

**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

**PETITION FOR RECONSIDERATION OF EDUCATIONAL MEDIA FOUNDATION
ON FOURTH REPORT AND ORDER AND THIRD ORDER ON RECONSIDERATION**

Educational Media Foundation (“EMF”), by counsel and pursuant to Section 1.429 of the Commission’s rules, hereby seeks reconsideration of the Fourth Report and Order and Third Order on Reconsideration in the above-captioned proceeding,¹ specifically, its decision to mandate that FM translator applicants in the Auction No. 83 window identify for dismissal all of their applications in excess of a national cap of 50 applications, with a limit of one application per-market in certain markets identified in Appendix A to the *Fourth R&O*. See *id.* ¶¶ 54-61. In particular, EMF seeks reconsideration insofar as the *Fourth R&O* imposes these one-to-a-market and national cap dismissal burdens. These caps are not justified as a matter of policy and are particularly arbitrary as they have been imposed without even clearly defining what constitutes a “market” for purposes of the one-to-a-market limitation. Because knowing how the “market” is defined for this purpose bears directly on which applications an applicant might

¹ *Creation of a Low Power Radio Service and Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, MM Docket No. 99-25; MB Docket No. 07-172; RM-11338, Fourth Report and Order and Third Order on Reconsideration, FCC 12-29 (Mar. 19, 2012), 77 Fed. Reg. 21002 (Apr. 9, 2012) (“*Fourth R&O*”).

choose to preserve, *see id.* ¶ 63, and as determinations of how many applications may be affected by this market-specific rule has an impact on the number of applications nationwide an applicant such as EMF will have remaining to prosecute and be subject to the proposed 50-application national cap, the Commission must grant reconsideration to clarify the points raised herein before any applicant must designate any of its Auction No. 83 applications for dismissal.

BACKGROUND

EMF is the licensee of hundreds of translator stations across the country, and has several hundred applications still pending from the Auction No. 83 FM Translator Filing 2003 Window (the “2003 Window”).² EMF has been a very active participant in this proceeding, commenting throughout on what it believes is the appropriate relationship between translators and low-power FM (“LPFM”) stations, and seeking to preserve its ability to apply for and obtain licenses to expand its translator services, particularly in rural areas. EMF’s very real and direct interest in this proceeding lies in its desire to construct and operate the translators for which it applied, in order to serve the public interest. Its interest is not in any financial return that it could recognize from sales of such stations – a truism that can be seen in the fact that, from applications filed in the 2003 Window, EMF has already constructed approximately 150 new translators that are on-air serving the public.

Among EMF’s primary concerns has been the FCC’s 2007 decision to limit to 10 the number of applications from the 2003 Window that one party could continue to prosecute.³ EMF was the lead party in seeking reconsideration⁴ and a stay⁵ of that decision, pointing out that the

² *Cf. Fourth R&O* ¶ 58 (adopting “cap [] high enough to permit all but twenty applicants to prosecute all of their pending applications”).

³ *See, Creation of a Low Power Radio Service*, Third Report and Order and Second Further Notice of Proposed Rulemaking, Docket 99-25, 22 FCC Rcd 21912 (2007) (“*Third R&O*” or “*Second Further NPRM*”).

⁴ Petition for Reconsideration of Educational Media Foundation, et. al., filed February 19, 2008. (“EMF Petition for Reconsideration”)

decision neither served the public interest nor accomplished the Commission's objectives. As EMF showed, that decision would have mandated dismissal of hundreds of applications intended to serve areas where there is little spectrum congestion, depriving rural communities of program options they might not otherwise receive. At the same time, limiting prosecutable applications to only 10 would no doubt center applicants' interests on the largest markets where prospective translators would likely serve the biggest populations – that is, large-market applications most likely to adversely affect LPFM opportunities.

In the *Third FNPRM* in this proceeding out of which the instant *Fourth R&O* arises,⁶ the Commission preliminarily determined that, given the passage of the Local Community Radio Act of 2010 (“LCRA”),⁷ the 10-application limit was at odds with the new law.⁸ EMF generally supported the *Third FNPRM*'s tentative conclusion to decide market-by-market whether to process the still-pending applications from the 2003 Window, especially insofar as it abandoned the *Third R&O*'s 10-application limit. As EMF showed, in the vast majority of markets, the pending translator applications do not preclude LPFM opportunities.⁹ Accordingly, that rule did little to preserve LPFM availability while greatly undercutting providing new program services in rural areas where no spectrum shortage of LPFM opportunity exists.

EMF thus advocated that a numerical cap on processing remaining translator applications from the 2003 Window would be arbitrary and capricious as it would not further the objective of

⁵ Request for Stay of Educational Media Foundation, et. al., filed March 13, 2008.

⁶ *Creation of a Low Power Radio Service and Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Third Further Notice of Proposed Rulemaking, 26 FCC Rcd 9986 (2011) (“*Third FNPRM*”).

⁷ Pub. L. No. 111-371, 124 Stat. 4072 (2011) (requiring FCC to, *inter alia*, adopt licensing procedures ensuring a minimum number of licensing opportunities for both LPFMs and translators nationwide, and to provide licensing opportunities for both services in as many local communities as possible). See also *Fourth R&O*, ¶ 5.

⁸ See *Fourth R&O* ¶ 1 (citing *Third FNPRM*); see also *id.* ¶ 6 (“the suspended national cap of ten translator applications ... is inconsistent with the statutory mandate to ensure some minimum number of LPFM licensing opportunities in as many local communities as possible”).

⁹ Comments of EMF at 4 (citing and incorporating by reference *ex partes* providing supporting studies).

making more channels available for new LPFMs, because dismissing all but an arbitrary number of applications would not meaningfully contribute to LPFM availability in large markets where applications are unlikely to be dismissed.¹⁰ EMF also urged that capping application processing is no more rationally related to preventing speculation than it is to preserving LPFM opportunities and that, rather, if the Commission believes it needs to deter speculation, it should do so directly, either by prohibiting translator sales or limiting compensation from them. *Id.*

The *Fourth R&O* adopted the market-specific translator application dismissal process, but ordered dismissal of pending translator applications in identified spectrum-limited markets in order to preserve adequate low LPFM licensing opportunities. The Commission adopted a detailed plan for protecting LPFM opportunities in “spectrum-limited” markets, where pending translators could have an impact on the ability of new applicants to seek LPFM stations in the future. *Fourth R&O* ¶¶ 38-49. This analysis is done initially on a market-by-market basis to determine the markets in which there are limited LPFM opportunities. *See id.* App. A. But it proceeds to a more granular level, providing for application-by-application analysis of pending translator applications in those markets, to determine if in fact each translator would in and of itself prevent LPFM opportunities, because the Commission recognized that the rules governing translator and LPFM operations are different, and that there are instances in such markets where a pending translator application can be granted without foreclosing an LPFM opportunity, as where the existence of other (primarily full-power) stations already preclude new LPFMs.

This detailed technical scheme adopted in the *Fourth R&O* fulfills the Commission’s responsibilities under the LCRA to preserve LPFM opportunities. Thus, the original purpose for the 2007 application cap, as expressed in the *Third R&O*, is no longer necessary to foster LPFM

¹⁰ *Id.*, *passim*. *See also id.* at 4 (citing and incorporating by reference *ex partes* providing supporting studies).

opportunities. Because of the market-specific methodology adopted in the *Fourth R&O* to protect LPFM opportunities, the Commission determined that the 2007 application cap was not necessary, and dismissed the pending requests for reconsideration of that cap as moot. *Id.* ¶ 72.

Even though there was no need to adopt a spectrum cap to protect LPFM opportunities, the *Fourth R&O* nevertheless adopted a limit of 50 applications nationwide that can be prosecuted by one applicant, with a limit of one application in each of the markets listed in Appendix A of the *Fourth R&O*. Each applicant will be ordered to identify the applications they wish to preserve, after which the remainder the applicant has on file (if any, *see supra* note 2) will be dismissed. *See id.* ¶¶ 54-61. These limits are being adopted not to protect LPFM opportunities, but instead to “deter speculative licensing conduct because the remaining translator filings present significant issues of abuses of our licensing process.” *Id.* ¶ 50.

DISCUSSION

EMF is relieved the *Fourth R&O* eliminated the cap of 10 applications, especially given EMF’s showings that it violated the Commission’s mandate to regulate in the public interest, as well as its Section 307(b) duty to provide “fair, efficient and equitable distribution of radio service” “among the several States and communities,” and that it would have deprived many rural areas the benefits of new service from translator stations. Indeed, many of the applications preserved propose service to locations that the Commission itself admits are not spectrum-congested areas in which demand for LPFM channels cannot be met. *See, e.g., Third R&O*, ¶50.

EMF also applauds the Commission’s intent “to facilitate to the maximum extent possible the grant of the pending translator applications in all markets – whether spectrum is limited or abundant.” *Fourth R&O*, ¶ 2. As the *Fourth R&O* reaffirms, translators “can effectively bring service to rural and under-served areas,” and “are essential components of local and regional

transmission systems that efficiently deliver valued programming to listeners.”¹¹ Many of these areas, as the Commission has found, need more choices in programming – choices that are taken for granted in larger markets.¹² While it is open to debate whether the course the *Fourth R&O* charts will result in the “maximization” seeks, *see infra* 7-8, recognizing the value of the services that translators provide is critical.

But EMF is particularly concerned about a key oversight in the *Fourth R&O*. In establishing a 50-nationwide/one-to-a-market rule for remaining pending translator applications in the 2003 Window, the Commission never defines what constitutes a “market” for purposes of that cap. The *Fourth R&O* explains how “[t]he Bureau studied all top 150 radio markets, as defined by Arbitron, and smaller markets where more than four translator applications are pending,” *Fourth R&O*, ¶ 28, while also setting out its “city-center” grid approach to “approximate ‘core’ market locations that could serve significant populations.” *Id.* But at no point does the Commission explain specifically how it intends – and how it intends 2003 window applicants – to treat “markets” for the mandated dismissal that has been imposed. Is it intended to mean census-designated urbanized areas? Metropolitan statistical areas? Arbitron metropolitan areas? Or will the limitations somehow rest on the *Fourth R&O*’s two-grid city-center formulation? And is the determination based on transmitter site location, coverage, or some combination thereof? As this is a vital consideration for affected applicants, both in designating applications in the 2003 window to keep on file, as well as in assessing whether to seek administrative and/or judicial review, the Commission must clarify its intentions.

These definitions must be made clear, both for determinations of when the one-to-a-market rule is being violated and, based on that question, how many applications will be left

¹¹ *Id.* ¶ 18. *See also id.* ¶ 46 (“translators serve community needs, especially those in rural or underserved areas”).

¹² *See Rural Radio Service*, Second Report and Order, MM Docket No. 09-52, 26 FCC Rcd 2556, ¶¶ 21-22 (2011).

to count against any nationwide cap. Both calculations are dependent on how the Commission defines the “market.” At the outset, it should be noted EMF has throughout this proceeding argued that not all markets are alike, and that pending translator applications do not necessarily preclude opportunities for new LPFM stations. EMF has also been consistent and firm in its belief that any numerical cap on processing 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.

As noted, in most cases translator applications that will have the most preclusive effect on LPFM availability will be those proposing to serve larger markets, and are most likely to be protected by applicants. And as EMF set out in many of its pleadings, there is an independent public interest basis for not setting an arbitrary cap on the number of applications that can be processed.¹³ EMF also submits that the *Third FNPRM*'s inquiry into whether “a cap of 50 or 75 applications in a window would force filers with a large number of applications to concentrate on those ... markets where they have *bona fide* service aspirations,”¹⁴ wrongly assumes translator applicants with greater than that number of applications by definition did not intend to serve the markets where they filed in excess of that number.¹⁵ The Commission's conclusion in the *Fourth R&O* that it believes the construction of 50 additional translators by any applicant is “feasible” implies that the construction of more is not – without any citation to any record

¹³ See, e.g., EMF Petition for Reconsideration and Request for Stay, *supra*. EMF Comments at 4-6. Further, as noted, EMF submits that if the Commission concludes it must somehow prevent speculative applications – *i.e.*, those filed without the applicant having the intent to build the station proposed – there are far more direct ways to combat speculation that do not involve compromising the public interest in providing service to rural areas.

¹⁴ *Fourth R&O*, ¶ 50. See also *id.* ¶ 56.

¹⁵ EMF is the licensee of hundreds of translators and provides service that is valuable to members of each of the communities in which they are located. See also *supra* at 2 (EMF's interest in its 2003 Window applications is wholly divorced from speculation); EMF Petition for Reconsideration and Request for Stay, *supra*.

evidence for this conclusion.¹⁶ EMF does not retreat from its position regarding the arbitrary and capricious nature of any cap, and expressly preserves those claims.

Indeed, the Commission adopted these caps without citing specifically what it considers to be abusive about the conduct of the applicants that will be subject to mandated dismissal of many of their applications. It acknowledges that there are other more direct means of deterring speculation, as suggested by EMF, including limiting sales of new translator construction permits or the prices at which they can be sold. However, it adopted a mass dismissal requirement as the assertedly most “administratively feasible solution for processing this large group of long-pending applications.” *Id.* ¶ 57. Seemingly, the Commission’s objective in mandating the application caps was more about limiting the number of applications that it had to process, rather than directly deterring speculation.

Moreover, an explanation is lacking as to how these caps square with the Commission’s own conclusions that the LCRA requires it to make available licensing opportunities for both translators and LPFM stations “in as many local communities as possible.” *Id.* at ¶ 5. Obviously, any dismissal will ensure that some translator service that could be provided to new communities will not in fact be provided, and the Commission has not disputed EMF’s contention that it will likely be the smallest communities which are allowed to go without service where applicants have to select which applications to process. The Commission states that some of these opportunities may be available in future filing windows. But is that really making available new translator services as the LCRA demands, when the last translator window was in 2003, and in

¹⁶ *Id.* at ¶ 58. The Commission assumption’s that any applicant will in fact get to build 50 translators seems equally misplaced. As the Commission recognizes, many of the remaining applications are mutually exclusive. Thus, only some subset of the 50 applications selected by any applicant will ultimately be granted. If the Commission had thought that 50 was an appropriate number of translators that an applicant could construct, then it should have set an application *grant* limit, as advocated by EMF in several *ex parte* filings submitted when it became clear that a cap was being considered, rather than a 50 *application* limit.

future windows the Commission has already proposed limits on how many applications can be filed by one party?¹⁷

Whether EMF needs to continue seeking relief from (or judicial review of) the arbitrary and capricious nature of the cap remains to be seen. But that cannot be determined as yet, as it is clearly just as arbitrary for the Commission to impose a market-based cap (regardless of the number of applications arbitrarily allowed under it) without defining what a “market” is for such purposes. This new, threshold uncertainty must be resolved before it can be determined whether there is any additional arbitrary and capricious agency action that requires attention.

Such failure to define such key terms is classic arbitrary and capricious agency action in its own right. *See, e.g., Qwest Corp. v. FCC*, 258 F.3d 1191, 1201-02 (10th Cir. 2001).¹⁸ This is particularly problematic insofar as setting the cap at 50 protectable applications nationwide is inherently arbitrary to begin with. The Commission formerly picked 10 as a nice round number to which it was thought necessary to limit 2003 Window applications, and once forced to back away from that by the LCRA, it could just as easily have been 75 rather than 50 on which the *Fourth R&O* landed.¹⁹ Obviously, if the Commission had to pick a number (a point EMF does not concede), it had to do just that – pick a specific number. But in doing so, it is incumbent upon the Commission to explain the increments by which one counts to that number. In this case, adopting a specific definition of “market” is necessary to satisfy that obligation.

¹⁷ *See, e.g., FCC Seeks Comment on Proposed Application Limit for NCE FM New Station Applications in October 12- October 19, 2007, Window*, Public Notice, 22 FCC Rcd. 15910, 15911 n.4 (2007) (noting FCC’s reservation of right to establish limits on number of applications that can be filed during a window, and citing number of translator applications received in the 2003 Window).

¹⁸ *Cf., e.g., CBS Corp. v. FCC*, 663 F.3d 122, 137 (3d Cir. 2011) (courts “find agency action arbitrary and capricious where the agency ... entirely failed to consider an important aspect of the problem); *Alascom v. FCC*, 727 F.2d 1212, 1219 (announcement of intent to preempt “inconsistent state regulation” did not constitute final action where FCC’s order indicated further proceedings were necessary to determine whether any state regulation was inconsistent with national policy, no specific state regulation was preempted, and no attempt was made to define sorts of state regulations that might be deemed inconsistent).

¹⁹ *See supra* 2-4, 6 (discussing evolution of cap from *Third R&O* through *Third FNPRM* to *Fourth R&O*).

It is critical to define what constitutes a “market” for the *Fourth R&O*’s one-to-a-market rule not just to avoid arbitrary and capricious agency action, but also because it will impact how 2003 Window applicants like EMF will select which applications they wish to prosecute, and which they will allow to be dismissed. If an applicant mistakenly believes two proposed translators are in the same “market” based on one understanding of that term, whereas they were actually in different markets under whatever definition the Commission had in mind, it could result in erroneous and unnecessary sacrifice of an application that an applicant might otherwise have sought to preserve. Alternatively, erroneously concluding that an application is outside of a market could mean the dismissal of that application, leaving the applicant with fewer than the 50 applications that it might otherwise be permitted to prosecute. In either case, the net result would be unnecessary loss of potential service to the public.

The Commission must therefore explain what it intends to consider a “market” for purposes of the 50-nationwide/one-to-a-market cap it has imposed. Only if that is made clear can EMF know whether the cap adopted in the *Fourth R&O* is a confine within which EMF can operate,²⁰ or if it presents obstacles that necessitate EMF seeking further modification or other relief from the Commission, and/or pursuing judicial review. And, obviously, the Commission absolutely must provide such clarification **before** any applicant in the 2003 Window is forced to identify which of its applications it wishes to preserve, and which it will allow to be dismissed.

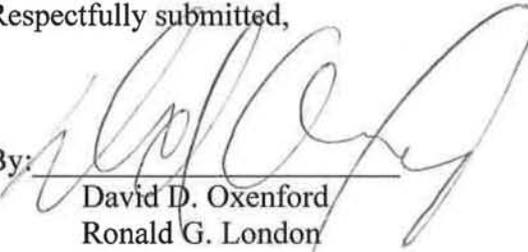
²⁰ While EMF filed many pleadings in this proceeding to demonstrate the value of the service provided by FM translator stations, and to ensure translator licensees, permittees, and applicants can continue to provide such service and can expand their reach, it also has been sensitive to desires of the LPFM community. 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 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. None of these proposals specified an application cap, and none was adopted in the *Fourth R&O*, however.

CONCLUSION

EMF supported the Commission's market-by-market approach to determining which applications from the 2003 Window to process, and which to dismiss to preserve LPFM opportunities. Adopting that process, now being coupled with a cap of 50 applications nationwide, with only one to each market, is potentially problematic. It is impossible to determine, however, just how problematic, without knowing what constitutes a "market" for purposes of the cap. And, of course, clarifying specifically what a market comprises has significant practical implications for 2003 Window applicants faced choices of how proceed.

EMF thus respectfully requests that the Commission grant reconsideration to clarify the definition of "market" for the one-to-a-market faced of the 2003 Window application cap adopted in the *Fourth R&O*.

Respectfully submitted,

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