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November 5, 2004

Marlene H. Dortch  
Office of the Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: *Ex Parte Communication - MM Docket No. 99-325*

Dear Ms. Dortch:

Pursuant to Section 1.1206(a) of the Commission's rules, Bonneville International Corporation ("Bonneville" or "BIC") hereby expresses its opposition to the submissions of Livingston Radio Company and Taxi Productions, Inc. (collectively, "Livingston") asserting that the pending Digital Audio Broadcasting ("DAB") proceeding is the proper forum to consider altering the grandfathered status of "superpower" FM stations.<sup>1</sup>

Bonneville is a diversified media company that operates a full service television station and thirty-four (34) radio stations in markets across the country, including KDFC-FM and KOIT-FM that serve the San Francisco, California market.<sup>2</sup> Both KDFC-FM and KOIT-FM are grandfathered superpower stations authorized pursuant to Section 73.211(c) of the Commission rules.<sup>3</sup>

On June 16, 2004, Livingston filed comments in the DAB proceeding proposing that the Commission terminate the grandfathered superpower status held by many FM radio stations once these stations transitioned to digital technology.<sup>4</sup> Livingston

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<sup>1</sup> Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service, *Further Notice of Proposed Rulemaking and Notice of Inquiry*, MM Docket No. 99-325, 19 FCC Rcd 7505 (April 20, 2004) ("*Further Notice*").

<sup>2</sup> All of the stations operated by Bonneville International Corporation are licensed to a BIC-affiliated company, Bonneville Holding Company.

<sup>3</sup> 47 C.F.R. 73.211(c). Section 73.211(c) provides that stations authorized prior to March 1, 1984 that do not conform to the requirements found in Section 73.211 may continue to operate as authorized (i.e., the so-called superpower FM stations). *Id.*

<sup>4</sup> See *Joint Comments of the Livingston Radio Company and Taxi Productions Inc.*, filed June 16, 2004.

reiterated this position in an *ex parte* meeting with the Commission in September, 2004 and in an *ex parte* letter submitted on October 21, 2004.<sup>5</sup>

Bonneville opposes the Livingston proposal on both procedural and substantive grounds. First, adoption of Livingston's proposal would violate the notice and comment requirements of the Administrative Procedure Act ("APA"). Pursuant to Section 553(b) of the APA,<sup>6</sup> an agency must publish notice of its proposed rules in the Federal Register; and such notice must include "either the terms or the substance of the proposed rule or a description of the subjects and issues involved."<sup>7</sup> Notice must be sufficient such that interested parties have a reasonable opportunity to comment.<sup>8</sup> The adequacy of the notice provided can be "tested by determining whether it would fairly apprise interested persons of the 'subjects and issues' before the agency."<sup>9</sup> For this reason, the D.C. Circuit Court found that generalized notice is deficient and does not provide parties a reasonable opportunity to comment.<sup>10</sup> Rather, an agency must "describe the range of alternatives being considered with reasonable specificity."<sup>11</sup>

In light of these standards, the Commission may not adopt Livingston's proposal to eliminate the grandfathered status of superpower radio stations in the DAB proceeding. The *Further Notice* never addresses or requests comment on such a proposition. Furthermore, while the *Further Notice* does seek comment on the measurement, appropriate measurement instruments, and calculation of FM operating power in a digital environment, this discussion does not address nor even hint that the grandfathered status of superpower FM stations was subject to potential change. As such, Livingston's proposal to terminate the long-standing grandfathered status of superpower FM stations does not rise to the level of a logical outgrowth of the Commission's proposal, because an interested party reviewing the *Further Notice* could never have anticipated such a

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<sup>5</sup> See *ex parte* Letter from Peter Tannenwald, Counsel, Livingston Radio Company, to Marlene Dortch, Federal Communications Commission, dated September 8, 2004; *ex parte* Letter from Peter Tannenwald, Counsel, Livingston Radio Company, to Marlene Dortch, Federal Communications Commission, dated October 21, 2004.

<sup>6</sup> 5 U.S.C. § 553(b).

<sup>7</sup> *Id.* at § 553(b)(3).

<sup>8</sup> *Connecticut Light & Power Co. v. Nuclear Regulatory Com.*, 673 F.2d 525, 533 (D.C. Cir. 1982); see also, *Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098, 1104 (4<sup>th</sup> Cir. 1985); *Cat Run Coal Co., v. Babbitt*, 932 F. Supp. 772, 777 (S.D. W. Va. 1996).

<sup>9</sup> *American Iron and Steel Inst. v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977); see also, *St. James Hosp. v. Heckler* 579 F.Supp. 757, 763 (D.C. Ill. 1984), *cert. denied*, 474 U.S. 902 (1985).

<sup>10</sup> See "*Complex*" *Horsehead Resource Development Company, Inc., v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994) (citing *Small Refinery Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983)).

<sup>11</sup> *Id.*

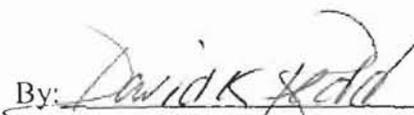
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development.<sup>12</sup> Moreover, a reasonable opportunity to comment on a specific agency proposal is never more vital than in a situation akin to this one where sixty-eight radio stations and the public they provide service to could be directly and harmfully affected by such a rule change.

Second, procedural deficiencies aside, terminating KDFC-FM's and KOIT-FM's grandfathered status necessarily will cause a reduction in service coverage. Such a reduction will result in a loss of service to a portion of the public that these stations have been serving for many years.

For these reasons, the Commission lawfully cannot adopt Livingston's proposal to eliminate the grandfathered status of superpower stations in the DAB proceeding.

Respectfully submitted,

By:   
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David K. Redd  
Vice President, Secretary and General Counsel

cc: Steven Broeckaert (Media Bureau, FCC)  
Susan N. Crawford (Media Bureau, FCC)  
Ann Gallagher (Media Bureau, FCC)  
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<sup>12</sup> See, e.g., *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299 (D.C. Cir. 2000); *Weyerhaeuser v. Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1978).