

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

To: The Commission

**OPPOSITION OF NATIONAL PUBLIC RADIO
TO
PETITIONS FOR RECONSIDERATION**

Introduction

National Public Radio, Inc. ("NPR") hereby files its Opposition to the Petitions for Reconsideration of the Second Report and Order in the above-captioned matter¹ seeking to annul the permanent authorization of digital audio broadcasting ("DAB").²

Best known for producing such noncommercial programming as *All Things Considered*, *Morning Edition*, *Talk of the Nation*, and *Performance Today*, NPR is a non-profit membership

¹ In the Matter of Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, MM Docket 99-325, 22 FCC Rcd. 10344 (2007) [hereinafter "Second Report and Order", "First Order on Reconsideration", and "Second Further NPRM", as the case may be].

² Petition for Reconsideration of Jonathan E. Hardis, MM Docket No. 99-325 (filed July 9, 2007) [hereinafter "Hardis Petition"]; Petition for Reconsideration of New America Foundation, Prometheus Radio Project, Benton Foundation, Common Cause, Center for Digital Democracy, Center for Governmental Studies, and Free Press, MM Docket No. 99-325 (filed Sept. 14, 2007) [hereinafter "NAF Petition"].

organization of more than 800 public radio stations licensed to community organizations, local school boards, private and public colleges and universities, and other local institutions, many of which have undertaken or completed the transition to DAB. NPR member stations are significant producers of local news, information, and cultural programming.

I. The Petitions For Reconsideration Are Completely Without Merit And Should Be Dismissed

The Commission will entertain a petition for reconsideration only in very narrow circumstances. "If it is based on new evidence, changed circumstances or if reconsideration is in the public interest."³ The Commission will not grant reconsideration "for the purpose of allowing a petitioner to reiterate arguments already presented, . . . especially where a petitioner advances arguments that the Commission previously considered and rejected in prior orders."⁴ The petitions in this case rehash previously considered and rejected arguments and present transparently fallacious ones without offering any new evidence, changed circumstances or compelling public interest considerations. Accordingly, they should be dismissed.

A. The Hardis Petition Fails To Raise Any New Issue Requiring Reconsideration Of The Second Report And Order

At its essence, the Hardis Petition challenges the Second Report and Order on the grounds that the iBiquity In-band, On-Channel ("IBOC") system employs proprietary technology. The petition proceeds by first complaining that the Commission failed to consider the entire record in this proceeding, including comments filed by the petitioner criticizing certain

³ In the Matter of Numbering Resource Optimization; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Telephone Number Portability, Fourth Order On Reconsideration, 22 FCC Rcd.8047; 8050 (2007) ["Numbering Resource Optimization"]. See also 47 C.F.R. § 1.429.

⁴ Numbering Resource Optimization, 22 FCC Rcd. at 8050.

proprietary aspects of the iBiquity IBOC system. Next, the petitioner claims the Commission failed to recognize the existence of certain proprietary aspects of the iBiquity IBOC system. Finally, the petitioner asserts that these flaws invalidate the permanent IBOC authorization in the Second Report and Order.

As is abundantly clear from the Second Report and Order and prior decisions in this proceeding, there is nothing revelatory about the presence of certain proprietary technology in the iBiquity IBOC system. In the First Report and Order, the Commission expressly acknowledged the use of proprietary software coding technology.⁵ Indeed, one of the petitions for reconsideration of *that* Order specifically challenged "iBiquity's status as the sole source of proprietary IBOC technology," a grounds for reconsideration the Commission expressly rejected because the matter had been thoroughly addressed in the First Report and Order.⁶ As the Commission aptly observed in invoking the standard applicable to petitions for reconsideration, "[i]t is well established that the Commission does not grant reconsideration for the purpose of debating matters on which it has already deliberated."⁷

Even if the use of proprietary technology in the iBiquity system had not been addressed, it provides no basis for reconsidering the Second Report and Order absent evidence that iBiquity is exploiting the situation inappropriately. While the Hardis Petition complains that the NRSC

⁵ In the Matter of Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service, First Report and Order, MM Docket 99-325, 17 FCC Rcd. 19990, 19996-97 (2002) (noting additional testing of iBiquity's PAC coding technology by the National Radio Systems Committee) [hereinafter "First Report and Order"].

⁶ First Order on Reconsideration, 22 FCC Rcd. 10387.

⁷ Id.

standard setting process does not include iBiquity's proprietary HD codec,⁸ formal standard setting is not essential to authorizing the iBiquity system.⁹ Moreover, the Commission's longstanding patent policy obligates iBiquity to license all parties on fair terms,¹⁰ iBiquity has committed to licensing all patents necessary to implement the NRSC standard with or without the iBiquity proprietary codec,¹¹ and the NRSC standard permits the use of other audio source coding and compression schemes.¹² Finally, the Commission's review of the NRSC standard setting process is ongoing.¹³ In these circumstances, the Commission made the appropriate judgment to authorize radio stations and equipment manufacturers to move forward with the DAB transition.¹⁴

B. The NAF Petition Is Predicated On False Premises, A Patently Incorrect Construction Of The Commission's Auction Authority, And A Rehash Of Previous Arguments And, Therefore, Should Be Dismissed

The NAF Petition seeks reconsideration of the Second Report and Order based on three grounds. The first accuses the Commission of failing to understand the basic attributes of the iBiquity system. The second misinterprets the Communications Act as requiring the

⁸ Hardis Petition at 7-10.

⁹ See Revised Patent Procedures of the Federal Communications Commission, 3 FCC Rcd.26 (1966) (noting that the Commission's statutory obligation to "encourage the larger and more effective use of radio in the public interest . . . may frequently be met only by the use of patented equipment").

¹⁰ See Second Report and Order, 22 FCC Rcd. at 10384; First Report and Order, 17 FCC Rcd. at 20002.

¹¹ Second Report and Order, 22 FCC Rcd. at 10350 n.22.

¹² Id.

¹³ Id., 22 FCC Rcd. at 10350.

¹⁴ See id.

Commission to auction each station's immediately adjacent spectrum rather than permanently authorizing use of the iBiquity system. The third asks that the Commission impose comprehensive new public interest obligations or mandatory DAB conversion requirements. Because none of these grounds meet the minimum threshold for reconsideration of a Commission rulemaking decision, the Petition should be dismissed.

The NAF Petition first challenges the Commission's permanent authorization of the iBiquity system by questioning the Commission's basic understanding of that system. Thus, the Petition asserts that the Commission acted on an "unexamined and unsupported assumption" that the iBiquity system only utilizes the 200 kHz required for each station's existing analog services.¹⁵ Next, the Petition points to numerous statements evidencing what has long been understood, including by the Commission: the iBiquity system transmits a station's digital data on the spectrum immediately adjacent to the station's analog signal.¹⁶ Finally, as evidence of "inconsistent reasoning," the Petition cites a few statements in support of what it initially claimed is the Commission's "unexamined and unsupported" assumption about the iBiquity system.¹⁷

The fallacy of this argument is two-fold. First, it assumes the Commission lacks even the most rudimentary understanding of the iBiquity system. Even if one were inclined to proceed on

¹⁵ NAF Petition at 8.

¹⁶ See *id.* at 9-11. See, e.g., Second Report and Order, 22 FCC Rcd. at 10347 ("In the hybrid mode, the iBiquity IBOC system places digital information on frequencies immediately adjacent to the analog signal."); First Report and Order, 17 FCC Rcd. at 19995 (The digital portion of the hybrid IBOC signal is transmitted on frequencies immediately adjacent to the main analog signal. Consequently, minimizing interference to stations on first- and, to a lesser extent, second-adjacent channels poses the most serious analog compatibility challenge.")

¹⁷ NAF Petition at 11-12.

that assumption, the various decisional documents in this proceeding clearly describe the basic attributes of the iBiquity system. Second, there is no fundamental inconsistency between acknowledging how the iBiquity system operates and describing the iBiquity system as "allowing broadcasters to transmit digitally *on their existing channel assignments*."¹⁸ That is because each station's channel assignment includes a spectral emission mask, and the iBiquity system transmits the analog and digital energy entirely within a given station's spectral emission mask. That is, in fact, the very definition of the Hybrid DAB System.¹⁹ Accordingly, this is not a case of "unexamined and unsupported" assumptions or inconsistent reasoning, at least on the part of the Commission.

The NAF Petition next contends that the Commission is statutorily obligated to auction each station's adjacent spectrum rather than authorizing the use of the iBiquity system. This contention has no legal basis. The Commission's auction authority is predicated on a threshold determination of *whether* to accept mutually exclusive applications, not a mandate to invite competing applications.²⁰ Accordingly, whether the authorization for stations to use the iBiquity system constitutes "initial licenses" and whether digital radio is mutually exclusive with other

¹⁸ *Id.* at 11 (*quoting, with emphasis, the Second Report and Order, 22 FCC Rcd. at 10347*).

¹⁹ 47 C.F.R. § 73.402(c) (defining "Hybrid DAB System" as "[a]system which transmits both the digital and analog signals within the spectral emission mask of a single AM or FM channel.")

²⁰ *If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection. 47 U.S.C. § 309(j)(1) (emphasis added).*

uses of a station's immediately adjacent spectrum are entirely irrelevant issues.²¹ In this case, the Commission made the reasonable and appropriate decision to authorize the iBiquity system, and the Commission's auction authority requires nothing more.²²

Last and, in this case, even less worthy of the Commission's consideration, the NAF Petition argues that stations should have to bear additional public interest obligations as a consequence of converting to the iBiquity system.²³ This is the same argument the petitioners made in their comments to the Commission and the Commission declined to accept in the Second Report and Order.²⁴ Petitioners also contend that, to avoid unjust enrichment, the Commission should impose a deadline for stations to convert to digital, among other "build out" requirements.²⁵ This argument is directly contrary to what the petitioners previously argued²⁶ when the Commission determined that the public interest was best served by not imposing a

²¹ See NAF Petition at 12-15.

²² While one might conceive of using each station's immediately adjacent spectrum for LPFM or unlicensed use, see NAF Petition at 15-17, the NAF Petition fails to address how such uses might be made technically feasible.

²³ Id. at 17-19.

²⁴ See Second Report and Order, 22 FCC Rcd. at 10371

²⁵ NAF Petition at 18-19.

²⁶ See Reply Comments of Alliance for Better Campaigns, American Federation of Television and Radio Artists, Benton Foundation, Campaign Legal Center, Center for Creative Voices in Media, Center for Digital Democracy, Center for Governmental Studies, Common Cause, National Federation of Community Broadcasters, New America Foundation, Office of Communication of the United Church of Christ, Inc., Prometheus Radio Project at iii, filed June 16, 2004 ("Allowing market forces to guide the speed of transition to digital radio will allow stations to transition at a pace dictated by their own markets and finances."). Except for Free Press, all of the parties to the NAF Petition were parties to the joint reply comments.

mandatory conversion deadline.²⁷ Having helped persuade the Commission to adopt what they previously recommended, the parties to the NAF Petition can hardly complain about the outcome. In any event, these contentions provide no basis for reconsidering the Second Report and Order.

II. Because Of NPR's Pioneering Efforts, The DAB Transition Is Enabling Significant New Public Services, Including Accessible Radio Services For The Print And Hearing Impaired

As demonstrated above, neither Petition presents a compelling case for reconsidering the Second Report and Order, and that alone is sufficient for the Commission to dismiss the Petitions. Nonetheless, it is important for the Commission to understand the harm that entertaining the Petitions would cause the DAB transition and the new public services NPR and others are developing.

The future of DAB is bright because it is more than simply providing digital quality sound for radio broadcasters. In fact, it represents a new digital operating system, requiring a significant investment by radio broadcasters and providing a substantial return for the public. While the first five years since adoption of the First Report and Order have witnessed the initial build-out of digital radio transmission techniques and distribution, the real revolution is just beginning.

Because DAB frees radio broadcasters from the historical constraints of the single-channel-per-carrier analog medium, it makes possible an array of new services. Among them are the following:

- Program associated data to explain and augment the corresponding audio content
- Digital multicast channels to offer valued programming missing in local markets

²⁷ Second Report and Order, 22 FCC Rcd. at 10351.

- Digital multicast channels to upgrade analog radio reading services for the blind
- Digital metadata tagging to offer new personalized audio information services
- Displays to deploy entirely new "captioned radio" for the deaf and hard of hearing
- Integrated Emergency Alerting with wake-up functions for overnight warnings of tornados, wildfires and other threats to safety of life and property

National Public Radio, through its research and development unit, NPR Labs, is currently engaged in developing, demonstrating, and piloting industry best operating practices to further the rapid deployment of these new services in partnership with service providers and consumer electronics manufacturers. In recognition of the significant public service value associated with these services, NPR Labs has received supporting grants from the Corporation for Public Broadcasting, the National Institute on Disability Research and Rehabilitation, the National Telecommunications and Information Administration, and the Harris Corporation to actively develop many of these development applications.

Reconsidering the Second Report and Order in response to the Hardis or NAF Petitions would, at a minimum, cast a significant cloud of uncertainty over the future of DAB. That is because each of the Petitions challenges the basic decision to authorize the iBiquity system and not merely some incidental aspect of it. Accordingly, to the extent the Commission is inclined to give any credence to the merits of either Petition, we urge the Commission to consider the potentially catastrophic consequences for the future of digital radio and the public.

Conclusion

Based on the foregoing, the Commission should dismiss the Petitions for Reconsideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

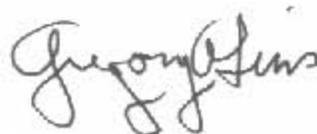
I, Gregory A. Lewis, hereby certify that a copy of the foregoing Opposition of National Public Radio, Inc. to Petitions for Reconsideration, was sent this 11th day of February, 2008, by first class mail, postage prepaid to the following:

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