

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Application Limit for NCE FM New)	
Station Applications in October 12-)	MM Docket No. 95-31
October 19, 2007 Window)	

COMMENTS OF
PROMETHEUS RADIO PROJECT
DIYMEDIA
FREE PRESS
MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL
NATIONAL FEDERATION OF COMMUNITY BROADCASTERS
NATIONAL HISPANIC MEDIA COALITION
OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, INC.

These comments are respectfully submitted by Prometheus Radio Project (“Prometheus”), DIYmedia, Free Press, Minority Media and Telecommunications Council, National Federation of Community Broadcasters, National Hispanic Media Coalition, and Office of Communication of the United Church of Christ, Inc, in response to the Commission’s Public Notice seeking comment on whether a 10 application limit per applicant is appropriate in the upcoming October 2007 window for non-commercial educational (“NCE”) FM licenses. *FCC Seeks Comment on Proposed Application Limit for NCE FM New Station Applications in October 12-October 19, 2007 Window (“Station Application Notice”)*, MM Docket No. 95-31 (August 9, 2007). Prometheus, *et al.* fully support the Commission’s conclusion that a ten application limit is the appropriate limit in the upcoming NCE FM license window to serve as “an appropriate procedural safeguard to deter speculation and permit the expeditious processing of the window-filed applications with limited Bureau resources.” *Id.* Additionally, limiting the number of applications to ten will help to ensure that the Commission is able to open additional filing windows in the future, avoiding the risk that this will be the only opportunity for NCE entities to acquire a construction permit. Prometheus, *et al.* also support the ten application limit as a means to promote

the Commission's goals of diversity and localism.

I. Introduction.

Prometheus, *et al.* support the Commission's conclusion that an application limit is necessary in the upcoming October NCE FM license window to prevent speculative filings and to expedite the processing of applications. *See Station Application Notice*. In initially adopting application procedures for NCE FM licenses, the Commission declined to adopt an application limit. *See Report and Order, In the Matter of Reexamination of the Comparative Standards for Noncommercial Educational Applicants ("NCE Order")*, 15 FCC Rcd 7386, 7422 (2000); *see also*, Memorandum Opinion and Order, *In the Matter of Reexamination of the Comparative Standards for Noncommercial Educational Applicants ("NCE Recon. Order")*, 16 FCC Rcd 5074, 5105 (2001). At that time, the Commission believed that the point system criteria and window filing procedures would be sufficient to deter "speculative, barely qualified, applicants." *NCE Order*, 15 FCC Rcd at 7422. However, the Commission noted that, "[i]f the number of mutually exclusive applications received under the new system exceeds our expectation, we reserve the right to establish by public notice a limit on the number of filings per applicant in a given period." *NCE Recon. Order*, 16 FCC Rcd at 5105.

Though the Commission is undertaking its first NCE FM license window, the Commission has had the recent, in March 2003, experience of opening a filing window for translators. That March 2003 translator filing window attracted an "extraordinary volume" of applications. *Second Order on Reconsideration and Further Notice of Proposed Rulemaking, Creation of Low Power Service ("LPFM Order")*, 20 FCC Rcd 6763, 6777 (2005). More than 13,000 applications were filed, approximately four times the number of applications as the number of translator stations authorized during the entire history of the translator service. *See id.* A number of groups alleged that a majority of the translator applications

were filed by only two applicants and raised concerns that the huge number of applications could deplete frequencies that could instead be used for new low power FM (“LPFM”) stations. *See Prometheus Radio Project, et al., Emergency Petition for Freeze on Pending FM Translator Applications*, MB Docket No. 99-25 (March 9, 2005). Eventually, in March 2005, the Commission instituted a six-month freeze on translator applications and has not processed any translator applications since then. The Commission’s experience in the translator window underscored the interest, sometimes speculative in nature, in obtaining spectrum and demonstrates that the lack of any limit on the number of applications can lead to a large number of filings, which could lead to the breakdown of the processing system.

II. The Commission Has Correctly Concluded An Application Limit Is Necessary To Deter Speculation And Permit The Expeditious Processing Of Applications.

A large number of filings could be the result of speculative filings and could lead to a drain on the Commission’s resources. The Commission has determined that “there are a number of factors that suggest the potential for a large volume of NCE FM license applications in the forthcoming window.” *Station Application Notice*. In anticipating a large number of applications, the Commission recognized that NCE FM licenses are much more attractive than translator licenses. NCE stations are full-power stations, and thus are protected from interference from secondary services such as translator stations,¹ NCE FM stations are able to originate programming, while translators simply repeat the signal of a full-power station, and NCE FM stations cover a larger area than translators. The Commission further noted that the October 2007 window has been long awaited after a seven-year freeze, and since there are no filing fees associated with the window, there is very likely to be a great demand for the NCE FM licenses. Prometheus, *et al.* would also like to note that media ownership limits do not apply to NCE FM stations.

¹Secondary services are not protected from interference from full-power stations and risk being displaced.

See 47 C.F.R. §3555(e). Thus, there is no deterrent to keep applicants from limiting the number of applications filed, which could result in speculative filings and a burden on the Commission's resources.

While the March 2003 translator window is especially instructive in the potential for speculative filings, its impact on other applicants, and the need to ensure the Commission does not face a similar scenario, Prometheus, *et al.* also would like to underscore the importance of an effective processing system. For example, processing delays can be a life or death matter for small, sometimes fragile, noncommercial organizations. If a noncommercial applicant is expected to wait a lengthy amount of time to learn whether or not its application has been approved, this results in the applicant waiting many years to recoup their investment in the engineering and legal services, which is difficult to sustain for a small organizations. While they wait, some of these groups could be forced to disband in despair after waiting for years for the application to be processed, with no closure in sight. Consequently, if the Commission is inundated with numerous applications, the Commission faces the prospect of worthy noncommercial organizations, which could have provided programming of interest to the community, no longer existing by the time the Commission processes the application.

Further, the application limit will prevent a burden on the Commission's resources imposed by "daisy chain" applications. Generally, when two applications are mutually exclusive, through contour overlap, for example, they can be resolved by the point system. However, when five, ten, or more applications are in conflict and spread out over hundreds of miles - a daisy chain - some perhaps with Section 307(b) preference² claims and others not, it becomes extremely difficult for the Commission's staff to determine the mutually exclusive group. Mass or speculative filings greatly increase the hazard of daisy chains and burden the processing of applications. Accordingly, the Commission has appropriately

²The Section 307(b) preference refers to the Commission's duty to "provide a fair, efficient, an equitable distribution of radio service." 47 U.S.C. §307(b).

imposed a limit on the number of applications an applicant can file in the October NCE FM license window.

II. An Application Limit is Also Necessary To Preserve Future NCE FM Windows And To Promote Localism and Diversity.

In addition to preventing speculation and expediting the processing of applications, an application limit could allow the Commission to open NCE FM license windows in the future.³ The October 2007 NCE FM window should not be the only opportunity for a party to receive a NCE FM license. Rather, the Commission should pledge to provide more opportunities for parties to apply for NCE FM licenses. By adopting an application limit, the Commission at least has the ability to preserve space on the spectrum for future windows.

Additionally, the ten application limit will further promote the Commission's goals of localism and diversity. The Commission has chosen to promote localism and diversity by awarding NCE FM license applicants points for local diversity of ownership and points for applicants who have been locally based for at least two years. *See Memorandum Opinion and Order, In the Matter of Comparative Consideration of 76 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations ("NCE FM Order"), 22 FCC Rcd 6101 (2007).* An applicant's likelihood of winning the license is enhanced by the number of points it is able to obtain. By limiting the number of applications per applicant, it is more likely communities will be receiving programming from a bona fide local organization as opposed to a non-local applicant who has requested numerous NCE FM licenses throughout various communities.

The application limit will also promote diversity by lowering a severe market entry barrier to

³By adopting application limits in awarding low power television licenses, the Commission was able to award LPTV licenses in future windows. *See infra*, Section III.

minority ownership.⁴ Minorities appear to be far more underrepresented in noncommercial radio ownership than they are in commercial radio ownership.⁵ This is due in significant part to the Commission's years of acquiescence in state-sponsored discrimination in higher education a generation ago.⁶

Today, most minority noncommercial radio applicants are colleges, churches, and civic groups that seek only one license each. They generally wish to provide local service directed to ethnic and multilingual populations not served by commercial stations, and they often seek to provide training that can serve as a bridge for employment and ownership diversity in commercial radio. Flooding the applicant pool with dozens of nearly identical non-local applications would shut out most minority applicants and inhibit ownership, viewpoint and language diversity.

Thus, the Commission has appropriately limited applicants to ten NCE FM license applications. This limit will not only prevent speculation and preserve the Commission's resources; it will also help to ensure that the October 2007 NCE FM license window will not be the first and last opportunity for applicants to obtain a NCE FM license, while also promoting localism.

⁴Congress has instructed the Commission to take steps to identify and lift such barriers. *See* 47 U.S.C. §257(b) (establishing a "National Policy" under which the Commission is to promote a "diversity of media voices, vigorous economic competition, technological advancement and promotion of the public interest, convenience and necessity").

⁵MMTC last surveyed full power noncommercial minority radio ownership in 1999 and counted only 35 such stations, mostly in the South and mostly licensed to colleges and universities. Those stations constituted only 1.7% of the total number of noncommercial stations. Free Press has found that minorities own 7.7% of commercial radio stations. *See* Free Press, "*Off The Dial: Female and Minority Radio Station Ownership in the United States*" (June 2007).

⁶In the past, the Commission cooperated with state legislatures in steering high powered noncommercial FM licenses to segregated White state colleges, while providing lower power licenses, much later in time, to historically Black state colleges). *See* Comments of MMTC, *et al.*, *Creation of a New Low Power Radio Service*, MB Docket 99-25 (August 2, 1999).

III. A Ten Application Limit Is Appropriate.

The Commission has asked “whether ten applications is the appropriate limit to serve the goals” of deterring speculation and permitting the “expeditious processing of the window-filed applications with limited Bureau resources.” *Station Application Notice*. Prometheus, *et al.* support a ten application limit as the appropriate limits to achieve those goals. Additionally, Prometheus, *et al.* support a ten application limit because it will help to ensure that the Commission will be able to open windows in the future and serves the public interest. A limit of ten for the first NCE FM license window is soundly based on Commission precedent and experience, and the Commission has the prerogative to change that limit for future windows.

The Commission has imposed a much more stringent limit in a previous proceeding. In the 1987 filing window for low power television (“LPTV”), the Commission imposed a limit of only five applications⁷ per applicant, together with geographical restrictions and an application fee. *See Low Power Television and Translator Service (Filing Window Procedures) (“LPTV Order”)*, 2 FCC Rcd 1278 (1987). The Commission chose to adopt the cap in an effort to deter “over-filing”, to “allow [the] staff to use its resources most effectively,” and to ensure “another window [could] then be opened.” *Id.* at 1279. Indeed, the Commission thereafter was able to open a number of filing windows.⁸

⁷The Commission concluded that five was an appropriate number based on LPTV applications received in a previous window. The Commission found that “according to [its] application database, 80 percent of all applicants have filed five or less applications, and that at least 75 percent of all applications have been filed by 10 percent of all applicants.” *LPTV Order* at 1279. A similar database does not exist in the NCE FM station context since this will be the first filing window under a points system.

⁸According to limited publicly available resources, the Commission was able to open at least three additional LPTV filing windows. *See, e.g.,* FCC Public Notice, *Notice and Filing Requirements Regarding July 31 through August 4, 2000 Limited Low Power Television/Television Translator/Class A Television Auction Filing Window*, Report No. AUC-00-81-A (Auction No. 81) (June 23, 2000); FCC Public Notice, *Notice of Limited Low Power Television/Television Translator Filing Window*

Precedent for a ten application limit also exists in the LPFM context. To encourage diversity and localism, the Commission initially prohibited LPFM applicants from holding an attributable interest in more than one LPFM station in a local community. *See* 47 C.F.R. §73.855(a). This effectively prevented applicants from filing multiple applications in a local community. The Commission also adopted a phased approach regarding national ownership limits, limiting an applicant from owning initially one station and at the most ten stations. *See* 47 C.F.R. §73.855(b).⁹ Again, this effectively limited applicants from submitting no more than ten applications in a filing window.

Similarly, in the case of the upcoming window, a ten application limit is appropriate for the NCE FM license window. While the Commission chose not to adopt the same limit of five as the LPTV proceeding, adopting a greater limit of ten for the NCE FM window seems reasonable considering the fact that radio stations require less resources to operate and maintain. Because less resources are required, it is likely there will be more interest in a radio station than in a LPTV station. Moreover, the Commission can continue to encourage the public interest, *i.e.*, localism and diversity, by adopting an application limit of ten for the NCE FM license window, as it did for the LPFM service.

However, by adopting a ten application limit for the first NCE FM window, the Commission is not prevented from adjusting the application limit in future NCE FM windows. Adopting a lower number in this proceeding, where there has never been a window previously, allows the Commission to make adjustments for future windows as it sees necessary. Adjustments could be made and justified based on

from April 11, 1994 through April 15, 1994 (March 3, 1994); FCC Public Notice, Notice of Limited Low Power Television/Television Translator Filing Window from February 10, 1992 through February 14, 1992 (December 9, 1991).

⁹The Commission concluded that in the initial two years of the LPFM service a party could hold an attributable interest in no more than one station. After two years, a party could hold an attributable interest in no more than five stations. After three years, a party could hold an attributable interest in no more than ten stations. *See* 47 C.F.R. §73.855(b).

the Commission's experience with the first NCE FM window. If the Commission were to find, after the October 2007 window, that applicants could file more than ten applications without overextending the Commission's resources, compromising future windows, or compromising diversity and localism, it could raise the application limit. On the other hand, if the Commission were to allow more than ten applications per applicant in the October 2007 window, which resulted in a backlog and foreclosed the possibility of future NCE FM license windows, the Commission would not be in a position to reverse course.

Moreover, the Commission is not required to, and must not, take into account the expenses that potential licensees may have already incurred. *See* 47 U.S.C. §307(a) (in granting licenses, the Commission is required to act solely in the public interest). Earlier this year, when the Commission announced the upcoming window, it made clear that a future "public notice will provide details on timing and procedures for the first NCE FM filing window." *NCE FM Order*, 22 FCC Rcd at 6163. Thus, prospective applicants assumed at their own risk the rules under which the Commission would conduct the October 2007 filing window and in making investments in engineering to that end. Further, minor change applications are being accepted through September 8, 2007. Thus, any alleged sunk-cost engineering study must be redone, and in some cases drastically revised, to coincide with new preclusions. Therefore, in many cases, the claims of large sums invested in engineering is, at best, an exaggeration. Moreover, no applicant has a vested right to a license, or even to having an application considered, merely because it made an investment in applying. Doing so would disable the Commission from refining its rules from time to time, based on its experience. Finally, any claim of equity evaporates considering the fact that the Commission took the extra precaution of proposing its limit through a Public Notice, seeking comment on the limit, and ultimately will make the final decision based on a public record. The final application limit must be made based on all public interest factors and not based on how some parties

assumed the Commission would conduct the filing window.

Thus, the Commission has appropriately adopted ten as the number of applications a party is limited to. This number is supported by previous proceedings and furthers the Commission's goals to deter speculation and avoid overwhelming the Commission's resources, as well as preserving future windows and promoting localism and diversity. Nonetheless, the Commission retains the option to either increase or decrease the limit for future windows.

III. Conclusion.

Prometheus, *et al.* support the Commission's conclusion that an application limit in the October 2007 NCE FM license window is necessary to deter speculation and effectively use the Commission's resources. The application limit will also help to preserve future NCE FM windows and to encourage the Commission's goals of diversity and localism. Prometheus, *et al.* also fully support the Commission's conclusion that an application limit of ten is the appropriate limit. This limit is supported by previous actions by the Commission and allows the Commission flexibility to adjust the limit in future NCE FM windows.

Respectfully submitted,

/s/

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