

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

To: Commission

**JOINT COMMENTS OF THE
NORTH CAROLINA, OHIO, AND VIRGINIA
ASSOCIATIONS OF BROADCASTERS**

The North Carolina Association of Broadcasters, Ohio Association of Broadcasters, and Virginia Association of Broadcasters (collectively, the “Associations”), through their attorneys, hereby jointly and timely file these comments in response to the Commission’s Second Report and Order, First Order on Reconsideration and Second Further Notice of Proposed Rulemaking in the above-captioned matter.¹

**I.
Introduction**

The Associations wish to emphasize their support for the Commission’s stated goal of establishing regulatory policies and practices that encourage innovation in digital audio broadcasting (“DAB”). The Associations agree with the Commission’s overarching objective to issue regulations that “foster the development of a vibrant terrestrial digital radio service for the public and to ensure that radio stations successfully

¹ *In the Matter of Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, Second Report & Order, First Order on Reconsideration & Second Further Notice of Proposed Rulemaking, MM Docket No. 99-325, FCC 07-33 (rel. May 31, 2007) (hereinafter the “*Second R&O*” and the “*Second FNPRM*”).

implement DAB.”² DAB is still in its early growth stages and, with policies enabling flexibility and experimentation, has the potential to offer multiple benefits to the public.

In the *Second FNPRM*, the Commission seeks comment in a number of areas related to DAB and broadcaster obligations. Those areas are addressed below.

II. Limits on Subscription Services and Imposition of Fees on Ancillary Revenue

The Commission asks for comment on methods by which it may preserve the existing system of free over-the-air terrestrial radio service as radio stations convert to DAB and for comment on the amount of subscription-based radio services. Specifically, the *Second FNPRM* asks whether the Commission should implement a requirement that no more than 20 to 25 percent of a station’s digital capacity be devoted to subscription services.³ The Commission also seeks comment from the public concerning the imposition spectrum fees for that portion of digital bandwidth, if any, used by broadcasters to provide subscription services.⁴

In this early stage of DAB’s development, it is premature and thus would be inappropriate to impose any limitation on the amount of bandwidth that may be devoted to subscription services or to impose fees on broadcasters for subscription services. Many stations are in the process of commencing operations in DAB over their main digital broadcast streams. The service, obviously, is in an experimental phase. We believe it would chill potential creative experimentation and valuable uses of the service

² *Id.* at ¶ 2.

³ *Id.* at ¶ 113.

⁴ *Id.* at ¶ 114.

to, at this time, restrict the number of secondary streams that may be used for subscription services. We urge the Commission to wait until a fuller record is developed concerning the extent to which stations are, in fact, offering digital streams on a subscription basis. Otherwise, a decision at this time would be made by the Commission in a vacuum.

Whether they have already started broadcasting in digital or are merely evaluating plans to do so, radio broadcasters are still working to discover viable business models for DAB. In fact, many Association members who have begun broadcasting secondary digital streams are currently selling no commercial advertising, or a nominal amount of commercial advertising, on secondary streams. Imposing limits on subscription services presents an obstacle for potential revenue right out of the gate. Such barriers would likely deter or delay market entrants, which would certainly disserve the public. Erecting disincentives for developing new services and new sources of DAB income would discourage innovation.

Not only would such a limit potentially impede the development of this nascent service—a result at odds with the Commission’s policy favoring rapid conversion to digital audio broadcasting⁵—it is also unnecessary. The Commission’s current rules require digital broadcasters to simulcast analog audio programming on at least one digital stream that is, at a minimum, “comparable in sound quality” to the analog service.⁶ Until the Commission has more real-world experience with the various kinds of digital subscription services to be offered by broadcasters, the existing rules are sufficient to

⁵ *Second R&O* at ¶¶ 29 & 47.

⁶ 47 C.F.R. § 73.403. *See also Second R&O* at ¶ 28.

ensure that listeners will continue to have access to free over-the-air digital signals comparable to those they presently receive in analog.⁷

Moreover, broadcasters can and have traditionally been permitted to utilize SCA analog frequencies to offer both datacasting and supplemental audio services to provide a variety of subscription and non-subscription services to the public. The Commission has not imposed taxes on these traditional analog subscription services. Therefore, an obvious question is why would the Commission be inclined to do so now for digital auxiliary services. Indeed, the Commission's primary interest in ensuring the continuation of a robust, free over-the-air service is protected, as stated, by the Commission's existing rules. As consumers are only just becoming aware of the existence of digital radio, and few (if any) broadcasters are currently offering ancillary services on their digital spectrum, there is no rational basis for the Commission to impose fees on this emerging technology and niche market. Doing so would only serve to suppress innovation and experimentation.

III. Public Interest Obligations

The Commission seeks comment on whether the public interest requirements extended to free over-the-air digital programming (*i.e.*, political broadcasting, payment disclosure, contest rules, sponsorship identification, cigarette advertising, broadcasting of

⁷ Similarly, the Commission should not, as an alternative to imposing fees, limit subscription services by requiring broadcasters to provide a free digital stream at least equal in quality to the best subscription service if they decide to provide a subscription service. *See FNPRM* at ¶114. Such a restriction is unworkable given rapidly changing technology and the non-linear nature of the trade-off between bits and audio quality acknowledged by the Commission (*see Second R&O* at ¶ 24) and may have the unintentional effect of putting an artificial ceiling on the nature and quality of the ancillary services the Commission is seeking to encourage.

taped or recorded material, public file, station log, station identification, etc.) should apply to DAB subscription services.⁸ Similarly, the Commission asks whether any new public interest obligations should be imposed on DAB, generally.⁹

The Associations' members accept their public interest obligations and are committed to serving their communities. But, in the context of the application of these requirements on bandwidth other than each station's main digital stream, it is, again, premature to consider imposing ancillary and supplementary public service obligations. A better approach would be to defer consideration of extending public interest obligations on additional streams until DAB is more developed. Likewise, creating entirely new public interest obligations for free over-the-air and other digital streams would be unwise. It is enough that the Commission has extended existing public interest obligations to all free over-the-air digital programming streams. Over-regulation of DAB would likely deter the innovation the Commission seeks to foster.

IV. Public File Requirements

The *Second FNPRM* also requests comment on whether current requirements for radio stations' public inspection files are sufficient to ensure that the public has adequate access to information on how broadcasters serve their communities.¹⁰ Specifically, the Commission asks whether each radio broadcaster should be required to post the contents of its public inspection file on the station's and its state association's websites. Because

⁸ *Id.* at ¶ 115.

⁹ *Id.* at ¶ 116.

¹⁰ *Id.* at ¶ 117.

the burden of such a rule would greatly outweigh the potential benefits, the Commission should not adopt this proposal. It is a solution in search of a problem.

Not every station has a website, particularly not small broadcasters whose resources are already stretched as they operate their stations while fulfilling existing public interest obligations. Requiring broadcasters to create and maintain a website where none exists is troubling enough given the economic realities for some small broadcasters. But, diverting resources from operating the station on regulated spectrum to maintaining the public file on a website is even more problematic.

As a practical matter, it is unreasonable and inappropriate to compel broadcasters to spend scarce resources to convert the hard-copy public file to an electronic public file and maintain both. The public file contains information routinely available to the station in hard copy only (*e.g.*, contracts and issue advertising and political broadcast content), so posting those materials on the Internet would require considerably more than linking electronic documents to the web. Conversion of that much paper to a digital format would require significant staff work. Even for documents that the station does have available electronically, the burden of posting online is still extraordinary: imagine the resources required to post on the Internet three years' worth of letters and e-mails from the public.¹¹ While broadcasters that do have websites have grown accustomed to posting their annual EEO public file reports online, that is but one document among many required to be in the public file.

Although the *Second FNPRM* apparently suggests that state broadcaster associations would be able to maintain the online public file on the relevant association's

¹¹ 47 C.F.R. § 73.3526(e)(9).

website, such a proposal is utterly impracticable and would cause more problems than it resolves. Association staffs, like the licensees themselves, simply do not have the time and resources to coordinate scanning, posting, and maintaining online the myriad documents that are required to be placed by all stations in the physical public file. Moreover, we do not believe the Commission's ancillary regulatory authority gives it ability to regulate state broadcast associations. The implications of the Commission's regulating a non-licensed trade association of radio and television stations are staggering. Where would it end? That aside, who, in a pragmatic sense, would the Commission require to field questions from the public about the contents of the association's public file—the association or the licensee? What happens if the station's or the association's website goes down for any reason? Would the licensee be sanctioned if a state association failed to post content in the online public file even though that content was timely placed in the station's physical public file? Would the association be fined and, if so, by what authority? If an individual who wishes to view documents from the public file online does not have the technical capabilities (*i.e.*, compatible software) to view the file's contents, does the state association (or the licensee for that matter) have some responsibility to convert so that the requestor may view the documents? These and countless other questions arise if state associations were to take responsibility for maintaining online public files of hundreds of stations.

It is also worth noting that the Commission requires licensees to maintain public inspection files, in part, so that the public may evaluate the way in which local broadcasters serve their *communities* of license.¹² The requirement that the public file be

¹² *Id.*

physically located in or near the community of license¹³ provides easy access to members of that community who wish to visit the station and inspect the file. While surely some residents of a station's community would find access to the public file on the Internet more convenient, at the margin, than an in-person trip to the station, by posting the public file on the Internet a world-wide universe of people with Internet access could access it and question its content. As a general matter, only those who confirm that they have listened to a radio station's programming have "standing" to file a complaint with the Commission about the station. Is it not at odds with the fundamental notion of "standing" and localism to require a local station's public file to be posted on the World Wide Web? Requiring the public file to be on the Internet is unnecessary, and it chips away the historical nexus between the station and its community. Given the magnitude of the collateral problem, those who advocate a change in the location of the public file have the burden of showing that the existing requirement poses an undue hardship or is unworkable. The current public file rule has worked well since its inception as the Commission is fully aware.

Finally, requiring the contents of the public file to be on the Internet raises a number of liability concerns for whomever is tasked with that responsibility. Many states have data security, privacy, and identity theft laws, the scope of which vary from state to state. Before requiring all licensees to post the contents of the public file on the Internet as a matter of federal regulatory policy, those state laws must be carefully scrutinized to ensure that inconsistent obligations are not imposed.

¹³ See 47 C.F.R. §§ 73.3526(b) and 73.1125.

In short, the marginal benefit of perhaps easier access by non-residents to the public file is far outweighed by the new burdens on broadcasters and their state associations; by inconsistency between localism and the posting of the file on the World Wide Web; by questions of the scope of the Commission's regulatory authority; by matters of state law; and by the cost of stations' compliance in terms of time, money, technical capabilities, and uncertain liabilities.

**V.
Unattended and Remotely Controlled Technical Operations**

The Commission asks for comment on whether there is any reason, in light of recent industry experience, the Commission should revisit its determination that stations may reliably and confidently use unattended and remotely controlled technical operations without jeopardizing the technical integrity of the radio service.¹⁴ The Associations know of no reason to revisit those rules in light of past operating experience or for any other reason. As noted in the *Second FNPRM*, the unattended operation rules went into effect only recently. Given the relatively brief amount of time stations have spent complying with those rules, it is inappropriate at this point to revisit the unattended operations rules. Moreover, broadcasters have made operational decisions in reliance on those regulations—any change now would have significant technical and financial impact on the stations. This docket is not the proper proceeding for any reconsideration of the unattended operations rules.

¹⁴ *Id.* at ¶ 119. See *Amendment of Parts 73 and 74 of the Commission's Rules to Permit Unattended Operations of Broadcast Stations and to Update Broadcast Station Transmitter Control and Monitoring Requirements*, Report & Order, 10 FCC Rcd 11479 (1995).

VI.
Conclusion

For the reasons stated above, the Associations respectfully request the Commission refrain from imposing any limits on subscription services, extending public interest obligations to subscription services, creating any new public interest obligations, requiring the contents of the public file to be made available on the Internet, and reconsidering the unattended operations rules.

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Respectfully submitted,

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**OHIO ASSOCIATION OF
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