

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Digital Audio Broadcasting Systems |) | MM Docket No. 99-325 |
| And Their Impact On the Terrestrial |) | |
| Radio Broadcast Service |) | |

**REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS**

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Executive Summary

The National Association of Broadcasters (“NAB”) hereby files in response to comments received by the Commission on its *Further Notice of Proposed Rulemaking* on final operational requirements, licensing and service rule changes for terrestrial digital audio broadcasting, as well as on the *Notice of Inquiry* on copy protection issues.

NAB is encouraged that the vast majority of commenters support the Commission’s moving ahead to finalize the authorization of the AM and FM IBOC digital radio service under flexible policies and minimum restrictions, which, as NAB and others have said, will provide the regulatory certainty for broadcasters and equipment manufacturers to continue to roll-out digital operations and receivers and, as well, to develop and introduce innovative digital services for the benefit of the radio listening public and the local broadcasters who seek to serve them and compete in a digital world.

NAB remains mindful of the challenges of and potential trade-offs involved in converting the nation’s radio stations to hybrid digital operations, especially in the case of AM nighttime operation, which, because of the mercurial nature of nighttime propagation, will require careful monitoring and, in many cases, individual resolutions. But we remain steadfast in our belief that digital radio will be transformative of both the AM and FM services, in terms of greatly improved audio quality, robustness of reception and opportunities for new, innovative services. This will be particularly so for the AM service, which, we are confident, will see a resurgence of formats, audiences and new services. These benefits will justify efforts to deal with instances of interference and some trade-offs of secondary service.

Commenters were overwhelmingly consistent in supporting Commission policies to let the marketplace drive the transition and set the pace of conversion, both as to broadcaster implementation of IBOC and its new services and as to consumer take-up of the new receivers. And the overwhelming majority of commenters agree that the most effective way for the Commission to foster the development of digital radio is to adopt policies that provide broadcasters with the flexibility needed to scale their digital signals to offer a high quality main audio stream and also upgrade or create innovative supplemental services. This approach will enable broadcasters to best serve the interests of their audiences, and in turn, succeed in an increasingly competitive marketplace.

Stations also must be free to leverage digital technology to upgrade or introduce innovative supplemental services, as these products surely will be the driving force behind the growth and expansion of digital radio. As a general matter, digital supplementary services essentially will be upgraded versions of unregulated subsidiary subcarrier services that exist today, and as such, should not be newly regulated in a digital world. The same line of reasoning dictates that the Commission take a hands-off approach to the ability of digital stations to offer supplemental services on a subscription basis, and to deliver datacast services as well.

As NAB made clear in its initial comments, public interest obligations obviously apply to digital radio. The Commission can, as NAB explained in its comments, apply in a relatively straightforward manner its existing public interest regulatory framework to the range of potential services that IBOC broadcasters may offer. There is consequently no need, as a few commenters have urged, to rewrite completely the Commission's

broadcast public interest regulatory regime, especially in this proceeding narrowly focusing on the implementation of IBOC.

Commenters' proposals to alter radically the existing broadcast regulatory framework by adopting, *inter alia*, specific, content-based programming requirements should be rejected on a number of grounds. These proposals are duplicative of issues that are currently being addressed in detail in other FCC proceedings and, in any event, lack empirical or other justification. The specific proposals made for radically altering broadcasters' public interest obligations are also impracticable and burdensome, and will only serve to deter digital broadcasters from offering new and innovative services, both free over-the-air and subscription. The proposed content-based programming requirements are not only constitutionally suspect, but the Commission's statutory authority to adopt such requirements is also very much in doubt.

NAB notes the widespread support for its requests that the Commission authorize the use of separate antennas for FM IBOC signals without the need to seek and renew Special Temporary Authorization (STA) for this purpose and that the Commission grant delegated authority to the Media Bureau to consider and, where appropriate, approve on a blanket basis new IBOC transmission techniques and apparatus that are cost-effective and thus will provide further incentive to initiate IBOC service.

Finally, while NAB staunchly opposes piracy of which broadcasters are, themselves, victims, the Recording Industry Association of America has failed to demonstrate a right to protection or a consensus technical system to implement such protections. Moreover, a series of comprehensive and complex legislative actions delicately balancing the rights and interests of copyright owners and users of sound

recordings dictates that the Commission should be loath to step where Congress has so heavily tread.

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**REPLY COMMENTS OF
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The National Association of Broadcasters (“NAB”)¹ hereby files in response to comments received by the Commission on its *Further Notice of Proposed Rulemaking* on final operational requirements, licensing and service rule changes for terrestrial digital audio broadcasting, as well as on the accompanying *Notice of Inquiry* on copy protection issues.²

The issues addressed in response to the *Further Notice* include final authorization of FM and AM hybrid digital operations, including AM nighttime digital service, policies relevant to the digital radio transition, the types of digital services offered, how the FCC’s existing public interest, programming and operational rules should be applied to digital radio, and formal technical standards and documentation of the chosen iBiquity Digital “HD Radio” AM and FM IBOC systems.

¹ NAB is a nonprofit, incorporated association that serves and represents America’s radio and television broadcast stations.

² *Further Notice of Proposed Rulemaking and Notice of Inquiry*, MM Docket No. 99-325, (rel. Apr. 20, 2004) (“*Further Notice*”).

NAB is encouraged that the vast majority of commenters support the Commission's moving ahead to finalize the authorization of the AM and FM IBOC digital radio service under flexible policies and minimum restrictions. This will provide the regulatory certainty for broadcasters and equipment manufacturers to continue to roll-out digital operations and receivers and to develop and introduce innovative digital services for the benefit of the radio listening public. The testimony of stations here³ as to the results of their digital conversions, the ease of implementation, greatly enhanced signal quality, reactions of station personnel, lack of complaints and responses of the listening public is, we believe, but a portent of the positive reactions to IBOC yet to come.

NAB remains mindful of the challenges and potential trade-offs involved in converting the nation's radio stations to hybrid digital operations, especially in the case of AM nighttime operation. Because of the mercurial nature of nighttime propagation, AM IBOC nighttime operation will require careful monitoring and some individual resolutions. But we remain steadfast in our belief that digital radio will be transformative of both the AM and FM services, in terms of greatly improved audio quality, robustness of reception and opportunities for new, innovative services. This will be particularly so for the AM service, which, we are confident, will see a resurgence of formats, audiences and new services – so long as full time IBOC operation is authorized. These benefits

³ *See, e.g.*, Comments of Greater Media, Inc. (“Greater Media”), June 16, 2004, at 2-3; Comments of Infinity Broadcasting Corporation (“Infinity”), June 16, 2004, at 2-3; Comments of KPOF Radio (“KPOF”), July 15, 2004, at 1-3. *See also* Comments of Infinity Broadcasting Corporation (“Infinity June 14, 2004”), MM Docket No. 99-325, June 14, 2004, at 2 (concerning interim authorization of AM nighttime IBOC).

should more than justify efforts to deal with instances of interference and some trade-offs of secondary service.

What is needed now is for the Commission to move ahead with final authorization of IBOC under flexible policies and minimal regulation, providing the further incentive and certainty to radio broadcasters and others that their digital future is here.

I. The Conversion to Digital Radio Should Be Governed by the Marketplace.

Commenters were overwhelmingly consistent in supporting Commission policies to let the marketplace drive the transition and set the pace of conversion, both as to broadcaster implementation of IBOC and its new services and as to consumer adoption of the new receivers.⁴ As NAB noted in its initial comments, the nature of iBiquity's IBOC systems permit a digital radio transition that can be governed by the marketplace and consumers.⁵ iBiquity echoed this in its comments stating that the system was designed to allow, indefinitely, analog and digital broadcasts to co-exist.⁶ Broadcast Signal Lab points out that adoption can take as long as it needs to, enabling it to remain

⁴ See Comments of Cox Radio, Inc., (“Cox”) MM Docket No. 99-325, June 16, 2004, at 2; Comments of Clear Channel Communications, Inc., (“Clear Channel”), June 16, 2004, at 2; Comments of Nebraska Rural Radio Association (“Nebraska Rural”), June 10, 2004, at 3; Comments of Susquehanna Radio Co. (“Susquehanna”), June 1, 2004, at 2; Comments of Miller Media Group (“Miller Media”), May 24, 2004, at 3; Infinity at 3,4; Comments of National Public Radio (“NPR”), June 16, 2004, at 16; Joint Comments of the Named State Broadcasters Associations (“State Associations”), June 16, 2004, at 7; Comments of iBiquity Digital Corporation (“iBiquity”), June 16, 2004, at 5; Comments of Kenwood USA Corporation (“Kenwood”), June 16, 2004, at 7; Comments of Harris Corporation, (“Harris”), June 16, 2004, at 12; Comments of Broadcast Signal Lab, (“BSL”), June 16, 2004, at 2.

⁵ Comments of National Association of Broadcasters (“NAB” or “NAB Comments”), June 16, 2004, at 3.

⁶ iBiquity at 5.

transparent to the consumer.⁷ Commenters were clear, as well, that there should be no mandated deadlines imposed by the Commission, nor is there a need for such deadlines, with stations' remaining free to convert as their individual circumstances allow.⁸ Some smaller broadcasters said that IBOC conversion was too expensive for them now,⁹ and NAB appreciates that some smaller broadcasters may want to wait to implement IBOC until there is a larger embedded base of IBOC receivers.

NAB agrees with several commenters that the FCC can periodically review the progress of stations' conversions to IBOC and the introduction of IBOC receivers.¹⁰ iBiquity suggests the first review occur in five years.¹¹

In addition, a great many commenters responded to the Commission's inquiry as to policies that will encourage station deployment of IBOC facilities and services by urging the Commission to finalize authorization of IBOC service and to adopt flexible service rules that impose minimal regulation and encourage maximum innovation, as is discussed below.

II. Flexible Policies Will Best Foster the Development of IBOC Services.

The Commission has laid a sound foundation for the development of digital radio and has avoided the adoption of unnecessary regulations. As a result, digital radio service is off and running. For example, Clear Channel notes the Commission's findings in the *Further Notice* that, as of October 1, 2003, over 280 stations in more than 100

⁷ BSL at 2.

⁸ Cox at 2; Clear Channel at 2; Greater Media at 4; Infinity at 4; Comments of the Walt Disney Company and ABC, Inc. ("ABC"), June 16, 2004, at 7; Miller Media at 1-2; Comments of Radio Kings Bay, Inc. ("RKBI"), June 14, 2004, at 2-3; State Associations at 7; iBiquity at 5; Kenwood at 3; BSL at 2.

⁹ Miller Media at 1-2; RKBI at 2-3.

¹⁰ Cox at 3; State Associations at 7; BSL at 2.

¹¹ iBiquity at 6.

markets had started broadcasting an IBOC signal or were in the process of converting, and several hundred more stations have plans to activate digital service by the end of 2004.¹²

The overwhelming majority of commenters agree that the most effective way for the Commission to continue this progress is to adopt policies that provide broadcasters with the flexibility needed to use their digital signals to offer a high quality main audio stream and also upgrade or create innovative supplemental services.¹³ This approach will enable broadcasters to best serve the needs and interests of their audiences, and in turn, succeed in an increasingly competitive marketplace. In fact, even radio stations with no immediate plans to actually deploy digital technology,¹⁴ and consumer groups that urge the Commission to impose additional public interest obligations on digital broadcasters,¹⁵ support flexible IBOC policies for secondary audio channels, high definition quality, datacasting, and subscription services.

¹² Clear Channel at 2. Last week, Clear Channel announced the launch of an aggressive new effort to rollout digital broadcasting equipment to 1,000 of the company's stations, working with Ibiquity Digital's HD Radio technology. Specifically, the company plans to install 95 percent of its top 100 markets within three years. Press Release: *Clear Channel Radio Launches Advanced Technology Initiative, Accelerates Rollout of Digital Radio*, July 22, 2004.

¹³ *Further Notice* at ¶ 18. See, e.g., BSL at 7; Comments of Minnesota Public Radio ("Minnesota"), June 16, 2004, at 1; Comments of WGUC-FM, Cincinnati Classical Public Radio, Inc. ("WGUC"), June 16, 2004, at 2; Comments of Station Resource Group ("Station"), June 16, 2004, at 3-4; Comments of Curators of the University of Missouri ("Missouri"), June 16, 2004, at 2-3; Comments of Boise State Radio ("Boise State"), June 14, 2004, at 2; Comments of Wisconsin Public Radio ("Wisconsin"), June 16, 2004, at 2; Susquehanna at 3-4; Comments of The WOSU Stations of The Ohio State University ("WOSU"), June 1, 2004, at 1-2; Comments of Harris Corporation ("Harris"), June 14, 2004, at 6-8; Comments of Microsoft ("Microsoft"), June 16, 2004, at 3-4; Kenwood at 2-3; Cox at 3-4.

¹⁴ RKBI at 2-4.

¹⁵ Comments of Alliance for Better Campaigns, *et al.* ("Alliance"), June 16, 2004, at 4-10.

As noted by various commenters,¹⁶ radio stations must compete for listeners' attention with many different media, including television, portable digital audio players (e.g., Apple iPod), compact discs, video games, movies, and the Internet. Terrestrial radio stations also face direct competition from satellite radio providers XM and Sirius. Naturally, this expanded competition has caused radio stations to evaluate their service and search for innovative formats, personalities and other new features that will increase consumer demand, and digital radio is a major element of that effort. Therefore, broadcasters need no additional incentives, or regulatory mandates, to leverage digital technology to serve their audiences.

Cox Radio states that digital radio is still in its infancy, and that no one can anticipate all of the technological innovations that may result from digital conversion. The Commission therefore must refrain from imposing any service rules that inadvertently hinders the growth of digital radio. Instead, the Commission should maintain a "do no harm" position. Cox suggests that if real harms arise later on during the conversion, the Commission can always adopt responsive rules at that time. This sort of approach will help ensure that the public realizes the full benefits of digital radio.¹⁷

Specifically, with respect to digital service rules, many parties urge the Commission to adopt an approach under which radio stations must provide at least one high quality audio stream, but have the discretion to decide whether, and to what extent,

¹⁶ See, e.g., NAB at 7; Comments of Entercom Communications ("Entercom"), June 16, 2004, at 3.

¹⁷ Cox at 3-4.

to scale their signals in order to deliver supplemental audio channels (“SACs”).¹⁸ NAB believes that nothing more than this “baseline” requirement is required to ensure that the benefits of digital radio flow to consumers.¹⁹

Similarly, the Commission should refrain from dictating the minimum level of quality of a station’s main audio signal.²⁰ At this early stage of the digital radio transition, it is impractical to require a particular number of bits needed to sustain a main audio signal of sufficient minimum quality. The Commission many years ago ceased regulating audio quality for existing analog service, and as iBiquity states, there is no reason to change course for digital operations.²¹ In the analog environment, some stations use little or no processing to create a purer sound, while others may use heavy processing to produce a “signature” sound to meet the desires of their particular audience. In either case, the decision whether to use processing is left to the station, free from government interference. This is the path that the Commission should follow in the digital world.²²

Also, as Cox Radio notes, any restrictions contemplated by the Commission may become obsolete soon after they are adopted. Technical advances in digital signal processing, combined with unforeseen marketplace competition, should expand multicasting capability for some time. Therefore, the Commission should rely on the

¹⁸ See, e.g., NAB at 7; NPR at 9-16; iBiquity at 8-10; Comments of Corporation for Public Broadcasting (“Corporation for Public Broadcasting”), June 16, 2004, at 2; Comments of American University – WAMU (“WAMU”), June 16, 2004, at 2.

¹⁹ NPR at 9.

²⁰ *Further Notice* at ¶ 19.

²¹ iBiquity at 13.

²² *Id.*; see also BSL at 6.

inherent incentives of radio stations to maximize digital technology, to deliver the best mix of quality and quantity of audio streams to their audiences.²³

If the Commission must regulate in this area, NAB would propose that, rather than some particular minimum number of bits, the Commission should require only that a station's digital main audio signal must be at least equivalent in audio quality to the station's analog main audio signal.²⁴ However, as Entercom notes, the Commission need not worry that broadcasters will discount the quality of their signal, or provide an inferior product.²⁵ Instead, a broadcaster's format or genre will dictate the number of bits needed to support the main audio signal. For example, some broadcasters will find it advantageous to promote the high definition quality of their signals, such as those offering classical, jazz, or opera. Other stations, like those with talk formats, may best serve their audiences with main audio signals consisting of lower bit rates, along with multiple ancillary services. Beyond this minimum obligation, no additional rules are necessary. Absent a showing that the broadcasting industry has clearly diminished the value of digital radio by delivering inferior audio service, the Commission should enable stations to decide the level of quality, and number of audio streams, they want to deliver.²⁶

iBiquity also notes that such an approach also would be consistent with the Commission's treatment of satellite radio. The Commission has allowed XM and Sirius total freedom to set the audio quality levels for their broadcasts, and in both cases,

²³ Cox at 4.

²⁴ Digital technology allows broadcasters to scale their audio quality downward to a substantial degree without affecting audio quality. *See* iBiquity at 6-9 for a more complete discussion of the relationship between scalability and audio quality.

²⁵ Entercom at 3.

²⁶ iBiquity at 13 –14.

according to iBiquity, the SDARS systems are operating at levels well below the 96 kbps level of the IBOC high definition radio system with no complaints about audio quality. Terrestrial radio stations should receive equal flexibility.²⁷

Furthermore, beyond an obligation to deliver at least one main audio channel of equal or better quality than a station's existing analog service, broadcasters must be free to take advantage of the flexibility provided by digital technology to scale their signals to upgrade existing supplementary services as well as offer new services for their audience. For digital radio to fulfill its potential, supplementary services must be a viable option. The Commission itself has recognized this concept:

We recognize that one of the most significant benefits of digital technology is its potential to enhance existing auxiliary services such as reading for the blind and foreign language programming. Entirely new auxiliary services may also be possible – for example, multiple audio programming channels, audio-on-demand service, and interactive features.²⁸

Almost all of the commenters support a flexible approach to digital service rules. The breadth and variety of upgraded and new supplemental services is limited only by the imagination of broadcasters. Many stations have plans to provide one or two, or even more, channels of content to their audience. For example, many public radio stations intend to devote their main audio channel to current regular programming, while using a supplemental channel for 24-hour classical music, or foreign language programming, or some other niche service, including:

- Bluegrass music;²⁹
- Homeland security and emergency information;³⁰

²⁷ *Id.* at 14.

²⁸ *First Report and Order*, MM Docket No. 99-235, 17 FCC Rcd, 19990, 20003 (2002).

²⁹ WAMU at 3.

³⁰ NPR at 2.

- Foreign language programming aimed at Somali immigrant population and other non-English speaking listeners;³¹
- Programming targeted at Native American communities;³²
- Statewide 24-hour classical music;³³
- Teen oriented information and entertainment;³⁴ and
- 24-hour jazz station in communities currently without this format.³⁵

These examples demonstrate terrestrial radio stations' ever-growing need for additional programming outlets to serve their increasingly diverse audiences, and also show the potential of digital technology to enable broadcasters to better serve the public interest with more diverse programming.

Allowing stations the flexibility to decide how many audio signals to deliver also would be consistent with the current regulatory scheme, which allows, but does not require, broadcasters to provide multiple streams via subcarriers.³⁶ In this vein, supplemental digital radio services are really nothing more than upgraded versions of current subcarrier services which often suffer from quality constraints, yet are still used to provide vital services, such as reading services for the blind.³⁷ Many of these services

³¹ WOSU at 2; Comments of Miami-Dade County (“Miami”), June 15, 2004, at 2 (noting significant demand for foreign language and ethnic programming in Dade County); Comments of State of Wisconsin Educational Communications Board (“Wisconsin Educational”), June 16, 2004, at 2 (expanding service to growing Hmong community in northwestern Wisconsin).

³² Minnesota at 1.

³³ Comments of Rocky Mountain Corporation for Public Broadcasting (“Rocky Mountain”), June 16, 2004, at 2.

³⁴ Comments of WNCU – North Carolina Central University (“WNCU”), June 16, 2004, at 3.

³⁵ Boise State at 1.

³⁶ Greater Media at 6.

³⁷ iBiquity notes in its comments that it has been working with the International Association of Audio Information Services (“IAAIS”) and National Public Radio to ensure that reading services may benefit from the digital radio conversion through enhanced quality and availability, and NAB supports these efforts. NAB agrees with several commenters that digital radio holds promise for protecting and enhancing reading services, in terms of both improved quality and potentially more accessible and user-

hope to benefit from digital technology,³⁸ and NAB believes that the Commission should enable broadcasters to scale their signal as they see fit to best foster the improvement and development of current and new supplemental services.

Accordingly, although enhanced audio quality is important to certain stations, especially those with certain music formats, the creation of supplemental channels may be the driving force behind consumer acceptance of digital radio, and in turn, the purchase of new digital receivers.³⁹ As National Public Radio states, terrestrial radio is the “most ubiquitous, most accessed content delivery medium in the United States, and we believe digital technology and its multicasting functionality will reinvigorate the service capabilities of the radio broadcasting medium.”⁴⁰ Broadcasters therefore must be allowed to develop and deliver supplemental services as they see fit for their audiences.

The same logic dictates that the Commission should adopt a flexible policy regarding digital stations’ offering supplemental services or datacast services on a subscription basis. In NAB’s earlier comments, we stated that subscription services should be exempt from the general bar against an FM licensee’s agreement to deliver its programming to any particular subscriber.⁴¹ First, we noted that digital radio stations will need maximum flexibility to respond to competitive pressures from the new satellite pay services, which operate on a subscription basis. Second, we asserted that allowing radio

friendly off-the-shelf consumer radios. BSL at 6; Comments of IAAIS (“IAAIS”), June 15, 2004, at 3-4; Kenwood at 10.

³⁸ Broadcast Signal Lab also conceives of a radio service for the hearing impaired that could be enabled by the rich text and graphics supported by digital technology. Broadcast Signal Lab states that it is too soon to establish any rules for such a service, and the industry should be granted the “time and scope” needed to develop such new features. BSL at 7.

³⁹ NPR at 7.

⁴⁰ *Id.* at 5.

⁴¹ NAB at 10-11.

stations to enlist subscribers for supplementary services will further increase broadcasters' incentives to invest in digital technology and in creating new and innovative services. For example, although some supplementary digital services may prove attractive to a wide audience, certain others may be more narrowly targeted. Broadcasters must have the flexibility to respond to the needs of more narrow audiences as well. In addition, Kenwood makes the interesting point that the revenue generated by SAC subscription channels could help support the offering of other free supplementary channels that may face initial hurdles in generating advertising revenues.⁴²

We noted that digital supplementary services essentially will be digitized upgrades of FM subcarrier services, which have long been exempt from the bar on subscription.⁴³ Even the Commission in the *Further Notice* recognized the potential for these services, listing enhanced news programming and vehicular navigation as two such possibilities.⁴⁴ Microsoft, in particular, agrees that the Commission should foster digital datacasting with flexible policies, noting that it has recently deployed its Smart Personal Objects Technology service, which uses FM subcarriers to deliver real-time data to mobile personal devices. Microsoft asserts that digital technology will open even more doors for such innovative services.⁴⁵ Accordingly, NAB believes that, like existing subcarrier services, the creation and offering of digital supplementary services should be left to the discretion of broadcasters. The Commission should encourage digital datacasting, or at the very least, not adopt unduly restrictive constraints that could hinder their development.

⁴² Kenwood at 3.

⁴³ 47 C.F.R. § 73.293.

⁴⁴ *Further Notice* at ¶ 23.

⁴⁵ Microsoft at 3.

A common theme expressed by commenters regarding ways in which the transition to digital can be hastened is for the Commission to craft rules encouraging innovative uses of IBOC-enabled datacasting. Cox notes that “datacasting innovations promise to transform radio broadcasting, allowing stations to develop and deploy new and exciting services,” adding that “such expanded opportunities will augment radio stations’ public service capabilities in ways no one can yet predict.”⁴⁶ Sage Alerting Systems, a manufacturer of Emergency Alert System (EAS) equipment, asks in its comments that the Commission “quickly adopt rules authorizing full use of IBOC technology on AM and FM stations” so as to “enable significant advances in alerting and warning technology through the use of the digital data stream on AM and FM HD radio stations.”⁴⁷ NAB agrees with these commenters and in addition supports iBiquity’s call for FCC authorization of the extended hybrid mode of operation.⁴⁸

The extended hybrid mode, which adds up to 50 kbps of data carrying capacity to an FM IBOC signal, will allow broadcasters to support a plethora of datacasting services without impacting the quality of the 96 kbps main channel digital audio signal (or equivalently, the quality of combined main and supplemental digital audio services which a broadcaster may elect to transmit using the sac features of IBOC). IAAS has expressed specific interest in the use of extended hybrid, noting that they are “participating in testing with NPR, iBiquity, Harris, and Kenwood USA to learn if a

⁴⁶ Cox at 5.

⁴⁷ Comments of Sage Alerting Systems, Inc. (“Sage”), MM Docket No. 99-325, June 16, 2004, at 2.

⁴⁸ iBiquity at 9-12.

service such as radio reading services (RRS) can be delivered using low bit rate encoders on the extended hybrid partitions.”⁴⁹

As discussed by iBiquity, while the use of extended hybrid increases the bandwidth occupancy of the digital carriers, this will not increase interference to adjacent channels since the additional (i.e. extended hybrid) digital carriers fall between a station’s primary digital carriers and its host analog signal.⁵⁰ Consequently, each broadcaster will be able to assess and control the level of impact these extended hybrid signals have on their transmission. NAB disagrees with the staged approach of authorization suggested by Kenwood as unnecessary and potentially disruptive to the digital transition.⁵¹ The Commission should authorize broadcasters to adopt all three extended hybrid modes and allow broadcasters to make the appropriate operational decisions based on the needs of their listeners.

Thus, as a general matter, it is premature to determine whether there are certain datacast services that should be required.⁵² At this point in time, the Commission should merely provide broadcasters with the maximum flexibility to develop and deliver supplemental services. Again, providing broadcasters flexibility in this area will help expedite the emergence of digital radio.

With respect to IBOC service rules, NAB urges the Commission to not impose fees on ancillary services offered by digital broadcasters because there is no

⁴⁹ IAAIS at 4.

⁵⁰ iBiquity at 11.

⁵¹ Kenwood at 4-5.

⁵² The same logic applies to any potential FCC policies concerning secondary audio channel transmissions, subsidiary communications, or sponsorship identification, should be amended for digital technology. 47 C.F.R. §§ 73.127, 73.295 and 73.593; *Further Notice* at ¶ 27.

reason to break from the Commission's historical approach of not imposing fees on new services offered by existing licensees.⁵³ The Commission's long-standing reasoning that such fees could impede broadcasters' service of the public interest has been correct in the analog world, and should be extended to the digital world.⁵⁴

As iBiquity states, supplementary digital channels will be mere upgrades to existing SCA services. Stations currently may provide both datacasting and SCA services without incurring spectrum or other fees, and the same approach should apply in the digital world.⁵⁵ iBiquity also correctly distinguishes digital radio from ancillary digital television services, on which spectrum fees are imposed.⁵⁶ Given the Commission's decision to allocate additional spectrum for digital television, the Congress determined that broadcasters might receive an unfair advantage over other media that had obtained other spectrum through the auction process. Thus, to level the playing field, Congress required the Commission to impose fees on ancillary services. However, digital radio requires no allocation of additional spectrum, and therefore no justification for imposing additional fees. Instead, any SAC or datacasting services will be created at broadcasters' expense, such that imposing fees on these services could hinder their development. As Broadcast Signal Lab notes:

Allowing stations to "offer for-fee services and advertising supported services in parallel with the main program will enable broadcasters to improve the quality and competitiveness of their programming to the public. A tax on this activity will ensure the premature death of such an opportunity, because the new services are more about competitiveness, relevance, and better public service than they are about new profits."⁵⁷

⁵³ *Further Notice* at ¶ 29.

⁵⁴ *See Subsidiary Communications Authorizations*, 53 RR 2d 1519, 1523 (1983).

⁵⁵ iBiquity at 19.

⁵⁶ *Id.* at 19-20 citing 47 U.S.C. § 336(e).

⁵⁷ BSL at 11.

NAB thus believes that imposing fees on SAC services would be counter-productive and unjustified.

III. The Commission Should Reject Proposals To Alter Radically The Existing Broadcast Regulatory Regime.

As NAB made clear in its comments, public interest obligations clearly apply to digital radio.⁵⁸ The same public interest obligations that apply today to broadcasters' single analog audio service should continue to apply if radio stations utilize IBOC digital radio to transmit a single high quality audio service. If IBOC stations transmit a main channel audio service with a free, over-the-air secondary audio channel, then existing "broadcast type" public interest obligations generally should apply to those services. And the public interest obligations applying to subscription and data or other non-audio services by an IBOC broadcaster should be comparable to the obligations currently applying to similar subscription or data services offered by other licensees, whether or not those competing licensees also provide broadcast services. Thus, the Commission can in a relatively straightforward manner apply its existing public interest regulatory framework to the range of potential services that an IBOC broadcaster may offer in the future.

Because the Commission can adapt its current regulatory framework to address public interest questions for digital radio, there is, as other commenters have stated, "no need for a new comprehensive regime of regulation to govern DAB."⁵⁹ For that reason alone, the Commission should reject in this proceeding focusing on the implementation of IBOC calls by the Alliance for Better Campaigns, *et al.* ("Alliance")

⁵⁸ NAB at 17-23

⁵⁹ NPR at 9.

for a complete and radical rewriting of the Commission’s broadcast public interest regulatory regime. Moreover, the laundry list of proposals made by Alliance lack justification, are impracticable and overly burdensome, and present a number of policy, statutory and constitutional problems.

A. Commenters Have Shown No Justification for a Radical Alteration of the Broadcast Public Interest Regulatory Framework, Especially in this Narrowly Focused Radio Proceeding.

Alliance attempted to justify its proposals for radically rewriting the Commission’s public interest regulatory framework by asserting that IBOC broadcasters “will use more spectrum” than analog broadcasters because digital radio technology involves the “use of side bands.”⁶⁰ This nonsensical argument in no way supports Alliance’s calls for very significantly increasing broadcasters’ public interest obligations. In implementing IBOC, radio broadcasters will in fact neither receive nor use any additional spectrum beyond current allocations. Terrestrial radio will therefore differ from some other communications services, which have required additional spectrum allocations for converting to digital.⁶¹ In sum, IBOC DAB will make far more efficient use of the spectrum than does the existing analog system, as broadcasters will be able to provide more services within the same allocation. Using the same spectrum resource more efficiently so as to provide additional services to consumers is hardly a justification for increasing regulatory requirements on broadcasters.

⁶⁰ Alliance at 16-17.

⁶¹ Indeed, by agreeing to “go digital” within their current spectrum, radio broadcasters have willingly accepted the small but unavoidable amount of additional interference resulting from an in-band digital implementation because they recognize the widespread benefits, including public benefits, of an in-band approach.

Moreover, radio broadcasters are not, as Alliance implied, receiving such a windfall from merely being allowed to convert to digital that very greatly increased public obligations must be imposed on them so as to extract some form of payment.⁶² To the contrary, radio broadcasters need to convert to digital just to remain economically and technically competitive in a media marketplace where their audio and video competitors will all have converted to digital.⁶³ Also contrary to Alliance’s implications, the listening public will significantly benefit from the radio industry’s conversion to DAB. Digital radio will enrich service to consumers through vastly improved sound quality on AM and FM channels, as well as through more diverse program offerings on multiple audio streams and perhaps other services, including data. Thus, NAB rejects Alliance’s premise that the industry’s conversion to DAB will not “result in direct, concrete benefits for the listening public” without a complete and immediate overhaul of the Commission’s entire broadcast public interest regulatory regime.⁶⁴

NAB also strongly disagrees with the commenters who claimed that the radio industry as a whole is failing to serve the public interest and that, as a result, the Commission should in this proceeding radically alter its well-established public interest regulatory framework. Many of these claims are simply unsupported by empirical

⁶² See Alliance at 3 (“broadcasters will receive significant additional benefits through DAB, and will receive even more benefits when the Commission adopts a technical standard for all-digital audio broadcasting”) and at 16 (“digital broadcasters will receive significant flexibility with the new technology and the opportunity to earn more revenue”).

⁶³ The Commission seemed to recognize this in ¶ 16 of the *Further Notice* (IBOC will “enable terrestrial radio broadcasters to better compete with satellite radio services now in operation”). And, in any event, even if broadcasters were to benefit from the conversion to digital, that fact alone would not support the imposition of new obligations.

⁶⁴ Alliance at 16.

evidence,⁶⁵ and a number have also been refuted by NAB and other commenters in earlier proceedings.⁶⁶ In any event, this proceeding focusing on radio stations' implementation of IBOC is not the proper vehicle for rewriting the Commission's regime of broadcast public interest regulation that applies to both television and radio stations. The proposals made by Alliance and other commenters are being specifically, thoroughly and more properly addressed in one or more proceedings already pending at the Commission that directly focus on broadcasters' public interest obligations.⁶⁷ It is therefore unnecessary and duplicative to address these issues in this narrowly-focused radio proceeding, as

⁶⁵ See, e.g., Comments of National Academy of Recording Arts and Sciences, Inc. ("Academy"), June 16, 2004, at 3 (claiming without empirical evidence that "varied programming and local decision making rarely exists in commercial radio" today and that "massive consolidation" has caused "[n]arrow national playlists," which "reduce artist access to the airwaves" and "consumer exposure to quality recordings"); Comments of American Federation of Musicians, *et al.* ("AFM"), June 16, 2004, at 5 (asserting with no supporting material that "local access to commercial airwaves" and the "diversity of types of music found on the radio" has greatly declined). Some commenters have also asserted complaints about the structure of the music industry that are not only unrelated to the conversion to DAB, but in fact have nothing to do with broadcasters' alleged failures to meet their Title III public interest obligations and nothing to do with any subject under the FCC's jurisdiction. See, e.g., AFM at 3-4 (complaining about the "grave injustice in US law" that purportedly allows broadcasters to "dodge payment of a performance royalty" to performing artists).

⁶⁶ See, e.g., Reply Comments of NAB, MM Docket Nos. 01-317 and 00-244 (filed May 8, 2002); Reply Comments of NAB, MB Docket No. 02-277 at 15-16, 63-69 (filed Feb. 3, 2003).

⁶⁷ For example, issues relating to a local programming requirement for radio broadcasters (see Alliance at 27; Academy at 3) are addressed in detail in the Commission's *Notice of Inquiry on Broadcast Localism*, MB Docket 04-233, FCC 04-129 at ¶¶ 13-14 (*rel.* July 1, 2004) ("*Localism NOI*"). The Alliance (see comments at 31-36) also made proposals for generally altering stations' obligations under the political broadcasting rules. Again, the *Localism NOI* (at ¶¶ 19-23) addressed the political programming rules, and inquired whether they should be revised for both television and radio stations. Calls by Alliance to significantly increase broadcasters' disclosure requirements (see comments at 46-47) are repetitive of both the *Localism NOI* (at ¶¶ 10-11) and another pending proceeding on broadcasters' public interest obligations. See *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, 15 FCC Rcd 19816 (2000).

claims that broadcasters are generally failing to serve the public interest will be addressed – and refuted – in the appropriate proceedings.

B. The Specific Proposals Made for Altering Broadcasters’ Public Interest Obligations Are Impracticable, Burdensome and Will Only Discourage Digital Broadcasters from Offering New and Innovative Services.

Even (temporarily) setting aside the serious statutory and constitutional problems with the lengthy list of proposals to overhaul broadcasters’ public interest requirements, a cursory examination of these proposals shows many of them to be simply impracticable. For example, Alliance proposed to require licensees to air a minimum number of hours per week of “qualifying local civic or electoral affairs programming on the most-listened to (primary) channel they control/operate during drive-time and peak listening periods.” To be “qualifying,” electoral affairs programming must meet a strict definition, such that, for example, programming that discusses the “strength or viability of a candidate or ballot issue; that focuses on a candidate or ballot issue’s status in relation to polling data, endorsements or fundraising totals; or discusses an election in terms of who is winning or losing” would *not* qualify.⁶⁸

This or any similar programming requirement would be wholly impracticable and virtually impossible to administer. Would programming “qualify” as “local electoral affairs programming” if it, for example, discussed a candidate’s declining prospects in an election due to his or her stand on a controversial and important local issue? Who would determine whether every single political or candidate oriented story on every single radio

⁶⁸ Qualifying “local electoral affairs programming consists of candidate-centered discourse focusing on the local, state and United States Congressional races for offices to be elected by a constituency within the licensee’s broadcast area.” This programming would include “candidate debates, interviews, or statements” and “substantive discussions of ballot measures.” “Local civic programming” has an equally long and involved definition. Alliance at 26.

station in the country did or did not meet the definition of “qualifying” electoral programming? Obviously the Commission could not – indeed, the Commission would be hard pressed even to resolve the disputes that would inevitably arise (especially in the renewal context) as to whether particular programs “qualify” and therefore whether stations aired the requisite amount of electoral and civic programming. And other proposals made by Alliance would be just as impracticable and difficult to administer.⁶⁹

The mere description of just some of Alliance’s proposals also shows that these proposals would ultimately disserve consumers by discouraging broadcasters from utilizing DAB to offer new and innovative services. Alliance proposed, for example, that broadcasters could “earn” the total amount of points necessary to offer a subscription service by turning over for free an entire audio stream to an independent noncommercial entity.⁷⁰ If the Commission were to adopt this or a similar proposal, the result would be clear – broadcasters would be deterred from developing and offering subscription services to consumers.⁷¹ As the Commission has previously recognized, a better

⁶⁹ For instance, Alliance proposed that broadcasters must “earn” the right to use DAB to offer any subscription service. To earn this right, Alliance (*see* Alliance at 51-62) suggested a complicated menu approach where different types of programming and services would be awarded differing levels of points. For example, broadcasters would earn “two points for every 5 minutes they offer” of additional defined “public interest” programming “during drive time and one point for every 5 minutes they offer during other broadcast hours.” If broadcasters provided data with audio programming, they would “receive 2 points for every ten minutes of data dedicated to public interest data transmissions during drive time, and 1 point for every 10 minutes outside of drive time.” How does Alliance expect the Commission to administer such a scheme? Who would keep track of the points that thousands of radio stations “earned”? How should “public interest” programming be defined, and who would decide whether the programming aired met the definition so that broadcasters properly received their points?

⁷⁰ Alliance at 54

⁷¹ Numerous commenters, including commercial and noncommercial broadcasters and equipment manufacturers, agreed that the Commission should adopt a flexible, minimally regulatory approach to DAB, which avoids imposing unnecessary costs and burdens on

approach would be to roughly equalize regulatory treatment between similar services so that, if a digital broadcaster offered a data or other subscription service, the obligations applying to that service would be comparable to the obligations applying to any similar data or other service offered by other licensees, whether or not those licensees also provided broadcast services.⁷²

Beyond virtually guaranteeing that broadcasters would not offer subscription services including data,⁷³ requirements such as those advocated by Alliance would be extremely burdensome for many radio stations (especially smaller, less profitable and lower-rated ones), and would add to the competitive difficulties of an industry facing growing competition from satellite services. Nowhere in their comments does Alliance consider that their proposals for both a 20% local origination requirement and a local civic and electoral affairs programming requirement would impose any burden

broadcasters as they work to develop and implement DAB. *See, e.g.*, Harris at 12; iBiquity at 7, 17-18, 27; Cox at 4-6; Susquehanna at 3, 5; Corporation for Public Broadcasting at 3; WOSU at 2-4; Comments of the University of South Florida (“South Florida”), June 16, 2004, at 2-3. Requirements such as those advocated by Alliance are the complete antithesis of the flexibility advocated by the considerable majority of commenters.

⁷² When expanding broadcast licensees’ authorized uses of their FM subchannels to include nonbroadcast as well as broadcast uses, the FCC determined that it would treat “FM subchannels used for non-broadcast related communications” (such as paging, dispatching and data distribution) in the “same manner, with all the same benefits, obligations and responsibilities as the [nonbroadcast licensee] providers of similar services.” *First Report and Order*, BC Docket No. 82-536, 53 RR 2d 1519 at ¶ 20 (1983). The FCC should, in the DAB context, continue to recognize the “equity” of treating data and other nonbroadcast services offered by broadcast licensees “in the same manner” as “similar services” offered by nonbroadcast licensees, such as “common carrier” or “private radio” licensees. *Id.*

⁷³ *See* iBiquity at 18 (noting that “there needs to be significant development work and innovation” for DAB data services “to flourish,” and that the FCC could provide an environment conducive to this development and investment by providing “flexibility and minimal regulation of datacasting services”).

whatsoever on free, over-the-air radio stations.⁷⁴ If the Commission's goal in this proceeding is to encourage radio broadcasters to expend the funds to convert to DAB and to offer multicasting and other innovative services to consumers expeditiously,⁷⁵ then new regulatory burdens, including a local origination and additional programming requirements, should not be adopted at the very beginning of the radio industry's digital transition.⁷⁶ Consumers will be the ultimate losers if an overly regulatory approach to DAB inhibits the emergence of new digital services, whether audio or data, free over-the-air or subscription.

C. The Specific Proposals Made for Altering Broadcasters' Public Interest Obligations Present Serious Statutory and Constitutional Problems.

Beyond their impracticable and burdensome nature, the proposals made by Alliance to alter radically the broadcast public interest regulatory framework raise serious statutory and constitutional questions. As described above, Alliance and other commenters have proposed specific, content-based public interest requirements, which

⁷⁴ The Commission itself has previously recognized that smaller and /or lower-rated broadcast stations with limited resources may simply be unable to offer significant amounts of certain types of programming, such as local news, due to the costs involved. *See Report and Order* in MM Docket Nos. 91-221 and 87-8, FCC 99-209 at ¶ 66 (1999).

⁷⁵ *See Further Notice* at ¶ 16 (noting the "spectrum efficiencies and related new service opportunities inherent in the IBOC system," and seeking comment on how to "encourage radio stations to convert to a hybrid or an all-digital format").

⁷⁶ NAB is not aware that the FCC has *ever* imposed on radio broadcasters a minimum local origination requirement, and the FCC certainly should not now impose a wholly unprecedented local origination requirement on emerging services, such as multicasting DAB, that have not yet gained even a toehold in the marketplace. *See TRAC v. FCC*, 801 F.2d 501, 518 (D.C. Cir. 1986) (court upheld FCC's determination not to apply certain broadcast public interest requirements to new teletext services offered by television broadcasters on grounds that the "burdens of applying" such obligations "might well impede the development of the new technology"). *See also* Greater Media at 9; State Broadcasters at 14-15; NPR at 14-15; Infinity at 8-9; Clear Channel at 4-5 (opposing, particularly at initial state of DAB's implementation, imposition of detailed programming rules including a local origination requirement that could burden development of the nascent technology).

are not explicitly authorized by any provision of the Communications Act.⁷⁷ In *Motion Picture Association of America v. FCC*, 309 F.3d 796, 807 (D.C. Cir. 2002), the D.C. Circuit concluded that the Commission lacked authority to require television broadcasters to provide video described programming because no specific statutory provision authorized such a requirement and because the Commission’s general powers under Sections 1, 4(i) and 303(r) of the Communications Act did not authorize the adoption of rules “about program content.” Because proposals to require broadcasters to air minimum amounts of locally produced independent programming and qualifying local civic and electoral programming obviously “implicate program content,” and are not explicitly authorized by any provision of the Communications Act, the Commission’s statutory authority to adopt such content requirements is very much in doubt. *Id.* at 802-803.

The Commission’s authority to require broadcast stations to afford reasonable access to state and local political candidates is also highly suspect.⁷⁸ Such a requirement is not authorized by any specific provision of the Communications Act and would certainly “implicate program content.” *Id.* Therefore, the Commission’s authority to adopt an access requirement for state and local candidates is very doubtful under *MPAA*.

Moreover, this proposed access requirement for state and local candidates is not consonant with the clear terms of the Communications Act, which creates a right of

⁷⁷ These content-based proposals include a 20% local origination programming requirement; a “local civic and electoral affairs” programming requirement; and a requirement that broadcasters air defined types of additional “public interest” programming beyond their “core obligations” to earn the right to offer any subscription service.

⁷⁸ See *Alliance* at 35 (urging FCC to “require digital broadcasters to provide reasonable access to local and state candidates”).

reasonable access only for *federal* candidates. *See* 47 U.S.C. § 312(a)(7). The Commission is not free to simply ignore this congressional directive and adopt a regime of political broadcasting different from the system specifically created by Congress. Such an action would violate the “ancient maxim” of *expressio unius est exclusio alterius* (*i.e.*, “[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode”).⁷⁹ In sum, because the only statutory provisions in the Communications Act directly addressing political broadcasting establish a right of access only for federal candidates, no other provisions of the Act (including the general public interest provisions, which do not even refer to political broadcasting) should be interpreted as providing the Commission authority to adopt a right of access for state and local candidates.⁸⁰

Finally, the specific content-based proposals made by Alliance raise very serious constitutional questions, as “broadcasters are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public duties.”⁸¹ The Supreme Court has explicitly stated that the “FCC’s oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by

⁷⁹ *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974).

⁸⁰ Courts have made clear, in several cases involving administrative agencies, that agencies cannot rely on their general authority to act in the “public interest” or “public convenience” if in so doing they ignore or act inconsistently with a specific congressional directive. *See, e.g., Markair v. Civil Aeronautics Board*, 744 F.2d 1383, 1385-86 (9th Cir. 1984); *Regular Common Carrier Conference v. U.S.*, 820 F.2d 1323, 1331 (D.C. Cir. 1987); *International Brotherhood of Teamsters v. ICC*, 801 F.2d 1423, 1429-30 (D.C. Cir. 1986), *different results reached on rehearing due to subsequent legislation*, 818 F.2d 87 (D.C. Cir. 1987). The FCC should therefore not attempt to rely on its general public interest authority to create a right of reasonable access for state and local candidates when Congress has expressly limited such access rights to federal candidates.

⁸¹ *FCC v. League of Women Voters*, 468 U.S. 364, 378 (1984).

broadcast stations.”⁸² Alliance’s proposed civic and electoral affairs programming and 20% local origination programming requirements would both attempt to “ordain . . . particular type[s] of programming that must be offered” by broadcasters, contrary to *Turner*, 512 U.S. at 650.

Alliance’s proposal to require specific amounts of particular types of programming would also require, as discussed in Section B. above, the Commission “to oversee far more of the day-to-day operations of broadcasters’ conduct,” and would “tend to draw it into a continuing case-by-case determination” of whether the programming aired by broadcasters did or did not fit the regulatory definition of qualifying local civic or electoral affairs programming.⁸³ *CBS v. DNC*, 412 U.S. 94, 127 (1973) (describing the difficult First Amendment problems with requiring broadcasters to accept editorial advertisements). In the *CBS* case, the Supreme Court found that “the risk of an enlargement of Government control over the content of broadcast discussion of public issues” was inherently too great in a requirement that broadcasters “accept some editorial advertising.” *Id.* at 125-126. This “risk of an enlargement of Government control” would be exponentially greater if the Commission were to adopt Alliance’s complex

⁸² *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 650 (1994). See also *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1430 (D.C. Cir. 1983) (Congress “has explicitly rejected proposals to require compliance by licensees with subject-matter programming priorities,” and any “Commission requirement mandating particular program categories would raise very serious First Amendment questions”).

⁸³ The same problem would occur if the Commission had to keep track of the points that thousands of radio stations earned by airing certain “public interest” programming to receive the right to offer a subscription service.

scheme of content-based regulation affecting the full range of free, over-the-air and subscription DAB programming and services.⁸⁴

In sum, the Commission should reject proposals made in this proceeding to alter radically the existing broadcast regulatory framework by adopting, *inter alia*, specific, content-based programming requirements. These proposed requirements are statutorily and constitutionally suspect, and would clearly inhibit the expeditious implementation of DAB and the development of new radio services, to the ultimate detriment of consumers. And, in any event, a radical reassessment of radio broadcasters' public interest obligations in this proceeding is unnecessary because the Commission can relatively easily adapt its current public interest regulatory framework to address DAB.

IV. The Commission Should Proceed with Final Authorization for AM and FM IBOC and Streamline Antenna Improvements.

In initial comments, at 25 *et seq.*, NAB urged the Commission to move ahead to approve final authorization of FM and AM IBOC service, including AM nighttime service, as recommended by NAB. As many commenters say, prompt implementation of permanent rules will encourage further rollout of digital signals and receivers,⁸⁵ and will give certainty and confidence to manufacturers, broadcasters and consumers that IBOC is

⁸⁴ And besides constitutional problems, NAB points out that the FCC is not particularly well suited to “ordain” the “particular type[s]” of programming that must be offered by all broadcast stations across the nation. *Turner*, 512 U.S. at 650. Communities and the interest of consumers in them vary from one locality to another, and it borders on the illogical to assume that the regulatory decisions of a government agency in Washington, D.C. would consistently and accurately reflect the interests of local viewers throughout the country. Indeed, it was such considerations that historically caused the Commission to withdraw from involvement in content regulation. *See, e.g., FCC v. WCNC Listeners Guild*, 450 U.S. 582, 601 (1981); *Deregulation of Radio, Report and Order* in BC Docket No. 79-219, 84 FCC 2d 968, 1059 (1981).

⁸⁵ ABC at 8; Greater Media at 5; Infinity at 3; Comments of KPOF (“KPOF”), June 16, 2004, at 3; iBiquity at 6; Comments of Telos Systems/Omnia Audio (“Telos”), July 7, 2004; Comments of Shively Labs (“Shively”), July 14, 2004, at 1.

here to stay.⁸⁶ It will also promote the development and introduction of innovative services and expanded programming options.⁸⁷ As Telos says final rules will eliminate any lingering regulatory uncertainty and give additional incentive for broadcasters to convert to digital broadcasts, particularly for smaller groups and individually-owned stations.⁸⁸ Miller Media says that, as a small market broadcaster, it does not have the financial incentive to convert to IBOC without being able to broadcast additional programming (notably, more high school sports and other special events).⁸⁹ But IBOC will give Miller Media and others the ability to have a secondary audio channel, and thus a financial incentive to convert to IBOC, so long as it can rely on the permanence of the service. And, with final IBOC rules, broadcasters can be confident that they can compete in a digital world with digital audio quality and expanded, diverse formats and services.⁹⁰

Many broadcasters agree with NAB that the benefits of IBOC in terms of enhanced audio fidelity, increased robustness to interference and the opportunities for innovative new services argue for permanent authorization, even for AM IBOC nighttime service, where these benefits should far outweigh the limited additional interference predicted by iBiquity's studies for AM nighttime IBOC service.⁹¹ Broadcasters and others have noted that IBOC promises to re-vitalize the AM service, including the re-

⁸⁶ ABC at 9; Greater Media at 5; Infinity at 3; Comments of Music Express Broadcast Association ("Music Express"), June 16, 2004, at 2; Susquehanna at 2.

⁸⁷ iBiquity at 10-11.

⁸⁸ Telos at 2.

⁸⁹ Miller Media at 1.

⁹⁰ KPOF at 1; Music Express at 1; iBiquity at 3-4. iBiquity notes that, with IBOC, broadcasters can offer listeners not only digital audio quality but new features like song, title and artist information, as do their SDARS competitors. *Id.*

⁹¹ ABC at 4; Greater Media at 10; KPOF at 3; State Associations at 18.

introduction of music formats and FM quality audio.⁹² Crawford Broadcasting, speaking about interim AM nighttime authorization, says that it has wrestled long and hard over the issue of AM nighttime IBOC operation, given the potential for increased nighttime interference from adjacent-channel IBOC stations, but has concluded that AM requires comparable fidelity with other media, that IBOC is the best route to that end, that AM IBOC must operate at night and that the tradeoffs are worth it.⁹³

KPOF emphasizes the importance of having AM IBOC operate full time, rather than be confined to daytime operation.⁹⁴ It states that it will be difficult for stations to introduce new services or encourage their listeners to convert to digital if AM broadcasts continue to exclude nighttime service, saying their listeners expect continuity and consistency of service. *Id.* This point was underscored in comments recently received on the issue of interim authorization of nighttime AM IBOC operation.⁹⁵

iBiquity repeats in its comments that the testing and analysis completed on nighttime AM IBOC broadcasts confirmed that introduction of AM IBOC at night will not result in widespread harm to nighttime analog broadcasts, but, rather, that the impact of new interference should be largely confined to areas at the periphery of a station's coverage.⁹⁶ Many broadcasters thus agree with NAB's comment that, while the impact

⁹² KPOF at 1-2; State Associations at 18; iBiquity at 22; Infinity June 14, 2004 at 2; Comments of New World Broadcasting, Inc. ("New World"), MM Docket No. 99-325, June 9, 2004, at 1; Comments of Arso Radio Corporation ("Arso"), MM Docket No. 99-325, June 9, 2004, at 1; Comments of Classical 1360, LLC ("Classical 1360"), MM Docket No. 99-325, June 9, 2004, at 1.

⁹³ Comments of Crawford Broadcasting Company ("Crawford"), MM Docket No. 99-325, May 10, 2004, at 1.

⁹⁴ KPOF at 3.

⁹⁵ See Reply Comments of the National Association of Broadcasters ("NAB Reply Comments"), MM Docket No., 99-325, July 14, 2004, at 4.

⁹⁶ iBiquity at 22.

on analog service from AM nighttime IBOC operation is not as benign or predictable as is the impact from FM IBOC or AM daytime IBOC, the dramatic improvement in local AM service seems to be well worth the limited tradeoffs.⁹⁷

Many broadcasters also support NAB's caveat that instances of interference to stations' primary nighttime analog service areas beyond that predicted in iBiquity's studies be addressed by the Commission on a case-by-case basis.⁹⁸ In its Reply Comments on interim nighttime AM IBOC, NAB urged the Commission to devise, in short order, a process for interference resolution.⁹⁹ There are a number of ways to accomplish this, and an FCC database, available to the public, perhaps with a link listing co- and adjacent channel stations, could provide a first step for broadcasters to investigate potential or possible interference.¹⁰⁰ *Id.* A number of commenters have raised the issue of the process for resolution of unexpected interference.¹⁰¹ While not endorsing other specific steps in this regard, NAB agrees the FCC should propose a rapid process for interference resolution.

As to potential interference with reception in secondary service areas, NAB indicated in its Reply Comments on AM nighttime IBOC that its Ad-hoc Technical

⁹⁷ Crawford at 1; KPOF at 4; Comments of First Broadcasting Investment Partners, LLC ("First Broadcasting"), MM Docket No. 99-325, June 16, 2004, at 3, 4; Infinity, June 14, 2004 at 5.

⁹⁸ Greater Media at 10; First Broadcasting at 3; Crawford at 2; State Associations at 18. *See also* NAB Reply Comments at 5 and fn. 14.

⁹⁹ NAB Reply Comments at 5.

¹⁰⁰ *Id.* NPR, in its comments on interim nighttime AM IBOC authorization, suggested that a notification process would be the best and most efficient way to authorize nighttime AM IBOC operation. Comments of NPR ("NPR June 14, 2004"), MM Docket No. 99-325, June 14, 2004, at 5. NAB agreed, saying that notification can be included in a FCC database that AM broadcasters can consult as to co- and adjacent channel AM IBOC operations. NAB Reply Comments June 14, 2004, at 4-5.

¹⁰¹ *See, e.g.*, ABC Comments at 2-3; First Broadcasting at 3; Comments of Cox Radio, Inc. on Nighttime AM IBOC Operations, MM Docket No. 99-325, June 14, 2004, at 2.

Group on AM IBOC Nighttime Performance and its Radio Board concluded that the improvement in local AM service was worth a potential reduction in distant service.¹⁰²

Other broadcasters agree.¹⁰³

Thus, to the variety of individual and other commenters who express concerns regarding interference to analog skywave reception and secondary service areas,¹⁰⁴ NAB responds that the re-vitalization of the AM band, with the broad benefits accruing to listeners and AM broadcasters alike, is in the public interest and worth the tradeoff of a reduction in some distant skywave service, which has been, in many if not most circumstances, difficult in any event.

To the individual and other commenters who express theoretical or analytical engineering concerns regarding AM IBOC nighttime operation and hypothetical interference issues,¹⁰⁵ NAB replies that the *only* hard test data, *i.e.*, that produced in the iBiquity AM Technical Reports, show some additional interference from AM nighttime IBOC to adjacent channel analog stations. In the vast majority of cases, however, this interference is confined to the edge of coverage.

¹⁰² NAB Reply Comments at 6.

¹⁰³ *See, e.g.*, Infinity, June 14, 2004, at 4; First Broadcasting at 3-4.

¹⁰⁴ Comments of Timothy C. Cutforth (“Cutforth”), MM Docket No. 99-325, May 27, 2004, at 2, 6; Comments of Paul Dean Ford, P.E., MM Docket No. 99-325, June 16, 2004, at 3; Comments of Reunion Broadcasting L.L.C. (“Reunion”), MM Docket No. 99-325, May 19, 2004, at 4; Comments of Nebraska Rural Radio Association, MM Docket No. 99-325, June 10, 2004, at 2. NAB points out in response to the comment of Cutforth, at 2, about AM IBOC stations’ voluntarily turning off IBOC because of adjacent channel interference that the very article Cutforth cites about these problems indicates that these are implementation glitches typically solved by the manufacturers.

¹⁰⁵ Cutforth at 3-4, 6, 9; Reunion at 1-3; Comments of Barry D. McLarnon (“McLarnon”), MM Docket No. 99-325, June 14, 2004, at 12, 13; Comments of Leonard R. Kahn, MM Docket No. 99-325, June 14, 2004, at 6-8; Comments of Cohen, Dippell and Everist, P.C., MM Docket No. 99-325, June 16, 2004, at 1-2.

NAB further urges that calls for extensive showings *before* stations may implement AM IBOC at night¹⁰⁶ be rejected. Infinity Broadcasting has noted that unnecessary licensing burdens will not only delay implementation of this superior IBOC service, but will likely discourage some broadcasters from even considering expending the financial resources necessary to convert to IBOC.¹⁰⁷

Finally, NAB notes the widespread support for its requests that the Commission authorize the use of separate antennas for FM IBOC signals without the need to seek and renew Special Temporary Authorization (STA) for this purpose and that the Commission grant delegated authority to the Media Bureau to consider and, where appropriate, approve on a blanket basis new IBOC transmission techniques and apparatus that are cost-effective and thus will provide further incentive to initiate IBOC service.¹⁰⁸ In this regard, WCPE asks the Commission to consider relaxing its requirements for expedited authorization of separate antennas for FM IBOC implementations established earlier this year.¹⁰⁹ It was work done by an NAB *ad-hoc* technical group that formed the basis for the separate antenna rules authorized by the Media Bureau. NAB agrees in principle with WCPE that separate antenna configurations outside of the specific requirements recommended by its *ad-hoc* group and approved by the Media Bureau may in fact be suitable for use by FM broadcasters. However, we believe that any new parameters proposed need to be tested before the Commission incorporates them into the

¹⁰⁶ Cutforth at 6; Reunion at 1, 4; McLarmon at 13.

¹⁰⁷ Infinity June 14, 2004, at 5.

¹⁰⁸ ABC at 5-6; Crawford at 2; Clear Channel at 8; Cox at 3; Greater Media at 3, 11; Infinity at 7-8; Music Express at 2; Susquehanna at 4; State Associations at 19, 20; Telos at 2; Shively at 2; Comments of Charles Newton, MM Docket No. 99-325, June 2, 2004.

¹⁰⁹ Comments of Educational Information Corporation d/b/a WCPE Radio, MM Docket No. 99-325, April 20, 2004.

rules. We thus encourage WCPE and others to submit additional test data, obtained under experimental authority, regarding the use of separate antennas into the record of this proceeding, at which time the Commission will be in a better position to consider such changes.

V. Other Technical Matters

A. Commenters Support Digital EAS But Agree That It Is Premature To Mandate Updated EAS Decoders.

The majority of commenters agree that it is in the public interest to extend the Commission's rules concerning the Emergency Alert System ("EAS") to cover digital broadcasting.¹¹⁰ NAB and all parties commenting on this question recognize that EAS is a vital link between government authorities and the public. NAB also would have the Commission recognize that that one of the main benefits of IBOC technology is that EAS functionality will be fully preserved during the digital conversion because the analog radio signal will continue to exist as a vital aspect of the hybrid IBOC signal. As a result, all equipment that public safety officials and broadcasters currently use for EAS will continue to fully operate. NAB thus believes that the Commission's inquiry concerning whether EAS decoders must be updated or replaced for digital service should be deferred until such time as all-digital radio is closer to reality and acceptance. It is worth noting that the FCC plans to conduct a wide-ranging review of the EAS system generally and it may be appropriate to defer IBOC EAS questions until the conclusion of that proceeding.

With respect to the availability of EAS, NAB supports the Commission's tentative conclusion that EAS signals be carried on the main audio channel portion of the digital audio stream. Further, we believe that it is appropriate in certain circumstances to

¹¹⁰ See, e.g., Cox at 5; State Broadcasters at 16; *Further Notice* at ¶¶ 37-38 citing 47 C.F.R. § 73.1250.

require EAS functionality on certain types of other free over-the-air secondary audio services.¹¹¹ As noted, many stations intend to use secondary audio services to offer competitive general or niche programming, while others may deliver more focused or subscription-based services. As a general matter, NAB believes that EAS functionality may not be appropriate for the latter kind of services.¹¹² Therefore, NAB would support a policy requiring EAS functionality on SACs intended for the general public, but at this time not mandate EAS on services targeted at more narrow audiences or subscribers.

B. AM Stereo

NAB reiterates that, given that AM IBOC technology is not compatible with current AM stereo system, NAB believes the Commission should loosen the requirement that AM broadcasters operating in the expanded band must offer AM stereo transmissions. Requiring that an AM broadcaster who is only just now starting operations in the expanded band support AM stereo would disadvantage that broadcaster, and also hinder the digital conversion for all. NAB thus urges the Commission to eliminate this requirement entirely, or do so for stations in the expanded band that implement IBOC.

¹¹¹ See NPR at 13.

¹¹² Commenters representing radio reading services for the blind somewhat disagree on mandating EAS functionality on digital SAC services for the blind. For example, IIAAIS states that the EAS system could be vastly improved for reading services audiences if the Commission required that reading services be included in the EAS system as part of stations' conversion to digital, at least to provide listeners with directions on where to tune during times of emergencies. See, e.g., IAAIS Section 8. On the other hand, Minnesota State Services for the Blind contend that including digitized reading services in the EAS system will be too expensive and complicated for the providers of these services to implement. Instead, this organization believes that it would be sufficient to follow its current system, which allows it to provide current information at least once every hour, and to interrupt its entire network in extreme emergencies. Comments of Minnesota State Services for the Blind ("Minnesota SSB"), June 16, 2004 at 4.

C. FM Boosters

Through the use of digital boosters, IBOC technology allows broadcasters to deliver service in even terrain-obstructed areas that currently receive little or no service.¹¹³ As noted in NAB's initial comments, a current analog broadcaster may cover one or more areas that cannot be served by analog boosters because there is enough main signal energy to cause unacceptable interference to a booster service.¹¹⁴ However, an IBOC signal's digital carriers are still viable in such an environment because they use Orthogonal Frequency Division Multiplexing (OFDM) modulation, which is especially strong under these conditions. As a result, it may be possible to extend sufficient coverage to these areas using digital boosters.

Therefore, NAB believes that, although it is too early in the conversion process premature to create specific rules for digital boosters, it would be prudent for the Commission to provide broadcasters the flexibility to enhance their digital service by means of FM digital boosters on the basis of individualized applications. Nothing more, including mandating the conversion of analog boosters as a condition of converting the main audio signal, is recommended at this time. Any such all-or-nothing rule is likely to deter stations from converting to digital.¹¹⁵

D. Standards

In initial comments, NAB emphasized that Commission adoption of technical transmission standards for IBOC digital radio is important for certainty within the radio

¹¹³ In this context, a digital booster refers to a low-power transmission facility, operating on the same frequency as a station's main signal and located within the station's protected contour, but transmitting only the digital sideband portions of a hybrid IBOC signal (i.e. no host analog signal).

¹¹⁴ NAB at 29.

¹¹⁵ NPR at 29.

broadcast service, for both broadcasters and the consumer electronics industry.¹¹⁶ We also said that Commission adoption of an industry-developed standard is the clearest, most practical and technically fruitful path to achieving a Commission IBOC technical standard. *Id.* We discussed the work of the NRSC to craft FM and AM IBOC standards documents that, when complete, should form the basis for many of the Commission's detailed technical rules governing the transmission of IBOC digital radio. *Id.* The initial NRSC IBOC standards are expected to be completed in the latter part of 2004 and will be provided to the Commission for its consideration in conjunction with developing final technical rules for IBOC digital radio. We note that iBiquity states in its comments that it anticipates that any final industry approved standard will be submitted to the FCC for broader public comment and ultimate adoption in the Commission's rules.¹¹⁷

VI. Congress Has Pre-Empted Issues Relating To Copy Protection For Sound Recordings And RIAA Copy Protection Proposals Could Inhibit DAB Implementation.

At the outset, NAB wants to make clear that it opposes piracy in all shapes and forms. Broadcasters are, themselves, victims of piracy of their content and their signals and support efforts to protect both, and to prosecute violators. Nevertheless, NAB's comments responding to the *Further Notice* addressing the Recording Industry Association of America's ("RIAA") concerns regarding the possibility of indiscriminate recording and distribution of musical recordings from digital radio broadcasters observed that RIAA had failed to demonstrate either a right to protections it sought or the technical systems to implement them. NAB also questioned the Commission's jurisdiction to provide the relief RIAA seeks, and the likelihood that the public would engage in

¹¹⁶ NAB at 30.

¹¹⁷ iBiquity at 25.

massive reproduction and distribution of sound recordings from digital broadcasts.

Finally, NAB urged that whatever relief might be warranted not delay the permanent authorization and implementation of digital radio.

On the jurisdiction issue, RIAA seeks to glean support from provisions of the Audio Home Recording Act ("AHRA"),¹¹⁸ the Digital Performance Right in Sound Recordings Act ("DPRA"),¹¹⁹ and the Digital Millennium Copyright Act ("DMCA")¹²⁰ for the proposition that Congress' purpose in these legislative efforts was to protect the sound recording industry from loss of revenues from the sale of sound recordings resulting from new digital technologies.¹²¹ RIAA then asserts that favorable Commission action on its proposals would merely promote the goals of copy and distribution protection articulated in these congressional actions.

While the AHRA, DPRA and the DMCA are, indeed, relevant to the Commission's decision on whether further to entertain RIAA's proposals, NAB submits they provide compelling reasons why the Commission should *not* take further action on these issues. First, RIAA oversimplifies the purposes of those Acts. In fact, all three pieces of legislation involved hard fought battles among parties, such as RIAA, which sought enhanced protection against copying and distribution of copyright works, and those who resisted such enhanced protection based on fair use and various other conditions and limitations included in the copyright laws.

¹¹⁸ Codified at 17 U.S.C. § 1001-1010.

¹¹⁹ Codified in relevant part at 17 U.S.C. § 114(d)-(i).

¹²⁰ Codified in relevant part at 17 U.S.C. § 114 (d).

¹²¹ Comments of The Recording Industry Association of America ("RIAA"), MM Docket No. 99-325, June 16, 2004.

For example while Congress, in the AHRA, provided the recording industry with limited protection against lost revenues associated with digital audio tape recorders, it also chose a scheme of compensation to the recording industry from the sale of blank tapes and recording machines rather than a ban on such machines and, as part of the balance, prohibited copyright lawsuits against manufacturers of digital audio recording devices and consumers who use them for noncommercial purposes.

The DPRA and DMCA reflect similar balances and trade-offs. For example, the legislative history of the DPRA reflects how Congress has found it "difficult to draft a bill that adequately protected the interests of the parties affected by the legislation, while striking a necessary balance between economic incentives for recording artists and public access to recordings."¹²²

In the DPRA, Congress essentially established a three-tier system for protecting and/or compensating the copyright owners of sound recordings with respect to digital audio transmissions. This system was based, in large part, on the threat level Congress felt various services posed to the sale of sound recordings. Interactive services, deemed the greatest threat, were subjected to the most rigorous level of protection. Other types of non-interactive subscription services were deemed to pose an intermediate threat level. Protection with respect to these services was provided through a compulsory license accompanied by numerous conditions such as a prohibition against pre-announcing music and limits on the consecutive cuts from one album or by one artist that could be performed.¹²³ In short, Congress believed: "sound recording copyright owners

¹²² S. Rep. No. 104-128 (1995) (hereinafter "1995 Senate Report") at 11.

¹²³ See 17 U.S.C. § 114(d)(2).

should enjoy protection with respect to digital subscription, interactive and certain other such performances." *Id.* at 15.

The third tier in the three-tier system of protection established in the DPRA related to analog and *digital* broadcasting. As to these services, Congress found they "often promote, and appear to pose no threat, to the distribution of sound recordings." *Id.* at 15. Accordingly, "by contrast" with the other types of services, Congress concluded "not to include free over-the-air broadcasting services in this legislation." *Id.* at 15. Specifically, it exempted analog and digital broadcasting from any payment obligation and imposed no conditions designed to provide protections or limitations against copying or distributing sound recordings.¹²⁴

The legislative history of the DPRA also indicates how Congress sought to "address the concerns of record producers and performers regarding the effects that new digital technology and distribution systems might have on their core business without upsetting the longstanding business and contractual relationships among record producers and performers, music composers and publishers and broadcasters that have served all these industries well for decades." *Id.* at 13. Perhaps, most significantly, the history of the DPRA states that it was designed to: "Provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmission, *without hampering the arrival of new technologies and without imposing new and unreasonable burdens on radio and television broadcasters.*" *Id.* at 15. (emphasis supplied)

¹²⁴ S. Rep. No. 104-128 (1995) at 19 (The Committee intends that such [broadcast] transmissions be exempt regardless of whether they are in a digital or nondigital format, in whole or in part.").

Turning to the DMCA, this legislation amended the DPRA by, *inter alia*, eliminating certain exemptions and by expanding the reach of the sound recording performance right to include certain nonsubscription transmissions. The DMCA did not, however, disturb the DPRA's broad and express exemption for analog and digital broadcasts.¹²⁵ In its intervenor appellee brief submitted in *Bonneville International Corp. v. Peters*, 347 F.3d 485 (3rd Cir. 2003), the RIAA described the DMCA amendments to the DPRA as "comprehensive" and quoted from its legislative history the intent of the DMCA:

"to achieve two purposes: first, to . . . ensure that recording artists and record companies will be protected as new technologies affect the various ways in which their creative works are used; and *second to create fair and efficient licensing mechanisms that address the complex issues facing copyright owners and users as the result of the rapid growth of digital audio services.*"¹²⁶
(emphasis supplied)

RIAA also described the various provisions of Section 114(d) of the Copyright Act as "comprising one aspect of an elaborate statutory scheme that prescribes a comprehensive relationship between copyright owners of sound recordings and services that wish to perform those recordings by means of digital audio transmissions."¹²⁷

Finally, RIAA conceded that as early as 1990, and certainly during its consideration of the DPRA, "Congress was well aware of the potential for digital broadcasts."¹²⁸

¹²⁵ In the process of eliminating two exemptions, the Conference Report makes clear that "the deletion of these two exemptions is not intended to affect the exemption for nonsubscription broadcast transmissions." 1998 Conference Report at 80.

¹²⁶ RIAA at 11 quoting H.R. Rep. No. 105-796 at 79-80 (1998).

¹²⁷ RIAA at 48.

¹²⁸ *Id.* at 66.

When the threads of the mosaic that include the AHRA, DPRA and DMCA are woven together, the guidance they provide for how the Commission should address RIAA's proposal is:

1) *Congress* historically has, and continues to be,¹²⁹ intimately involved in evaluating and determining the proper balance that should be struck between the owners and users of sound recordings;

2) *Congress* has, and continues to be, acutely aware of and has repeatedly responded to concerns about the effects of digital technology on the ability to copy and distribute sound recordings;

3) *Congress* has, in RIAA's words, "established an elaborate statutory scheme that prescribes a comprehensive relationship between copyright owners of sound recordings and services that wish to perform those recordings by means of digital audio transmissions.";¹³⁰

4) As part of this "elaborate statutory scheme" *Congress* has expressly chosen not to impose any copyright liability, or any copy or distribution protection conditions on digital audio broadcasts, based on a finding that such broadcasts "often provide and appear to pose no threat, to the distribution of sound recordings.";¹³¹

5) *Congress* has expressly admonished that any copy protection scheme for sound recordings should not "hamper [] the arrival of new technologies [or] impose new

¹²⁹ The House Subcommittee on Courts, the Internet and Intellectual Property held an oversight hearing only last month on balancing the interests of sound recording copyright owners and broadcasters during which RIAA's copy protection proposals were addressed.

¹³⁰ RIAA at 48.

¹³¹ 1995 Senate Report at 15.

and unreasonable burdens on radio and television broadcasters."¹³² This overwhelming expression of Congressional preemption of these issues would suggest the Commission should be loath to step where Congress has so heavily tread.

Pretermittting the bona fides of RIAA's claim that current or imminent technologies will convert digital audio into a de facto interactive music service, it has been Congress that has made such judgments. RIAA's attempted analogies with the digital television broadcast flag are unavailing. There simply is no comparison between Congress's micromanagement of balancing the interests relating to sound recordings and those of audio visual works; nor are the levels of protection Congress has chosen to provide sound recordings and audio visual works comparable. Further, in the television context, the Commission possessed specific statutory authority over receiver technology that does not exist with respect to radio.

Another set of arguments RIAA raises in support of its proposals is that they are necessary to preserve the system of free over the air broadcasting. According to RIAA, the near future holds the prospect that consumers will use scanning devices to seek out their music preferences from the digital broadcasts of their local radio stations, make perfect copies of those performances, and then listen to these copies in lieu of listening to the stations. The immediacy, reality, or scope of such a scenario remains to be demonstrated. Moreover, it is clear that those desiring to obtain and listen to pure, uninterrupted performances of sound recordings in lieu of the radio, already have an abundant number of means to do so. Satellite and cable digital subscription services, peer to peer file sharing, and hours of uninterrupted music that can be stored on CDs and discs

¹³² *Id.*

are but a few such means. Radio has continued to be valued by listeners and NAB doubts that the availability of one additional option for listening to recorded music will alter that situation.

RIAA's proposal to protect sound recordings broadcast in the digital environment includes two options: encryption or *mandatory* adoption of an audio protection flag ("APF").¹³³

The restrictions suggested in RIAA's report of Jeff Hamilton Technologies, Inc. ("Hamilton Report")¹³⁴ regarding how listeners can use radio receiver equipment and how broadcasters should encrypt their transmissions, if adopted, would seriously impact the desirability and rollout of IBOC digital radio services, specifically:

- *Proposal for encryption:* the Hamilton Report proposes the use of encryption, presumably done at the broadcast point of transmission, as a means to protect copyrighted sound recordings, noting that "an encryption specification would be developed so that all devices licensed to receive HD radio transmissions would be licensed to decrypt such transmissions."¹³⁵ Encryption is fundamentally contrary to the concepts of free over-the-air broadcasting. No U.S. free over-the-air broadcast service, analog or digital, has ever been required to encrypt its transmissions. This proposal if adopted would disenfranchise every HD Radio "early adopter" who has already elected to purchase an HD Radio-equipped receiver since all devices manufactured and sold to-date do not

¹³³ RIAA at 612 *et seq.*

¹³⁴ See *Report of Jeff Hamilton, Hamilton Technologies, Inc. for the Recording Industry Association of America, Inc.*, June 2004, RIAA Comments at Appendix A.

¹³⁵ *Id.* at 9.

support encryption technology.¹³⁶ Likewise, the hundreds of broadcasters who have already licensed and are deploying (or have deployed) HD Radio transmission equipment risk having this equipment made obsolete or in need of a major upgrade by the Hamilton Report encryption proposal. In this regard, RIAA provides no assessment of the cost to broadcasters and listeners to implement its encryption proposal.

- *Recording function rules:* the Hamilton Report proposes to severely restrict a listener’s ability to make recordings of free over-the-air radio broadcasts, for example, by limiting “pre-programmed recordings” to a minimum of 30 minutes duration, by prohibiting a listener’s ability to subdivide a recorded segment after-the-fact, and by allowing a listener to view the ID information for a particular recording (e.g., song title and artist) only while simultaneously listening to that recording.¹³⁷ HD Radio receivers so restricted would present to consumers a stark contrast with the abilities of other devices, such as existing analog radios which incorporate recording features, or more appropriately with devices such as the Apple iPod. These restrictions could have a profound chilling effect on the HD Radio receiver market and could jeopardize the ultimate success of terrestrial digital radio. As with its encryption proposal, RIAA provides no cost assessment to broadcasters for adoption of its mandatory APF.

¹³⁶ There are presently three HD Radio receivers on the market—the Kenwood KTC-HR100, the Panasonic CQ-CB9900U, and the JVC KD-SHX900—with more models, in particular a “home hi-fi” model from Onkyo, expected later this year.

¹³⁷ Hamilton at 7.

Another RIAA-commissioned report, from Cherry Lane Digital LLC (“Cherry Lane”), also clouds the issues surrounding the U.S. transition to digital radio with a compilation of facts and opinions based primarily on the new-band Eureka-147 DAB technology being deployed in Europe and other parts of the world.¹³⁸ Cherry Lane discusses a plethora of Eureka DAB receivers and services, suggesting that the capabilities of this equipment pose an imminent threat to copyright holders whose works will be broadcast in the U.S. over IBOC-equipped radio stations. The fact of the matter is that none of the currently available IBOC receivers have functionality (*e.g.*, content storage, electronic program guides, etc.) that even begins to approach this level of sophistication and are not expected to for quite some time.

The Cherry Lane Report also fails to specify how receiver capabilities would translate from Eureka-based systems (where each transmitted signal supports a usable bit rate of approximately 1.2 Mbps) to the HD Radio-based IBOC systems (with their lower bit rate capacities of approximately 100 kbps and 36 kbps for hybrid FM and AM IBOC, respectively). In some of its assertions regarding the current capabilities of existing analog radio, Cherry Lane neglects to mention the data broadcasting features of the FM subcarrier-based Radio Data System (RDS) which has recently been experiencing a surge in popularity in the U.S. among both broadcasters and listeners alike.¹³⁹

¹³⁸ See *Report of Cherry Lane Digital LLC on Digital Audio Broadcasting for the Recording Industry Association of America, Inc.*, June 2004, RIAA Comments at Appendix B.

¹³⁹ See for example a recent article in the trade publication *Radio World* entitled *RDS in Dallas Clicks With Listeners*, May 5, 2004, (available on the Internet at http://www.rwonline.com/reference-room/special-report/01_rw_rds_2.shtml) discussing “Clear Channel has been at the forefront of what has turned into an RDS revival, implementing the technology on more than 200 of its stations.”

In addressing the NOI's inquiry about the European DAB experience and potential threats posed to sound recordings, RIAA essentially reiterates that IFPI, the international organization representing the sound recording industry, has expressed the same concerns in Europe that RIAA expresses here.¹⁴⁰ Of considerable significance in its description of the European experience, is the absence of any reference to any regulatory action or even a request for regulation by the European Commission or the British regulatory authorities. To the contrary, what is described are industry discussions and industry agreements to discuss the issues of concern to IFPI and RIAA.

VII. Conclusion

For the foregoing reasons, NAB urges the Commission to promptly endorse permanent authorization of AM and FM IBOC service and to adopt policies that provide broadcasters the maximum flexibility to implement digital radio to best serve the interests of American consumers. The Commission should act expeditiously to approve an open

¹⁴⁰ RIAA Comments at 75-78.

and flexible regulatory environment that will allow innovative digital services to flourish.

It should refrain from establishing a copy protection system for IBOC.

Respectfully submitted,

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