

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Creation of a Low Power Radio Service)	OMB Control No. 3060-xxxx
)	ICR Reference No. 201205-3060-015
Amendment of Service and Eligibility)	
Rules for FM Broadcast Translator)	MM Docket No. 99-25
Stations)	MB Docket No. 07-172
)	RM No. 11338
)	

**PAPERWORK REDUCTION ACT COMMENTS
OF
PROMETHEUS RADIO PROJECT**

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via electronic filing

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SUMMARY

Pursuant to the Paperwork Reduction Act, the Prometheus Radio Project (“Prometheus”) respectfully submits the following Paperwork Reduction Act comments in response to the Federal Communications Commission’s Creation of a Low Power Radio Service and Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations, Fourth Report and Order and Third Order on Reconsideration (“Fourth Report and Order”) which implements application caps as well as a modified processing regime for pending FM translator applications. Prometheus is the leading advocacy organization for low power FM (“LPFM”) radio. We urge the Office of Management and Budget to promptly approve the revised information collection process so that these rules can be implemented and so that the long-awaited licensing of both LPFM and FM translators can proceed.

Prometheus agrees with the Commission’s assessment that Section 5(1) of the Local Community Radio Act (“LCRA”) requires the Commission to ensure that the processing of pending FM translator applications does not preclude licensing opportunities for future LPFM stations. In order to carry out this mandate in a limited spectrum environment, the Fourth Report and Order creates a translator processing regime designed to protect LPFM opportunities in spectrum limited markets as well national and market based translator application caps, balancing the needs of LPFM, translators, and the public interest.

The translator processing model adopted by the FCC promotes the goals of the Paperwork Reduction Act and Communications Act by collecting, with minimum burden to the public, only information with practical utility to promote the well-supported market-based dismissal policy and market-based and national caps adopted in the *Fourth Report and Order* in accordance with core Commission functions. The proposal allows stations with pending applications to file a Dismissal Letter, and if necessary to amend their applications to include a Spectrum Available Amendment or a Spectrum Limited Amendment. Notably, a great number of translator applicants will not be affected by the application caps and will not have to file anything additional. Further, we note that the Commission is providing a list of LPFM locations as well as

free online software in order to decrease the information collection burden on affected applicants.

Prometheus strongly supports the Commission's national and market-based caps, market-based dismissal policy, and its faithful implementation of the Local Community Radio Act in this regard. These policies will ensure the Commission can meet its mandate to provide licensing opportunities for future low-power FM stations with a minimum burden on translator applicants. To this end, we urge the Office of Management and Budget to expeditiously approve this additional information collection.

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I. THE PROPOSED INFORMATION COLLECTION IS NECESSARY FOR THE PROPER PERFORMANCE OF COMMISSION FUNCTIONS UNDER THE COMMUNICATIONS ACT

A. The Commission Is Statutorily Committed to Grant Translator Licenses in a Way that Preserves Diversity and Ensures Licensing Opportunities for Low Power FM Radio

In granting applications for use of the spectrum, the Commission is statutorily committed to consider “public interest, convenience, and necessity,”¹ and to ensure that spectrum for LPFM is kept available. Preserving radio market diversity by limiting speculative behavior is essential to achieve the “public interest, convenience, and necessity” mandate. The Commission must ensure licensing opportunities exist for LPFM radio stations.² A system that reserves spectrum is vital to maintaining spectrum for LPFM radio.

Preserving radio market diversity is a proper and important goal of the Commission. The Communications Act authorizes the FCC to grant exclusive broadcast licenses. However, given the limited number of broadcast stations that can operate simultaneously without interfering with one another, the Act mandates that the Commission consider “public interest, convenience, and necessity” when granting applications for the use of spectrum.³ The preservation of broadcast diversity is a longstanding cornerstone of the public interest mission. In the words of the Third Circuit, “the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity and service

¹ 47 U.S.C. § 309(a).

² *Creation of a Low Power Radio Service*, Fourth Report and Order and Third Order on Reconsideration, MM Dkt. No. 99-25, 27 FCC Rcd. 3364, 3382 ¶ 8 (rel. Mar. 19, 2012), 77 Fed. Reg. 21003 (Apr. 9, 2012) [hereinafter *Fourth Report and Order*].

³ 47 U.S.C. § 309(a).

viewpoints, as well as by preventing undue concentration of power.”⁴ As Prometheus has argued in the past and the Commission has recognized, limiting speculative behavior is essential to ensure radio market diversity.⁵

The 2003 translator auction, Action 83, generated an unprecedented number of applications. However, commonly-owned Radio Assist Ministries and Edgewater Broadcasting (collectively, “RAM”) filed almost one third of the proposals. Since the window, RAM has sought to assign more than half of their construction permits.⁶ The Commission noted that these skewed filing practices undermine the integrity of the application process.⁷ Processing all of the remaining translator applications would not only create a consolidated translator market, but would also frustrate the development of LPFM service.⁸ Such behavior limits the diversity of local radio markets, undermining the Commission’s statutory public interest mandate.

In drafting the LCRA, Congress sought to have the Commission facilitate the “creat[ion of] new voices on the air waves and . . . allow local groups . . . to provide programming responsive to local needs and interests”⁹ by authorizing the licensing of LPFM stations in urban markets. As such, under the LCRA, the Commission must ensure that licenses for FM translators, FM boosters, and LPFM are made available “based on the needs of the local community.”¹⁰ The LCRA also requires that LPFM and translator applications be treated equally.¹¹ However, the Commission has found that

⁴ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 382–83 (3d Cir. 2004), cert. denied, 567 U.S. ____ (2012).

⁵ *Creation of a Low Power Radio Service*, Third Further Notice of Proposed Rulemaking, MM Dkt. No. 99-25, 26 FCC Rcd. 9986, 9987 at ¶ 7 (rel. July 12, 2011), 76 Fed. Reg. 45493 (July 29, 2011) [hereinafter *Third Further Notice*].

⁶ *Id.* at 9988 ¶ 4.

⁷ *Id.*

⁸ *Id.* at 9987 ¶ 3.

⁹ S. 592, 111th Cong. § 2(7) (2d Sess. 2009).

¹⁰ Local Community Radio Act of 2010, Pub. L. No. 111-371, § 5, 124 Stat. 4073, 4074 (2011) [hereinafter LCRA].

¹¹ LCRA § 5.

while LPFM licensing is unlikely to preclude future translator licensing, translator licensing may well have a preclusive impact on the future of LPFM.¹² Thus the Commission is not free to adopt a translator processing plan that does not ensure that licenses are available for LPFM stations.

B. Market-Based and Nationwide Caps and Targeted Translator Application Dismissals Constitute Proper Performance of these Goals

Given that the Commission is committed to preserving radio market diversity and ensuring licenses for LPFM radio stations, the national and market-based caps and market-based dismissal policy adopted by the Commission in the *Fourth Report and Order* constitute proper performance of these goals. The granting of all pending translator applications would decrease ownership diversity, reward speculative behavior, and preclude licensing opportunities for future LPFM stations.

Dismissing selected translator applications and capping the number of allowable applications by a single entity will preserve diversity in local radio markets by ensuring that spectrum in each market remains available for a greater number of voices. Furthermore, although translators perform the public service of repeating a geographically limited signal to a larger audience, they may not originate content, and are thus inherently limiting to local market diversity. Translators may indeed serve the public interest; however, the Commission has properly determined that the blanketing of major radio markets with thousands of translators owned by a small number of entities does not serve the public. The adopted market-based dismissal policy and application caps will thus preserve the diversity of radio markets so that available spectrum may be licensed in a way that is consistent with the public interest in this and future application windows.

In addition, the adopted translator application caps curtail speculative behavior by placing prudent limits on the number of active translator applications that a single entity may reasonably expect to prosecute. The national cap prevents a single entity

¹² *Third Further Notice* at 45493 ¶ 7.

with no intent to build or operate their stations from selling hundreds or thousands of construction permits. The Commission has noted that speculative behavior is a problem that also decreases radio market diversity.¹³ The one-per-market cap ensures that no single entity will reap dozens of licenses across one market, limiting opportunities for diverse voices in a given community.

Moreover, the LCRA requires the Commission to “ensure” that spectrum is available for LPFM.¹⁴ As the Commission has recognized, the provision does not allow the Commission to adopt a translator processing plan that will preclude licensing opportunities for future low-power FM stations.¹⁵ Most markets already have many licensed FM translator stations. In the 156 markets analyzed in Appendix A of the Commission’s *Fourth Report and Order* there are 239 licensed LPFM stations.¹⁶ In contrast, in those same markets there are 1,580 licensed FM translators – about 6.6 times the number of LPFM stations.¹⁷ In fact, 51 of these markets have absolutely no licensed LPFM stations. These markets include the major markets of New York, Boston, Philadelphia, Dallas-Ft. Worth, and the Miami-Ft. Lauderdale-Hollywood markets. Because Congress has required the Commission to treat LPFM and translator stations as “equal in status,” future licensing policy must address this disparity. The market-based dismissal policy is the best way to address the existing disparity in license holders and ensure that adequate spectrum is available for LPFM, particularly in urban markets. The Commission has evaluated markets to determine where spectrum is limited, and under this policy is only dismissing translator applications only where little or no room for LPFM is available.

Without dismissing some translator applications and capping the total allowable applications from a single entity, it would be impossible for the Commission to fulfill its

¹³ *Fourth Report and Order* at 3367 ¶ 6.

¹⁴ LCRA § 5.

¹⁵ *Third Further Notice* at 9998 ¶ 30.

¹⁶ *Fourth Report and Order* at Appendix A.

¹⁷ *Id.*

mandates set forth in the Communications Act and the LCRA. These measures are necessary in order for the Commission to successfully fulfill its mission.

C. This Information Collection Is Necessary to Facilitate These Measures

The *Fourth Report and Order* gives rise to two proposed information collections, both of which have practical utility to facilitate the measures described above in accordance with the Commission's functions. The first proposed information collection, which requires entities with pending applications exceeding the adopted caps to file Dismissal Letters, has practical utility for the implementation of the caps, needed to preserve market diversity and preclude speculative behavior. The second proposed information collection, which allows translator applicants to modify their proposals to avoid dismissal under the market-based dismissal policy, and requires applicants in top 50 spectrum-limited markets to make a "Top 50 Market Preclusion Showing," has practical utility for the implementation of the market-based dismissal policy, needed to preserve spectrum for LPFM.

Implementation of the national and market-based application caps necessitates the first proposed collection of information from translator applicants. To enforce the market-based and national application caps, the Commission proposes to require parties with more than fifty pending applications nationwide and/or more than one pending application in the markets specified in Appendix A of the *Fourth Report and Order* to request dismissal of applications to comply with these limits. To do so, applicants will file a Dismissal Letter with the Commission, identifying the applications they wish to be dismissed. If no letter is filed, the Commission will select the applications for dismissal on the basis of their original filing dates. Such a letter clearly has practical utility to implement the applications cap, while also providing affected applicants with the flexibility to prioritize among their applications. Furthermore, the production of such a letter is minimally burdensome. Notably, a very small percentage of applicants have more than fifty applications nationally, reducing the burden on the majority of those with pending applications.

Implementation of the market-based dismissal policy necessitates the second proposed collection of information from translator applicants, non-preclusion showings. These showings require translator applicants to protect potential LPFM channels at given points within the central grid of spectrum-limited markets, as well as to protect potential LPFM licensing opportunities outside the grid within the top 50 markets if they are designated as spectrum limited.¹⁸ By demonstrating which translator applications actually will have a preclusive impact on future LPFM licensing, these showings have practical utility to implement the market-based dismissal policy.

The information the Commission seeks to collect is necessary for the implementation of necessary national and market-based caps and the market-based dismissal policy. As such, OMB should approve the collection of this information.

II. THE INFORMATION NECESSARY TO IMPLEMENT NATIONAL AND MARKET SPECIFIC APPLICATION CAPS PLACES A MINIMAL BURDEN ON TRANSLATOR APPLICANTS

The Commission's rule in its *Fourth Report and Order* combines application caps and non-preclusion showings as means to meet its goals. This creates prudent limits designed to preserve diversity in local markets and ensures spectrum for LPFM without unreasonably burdening single entities that may reasonably serve a number of local communities nationwide. All applicants with pending applications from Auction 83 have already filed a short-form application with the FCC, the first step in an existing two-part application process. The amount of additional information each entity will have to collect, beyond that required by the long form already required of applicants, is dependent on the number of applications and location of those applications. Collecting this information can be done with information and software provided by the FCC, or with common engineering software already required to complete the long form.

¹⁸ Office of Information and Regulatory Affairs, Top 50 Market Preclusion Showings, May 30, 2012, *available at* http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201205-3060-015.

The nationwide application cap of fifty applications requires the applicants to first determine if they have more than fifty pending applications. For applicants who have fewer than fifty pending applications there is no further information collected from them and these applicants are not required to do anything to be in compliance with the national cap. Applicants with more than fifty pending applications must determine if they wish to keep the first fifty applications they applied for or if they wish to identify a different fifty of their pending applications to pursue. If the applicant wishes to keep only the first fifty filed applications, and/or fails to indicate a different preference, the Commission will dismiss all applications filed after the fiftieth application. In order to indicate which applications an applicant wishes to dismiss, the applicant need only file one Dismissal Letter requesting the Commission to dismiss the applications identified in the letter. We agree with the FCC's estimate that this process presents a one-time task that should only take approximately two hours of labor by each of 300 applicants and should cost the applicants nothing to fulfill. This is a minimal burden on applicants in order to implement the necessary national cap.

The market-based application cap allows all translator applicants a limited time to amend their proposals. In the 156 markets identified in Appendix A of the FCC's proposal, one application per market is permitted.¹⁹ If an applicant has more than one application currently pending in any of those markets, they must select a single application to pursue; any other pending application(s) within the same market must be dismissed. The applicant can specify which application(s) to dismiss for compliance with the market-based cap through the same Dismissal Letter used to comply with the national cap. In the event that an applicant does not indicate which application(s) are to be dismissed, the Commission will, after applying the national cap, dismiss all but the first filed application in each of the markets identified in Appendix A of the *Fourth Report and Order*.

For the non-preclusion studies, translator applicants in Spectrum Available and Spectrum Limited markets must modify their applications to show that they do not

¹⁹ *Fourth Report and Order* at 3366 ¶ 2.

preclude any LPFM channel/point combination identified in the Commission's Media Bureau's study. In addition to these requirements, any translator application in a top-50 market must also show that their proposal does not preclude the only LPFM station licensing opportunity at the location by showing either that no LPFM could be licensed at the site or, if one could, that an additional channel is available for a LPFM.

The Commission has taken considerable steps to minimize any burdens associated with compliance with the application caps. The Commission is allowing the amendment of applications rather than dismissing all pending applications and requiring all applicants to reapply. In addition, the Commission has created a tool to assist applicants in assessing the viability of FM translators.²⁰ In May 2012, the Commission held a workshop for the public which outlined the market-based and national application caps and non-preclusion showings.

To assist translator applicants in conducting the required non-preclusion showings, the FCC has provided a publicly-available LPFM grid tool to help applicants assess the viability of FM translators in both spectrum available and limited markets.²¹ The tool includes the current data file, city center coordinates, necessary code/data files and other information needed to assess an application site. This tool provides channel summaries and channel-by-channel lists of available LPFM locations. The Commission also held a meeting explaining the cap procedures, the non-preclusion showings, the likely timeline for processing, and the tools available for applicants.²² This tool and training were provided at no cost to the applicants and eases the information collection burden placed on translator applicants.

²⁰ Federal Communications Commission, Media Bureau Announces Release of Low Power FM Spectrum Availability Program and Data Files, April 30, 2012, *available at* http://www.fcc.gov/Bureaus/MB/Databases/source_code/lpfm/lpfm6.20120416.zip.

²¹ *Id.*

²² Federal Communications Commission, FCC Announces Details for May 16, 2012, Low Power FM and FM Translator Public Forum, May 11, 2012, *available at* http://www.thedcoffice.com/late_releases_files/05-11-2012/DOC-314029A1.pdf

Furthermore, applicants are already required to complete a “long form” application, which asks for information related to the technical specifications of the proposed facilities. To complete this application themselves, applicants require access to allocations software. Applicants also have the option of retaining a consulting engineer to complete the long form on their behalf. Thus applicants will already be in consultation with engineers who can help with the new data collection required. Apart from the aforementioned channel/point data now provided by the FCC, the additional information collected by the Commission does not require technical expertise beyond that already needed for long form applications.

We believe that the Commission has conscientiously and successfully sought to decrease the burden on both large and small translator applicants while seeking additional necessary information from applicants. The FCC provided estimate of a one-time 2 hours response for 1,300 responses at an annual cost of \$0. This estimate is accurate given the number of applications and the detailed tools and training made available by the Commission.

CONCLUSION

For the reasons stated above, Prometheus believes that the implementation of Translator Application Caps proposed by the Commission, and the requisite information collection, will benefit the public interest. The proposed information collections balance the need for FM translators and radio market diversity while minimally burdening translator applicants.

We urge the Office of Management and Budget to promptly approve the revised information collection so that these rules can be implemented and so that both translators and LPFM licensing can commence as soon as possible.

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