

NOV 16 1994

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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In the Matter of	:	
	:	
Amendment of the Commission's Rules	:	ET Docket
to Establish a Single AM Radio	:	No. 92-298
Stereophonic Transmitting	:	
Equipment Standard	:	
	:	
	:	

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OPPOSITION OF MOTOROLA, INC. TO PETITION FOR STAY

Motorola, Inc., by its attorneys and pursuant to Sections 1.45(a) and 1.4(h) of the Commission's Rules, hereby files this Opposition to the Petition for Stay Pending Appeal ("Petition") filed by Kahn Communications, Inc. ("Kahn") in the above-captioned proceeding. Through its Petition, Kahn is attempting to reargue many of the issues decided by the Commission in its Report and Order in this proceeding, 8 FCC Rcd 8216 (1993), and its Supplemental Order, 9 FCC Rcd 1907 (1994).

Kahn's Petition should be denied. Kahn's Petition is replete with reasserted opinions and contentions that were fully considered but rejected by the Commission in this rulemaking proceeding. The Commission has acted pursuant to a statutory mandate to adopt a standard for the AM stereo broadcasting; Section 214 of the Telecommunications Authorization Act of 1992, Pub. L. No. 102-538, required the Commission to act within a specified period after enactment. Pursuant to that mandate, the Commission has selected a national AM stereo broadcast standard.

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To effect that standard, the Commission has ordered AM stations that were transmitting in stereo prior to March 21, 1994 to conform to the adopted standard by March 21, 1995. Kahn now requests that the Commission stay the effective date of its Order pending the outcome of his petition for review of the Commission's decision, which has been filed in the United States Court of Appeals for the District of Columbia. Yet nothing in Kahn's Petition would constitute a basis for staying the effective date of the Commission's Order.

The Commission applies the four-part test of Virginia Petroleum Jobbers Ass'n. v. Federal Power Comm'n., 259 F.2d 921 (D.C. Cir. 1958), to petitions for stays. In order to qualify for a stay under the Virginia Petroleum Jobbers test,

- (1) a petitioner must make a strong showing that it is likely to prevail on the merits on appeal;
- (2) a petitioner must show that without a stay it will be irreparably injured;
- (3) the issuance of a stay would not substantially harm other parties interested in the proceeding; and
- (4) the stay must be in the public interest.

See, e.g., In re Application of WWOR-TV Inc., 6 FCC Rcd 193, 205 (1990). Before a stay is granted, each of the four elements of the Virginia Petroleum Jobbers test must be satisfied. In fact, none of these requirements is met by Kahn's Petition.

### Likelihood of Prevailing

Kahn has failed to show that it is likely to prevail on the merits in its petition for review of the Commission's rulemaking decision. Kahn has offered nothing other than a recitation of allegations that it intends to make on appeal, and nothing on the face of those allegations suggests any likelihood of success on the merits. All of the allegations made in Kahn's Petition were considered but rejected by the Commission on the basis of the record as a whole.

### Irreparable Injury

Kahn's Petition recites several consequences which are characterized as "injury" that would result from the failure of the Commission to stay its Order, but none of these effects would constitute irreparable injury pending appeal. Kahn claims that the Commission's Order would significantly "disrupt" the broadcast service of a number of AM stereo stations. In fact, no disruption of service should be occasioned by the Commission's Order. The Report and Order contemplated that stations employing the Kahn or Harris stereo systems would discontinue operations with those systems within one year of the effective date of the rules implementing the new standard. Report and Order at 1-2. The Commission expressly concluded that a one-year transition period will be sufficient to allow broadcasters time to finance their purchases of new compatible equipment. The transition does not require stations to disrupt service to their listeners; rather, it only requires them to comply with the new transmission

standard. Thus, the kind of "injury" suggested by Kahn would result only from the failure of a station to take reasonable steps to convert its equipment and to come into compliance with the standard. Such "injury" does not justify staying the Commission's Order.

Kahn also characterizes as "injury" the costs borne by the owners of receivers that are compatible with systems other than the national standard. While such expenses were explicitly considered by the Commission in its balancing of multiple factors, id. at 3, the Commission determined that selecting any system other than the Motorola system as the national standard would, in fact, result in greater costs, both private and public. Id.

#### Harm to Other Parties

The Commission selected the Motorola system as the national standard after weighing multiple considerations. Having done so, the Commission issued an Order to effect the orderly transition of the broadcasting industry to compliance with that standard. Pursuant to the Order, investments by Motorola and broadcasters have now been made or are in motion. To stay the effective date of the national standard would cause harm to many parties that have already taken steps to come into compliance with the standard and would further delay the development of AM stereo.

In an apparent attempt to suggest that Motorola and users of its system would not be harmed by a stay, Kahn attaches

to its Petition a purportedly new survey of Motorola-system broadcasters. This extra-record material is of dubious validity and probity; in any event, the Commission's Rules do not allow the introduction of new material on reconsideration, 47 C.F.R. § 1.106, much less as an attachment to a Petition for Stay. Accordingly, the material should be rejected.

### Public Interest

Kahn asserts, as a matter of public interest, that the discontinuation of broadcasts employing the Kahn signal would injure the reputation of AM stereo for two reasons. First, Kahn claims that the absence of Kahn-system broadcasts itself will deprive listeners of a certain amount of enjoyment after the effective date of the Order. Second, Kahn asserts that Motorola-system broadcasts will adversely affect the development of AM stereo. These claims are nothing more than a restatement of the groundless attack on the quality of the Motorola system launched by Kahn during the rulemaking proceeding. Such "public-interest" claims in effect call upon the Commission to repudiate its entire rulemaking decision.

In its rulemaking, the Commission considered all options, including all of the possible consequences suggested by Kahn's Petition. Weighing the record as a whole, the Commission found that selection of the Motorola system as the national standard was in the public interest. Moreover, the Commission determined that the selection of any other system as the standard would result in greater private and public costs than the

selection of Motorola's system. Accordingly, the Order serves the public interest, whereas a stay of the Order would be contrary to the public interest.

**Conclusion**

Kahn's Petition fails to satisfy even one of the four requirements for a stay set forth in Virginia Petroleum Jobbers; in order to warrant a stay, all four requirements must be met. For all of the foregoing reasons, Kahn's Petition should be denied.

Respectfully submitted,

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November 16, 1994

CERTIFICATE OF SERVICE

I, Kenneth G. Starling, hereby certify that a copy of the foregoing Opposition of Motorola, Inc. to Petition for Stay has been served by hand delivery\* or by first-class U.S. mail, postage prepaid, this 16th day of November 1994 on the following:

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