

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Authorization Of)
In Band On Channel) FCC Docket 99-325
(IBOC) Digital Radio)

MOTION BY THE AMHERST ALLIANCE
TO STAY PROCEEDINGS,
PENDING FINAL COMMISSION DECISIONS
ON 3 PETITIONS FOR RULEMAKING,
1 PETITION FOR RECONSIDERATION
AND 1 REQUEST
FOR AN ENVIRONMENTAL IMPACT STATEMENT (EIS)

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THE AMHERST ALLIANCE is a Net-based, nationwide citizens' advocacy group for Low Power Radio in particular and media reform in general. Our group has made numerous filings in FCC Docket 99-325 -- as well as in earlier Dockets which concern the authorization and/or implementation of In Band On Channel (IBOC) Digital Radio.

We now file this Motion to stay the current proceedings in FCC Docket 99-325 -- regarding a shift from "interim" to permanent authorization of certain IBOC broadcasts, as well as the possible authorization of currently prohibited IBOC broadcasts at night on the AM Band -- *until and unless* the FCC progresses to the point of final determination on *5 relevant and pending proceedings* which the Commission has never completed.

4 of the 5 filings were made by THE AMHERST ALLIANCE and associated parties.

The other filing, with which Amherst is affiliated as a retroactive signatory, was made by Leonard Kahn, P.E. of KAHN COMMUNICATIONS.

**Enumeration Of 4 Relevant, Material *And Pending* Proceedings
Initiated By THE AMHERST ALLIANCE
And Various Other Interested Parties**

We point to 4 different multi-party proceedings. Each of them is directly and materially related to the current Docket 99-325 proceedings ... each of them is a multi-party filing, spearheaded by THE AMHERST ALLIANCE as the leading party ... and all but 1 of them have been completely ignored -- not denied, but *ignored* -- by the FCC.

In reverse chronological order, the 4 earlier filings are as follows:

1. *Multi-Party Petition For Expedited Relief Through Rulemaking* -- Seeks emergency relief for potential Low Power FM (LPFM) applicants, faced with pervasive pre-emption of otherwise available FM frequencies by satellite-fed translators and other "long distance" translators. Also seeks emergency relief for currently licensed and operational LPFM stations, which are threatened with displacement by new, relocating or upgrading full power commercial stations *and/or* with erosion of their originally authorized service areas by IBOC-induced interference. Urgently requests FCC action to address these problems by assigning Primary Service Status to LPFM stations ... establishing a new, Tertiary Service Status for satellite-fed translators and other "long distance" translators ... *and*, in the case of IBOC, allowing case-by-case increases in tower height and/or wattage where *demonstrably necessary* to offset IBOC-induced erosion of a station's original service areas. There has been no FCC response, of any kind, since the Petition For Rulemaking was *filed 7 months ago* (on November 14, 2003).

2. *Multi-Party Petition For Reconsideration Of "Interim" IBOC Authorization* -- Seeks reconsideration of the FCC's October 11, 2002 Order, in FCC Docket 99-325, granting "interim" authorization of IBOC broadcasts (except for a moratorium on AM IBOC broadcasts at night). Claims, among other arguments, that "interim" IBOC approval was granted without adequately addressing a multi-party Environmental Impact Statement (EIS) Request, which is discussed below, and without considering at all a relevant April 2002 Petition For Rulemaking, which is also discussed below. Further asserts that the Commission has never provided a credible rationale for its "rush to judgment" on IBOC implementation, which was used to justify foregoing any attempt to

undertake comparative testing and evaluation of alternative Digital Radio technologies. In this regard, notes that military monopoly of the “L Band” -- which was the FCC’s original rationale for rejecting the internationally popular Eureka-147 Digital Radio technology -- is no longer a valid argument, since the FCC itself has since decided that there is enough room in the “L Band” for the military to share it with wireless services and other spectrum uses. There has been no FCC response, of any kind, since the Petition For Reconsideration was *filed 1 year and 8 months ago* (on October 25, 2002).

3. *Multi-Party Request For An Environmental Impact Statement (EIS) On IBOC Implementation* -- This multi-party EIS Request was filed by the FCC on July 18, 2004. Pursuant to the National Environmental Policy Act (NEPA) of 1969, as amplified by other statutes and wildlife-related treaties, the EIS Request asks the Commission to defer any final decision on IBOC implementation until *after* it has first assessed the environmental impact of instituting a nationwide IBOC implementation mandate, requiring in many cases the retrofitting of existing communications towers or even the construction of new ones. Among other specific issues, the EIS Request asks the Commission to prepare (or require the Petitioners for IBOC implementation to prepare) a comprehensive EIS that addresses the impact on wildlife habitats of IBOC-related retrofitting and construction and the impact on solid waste disposal -- including disposal of *toxic chemicals* -- of rendering 500,000,000 Analog Radio receivers prematurely obsolete. Under NEPA, the FCC should have responded by conducting a formal Environmental Assessment (EA) to determine whether or not a formal, comprehensive EIS is needed. Instead of responding with an EA, however, the FCC responded to the EIS Request by denying it in one paragraph of the October 25, 2002 Report & Order that authorized “interim” IBOC broadcasts. This single paragraph of explanation did not even acknowledge the solid waste disposal issue or some of the other issues that are presented expressly in the EIS Request. Thus, while the Commission did respond to the EIS Request with a denial On The Record, this denial On The Record was not an EA and did not even begin to approach an EA in its scope. Therefore, the FCC’s denial fell short of NEPA standards, which means that it is not legally adequate, which means that the EIS Request is functionally still pending. The EIS Request was *filed 1 year and 11 months ago* (on July 18, 2002).

4. *Multi-Party Petition For Rulemaking On Comparative Testing And Evaluation Of IBOC Digital Radio And Alternative Technologies* -- This Petition For Rulemaking, which became a major argument in the subsequent Motion For Reconsideration in FCC Docket 99-325, seeks a rule to mandate comparative testing and evaluation of iBiquity Corporation’s IBOC technology, in conjunction with alternative technologies, before IBOC is authorized by the FCC. There has been no FCC response, of any kind, since the Petition For Rulemaking was *filed 2 years and 2 months ago* (on April 12, 2002).

Of the current “backlog” of 126 Petitions which are still sitting in limbo in the FCC’s “holding tank”, at PRM02MB, only 8 have been there longer than this one.

**Leonard Kahn’s Petition For Rulemaking,
Seeking A Competitive Comparison Of CAM-D Digital Radio Technology
With AM IBOC Digital Radio Technology**

THE AMHERST ALLIANCE contends that the Commission should also address the pending, and currently unacknowledged, Petition For Rulemaking by Leonard Kahn, P.E. of KAHN COMMUNICATIONS in New York State. This Petition For Rulemaking was filed *1 year and 2 months ago* (on April 5, 2003).

The Petition (which is actually an amendment to a January 24, 2003 Petition by Mr. Kahn) is straightforward. It declares that KAHN COMMUNICATIONS, acting in response to repeated reports of disruptive interference on the AM Band, has developed on its own initiative a new Compatible AM Digital Radio (CAM-D) technology that avoids these AM Band interference problems. The Petition asks the FCC to verify these claims through impartial testing and evaluation -- including *comparative* testing and evaluation of CAM-D technology in conjunction with iBiquity Corporation’s IBOC technology.

While THE AMHERST ALLIANCE has stressed, repeatedly, that we can neither confirm nor deny the claims of Leonard Kahn and his company, Amherst also maintains that these claims are worthy of investigation -- *before* IBOC broadcasts are authorized permanently and, especially, *before* nighttime AM IBOC broadcasts are permitted.

For this reason, THE AMHERST ALLIANCE and 11 other parties (now 13 other parties) sought and obtained Leonard Kahn's permission to affiliate themselves with his April 2003 Petition. In a brief string of letters that were filed with the FCC in this Docket -- on July 2, 2003, August 28, 2003 and January 22, 2004 -- these additional parties identified themselves to the FCC as retroactive signatories of the Petition. These retroactive signatories playfully dubbed themselves "Kahn's Crusaders".

Leonard Kahn's Petition underscores the reality that the FCC, to date, has been seriously considering only 3 pair of choices with respect to Digital Radio "rollout":

First: Whether to permit and encourage conversions from Analog Radio to iBiquity's IBOC technology -- on both the FM Band and the *daytime* AM Band (The FCC answered "Yes")

Now: Whether to re-affirm the prior decision by making it permanent

And

Whether to permit and encourage conversions from Analog Radio to iBiquity's IBOC technology on the *nighttime* AM Band

As we noted above, the option of selecting either Eureka-147 or Digital Radio Mondiale, as a viable Digital Radio alternative to both IBOC and Analog Radio, has never been seriously investigated by the FCC -- and various requests for comparative testing and evaluation of these alternatives, by THE AMHERST ALLIANCE and other parties, have never been seriously addressed. They have only been ignored.

Now, Leonard Kahn's Petition For Rulemaking has created *more*, and *newer*, options:

Authorization of IBOC on the FM Band, with CAM-D on the AM Band

Or

Authorization of IBOC on the FM Band and on the *daytime* AM Band, with CAM-D on the nighttime AM Band (which is explicitly raised as a possibility in the February 11, 2004 "Counterproposal" that was filed in this Docket by John Pavlica, P.E. of Ohio)

In a later letter to the FCC, filed in FCC Docket 99-325 on September 3, 2003, Leonard Kahn indicates that KAHN COMMUNICATIONS is now working on, and expects to develop by the end of 2004, an *FM-compatible* version of its technology. This will create yet another option for the FCC: replacing IBOC technology with KAHN COMMUNICATIONS' technology across-the-board ("24/7" on both Bands).

After 1 year and 2 months of silence from the FCC, Amherst can only assume that the FCC's inattention to Leonard Kahn's Petition is a conscious, deliberate decision. It forms the latest link in the FCC's conclusive pattern of *ignoring more technologies than it has investigated*. The FCC first ignored Eureka-147 and Digital Radio Mondiale, and is now ignoring the new possibility of an FM IBOC/AM CAM-D "hybrid" -- *and it* has also ignored our requests, On The Record, not to ignore them. Thus, out of at least 4 technological options (5 if retention of Analog Radio is considered an option), the FCC has seriously investigated *only* the single technology of IBOC, as developed by iBiquity.

In short:

The Commission has not done its homework.

Before the FCC decides whether to authorize IBOC permanently -- and *especially* before it decides whether to open the floodgates to *nighttime* AM IBOC broadcasts, which pose the greatest interference problems of all -- the Commission should either finish its incomplete investigation of IBOC alternatives *or* explain clearly and credibly, On The Record, in formal denials of the 5 pending Petitions and requests, *why* the completely un-competitive selection of a troubled technology, without considering either alternatives *or* environmental impact, is justified.

Other Relevant, Material *And Pending* Proceedings

We note that the same basic issues have been raised in 2 other requests to the FCC, in FCC Docket 99-325, to which THE AMHERST ALLIANCE is not a party:

The August 21, 2003 Motion To Enlarge The Issue by John Pavlica, P.E. of Ohio

And

The January 13, 2003 Motion To Dismiss by John Pavlica, P.E. of Ohio

These 2 Motions are the functional equivalents of a Petition For Rulemaking and a Petition For Reconsideration, respectively. The first filing was made *1 year and 5 months ago* ... the second filing was made *10 months ago* ... and the Commission should not continue to ignore them.

“Due Process Of Law” Requirements

We submit that, under both the Administrative Procedure Act and the Due Process Clause of the United States Constitution, the FCC may not lawfully proceed to respond to the relatively recent requests by the National Association of Broadcasters (NAB) -- for permanent authorization of current IBOC broadcasts, plus authorization of new AM IBOC broadcasts at night -- when it has never granted, denied or even acknowledged relevant and material requests, by *other* parties with a clear stake in these proceedings, that were filed long before the NAB request upon which the FCC is now acting.

The FCC may, of course, deny any and all of the 5 earlier multi-party filings, but it must do so officially *and* it must do so for cause. That is: The Commission must *explicitly address*, not simply ignore, the arguments made in these 5 earlier filings. Further, if the requests are denied, the Commission must provide one or more explicit reasons -- in a form which is clear enough, firm enough and final enough to provide a basis for appealing those denials in Congress, in court and/or in the court of public opinion.

Instead, the FCC has simply left these 5 filings “pending”, while proceeding to weigh policy changes which would, effectively, preclude the relief sought in earlier filings.

We emphasize this point -- which is the presence of *competitive* forces in this situation.

To take a hypothetical example: THE AMHERST ALLIANCE has periodically recommended to the FCC, and might eventually propose in a Petition For Rulemaking, the establishment of small, surcharge-funded Research, Development & Demonstration (RD&D) grants that allow individual inventors and small institutions to investigate “spectrum expansion” technologies such as infrared broadcasting. Were such a Petition to be filed, and were the FCC to ignore it for 2 or 3 years, the delay would impose “opportunity costs” on the Petitioners and on potential beneficiaries among the listening public. After a long enough delay, the Petitioners might be able to assert in court a violation of “due process of law”, arguing that their Petition had been effectively denied by the FCC, but *without* a public comment period that might have strengthened their case *or* a formal denial that would have been automatically appealable.

In this hypothetical case, then, there might be demonstrable injury from the delay -- and a successful case might also be made that the FCC had effectively denied a Petition through its silence, thereby attempting to avoid the legal accountability that would come from denying it openly, On The Record, with its reasons set forth for all to see.

Still, even the arguments in this hypothetical case would not be as compelling as the arguments stemming from the “real world” case in this Docket: that is, the FCC’s pattern of silence in the face of several different substantive and procedural challenges to its *un-competitive* choice of IBOC as the single authorized Digital Radio technology.

In this case, the problem is not “merely” that *the Petitioners have been delayed* in receiving official Commission consideration of their requests. This basic problem is compounded by the fact that the Petitioners have been delayed *while mutually exclusive claims by others are being considered and have, to some extent, been granted*. That is: Approval of IBOC is *automatically* a disapproval of alternatives, but so far only the approval -- *not* the disapproval -- is the product of “reasoned decision-making”, based on all relevant and material evidence that is available, in the open light of day. Manufacturers of equipment which competes with IBOC Digital Radio are effectively being kept out of the market, but *without* first having their “day in court” in the form of comparative consideration. Similarly, radio listeners *and stations* are being denied the benefits -- including, but not necessarily limited to, lower interference -- from technologies which might, *if* directly compared to IBOC, turn out to be much better.

It is procedurally premature for the Commission to be considering whether to change IBOC authorization from “interim” status to permanent status, and/or whether to lift its current ban on AM IBOC broadcasts *at night*, when it has not yet resolved the pending questions presented in the various proceedings we have referenced.

Since these pending questions center on whether IBOC Digital Radio should have been authorized *in the first place*, it is both logical and equitable, as well as legally necessary, for the FCC to resolve the pending questions *first* -- before deciding whether to make

current IBOC approval permanent and/or authorize *nighttime* AM IBOC broadcasts. Conceivably, resolving these pending, unanswered questions *first* could render moot the need to address the other IBOC implementation questions.

In any event, broadcast equipment manufacturers, radio listeners and radio stations *all* deserve the benefit of having access to the best Digital Radio technology available. This is *especially* true when, as in this case, the FCC is selecting that technology *for* the nation's radio listeners and radio stations, rather than allowing marketplace competition between different equipment manufacturers.

3 Key Unaddressed Questions

The FCC will not *really* know which Digital Radio technology is best *until and unless* it completes the comparative testing and evaluation -- plus the basic Environmental Assessment, perhaps followed by an Environmental Impact Statement -- that has been requested in the 5 pending filings we have referenced.

These 3 questions are the central themes of the referenced filings:

1. How does IBOC *compare in quality* to competing Digital Radio technologies?
 2. What would be *the environmental impact* of implementing IBOC and/or its Digital Radio competitors?
- And*
3. Why doesn't the FCC seem to care about learning the answers to these questions?

The Question *Beneath* The Questions

While the FCC has completely ignored 4 out of the 5 referenced Petitions and requests, and has addressed the multi-party EIS Request only in a cursory passage that ignores half the issues raised and falls well short of an EA, the Commission's October 11, 2002 Report & Order on IBOC implementation offers a faint hint of a rationale for the Commission's pattern of functional denials through silence.

In acknowledging, briefly, some of the points raised by THE AMHERST ALLIANCE in its various *Written Comments* in FCC Docket 99-325, the October 2002 Report & Order speaks of avoiding any more delays in the implementation of IBOC technology. The Commission notes that years of time, energy and money have already been invested in IBOC technology, adding that "it would take years to clear the L Band" to permit use of Eureka-147 technology instead. (Now, of course, CAM-D technology and Digital Radio Mondiale, which do not use the L Band, are also available as alternatives to IBOC.)

In short:

The FCC seems to be saying, in its Report & Order, that it is behind schedule in promoting Digital Radio -- and is, therefore, in too much of a hurry to pause for consideration of *any* alternative approach, even if that approach is a better one.

Yet this illumination carries us only so far -- because the apparent fear of re-opening past decisions seems more suited to planning the Normandy invasion than to managing the “rollout” of Digital Radio. The FCC may be suggesting that it is resolutely resisting *any* re-opening of past decisions on Digital Radio because it is in such a hurry to finish the “rollout” process. However, it has still not explained *why* it is in such a hurry.

Thus, we come to the most central question -- “the question beneath the question”:

“Where’s the fire? *What’s the rush?*”

We have asked the FCC this question on various occasions, in various different ways, but we have yet to receive even the faintest glimmer of a clear, meaningful, credible answer.

Where is the evidence of a fevered popular demand for immediate implementation of IBOC, or even of Digital Radio in general? By and large, the only parties to support IBOC in this Docket have been institutions with a clear financial self-interest at stake in IBOC implementation. There has been no persuasive documentation that millions of radio listeners, let alone tens of millions of them, are demanding a rapid shift to IBOC -- or to any other version of Digital Radio. In fact, to the extent that radio listeners and groups which represent them have expressed an opinion on IBOC in this Docket, they have overwhelming *opposed* its implementation, not demanded it.

While American radio has been suffering from declines in listenership, and must clearly do *something* to reverse this trend, *where* is the evidence that the “something” which must be done is the immediate implementation of IBOC Digital Radio -- or *any* kind of Digital Radio?

In a different FCC Docket, RM-10803, the FCC’s new Localism Task Force has been holding regional Hearings that have literally been “Standing Room Only” events in every single instance. Long lines of listeners, winding around the block several times over, have been seen. Yet what have these radio listeners, obviously motivated enough to show up at the Hearings in record numbers, and to wait for several hours in the hopes of a *chance* to speak for 2 minutes, been asking the Commission to do? They have been asking the Commission to improve *the quality* of radio programming by restoring *the diversity* of radio ownership. They have been urging the Commission to retain, and even roll back, regulatory ceilings on media ownership. They have been urging the Commission to retain, and even expand, Low Power Radio as a major presence on the airwaves. They have been asking for better radio writing and reporting, more local news and feature coverage, more locally based disc jockeys and reporters, far fewer commercials and escapes from having to hear the same 50 or 100 songs played over and over again, 6 or 7 or 8 times a day. Further, they have repeatedly pinpointed the reversal of current media ownership concentrations as the cornerstone of any radio reform to make the make the medium more useful and appealing.

Few of these apparently unhappy radio listeners, if any, have been asking the FCC to give them IBOC Digital Radio -- or *any* kind of Digital Radio. In fact, the current version of IBOC Digital Radio, with its ruinous interference, would give these radio listeners *exactly the opposite* of what they have been asking the Commission to provide. It would give radio listeners *fewer* choices on the dial, not more. Further, with its disproportionately harsh impact on the smallest and most local radio stations, it would *reduce* the competitive pressures on the largest, most standardized broadcasters -- leading to *more* commercials, not fewer commercials, and to *more* standardization in radio programming, not less.

If the intention behind IBOC is the desire to boost radio listenership, then the rush to IBOC implementation is literally throwing a drowning man an anchor.

In this regard, the Commission should *not* assume that an industry is necessarily the best judge of its own long term interests -- or even of its own short term interests. Ask Pacific Gas & Electric (PG&E) after it successfully lobbied for the utility deregulation in California that would drive it into bankruptcy only a few years later. Ask WorldCom, or any of several large communications companies with even larger financial hemorrhages, after eager over-investments in fiber optics capacity led to fiscal ruin.

Nor should the Commission even assume that radio broadcasters are primarily concerned with thriving in the radio business. A broadcaster that supports IBOC may well expect

the radio industry as a whole to lose listeners, while it gains market share through interference -- *or* it may even expect to lose listeners in its own service areas, but more than offset the losses with revenue gains from data transmission over sub-carriers.

The Commission should also bear in mind that some of the largest prospective users of IBOC equipment are also owners of iBiquity Corporation, which produces IBOC equipment. Like the possibility of data transmission revenues, this cross-ownership creates for a number of broadcasters an inherent conflict-of-interest that makes them questionable judges of which Digital Radio technology is really best for *radio*.

If radio were a different kind of industry, the Commission could simply shrug its collective shoulders and say: “The broadcasters are the ones who use the broadcasting equipment. Let them pick the broadcasting equipment they want and live with the consequences, for better or worse.”

There are only 2 problems with this possible approach.

First: The broadcasters aren't the *only* ones who have to “live with the consequences”. Their *listeners* may be the ones with the most to lose, or gain, from the broadcasters' purchasing decisions -- particularly if it erodes their choices and/or quality of service.
And

Second: The statutory law of America recognizes the reality.

Much as some Members of the current Commission might wish otherwise, the

Telecommunications Act of 1996 did *not* end either public ownership of the airwaves

or the Commission's legal obligation to weigh "the public interest" in making its decisions. Thank God!

So long as those surviving pillars of Federal communications regulation remain on the statute books, the Commission is obligated to fully consider the 5 Petitions and requests we have mentioned -- *or* deny them on the basis of a clear and credible rationale, which explains why and how their denial serves "the public interest".

THE MOTION ITSELF

For the reasons which are set forth herein -- and in some of the 26 other substantive filings we have made so far in FCC Docket 99-325 -- THE AMHERST ALLIANCE submits the following Motion:

We move that the Commission stay the current proceedings in FCC Docket 99-325 *until and unless* each of the 5 pending Petitions and requests we have referenced has been either granted or denied, in whole or in part, for reasons which are clearly and fully explained to the public.

In reverse chronological order, the 5 pending matters in question are as follows:

The November 14, 2003 Petition For Expedited Relief Through Rulemaking (which includes a request to allow case-by-case adjustments of tower height and/or wattage where this is *demonstrably* necessary to offset IBOC-induced erosion of a station's originally authorized service areas) by THE AMHERST ALLIANCE and others

The April 5, 2003 Petition For Rulemaking by Leonard Kahn, P.E. (an amendment to his January 24, 2003 Petition For Rulemaking) -- with which THE AMHERST ALLIANCE and 13 other parties have affiliated themselves as retroactive parties in a series of 3 letters to the Commission

The October 25, 2002 Petition For Reconsideration (of the Commission's October 11, 2002 Order for "interim" approval of certain IBOC broadcasts) by THE AMHERST ALLIANCE and others

The July 18, 2003 Request For An Environmental Impact Statement (EIS) by THE AMHERST ALLIANCE and others -- which the Commission cannot lawfully grant or deny until and unless an Environmental Assessment (EA) has first been prepared

The April 12, 2002 Petition For Rulemaking (to require *comparative* testing and evaluation of IBOC technology, *in competition with* other Digital Radio alternatives) by THE AMHERST ALLIANCE and others

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