Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	:	
Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service	:	MM Docket No. 99-325

COMMENTS OF IBIQUITY DIGITAL CORPORATION

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Executive Summary

iBiquity Digital Corporation ("iBiquity"), by its attorneys, hereby submits these comments in response to the Commission's Second Further Notice of Proposed Rulemaking ("SFNPM") in this proceeding. As an initial matter, iBiquity wants to note its appreciation for the Commission's ongoing support for the transition of AM and FM radio to digital broadcasting using iBiquity's HD Radio™ technology. The Commission's longstanding policy concerning digital radio has been to avoid unnecessarily burdensome regulation and to provide a flexible regulatory environment to encourage the robust development of digital AM and FM services to serve the interests of listeners, broadcasters, manufacturers and the public. iBiquity urges the Commission to extend this approach to any future rules it adopts in this proceeding in order to foster the continued rollout of the digital service and new features such as conditional access.

In these comments, iBiquity encourages the Commission to view "subscription services" more broadly than is implied in the SFNPM. iBiquity refers to subscription services by the broader and more generic term conditional access. With conditional access, reception only occurs when the service provider authorizes the receiver to receive the transmission and the receiver has the ability to decrypt the broadcast content. The broadcast signal is scrambled or encrypted and receivable only by those receivers that the service provider has authorized or entitled to descramble or decrypt the content. When conditional access is implemented, all eligible receivers will be given a serial number. The listener uses the serial number to register the receiver with the service provider (through a call to the station, an online registration, mailing in a form, etc.) in order to be entitled to access the encrypted service. iBiquity's conditional access technology will provide broadcasters with the opportunity to introduce new services that complement rather than supplant free, over-the-air broadcasting. The SFNPRM implies the Commission is concerned that subscription services will eliminate current radio services and will

undercut broadcasters' commitment to serving the public interest. The HD Radio system, however, uses the existing FM channel more efficiently than analog radio, thereby affording broadcasters the capacity to offer new services without diminishing the quality or availability of main channel audio.

iBiquity believes conditional access will allow broadcasters to provide new and innovative services that will have numerous benefit for listeners through the United States. At the same time, it will help the radio industry mitigate numerous technical, business and regulatory issues that it has confronted for years.

iBiquity recommends that the Commission adopt a flexible regulatory scheme that encourages broadcasters to experiment with all the current and future features of the HD Radio system to determine what meets the needs of listeners in each location. Based on the inherent local nature of AM and FM service, it is difficult for the Commission to impose uniform regulatory requirements that will meet the needs of listeners in all markets. Instead, the Commission should assess both how these services develop and the public demand for various services before considering whether any regulation of these service offerings is necessary to support the public interest.

The SFNPRM seeks comment on whether the Commission can and should impose spectrum fees for what the Commission characterizes as that portion of digital bandwidth used by broadcasters to provide subscription services. Before the Commission can consider assessing these fees, it must first determine whether it has a jurisdictional basis to do so. Specifically, it must determine whether Congress has delegated to the Commission the authority to promulgate a rule to impose this type of fee.

The Commission concedes in the SFNFRM that "no express authority exists in the DAB context" to impose fees on certain ancillary or supplemental services. iBiquity agrees. In previous instances where the Commission imposed a fee or collected money from licensees, Congress had provided the Commission with specific jurisdictional authority to collect the fee. The closest analogy to the current situation is the Commission's imposition of fees on the ancillary or supplemental use of digital television spectrum. In the DTV case, however, the 1996 Telecommunications Act provided the Commission with specific jurisdiction to assess the fees on television broadcasters. Congress authorized this fee specifically to repay the U.S. government for the additional DTV spectrum assigned to analog television broadcasters without cost. That statutory authorization was limited to digital television and cannot be used to justify a fee on radio broadcasters. A review of the legislative history of the 1996 Telecommunications Act reinforces the fact that the Commission's authority to impose fees on DTV "ancillary or supplemental services" is restricted solely to DTV. Neither the legislation nor the legislative history mentions AM or FM radio or the applicability to radio broadcast stations of a fee on TV subscription services.

With the above historical context in mind, it is very difficult to argue that fees on subscription radio services is ancillary to the Commission's effective performance of its statutorily mandated responsibilities. Fees on subscription services will not prevent interference among radio stations nor will it insure that free radio service is available throughout the United States. Additionally, unlike other statutorily mandated fees, this proposed fee would not recover Commission regulatory costs or pay for spectrum. Nor would such a fee serve the FCC's underlying jurisdictional mandate to "regulate interstate and foreign commerce in communication by wire and radio so as to make available… a rapid efficient, nation-wide and

world-wide wire and radio communication service with adequate facilities at reasonable charges." The fee would not encourage the development and implementation of new radio services, lower costs to consumers or increase accessibility to existing radio services. Given this background, iBiquity believes that it would be quite a stretch to conclude that a fee on subscription radio services is ancillary to the Commission's mandated responsibilities.

Even if the Commission determines it has jurisdiction to impose a fee on HD Radio subscription services, such a fee would be contrary to the public interest. Without clear jurisdictional authority to impose a fee, the Commission has a high threshold to meet in order to determine that such a fee would serve the public interest. As discussed above, the Commission cannot use the DTV proceeding to justify the imposition of a fee on HD radio broadcasters. Here, there is no new spectrum allocation to radio broadcasters for the digital conversion, and the Commission cannot claim the public interest requires the imposition of a fee to prevent a windfall. In fact, radio broadcasters adopting HD Radio technology are making a tremendous investment in order to more efficiently and thoroughly use their existing spectrum rather than relying on a new spectrum allocation or channel assignment. Instead of imposing a punitive fee on the radio industry, the public interest would be served by commending broadcasters for their investment in such a creative and spectrally efficient technology. In place of fees, the Commission should extend its flexible regulatory policies to HD Radio subscription services to reward broadcasters for the investment they have made the DAB technology.

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iBiquity Digital Corporation ("iBiquity"), by its attorneys, hereby submits these comments in response to the Commission's Second Further Notice of Proposed Rulemaking ("SFNPRM") in this proceeding.[1] As an initial matter, iBiquity wants to note its appreciation for the Commission's ongoing support for the transition of AM and FM radio to digital broadcasting using iBiquity's HD Radio™ technology. The Commission's longstanding policy concerning digital radio has been to avoid unnecessarily burdensome regulation and to provide a flexible regulatory environment to encourage the robust development of digital AM and FM services to serve the interests of listeners, broadcasters, manufacturers and the public.[2] iBiquity urges the Commission to extend this approach to any future rules it adopts in this proceeding in order to foster the continued rollout of the digital service and new features such as conditional access.

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[1] *Digital Audio Broadcasting Systems And Their Impact on the Terrestrial Radio Broadcast Service*, MM Docket No. 99-325, *Second Report and Order, First Order on Reconsideration, Second Further Notice of Proposed Rulemaking* (rel. May 31, 2007).

[2] SFNPRM at para. 29.

A. BACKGROUND

iBiquity is the developer of the HD Radio system, the technology the FCC has designated as the digital solution for AM and FM broadcasting. Since the Commission's initial authorization of digital radio in 2002,[3] there has been tremendous progress as the broadcast and receiver industries have rolled out HD Radio products and services. As of October 1, 2007, there were more than 1,500 radio stations broadcasting domestically using HD Radio technology and an additional 500 stations licensed to implement HD radio who are now in the process of converting to digital. There are more than 680 stations currently providing 733 new multicast streams in addition to the simulcast of existing analog programming in a digital format.

The receiver industry has matched these efforts of the broadcasters. Manufacturers offer more than 50 HD Radio receiver products for sale throughout the United States ranging from $99 tabletop radios to high-end home units and factory installed automobile receivers. Most receiver segments, including tabletop radios, OEM auto, aftermarket auto, home HiFi and shelf systems, docking stations and car converter products, offer HD Radio receiver options. Consumers can purchase HD Radio receivers at national retailers such as Best Buy, Circuit City, Wal-Mart, RadioShack and Amazon, regional electronics chains, specialty retailers, and as automobile original equipment.

The introduction of commercial HD Radio service in 2002 was limited to the simulcast of analog programming in a digital format, which is known as hybrid main channel audio service. Since that time, iBiquity has offered several technical upgrades to add new HD Radio functionality. In 2004, iBiquity introduced multicasting, which allows FM broadcasters to offer new audio programs in addition to the main channel audio service, as the first upgrade to HD

[3] *Digital Audio Broadcasting Systems And Their Impact on the Terrestrial Radio Broadcast Service*, First Report and Order, 17 FCC Rcd. 19990 (2002).

Radio technology. In 2006, iBiquity further upgraded the HD Radio system to create a platform to support new data services. In 2007, iBiquity introduced song tagging using docking stations. iBiquity has scheduled the introduction of additional features such as conditional access and store and replay services during 2008 and 2009.

B. OVERVIEW OF CONDITIONAL ACCESS TECHNOLOGY AND SERVICES

iBiquity encourages the Commission to view "subscription services" more broadly than is implied in the SFNPM. iBiquity refers to subscription services by the broader and more generic term conditional access. With conditional access, reception only occurs when the service provider authorizes the receiver to receive the transmission and the receiver has the ability to decrypt the broadcast content. The broadcast signal is scrambled or encrypted and receivable only by those receivers that the service provider has authorized or entitled to descramble or decrypt the content. When conditional access is implemented, all eligible receivers will be given a serial number. The listener uses the serial number to register the receiver with the service provider (through a call to the station, an online registration, mailing in a form, etc.) in order to be entitled to access the encrypted service.[4]

Conditional access is not only an audio feature; broadcasters also can use it to restrict access to data services. The Commission also should note that conditional access is not synonymous with fee-based services. iBiquity envisions broadcasters will use conditional access to offer a range of public service and commercial services, in some cases based on monetary subscriptions, in other cases advertising supported. As is described below, there is a wealth of opportunities for new and innovative services. The Commission should provide a regulatory

[4] This is similar to how access is provided to many websites. A user needs to register with the website before access to the site is provided.

environment to encourage broadcasters to provide the most valuable services to the public, including those made possible through conditional access.

C. IBIQUITY'S CONDITIONAL ACCESS TECHNOLOGY WILL ENABLE IMPORTANT NEW SERVICES

iBiquity's conditional access technology will provide broadcasters with the opportunity to introduce new services that complement rather than supplant free, over-the-air broadcasting. The SFNPRM implies the Commission is concerned that subscription services will eliminate current radio services and will undercut broadcasters' commitment to serving the public interest. The HD Radio system, however, uses the existing FM channel more efficiently than analog radio, thereby affording broadcasters the capacity to offer new services without diminishing the quality or availability of main channel audio. Moreover, the Commission should draw comfort from its experience with analog FM SCA services. Broadcasters have a long history of using SCA channels for subscription-based services without detriment to free over-the-air broadcasting. HD Radio conditional access services represent a digital upgrade to SCA services that will enhance the public interest rather than undermine existing broadcasting services.

iBiquity believes conditional access will allow broadcasters to provide new and innovative services that will have numerous benefit for listeners through the United States. At the same time, it will help the radio industry mitigate numerous technical, business and regulatory issues that it has confronted for years. For instance, the HD Radio system will allow radio reading services to upgrade to a robust digital platform, thereby eliminating the technical limitations and poor quality associated with analog FM SCA-based services. However, without conditional access, the reading services would have to continue to rely on specialized receivers to limit access to their service or risk losing the copyright exemption extended to reading services. Conditional access will allow the reading services to restrict access to only those

visually impaired Americans that register for the reading service, thereby preserving the current copyright exemption. It would be difficult to find a more compelling example of serving the public interest through the expansion of digital FM service.

iBiquity envisions broadcasters will use conditional access technology to enable additional new public interest uses of the FM band. FM broadcast spectrum could be used to send announcements or instructions to first responders and conditional access technology could restrict general access to such broadcasts. Based on FM's point-to-multipoint architecture, this would be particularly useful if there is an overload of existing wireless networks during an emergency. Broadcasters also could team with various service providers to offer a low cost distance learning solution that would eliminate the expense of a personal computer and Internet connection. Conditional access may enable noncommercial broadcasters that rely on individual donors to address one of the more vexing of their "business" issues: how to provide simultaneously attractive programming and pledge drives for sponsorship. Using conditional access NCE stations would be able to broadcast pledge drive programming on their main channel and offer listeners that have pledged access to normal programming on a separate channel. This would allow stations to maintain this important fundraising activity and eliminate the risk that their most loyal listeners will turn elsewhere for programming to avoid pledge drives.

Conditional access technology also will allow broadcasters to offer premium audio and data services that may not otherwise be economically viable. Many listeners would be willing to pay a subscription fee for instant traffic and navigation information rather than waiting for traffic and weather every ten minutes. However, it may not be economically viable for stations to provide this service without a separate revenue stream to support their additional costs. Conditional access also could enable broadcasters to provide commercial free programming on

multicast channels to subscribers, thereby allowing FM broadcasters to expand their revenue sources and transform part of their business model away from complete dependence on advertising revenue. Broadcasters can achieve this using HD Radio technology as a complement to and without any impact on the continued open availability of main channel audio.[5]

D. THE COMMISSION SHOULD AFFORD BROADCASTERS FLEXIBILITY TO OFFER SUBSCRIPTION SERVICES

iBiquity encourages the Commission to adopt a flexible regulatory approach to support the introduction of subscription services. The Commission should avoid burdensome restrictions and regulations that will retard the development of this functionality, particularly in a case such as this where the broadcast community and the Commission do not yet have sufficient understanding about the use of the conditional access feature of the HD Radio system.

It is important to note subscription services using the HD Radio platform represent a digital upgrade for existing FM SCA services. Nonetheless, the limited range of services that broadcasters have introduced using analog SCAs makes it difficult to predict the potential scope of HD Radio subscription services and the functionality broadcasters would introduce using a conditional access feature. As described above, iBiquity envisions a number of valuable services that conditional access can support. However, what eventually succeeds in the marketplace and what meets the needs of listeners and the public remains to be seen.

iBiquity believes it is unnecessary for the Commission to impose limits on the amount of digital service that can be dedicated to subscription services. The Commission already has adopted a requirement that broadcasters offer a main channel digital stream that is at least comparable to analog service.[6] This requirement will ensure that broadcasters use the HD Radio

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[5] Conditional access encryption is added to the multicasting or datacasting stream prior to multiplexing with the main channel audio, thereby ensuring the main channel audio remains available generally to the public.

[6] *See* SFNPRM at para.28.

system to provide free, over-the-air broadcast services to the public in fulfillment of broadcasters' public interest obligations. However, the HD Radio platform, particularly with the use of the extended hybrid mode (and eventually all digital service), can support both main channel audio and a range of additional audio and data services. As long as the main channel audio is comparable to or better than existing analog service, the Commission should not preclude broadcasters from determining what best meets the needs of the public by imposing limits on the allocation of the HD Radio capacity among various services supported by the HD Radio system.

iBiquity recommends that the Commission adopt a flexible regulatory scheme that encourages broadcasters to experiment with all the current and future features of the HD Radio system to determine what meets the needs of listeners in each location. Based on the inherent local nature of AM and FM service, it is difficult for the Commission to impose uniform regulatory requirements that will meet the needs of listeners in all markets. Instead, the Commission should assess both how these services develop and the public demand for various services before considering whether any regulation of these service offerings is necessary to support the public interest.

E. THE COMMISSION DOES NOT HAVE AUTHORITY TO IMPOSE FEES ON SUBSCRIPTION SERVICES

The SFNPRM seeks comment on whether the Commission can and should impose spectrum fees for what the Commission characterizes as that portion of digital bandwidth[7] used by broadcasters to provide subscription services.[8] Before the Commission can consider

[7] It is important to note the HD Radio system does not use separate bandwidth for main channel versus multicast services. All services (main channel, multicasting and datacasting) are multiplexed across the available bandwidth in a unified signal.

[8] *See* SFNPRM at para. 114.

assessing these fees, it must first determine whether it has a jurisdictional basis to do so. Specifically, it must determine whether Congress has delegated to the Commission the authority to promulgate a rule to impose this type of fee.

The Commission concedes in the SFNFRM that "no express authority exists in the DAB context" to impose fees on certain ancillary or supplemental services.[9] iBiquity agrees. In previous instances where the Commission imposed a fee or collected money from licensees, Congress had provided the Commission with specific jurisdictional authority to collect the fee. The closest analogy to the current situation is the Commission's imposition of fees on the ancillary or supplemental use of digital television spectrum. In the DTV case, however, the 1996 Telecommunications Act provided the Commission with specific jurisdiction to assess the fees on television broadcasters.[10] Congress authorized this fee specifically to repay the U.S. government for the additional DTV spectrum assigned to analog television broadcasters without cost. That statutory authorization was limited to digital television and cannot be used to justify a fee on radio broadcasters. A review of the legislative history of the 1996 Telecommunications Act reinforces the fact that the Commission's authority to impose fees on DTV "ancillary or supplemental services" is restricted solely to DTV.[11] Neither the legislation nor the legislative history mentions AM or FM radio or the applicability to radio broadcast stations of a fee on TV subscription services.[12]

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[9] *Id.*

[10] 47 U.S.C. § 336(e).

[11] *See*, Telecommunication Act of 1996, House Report No. 104-204 at 65-66, 69 and 172 ("House Report"). *Also see*, House Conf. Rep. No. 104-458 at 160.

[12] The House Report only discusses television. It states: "Title III would prescribe procedures for issuing licenses for advanced television (ATV). It also would provide for transition from the current standard of television broadcasting to that of ATV, and for the return and reassignment by auction of part of the radio spectrum currently allocated to television broadcasting. It would require the FCC to collect a fee from licensees offering ancillary or supplemental services, under certain circumstances, and would permit the FCC to retain amounts necessary to pay for regulating ATV services." House Report at 65.

It is equally instructive to examine Congress' grant to the Commission of authority to collect regulatory and license processing fees. In these instances, Congress explicitly authorized the imposition of these fees to recover Commission costs to regulate.[13] Here, there is no specific Congressional mandate to collect a 5% fee (or any fee) on HD Radio subscription services nor is there any Congressional finding that such fees would serve the public interest. Without such specific authority, the Commission must first be assured that it has a jurisdictional base to impose a fee before even considering whether the fee would serve the public interest.

Although the SFNPRM concedes the Commission has no express statutory authority to assess a fee on subscription services, it asks whether the Commission has authority to impose the fee based on its ancillary jurisdiction. The U.S. Court of Appeals for the District of Columbia[14] recently when considering broadcast flag regulations specified what is necessary for the FCC to regulate pursuant to ancillary jurisdiction:

> Although somewhat amorphous, ancillary jurisdiction is nevertheless constrained. In order for the Commission to regulate under its ancillary jurisdiction, two conditions must be met. First, the subject of the regulation must be covered by the Commission's general grant of jurisdiction under Title I of the Communications Act, which encompasses all interstate and foreign communications by wire or radio. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167 (1968) (quoting 47 U.S.C. § 152(a)). Second, the subject of the regulation must be reasonably ancillary to the effective performance of the Commission's various responsibilities.[15]

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[13] AM and FM radio station licensees currently are obligated to pay annual regulatory fees. *See* 47. U.S.C. § 9. S*ee also* 47 CFR § 1.11.51. Relatedly, applicants for AM and FM radio station licenses need to submit filing fees with a license application. *See* 47 U.S.C. § 8. *See also* 47 CFR § 1.1101.

[14] *See, American Library Association v. Federal Communications Commission*, 406 F.3 689, 692 and 693 (2005), *citing United State vs. Southwestern Cable Co.*, 392 U.S. 157, 167, 178 (1968) ("American Library Association v. FCC").

[15] *Id.* at 691-692.

The Commission does have jurisdiction to regulate radio broadcasting under Title I of the Communications Act of 1936. Thus, before the FCC can impose a fee it must determine whether such a fee would reasonably ancillary to the Commission's responsibilities in regulating radio.

In American *Library Association v. Federal Communications Commission*, the U.S. Court of Appeals when analyzing previous Supreme Court decisions noted that the Supreme Court "followed a very cautious approach in deciding whether the Commission had validly invoked its ancillary jurisdiction, even when the regulations under review clearly addressed communication by wire or radio."[16] If the Commission were to consider imposing a fee on subscription radio services, it would need to be particularly cautious because past precedents indicate that specific congressional authorization is necessary before any fee can be imposed. In each of the previous situations described above, the Commission worked with Congress to draft legislation to allow the FCC to assess a specific fee. Presumably, if the Commission already had jurisdiction to assess fees, the legislation to impose regulatory, application or DTV subscription fees would have been unnecessary.

With the above historical context in mind, it is very difficult to argue that fees on subscription radio services relate to the Commission's effective performance of its statutorily mandated responsibilities.[17] Fees on subscription services will not prevent interference among radio stations nor will it insure that free radio service is available throughout the United States. Additionally, unlike other statutorily mandated fees, this proposed fee would not recover Commission regulatory costs or pay for spectrum. Nor would such a fee serve the FCC's underlying jurisdictional mandate to "regulate interstate and foreign commerce in communication by wire and radio so as to make available… a rapid efficient, nation-wide and

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[16] *Id.* at 702-703.

[17] *Id.*

world-wide wire and radio communication service with adequate facilities at reasonable charges."[18] The fee would not encourage the development and implementation of new radio services, lower costs to consumers or increase accessibility to existing radio services. Given the above, it would be quite a stretch to conclude that a fee on subscription radio services relate to the Commission's mandated responsibilities.

To the contrary, the imposition of a fee would put a chill on the development of new HD Radio subscription services that could provide consumers with innovative safety and entertainment services. In light of the cautious approach defined by the courts and the lack of any nexus between the FCC's statutory responsibilities and the imposition of the fee, iBiquity believes that the Commission can not demonstrate that it has ancillary jurisdiction to impose a fee on radio subscription services.

F. IMPOSITION OF A FEE ON HD RADIO SUBSCRIPTION SERVICES WOULD BE COUNTER TO THE PUBLIC INTEREST

Even if the Commission determines it has jurisdiction to impose a fee on HD Radio subscription services, such a fee would be contrary to the public interest. Without clear jurisdictional authority to impose a fee, the Commission has a high threshold to meet in order to determine that such a fee would serve the public interest. As discussed above, the Commission cannot use the DTV proceeding to justify the imposition of a fee on HD radio broadcasters. In the DTV context, the fee on ancillary or supplemental services compensated the U.S. government for the new spectrum assignments to broadcasters. It served the public interest by ensuring there was no windfall for television broadcasters. Here, there is no new spectrum allocation to radio broadcasters for the digital conversion, and the Commission cannot claim the public interest requires the imposition of a fee to prevent a windfall. In fact, radio broadcasters

[18] 47 U.S.C. § 151.

adopting HD Radio technology are making a tremendous investment in order to more efficiently and thoroughly use their existing spectrum rather than relying on a new spectrum allocation or channel assignment. Instead of imposing a punitive fee on the radio industry, the Commission should commend broadcasters for their investment in such a creative and spectrally efficient technology. The public interest would be better served by the Commission extending its flexible regulatory policies to HD Radio subscription services to insure the rapid proliferation of this exciting new technology.

Commission promotion of the development of innovative subscription services rather than the imposition of fees would be consistent with the FCC's overall responsibility to promote the public interest. As discussed above, HD Radio subscription services provided by conditional access can be as simple as narrowcasting radio broadcasts to underserved audiences or a variety of safety and traffic services that will allow the public to avoid traffic jams, drive more efficiently, and improve emergency notification and safety responses. The Commission should actively promote these services rather than impede their development with the imposition of new fees.

G. THE COMMISSION SHOULD NOT ATTEMPT TO ADDRESS ANCILLARY ISSUES IN THIS PROCEEDING

The SFNPRM raises a number of questions concerning broadcast public inspection files and the automated operation of transmission facilities. iBiquity offers no comment on the merits of these issues but believes these issues are not relevant to the rollout of HD Radio technology, should not be used to delay the completion of work on additional HD Radio rules and could be addressed more expeditiously in a separate proceeding. iBiquity urges the Commission to remove these issues from this proceeding.

H. CONCLUSION

iBiquity encourages the Commission to extend its policy of flexibility to new HD Radio subscription services and to allow broadcasters to offer subscription services without the need for additional Commission authorization. iBiquity also urges the Commission to forebear from imposing any fees on the use of HD Radio technology for subscription services to insure the rapid introduction of HD Radio technology without any burdensome regulatory constraints.

Respectfully submitted,

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