

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

Creation of A)

Low Power Radio Service)

Docket No. 99-25

REPLY COMMENTS OF THE AMHERST ALLIANCE
TO EX PARTE COMMENTS OF
THE EDUCATIONAL MEDIA FOUNDATION (EMF)

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REPLY COMMENTS OF THE AMHERST ALLIANCE
TO EX PARTE WRITTEN COMMENTS OF THE
EDUCATIONAL MEDIA FOUNDATION (EMF)

THE AMHERST ALLIANCE is a Net-based, nationwide citizens' advocacy group for Low Power FM (LPFM) and other media reforms. We were founded on September 17, 1998, at a meeting in Amherst, Massachusetts. Since then, we have submitted hundreds of filings to the FCC.

While we have numerous differences of opinion with EDUCATIONAL MEDIA FOUNDATION (EMF), a fundamentalist Christian broadcasting network, we challenge in particular the following assertion on page 2 of EMF's October 16, 2012 Ex Parte Written Comments:

"There is not a spectrum shortage for translators in rural areas, and there is also likely to be less demand for LPFM applications outside of the metropolitan areas, an area of agreement between EMF and Prometheus in their settlement agreement from 2010. See, revised settlement agreement between EMF and Prometheus Radio Project, filed in this Docket on September 22, 2010, at Item 1(1) of the Memorandum of Agreement. Thus, any forced dismissal of translator applications outside of the major markets does not significantly advance

LPFM opportunities, but instead just denies service to listeners who desire the service that EMF provides.”

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A. More Does Not Automatically Equal Enough

We view EMF’s statement as a *non sequitur*: an illogical chain of reasoning in which the conclusion (dismissing fewer translators in rural areas and small cities would not adversely affect licensing chances for LPFM applicants) “does not follow” from the premise (there is more spectrum available in rural areas and small cities than there is in large cities).

In a nutshell: *More* spectrum for competing applicants to share does not automatically equal *enough* spectrum for all competing applicants. In affected areas, increasing the total pool of applicants, by dismissing fewer translators, will reduce the odds of licensing for a typical LPFM applicant.

In this regard, we note that the Membership of THE AMHERST ALLIANCE resides primarily in rural areas and small metropolitan areas. Because we are serving a cause -- and are not pursuing rational self-interest alone -- we have fought as hard as we can to expand urban LPFM by backing the licensing of stations below 50 watts in center city portions of the Top 100 Arbitron Markets. Still, less than a fifth of Amherst’s Members live in large metropolitan areas.

With this perspective, we can knowledgeably report that many aspiring LPFM broadcasters in rural areas and small cities *do* expect to face competition for licenses in their service areas. They *would* experience an adverse impact if the FCC dismisses fewer translators than currently planned.

EMF is correct to the extent that there are probably some rural areas, and possibly even some small cities, where enough radio spectrum exists to accommodate all pending translator applications *plus* all of the likely new LPFM applicants. Even in the least populated areas, however, we won’t know this for sure until the filing window opens and the new LPFM applications roll in. The hunger across the nation for truly local programming may turn out to be greater than anyone expects.

Indeed, we would not be surprised to see *some* communities where otherwise un-economic LPFM stations are heavily subsidized by local governments and/or local charities.

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In any event, EMF presents zero spectrum scarcity as the national norm -- “outside of the major markets” -- when, in fact, it is more of an exception to the rule.

We certainly do not expect zero spectrum scarcity to be the norm in the proposed service areas for any Amherst Member LPFM applicants, far as those applicants may be from “the major markets” mentioned by EMF.

B. An Important Caveat

Some of our Members report that they have had positive experiences in the past when working with EMF. We have no desire to "demonize" that organization. Nevertheless, we believe that EMF is gravely mistaken on the facts, is standing in the way of Congressional intent and is attempting to destabilize the Commission's politically fragile balancing of competing interests.

C. The FCC's Current Approach Is Consistent With Congressional Intent

We add that the FCC's currently adopted approach to this matter reflects careful and lengthy deliberations, resulting in a delicate balancing of interests between pending translator applicants and new LPFM applicants.

Our Members are deeply grateful to Congress for enactment of the Local Community Radio Act (LCRA), but we also realize that the legislative drafting was not as clear as it could have been.

Still, in spite of ambiguities in some of the statute, Congress left clues to its intent.

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In the crucial instance of the competition for available frequencies between LPFM applicants and translator applicants, Congress, in Section 5 of the LCRA, mandated abundant representation of *both* translators *and* LPFM stations, in *all* geographic areas. It crafted this mandate at a time when interested parties were well aware that the sum total of thousands of *pending* translator applicants, when added to the sum total of thousands of *anticipated* LPFM applicants, would in many areas exceed the sum total of frequencies available.

In short: Congress certainly knew, or should have known, that “the numbers” would not accommodate its mandate for rough “equality of outcomes” between translators and LPFM stations. Arithmetically, there had to be “thinning” of someone’s herd -- and translators had the larger herd.

Among *prospective* radio station licensees, translators had the larger herd. Among *current* radio station licensees, they had a *vastly* larger herd: a numerical advantage exceeding 10 to 1.

Therefore, we can clearly infer that Congress must have known, when it mandated for rough “equality of outcomes” between translators and LPFM stations, that the usual “first come first served” policy for radio station applicants would have to be restrained. Without such restraint, the directive for abundant representation of both translators and LPFM stations would be a practical impossibility.

Given the somewhat murky and essentially thankless task that Congress handed to the Commission, a clear majority of Amherst’s Members doubt that anyone on the planet could have developed, in practice, a more equitable balance between the needs of pending translator applicants and new LPFM applicants. The Commission’s current approach advances all of those Congressional goals which are rationally discernible. In addition, it meets the test once set forth by Representative John Dingell (D-MI), Chairman of the House Energy and Commerce Committee: “You know you have a true compromise when all parties are equally unhappy.”

Amherst urges the FCC not to upset its current delicate balance of competing interests -- which has won widespread acceptance, including general approval by those Congressional legislators who were primary co-sponsors of the LCRA.

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D. Does PROMETHEUS RADIO PROJECT Support EMF's Position?

As for the reported endorsement of EMF's approach by PROMETHEUS RADIO PROJECT of Pennsylvania:

(1.) We are far from certain that EMF has correctly interpreted the views of Prometheus -- as supposedly reflected in the 2010 statement that EMF has cited. EMF references Section of I (1), of a revised Memorandum of Agreement, between Prometheus and EMF, which is dated September 22, 2010 and was filed in FCC Docket 99-25 on September 23, 2010.

First, to start with the obvious, the revised Memorandum of Agreement was filed more than two years ago -- *before* the FCC developed its present approach for balancing the interests of pending translator applicants and new LPFM applicants. The Commission cannot wisely assume that Prometheus would take the same position in the current context, where FCC policies which were then unsettled have now solidified into a form which most LPFM advocates support -- or at least accept.

Second, even if Prometheus is still holding to the exact text of the September 2010 language, that language advocates only *carefully targeted* protection of *narrowly selected* translator applications by "*small broadcast groups*" [emphasis added]. To us, this language from 2010 appears to fall far short of endorsing the wholesale loosening of restraints which EMF seems to be advocating in 2012.

Third, with respect to spectrum scarcity in rural areas and rural areas, it seems to Amherst that the September 2010 language only acknowledges what Amherst itself has acknowledged: there is generally more spectrum available in rural areas and small cities than in large metropolitan areas. However, like

Amherst, the September 2010 language declines to make the jump in logic from perceiving *more* spectrum to perceiving *enough* spectrum, in *all* rural areas and small cities, to accommodate *all* competing radio applicants.

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Yet that is exactly what EMF told the FCC on October 16, 2012: “*any* forced dismissal of translator applications outside of the major markets does not significantly advance LPFM opportunities” [emphasis added]. That is: According to EMF’s *totally caveat-free* depiction of the nature of reality, there should be *zero* restraints on pending translator applications, in *any* location “outside of the major markets”, because there is *zero* spectrum scarcity *anywhere* outside of the major markets.

To put it mildly, Amherst and Prometheus do not always think alike. Prometheus has stated that it sees LPFM radio stations as “tools for social justice” (basically meaning, as we interpret the phrase, the promulgation of liberal and Left of Liberal political outlooks). Amherst wants to open the airwaves to as many *grassroots* viewpoints as possible: Left, Center, Right, entertainment only and “Totally Out There”. We don’t “screen” our Members for political ideology -- or any other kind of ideology.

The relative pluralism of Amherst sometimes leads us in a different direction than the philosophical zeal of Prometheus. Yet we like to think there is a grudging respect between the two sometimes competing organizations. Indeed, Amherst and Prometheus have been known to work together, in a spirit of mutual caution, upon occasion. From what we know of Prometheus, we find it difficult to believe that its leaders would knowingly echo EMF’s claim that there is *zero* spectrum scarcity in almost all of the United States.

At the risk of being undiplomatic, we feel compelled to state that EMF’s assertion is factually absurd. It is a pipe dream. Whether an observer is radical, liberal, moderate, conservative or totally non-political, indisputable factual reality is indisputable factual reality. We believe that Prometheus is too much in touch with factual reality to knowingly second the October 16, 2012 assertion by EMF.

Fourth, THE AMHERST ALLIANCE cannot “put words in the mouth” of the PROMETHEUS RADIO PROJECT. For this reason, we have recently contacted Brandy Doyle of Prometheus, asking

her own organization to place On The Record, in FCC Docket 99-25, its own interpretation of EMF's interpretation of the 2010 Prometheus/EMF language.

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In any event, the entire text of Section I (1) of the revised Memorandum of Agreement -- the exact provision referenced by EMF -- is reproduced below:

"I. 2003 FM Translator Window

"1) As to the pending applications for FM translators filed during the 2003 FM Translator Window, the parties recognize that, for purposes of this agreement, a limit of 10 protected FM translator applications from that window may not serve the interests of either the FM translator or the LPFM communities. A limit of 10 protected FM translator applications identified before an LPFM window may result in the preclusion of many new LPFM stations in larger markets through the grants of new FM translator applications, while also resulting in rural populations and other underserved areas not receiving any radio service because FM translator applicants forego protection of these applications when selecting the 10 applications to prosecute. The parties further recognize that there have been objections to the original version of this Memorandum of Agreement, as it could preclude some small broadcast groups from receiving any grants of their long-pending applications were an LPFM window to be held before the

processing of any additional applications from the 2003 Translator Window. The parties revise their original proposal to suggest that some such opportunity be given to those FM translator applicants before the LPFM window suggested below be opened. To minimize

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its impact on the availability of LPFM channels, Prometheus proposes that this window be opened as follows: For those applicants who have had no translator applications granted from among the applications filed by that applicant in the 2003 Translator Window, such filers should be accorded the opportunity to provide an engineering solution that would allow one of their pending applications to be granted prior to the LPFM window proposed herein.”

(2.) Even *if* EMF reported the views of Prometheus correctly, the fact remains that Prometheus is not the only nationwide advocacy group for LPFM. Prometheus may have more resources than any other LPFM advocacy group, and is the only one which can afford to maintain a Washington office, but it does not begin to represent all of the national LPFM community. *Other* major LPFM advocacy groups -- *none* of which has signed any joint proposal with EMF -- are THE AMHERST ALLIANCE of Connecticut, REC NETWORKS of Maryland, COMMON FREQUENCY of California, CHRISTIAN COMMUNITY BROADCASTERS of Georgia, NEXUS LPFM ADVOCACY of Colorado and NEXUS BROADCAST of Texas. The views of *all* LPFM advocacy groups should carry weight with the FCC.

(3.) We want to clarify, For The Record, that Amherst’s non-participation in development of the Prometheus/EMF joint proposal was not simply a case of refusing to sign the agreement. We were never invited to review and sign the document, nor were we invited to join in the underlying negotiations, nor were we even notified that the underlying negotiations were occurring.

Most Amherst Members are open-minded and intellectually flexible. We are willing to *talk* with Prometheus, EMF, the NATIONAL RELIGIOUS BROADCASTERS, the NATIONAL ASSOCIATION OF BROADCASTERS, the NATIONAL RELIGIOUS BROADCASTERS and the People's Republic of China. However, the other party or parties must be willing to talk with *us*.

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For future reference, we have this advice for all potentially interested parties:

If you want to negotiate with *the LPFM community as a whole*, don't just invite Prometheus to negotiate. Don't just invite Amherst to negotiate, either. At a minimum, as a practical matter, development of a *consensus* within the *entire* LPFM community will probably require discussions with Prometheus *and* Amherst *and* REC NETWORKS.

(4.) As a point of legal semantics, it would be more accurate and precise to refer to the revised Prometheus/EMF Memorandum of Agreement, reached in September of 2010, as a "joint proposal" rather than a "settlement agreement". In a judicial and/or judiciable context, the term "settlement agreement" holds a fairly specialized meaning which the Prometheus/EMF agreement does not really match.

E. Notifications

THE AMHERST ALLIANCE has E-Mailed an electronic copy of this filing to: (1) David Oxenford, Esquire of Wilson Barker Knauer, LLP, in Washington, D.C., Counsel in this matter for EMF; and (2) Brandy Doyle of PROMETHEUS RADIO PROJECT in Philadelphia, Pennsylvania.

F. Conclusion

In general, Amherst urges the FCC not to upset the just but delicate balance it has struck between pending translator applicants and new LPFM applicants. In particular, we urge the Commission to reject EMF's recommendation for dismissal of fewer translator applicants in small cities and rural areas.

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Respectfully submitted,

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