to get the new services promised by these translator applications if applicants were limited to processing only 10 applications. Applicants would naturally choose to protect the 10 applications that would serve the greatest populations, and thus

service would be delayed or denied to rural areas – areas most in need of new diverse programming options.

While EMF agrees with the Commission’s decision to abandon the Rule of 10, it expressed concerns that the Commission might adopt a new arbitrary limit on the number of 2003 FM Translator Window applications that a party can pursue. This arbitrary limit would be adopted not to preserve LPFM opportunities, but instead as a way of preventing speculation in the prosecution of translator applications. As EMF expressed in its Comments, a nationwide limit on applications does not deter speculation. Applicants can be filing for purposes of resale even if they are filing for only one application. Certainly, if a limit of 50 or 75 or any other number was adopted, certain applicants might have a speculative purpose for pursuing such applications. EMF, and a number of other parties, made clear in their comments that there are other means available for the Commission to limit speculation – means which tackle the issue directly, rather than using an imperfect device of an application limit that also serves to deny service to rural areas, just as did the Rule of 10. Limits on the compensation that be received for the sale of a translator, or even holding requirements for translators after they have been constructed, can accomplish the Commission’s stated purpose much more directly, without imposing public interest costs that are simply unnecessary.

As set forth below, EMF believes that the compromise crafted by the FCC, with some minimal revisions, will work to quickly bring this long-running proceeding to an end. Many parties have, in their comments in this case, sought to introduce new issues not contemplated in the FNPRM. As the Commission has more than enough on its plate in resolving the issues at hand, these attempts to raise new matters must be rejected. For the reasons set forth in its Comments and in this Reply, EMF requests that the Commission adopt its proposed market

specific approach to translator processing, and adopt the other proposals EMF has advanced in this proceeding.

II. The FCC's Market Specific Approach to Translator Processing Is Justified

The market specific approach to the decision as to whether to dismiss applications pending from the 2003 FM Translator Window has been accepted by many of the major parties filing comments in this proceeding.¹ Only NPR suggests that an application limit be adopted simply for purposes of culling applicants so that there are not as many applications for the FCC to process.² NPR suggests that such a limit will address the “excessive filing” by certain applicants.³ Yet, as NPR seems to acknowledge, and the Commission recognizes in the FRPRM, the application limits did not foster LPFM opportunity. What NPR seems to be saying is that the applications of some parties should be dismissed simply to make it easier for other applicants to get a grant of their pending applications. This simply has not been the way that auctions have been run at the FCC. The Commission has never accepted applications during an auction window, and then turned around and decided to dismiss an arbitrary number of the applications that were filed simply because it will not be as easy for some of the other applicants to be successful in pursuing their applications. Moreover, as set forth in EMF's comments, any arbitrary limit on the number of applications that can be processed will deprive rural areas of new services. There simply is no public interest justification for adopting the NPR proposal.

The real issue raised by the vast majority of the comments is not with the question of how to move forward – there seems to be general agreement that some form of the FCC's market-by-

¹ See, e.g. Comments of Prometheus Radio Project, REC Networks, and Common Frequency at p.1 (stating that the parties “support the general direction” of the FNPRM; Comments of NAB at pp. 8-9 (the approach of the FNPRM “could be a reasonable first step”).

² See, Comments of NPR at pp. 4-6 (“An application limit would still serve a useful purpose in addressing the excessive filing of FM translator station applications.”).

³ Even NPR does recognize that any limit adopted for this purpose could conceivably be much higher than the Rule of 10 that had been adopted by the Commission and challenged by many parties, including EMF.

market review of LPFM and translator availability is an acceptable methodology. Instead, the real issue seems to be whether the FCC made the right “cut” in deciding how many of the applications from the 2003 FM Translator Window can be processed, and how many must be dismissed to preserve opportunities for LPFM.

Naturally, the comments of LPFM proponents, such as Prometheus, REC and Common Frequency argue that there should be more protection for LPFM opportunities, and hence more dismissals of translator applications. However, these comments all seem to proceed from a reading of the LCRA that presupposes that the only goal of the statute was the promotion of LPFM stations. In fact, as pointed out in EMF’s comments and those of other parties, the LCRA does not read that way. Instead, the LCRA seeks to promote opportunities for both new LPFM and new FM translators. By its very language, the LCRA is instructing the FCC to promote both services.⁴ While the bill may have started out as a bill solely to promote LPFM by eliminating restrictions against third-adjacent channel interference protections, the statute that was ultimately adopted must be read literally, and a literal reading says that opportunities for both new LPFM and new FM stations must be available. Thus, a wholesale dismissal of the translator applications is not warranted, and the proposals that suggest any drastic increase in the number of translators that will be dismissed by the Commission do not foster the balance that Congress sought to promote in the LCRA.

Many of the proposals to dismiss additional translators seem to be premised on the belief that the LPFM rules should be amended to allow for more LPFM stations, using interference

⁴ “The Federal Communications Commission, when licensing *new* FM translator stations, FM booster stations, and low-power FM stations, shall ensure that – (1) licenses are available to FM translator stations, FM booster stations, and low-power FM stations”[emphasis added]. This language from the statute specifically addresses the licensing of new stations, not those that are already licensed.

standards such as those used for the translator service.⁵ While change in the LPFM technical standards may be something that the FCC could explore, that issue is not before the Commission in this proceeding.⁶ The interference standards are established by the rules, and further changes should be worked out in a separate proceeding. Unless and until any changes are adopted, however, possible liberalization of the LPFM spacing rules should not be a basis for denying currently grantable translator applications.

The comments of Prometheus and other LPFM advocates also suggest that the FCC's proposal was overly generous in protecting FM translator applications through its use of a grid system that was 31 minutes by 31 geographical seconds in size. These parties propose instead to use a much smaller grid, which they say better reflects the area in which LPFM stations can serve various radio markets.⁷ They provide maps of several markets that they claim demonstrate that the 31 by 31 grid reaches areas far outside of the local market areas. On review of these maps, it appears that the advocates are using maps not of the Arbitron market areas for their determinations of how the grids cover particular markets, but instead using maps of Urbanized areas. These maps substantially understate the size of the Arbitron Metro Markets that are used for virtually all FCC definitional issues for radio markets. In fact, in connection with the proposed dismissal of FM translator applications from the 2003 Window, the LPFM proponents

⁵ See, e.g. Common Frequency Comments at pp. 8-9; REC Comments at ¶5.

⁶ EMF suggests that any liberalization in the LPFM rules be approached cautiously. The translator rules allow applicants more flexibility in where stations can be located, with the understanding that, if the translator causes any interference to a regularly used signal of a full-power station, its operations must cease. Such a standard imposes potential risks that more easily be absorbed by a translator operator, whose station is an adjunct to a main station. The costs of construction and operation of a translator that must cease operations, while they are certainly a concern to any organization, can more easily be absorbed when they are incurred by an organization with other business. For an LPFM applicant, where the station may be the sole operation of a non-profit organization, the costs of having to shut down a station that is causing actual interference may be devastating. Loosening LPFM interference standards so that they are similar to those that apply to translators may well end up creating many very hard decisions for the FCC as non-profit groups seek to protect their stations, and the contributions of their members and donors, from devastating losses that could be incurred based on legitimate claims of interference. The FCC should think long and hard before putting these nonprofit operators into that situation.

⁷ See, Joint Comments of Prometheus, REC and Common Frequency ("LPFM Joint Comments") at p. 4.

do not seem to suggest that the applications for translators that will serve areas in an Arbitron Metro, but will be located outside the Urbanized area, be preserved. Instead, they seem to be urging that the larger area be used for purposes of determining who to dismiss, while using the smaller area for purposes of determining how many LPFM stations can serve the area. They cannot have it both ways.

Moreover, there is nothing in the LCRA or in any other policy of the FCC that says that LPFM should get access to only the most densely populated areas of a market. LPFM stations are supposed to serve unique neighborhoods or clustered groupings of people with common interests. They are not meant to be wide-area services to serve large population centers. Yet the comments of the LPFM advocates seem to center their interest on the heart of urban areas. These areas may be the areas least conducive to LPFM stations. Low power stations are most likely to suffer from reception problems in high density areas because of signal issues with building penetration in the steel and concrete canyons of central cities. Moreover, in the centers of many urban areas, there are many transient workers, commuting to the center city from suburban residential communities. LPFM, because of its limited coverage area, is not set up to serve transient populations traveling throughout a metropolitan area. That role has been, and should appropriately be, served by full-power stations, which are designed to cover larger areas. LPFM is instead meant to be a very localized service, and the needs for such services will arise in suburban as well as urban areas. Thus, opportunities for service to areas within an Arbitron metro, but outside of the Urbanized area, should still be important to LPFM applicants, and should still be counted by the Commission in assessing whether Service Floors are met.

Similarly, Prometheus and others suggest that the grid studies done by the FCC should be adjusted to exclude areas that fall over water or which otherwise have limited populations.⁸ EMF has suggested that the grid should actually be extended to cover the full Arbitron markets, as these can be readily determined. Logically, if there are areas where there are major bodies of water that can easily be determined on the grid, perhaps these areas are appropriately excluded when considering if there are real LPFM opportunities in that market.⁹ But extending this rationale to areas of low population is much more difficult, as this requires a whole new level of analysis. What population density is too low to be accurately considered an area where LPFM stations can be operated? How would you define the boundaries of such areas? Couldn't there be towns and other population groupings even in less densely populated areas that could benefit from the localized service provided by LPFM? Because of these and similar difficulties, excluding areas of low population density does not seem to be practical.

On the other hand, there are some comments that suggest that the FCC has been too harsh in dismissing all of the translators in a market. EMF, in its comments suggested some minor tweaks that would allow more FM translators to be granted without unduly restricting the availability of LPFM stations. Many other parties have suggested similar tweaks. EMF believes that many of these tweaks are achievable without unduly encroaching on LPFM opportunities, though implementation of these suggestions may require additional processing time by the Commission, and might best be handled through a waiver process. For instance, the comments of Sacred Heart University suggest that translator applicants, in markets where all applications are to be dismissed, should be allowed to continue to process their applications if they can demonstrate that no LPFM opportunities would be harmed by the grant of their application.

⁸ See, LPFM Joint Comments at pp. 4-5.

⁹ See, LPFM Joint Comments at pp. 5-7.

Because of the different spacing and interference protections between these services, it would seem that the approach suggested by Sacred Heart has merit, and in fact serves the admonition of the statute to give both LPFM and translators the opportunities for new stations.

Several parties suggest that the Commission first allow a settlement window to open, before taking any actions with respect to the pending translators, so the Commission would have an accurate basis to determine how many translator applicants remain interested in pursuing their applications. The theory appears to be that, by allowing the winnowing of applications through such a window, the FCC may find that there are far fewer FM translator applications than it now believes to exist. While this idea may have some initial appeal, EMF is concerned about the proposal for several reasons. First, setting up such a window will take time and will further delay the processing of all of the applications. Under the process proposed by the Commission, processing of unaffected translators can begin immediately after the decision is made as to which markets have translator applications that can continue to be processed, and which are markets in which all translator opportunities are blocked.

Second, these proposals do not state what would happen if there remain many applications after the settlement window ends. It would seem that processing of all translator applications would be delayed while the settlement process plays out, as well as any LPFM window and, at the end of the process, the FCC might well be still left with many translator applications. It would then have to revisit the issues now on the table at some later date – further delaying processing.

Finally, parties may find it difficult to work out any settlements during a settlement window if they do not know what the ultimate status of their applications will be. How can one negotiate intelligently, if the ultimate outcome may be the dismissal of the application because it

is too preclusive of LPFM opportunities? The rules of the road need to be clear before any settlement window is opened.

EMF submits that the decision of the Commission must be guided by the LCRA's admonition to make available new stations for both LPFM and FM translator stations. As the NAB's comments make clear, the Commission simply cannot make a blanket determination that the needs of a community are better met by LPFM stations than by FM translators. While many of the LPFM advocates suggest that LPFM is always to be favored as it is supposed to provide a local service, the NAB is correct in pointing out that the rebroadcast of AM signals, or FM fill-in translators, also provide local services.¹⁰ With the greater resources of a full-power station standing behind these stations, the local service that they provide may well be more professional and in-depth than that which can be provided by a local non-profit organization – one either newly formed to start an LPFM, or one which has a primary focus in some area other than broadcasting. As EMF has pointed out many times, the service that can be provided by a national service like that which it provides, targeting a specialized audience, is also highly valued by consumers, as demonstrated by the vast listening to EMF's stations, both to translators and to full-power stations. If the service did not serve the needs of the community, the listening and donor support that EMF receives would not be anywhere near as high as it is. Thus, the Commission cannot blindly choose LPFM services when making the decisions as to which services to favor and which to reject in this proceeding. Instead, as required by the LCRA, opportunities for both groups to acquire new stations must be kept in mind as the Commission makes its decision in this proceeding. EMF believes that the proposal advanced by the FCC in

¹⁰ Various comments suggest that the FCC reexamine the use of translators to rebroadcast HD radio signals, and even suggest that the Commission reconsider the rules allowing the translators to be used by noncommercial entities outside of their primary station's service areas. These questions are far beyond the limited reach of the FNPRM and, if considered at all, should be dealt with in a different proceeding after a full and fair opportunity for parties to comment after notice of the potential issues from the Commission.

the FNPRM, with the modifications supported herein and in EMF's Comments, strike that balance and should be adopted.

III. Translator Applicants Must be Given Some Opportunity to Change Transmitter Sites to Adjust to Changing Conditions in their Markets

In its comments, EMF responded to the Commission's proposal to limit channel changes and site moves by translator applicants. As set forth in EMF's Comments, totally foreclosing such moves puts an impossible burden on applicants who have been processing their applications for over 8 years. During such a prolonged period of time, sites that were specified long ago in good faith may simply no longer be available, and applicants may need to adjust to those changed circumstances. Other parties have supported the position of EMF, recognizing many of the same issues.¹¹ Those who support the Commission's position seem to do so without evidence of the need for an absolute ban on any change in the 8 year old technical proposals – simply echoing the Commission's tentative conclusion that no changes should be allowed. The minimal changes proposed by EMF in its comments will resolve many of the issues identified by EMF and other parties like WCFR, by giving applicants some limited flexibility to change sites and, given the limited nature of the site changes suggested, should not unduly interfere with LPFM opportunities. Thus, this proposal should be adopted.

IV. The Commission Should Not Adopt Numerical Application Limits in an Attempt to Limit Speculation – There are More Direct Remedies for the Perceived Problem

EMF has been particularly concerned with the Commission's suggestion that, while numerical caps on applications are not justified for purposes of encouraging LPFM opportunities, such caps may be justified in connection with limits on speculation. Again, some parties have picked up that suggestion and supported it, without any real justification other than a

¹¹ See, e.g., the Comments of WCFR at pp. 5-7 for a summary of the issues that may face translator applications were the Commission's limitations on site moves to be adopted.

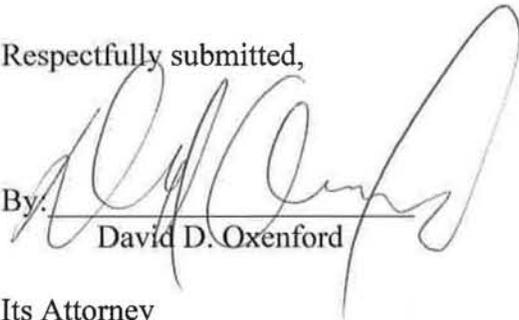
cold recital that too many applications on a nationwide basis are bad – without any reason why they are bad. As shown in EMF’s comments, the ability to serve new markets, including many rural communities that may not otherwise get new programming options, is a public interest benefit that will be undermined by application limits. Several other parties support EMF’s position on this issue.

As stated in EMF’s comments, if the Commission is concerned about speculative applications, they should regulate the conduct about which they are concerned, and not try to indirectly get at that conduct by putting limits on an unrelated matter – the number of applications filed by a party. Limits on sales of unbuilt construction permits, or the prohibition on the sale of an unbuilt construction permit for a profit, or even holding periods on constructed stations, are all direct ways of limiting speculation. If the Commission is truly interested in the deterrence of speculation, these are proposals that the Commission should adopt – not unrelated limits on the number of applications that one party can pursue.

V. Conclusion

For the reasons set out above, the Commission should proceed with its plans to review translator applications on a market-by-market basis, while looking to permit opportunities for both new LPFM stations and new FM translators, as required by the LCRA. The Commission should not adopt any limit on the number of applications that can be processed by one party, as such limits neither promote LPFM availability, nor deter speculation. EMF respectfully requests that the Commission take these actions.

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