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Re: Docket Number 04-160

Dear Sirs:

Please reject the NAB's petition to limit the kind of information that consumers can receive on our satellite radios.

This petition is particularly appalling. It hurts consumers who want to receive timely and accurate news, hampers technological progress that could provide as-yet unimaginable services, and threatens public safety. And although not always an immediate concern for people debating the practical nuts and bolts of public policy, the NAB's requests would plainly violate the First and Fifth Amendments to the United States Constitution.

The Petition Hurts Consumers

When I first bought my XM radio last year, I did not intend to have it replace my AM and FM listening. I had already long stopped listening to terrestrial radio, years ago, because it had become completely devoid of any value. There was nothing to listen to on the AM and FM bands. The music was largely terrible and repetitive, when it was not being interrupted by endless commercials, obnoxious contests and deejays who added nothing positive to the listening experience. The news stations weren't much better. Sometimes they would broadcast programs that had nothing to do with news, traffic, or weather. The traffic information, in particular, was very hit and miss. If I finally got through all the commercials and noise to hear a traffic report, there was no guarantee that the report was still accurate or worse, that they weren't focused on traffic on the other side of town. It simply wasn't worth the annoyance to wait for a traffic report. I just listened to my CDs and hoped for the best with the traffic.

It was a pleasant surprise when XM introduced its dedicated traffic and weather channels. The information is timely, accurate, and doesn't require me to listen to an excessive amount of commercials or other garbage. I am willing to continue paying for this service. How is it in the public's interest to prevent me from getting this information from XM?

Terrestrial broadcasters would doubtless benefit from a monopoly on traffic and weather information, but I do not understand how creating such a monopoly would be in keeping with the FCC's mission to regulate the airwaves in the *public* interest. Certainly, if the traffic and weather channels on XM were to disappear, it is not as though terrestrial radio would suddenly provide a comparable service. Consumers would simply be denied the ability to pay for desirable content. There would be no incentive for terrestrial radio to try to compete by actually offering something that consumers want to tune in.

The Petition Threatens Technological Progress

I am concerned about the petition's request to limit the kind of information displayed on each satellite radio tuner.

When I first bought my XM radio, it never occurred to me that the radio display would be used to display the local weather or, as during the World Series last year, current statistics about the baseball game. Now, some car makers are starting to offer a GPS navigation unit that integrates with XM real time traffic data, allowing the navigation unit not only to display a map of the area, but also have the map display traffic accidents, construction delays, and average speeds on various stretches of road. Perhaps in the future, this kind of technology could be used to alert drivers to all sorts of nearby attractions, incidents, or businesses. What a shame it would be for the government to get in the way of these technological advances simply to benefit a small group of radio station owners threatened by new technologies.

Did newspaper and book publishers attack the legality of broadcasters when radio was in its infancy? And what about the internet? Certainly, each computer is capable of displaying all kinds of information that competes with terrestrial radio. Should that be frustrated by regulatory petitions as well?

I hope that NAB members focus their energies not on having government ban the competition's ability to innovate, but rather on developing new and useful technologies of their own. After all, that is how they got their start.

The Petition Threatens Public Safety

God forbid some natural disaster or terrorist activity were to impact our nation, satellite radio would provide a far more reliable source of public safety information than would terrestrial radio stations. For one thing, it would be impossible for weather events or terrorists to knock out satellites broadcasting from high above the Earth. Disruptions in the power grid and blocked roads could also affect the ability of local radio employees to reach and operate their stations, but such events would be less likely to impact satellite radio. Satellite radio would also give consumers the ability to hear about local conditions in far away cities, whether out of concern for loved ones or their own travel plans. Terrestrial radio cannot satisfy that need.

Satellite radio is already demonstrating its unique ability to help public safety. I've noticed that on XM's traffic and weather channels, "Amber Alerts" about missing children are frequently displayed. For all their talk about commitment to local communities, I'd venture many terrestrial radio operators would prefer locating missing children if they could then be delivered to advertisers. Isn't that what the NAB petition is all about?

The NAB's Requests are Unconstitutional

While I do not practice communications law, I do have a background as an attorney in constitutional law. Most of my practice involves civil rights claims in the federal courts, so I am comfortable in suggesting that the NAB's requested relief violates the First and Fifth Amendments to the United States Constitution.

First Amendment Free Speech Concerns

The kind of information that the NAB seeks to have banned is, without question, constitutionally protected speech. There is nothing remotely obscene, indecent, fraudulent, inciteful, extortionist or otherwise inherently criminal about reporting weather and traffic conditions. As such, the proposed request would be a content-based restriction subjected to strict scrutiny by the courts. The regulations could survive only if they were narrowly tailored to achieving a compelling governmental interest, and there were no less restrictive alternative.

What, exactly, is the compelling governmental interest in silencing satellite radio broadcasters from providing this sort of content? The compelling private interests for terrestrial radio broadcasters are obvious – their competition is eliminated. But since when does the government have an interest in selecting which private actors are allowed to present what sort of content?

The NAB would suggest there is a compelling interest in preserving terrestrial broadcasting as a viable medium, and thus shielding it from competition serves such a goal. The theory is specious. If, in NAB's worst-case scenario, consumers display such an overwhelming preference for satellite radio that the lights go off at terrestrial radio stations throughout the land, consumers would simply be opting to receive broadcasting through a superior medium. Broadcasting itself would never disappear. In such an extreme environment, with satellite radio becoming a necessary utility, the government might even choose to subsidize satellite radio for low income consumers, much as it does with electricity and telephone service. Or perhaps satellite radio providers could be required to broadcast free emergency information.

Of course, the NAB's argument can be turned on its head. Why does the FCC permit terrestrial broadcasters to undermine the business of satellite radio, by providing free "national" content? Is there no public interest in maintaining satellite radio broadcasting? Perhaps under NAB's proposed dichotomy, terrestrial radio operators should be forbidden from relaying any content by satellite or other "non-local" technology, and broadcast only "local" information, delivered by personalities physically located at each station. Perhaps only music by local artists or performers should be permitted on terrestrial radio stations as well.

If one accepts the NAB's proposed governmental interest, however, there is no reason to stop with satellite radio operators. The internet and local newspapers compete in the marketplace for "local" news and information. Should these not be banned, too? And what about individuals? If I telephone my neighbor to discuss the weather and traffic, am I not thereby undermining the NAB's monopoly on such information? Extending NAB's proposed monopoly

to the limits of its logic could have absurd, patently unconstitutional results well beyond the impact on satellite broadcasting.

In any event, it is obvious that terrestrial radio is not going the way of the buggy whip. There is no threat to the governmental interest in preserving the existence of effective broadcasting, or even any supposed interest in saving terrestrial radio operators from having to compete for listeners.

Fifth Amendment Due Process Concerns

Apart from the free speech concerns, the NAB's petition also raises serious Fifth Amendment Due Process problems. Any regulation seeking to delineate between "local" and "national" content would be hopelessly void for vagueness. Were the 9/11 attacks items of local news, or national news? What about the Michael Jackson trial? Should only local broadcasters in Santa Barbara be able to discuss this news event? Perhaps under the NAB's desired rules, local broadcasters could discuss local school board elections, but then, satellite radio might have a monopoly on discussing the Presidential election.

Traffic and weather information is no easier to classify as "local." The Weather Channel is carried by most cable and satellite operators, demonstrating there is a national market for information about the weather. Travelers or others who have re-located may well have an interest in traffic and weather outside their immediate area. And of course, in today's world, a traffic or weather event can have an impact far beyond its immediate area.

Thank you opening this proceeding to public comment. I hope the FCC does not take any action that would interfere with the usefulness of satellite radio, technological progress, public safety, or the Constitution. The NAB petition should be dismissed.

Sincerely

Alan Gura