

# HOGAN & HARTSON

L.L.P.

MARISSA G. REPP  
PARTNER  
(202) 637-6845  
MGREPP@HHLAW.COM

October 19, 2005

COLUMBIA SQUARE  
555 THIRTEENTH STREET, NW  
WASHINGTON, DC 20004-1109  
TEL (202) 637-5600  
FAX (202) 637-5910  
WWW.HHLAW.COM

## VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

**Attention: Audio Division, Media Bureau**

**Re: *Ex Parte* Communication  
MM Docket No. 99-325  
Grandfathered "Superpower" Stations**

Dear Ms. Dortch:

Clear Channel Communications, Inc. ("Clear Channel") submits these comments in opposition to a proposal submitted by The Livingston Radio Company ("Livingston") and Taxi Productions, Inc. ("Taxi" and collectively with Livingston, the "Joint Proponents") through joint comments filed in the above-referenced proceeding on June 16, 2004, and subsequent *ex parte* presentations to the FCC staff by Livingston (the "Joint Proposal"). In the Joint Proposal, Livingston and Taxi argue that this proceeding presents the "perfect opportunity" for the Commission to "restore an orderly balance to the FM broadcast band" by eliminating the grandfathered "superpower" status of certain Class B FM stations. Clear Channel strongly disagrees and urges the Commission to reject the Joint Proposal in its entirety.

Initially, it should be noted that Clear Channel owns and operates numerous AM and FM broadcasting stations (including grandfathered "superpower" FM stations) through its wholly-owned indirect subsidiaries. Clear Channel has been an active supporter of Digital Audio Broadcasting ("DAB"), having implemented DAB broadcasting at over 190 stations, including several "superpower" FM stations, including WBCT(FM), Grand Rapids, Michigan.

Clear Channel has serious concerns about the merits of the Joint Proposal. Eliminating the "superpower" status of the grandfathered stations, or as more recently suggested by Livingston, giving superpower stations a "choice" between their established analog power or deferring digital operations, would create substantial financial hardship for these important stations, would reduce the listening public's access to long-established programming in 68 markets and would delay the roll-out of digital broadcasting. In so doing, the Joint Proposal would create a windfall for an isolated group of stations at the expense of many others and the public.

Marlene H. Dortch, Secretary  
Federal Communications Commission  
October 19, 2005  
Page 2

Moreover, Livingston and Taxi have not submitted to the Commission any evidence of actual interference, notwithstanding that many superpower FM stations, including WBCT(FM), have implemented DAB operations. The Joint Proponents are proposing a solution when there is no evidence that a problem exists.

However, these substantive concerns aside, Clear Channel's more immediate objection is that addressing the Joint Proposal in this proceeding would usurp the purpose of this proceeding, which is to consider the operational requirements for in-band, on-channel ("IBOC") digital AM and FM technology. At a minimum, such suggested sweeping changes merit the full scrutiny of a separate proceeding, including, as appropriate, detailed and objective technical analysis of the real-world technical impact, in lieu of Livingston's and Taxi's one-sided, speculative and non-technical comments. Moreover, addressing the Joint Proposal in conjunction with this proceeding would be contrary to statutory notice and comment requirements.

Specifically, Section 553(b)(3) of the Administrative Procedure Act requires proposed rule makings to include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." <sup>1/</sup> The Commission accordingly is required to give interested parties a meaningful opportunity to comment when it proposes changes to rules and policies. <sup>2/</sup> To comply with this requirement, notice must be sufficiently specific to allow interested parties to understand the policies at issue. <sup>3/</sup> Finally, any decision arising out of the proceeding must be either directly related to the issues and policies identified in the notice, or be a "logical outgrowth" of the issues and policies identified in the notice. <sup>4/</sup>

These notice requirements mandate that the scope of this proceeding, and any Commission action arising out of it, must be limited to the proposals and comments

---

<sup>1/</sup> 5 U.S.C. § 553(b)(3).

<sup>2/</sup> See, e.g., *Citibank Federal Savings Bank v. FDIC*, 836 F. Supp 3, 10 (D.D.C. 1993) ("A notice of proposed rule making is legally inadequate if it does not 'adequately frame the subjects for discussion'" (citing *Connecticut Light and Power Co. v. NRC*, 673 F.2d 525, 533 (D.C.Cir. 1982)).

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

<sup>4/</sup> See *Weyerhaeuser Company v. Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1978); *Owensboro on the Air v. United States*, 262 F.2d 702 (D.C. Cir. 1958).

HOGAN & HARTSON L.L.P.

Marlene H. Dortch, Secretary  
Federal Communications Commission  
October 19, 2005  
Page 3

solicited in the *Further Notice*. <sup>5/</sup> The *Further Notice* addresses a variety of issues related to DAB's expanded capabilities, but none of these issues relate to the merits of grandfathered "superpower" stations. The *Further Notice* does not propose any changes to grandfathered stations, nor does it request any comments on the subject. Moreover, the Joint Proposal does not address any of the issues that *are* contained in the *Further Notice*. No one could have predicted that the Joint Proposal would be a "logical outgrowth" of this proceeding. Simply put, Livingston's and Taxi's proposal is completely ill-suited for consideration in connection with this proceeding.

For the above reasons, the Commission must refrain from addressing in this proceeding Livingston's and Taxi's request to eliminate the grandfathered status of "superpower" stations or otherwise force such stations into an election that would delay the implementation of DAB service.

Respectfully submitted,

HOGAN & HARTSON L.L.P.

By Marissa G. Repp /ast  
Marissa G. Repp

Attorneys for  
Clear Channel Communications, Inc.

cc: Attached Service List

---

<sup>5/</sup> Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service, *Further Notice of Proposed Rule Making and Notice of Inquiry*, MM Docket No. 99-325, FCC 04-99 (rel. April 20, 2004) ("*Further Notice*").

**Certificate of Service**

I, Alexis Brooks, do hereby certify that a copy of the foregoing **letter** is being sent via first class, U.S. Mail, postage prepaid, this 19<sup>th</sup> day of October, 2005, to the following:

Donna C. Gregg, Acting Chief\*  
Media Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Room 3-C740  
Washington, DC 20554

Roy J. Stewart, Senior Deputy Chief\*  
Media Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Room 2-C337  
Washington, DC 20554

Peter H. Doyle, Chief\*  
Audio Division  
Media Bureau  
Federal Communications Commission  
445 – 12<sup>th</sup> Street, S.W.  
Room 2-A320  
Washington, D.C. 20554

Steven Broeckaert, Deputy Division Chief\*  
Policy Division  
Media Bureau  
Federal Communications Commission  
445 – 12<sup>th</sup> Street, S.W.  
Room 4-A865  
Washington, D.C. 20554

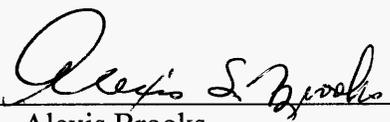
Ben Golant, Attorney Advisor\*  
Policy Division  
Media Bureau  
Federal Communications Commission  
445 – 12<sup>th</sup> Street, S.W.  
Room 4-A803  
Washington, D.C. 20554

Susan N. Crawford, Assistant Division Chief\*  
Audio Division  
Media Bureau  
Federal Communications Commission  
445 – 12<sup>th</sup> Street, S.W.  
Room 2-A333  
Washington, D.C. 20554

Ann Gallagher\*  
Audio Division  
Media Bureau  
Federal Communications Commission  
445 – 12<sup>th</sup> Street, S.W.  
Room 2-B534  
Washington, D.C. 20554

Peter Tannewald, Esq.  
Irwin, Campbell & Tannenwald, P.C.  
Attorneys at Law  
1730 Rhode Island Avenue, NW  
Suite 200  
Washington, DC 20036-3101  
Counsel to The Livingston Radio Company  
and Taxi Productions, Inc.

\* Indicates delivery by hand.

  
\_\_\_\_\_  
Alexis Brooks