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April 23, 2010

Via Hand Delivery

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street SW
Room TW-A325
Washington, DC 20554

FILED/ACCEPTED

APR 23 2010

Federal Communications Commission
Office of the Secretary

**Re: MM Docket No. 99-325
Opposition to Application for Review**

Dear Ms. Dortch:

Pursuant to Section 1.115(d), of the Commission's Rules, National Public Radio, Inc. ("NPR") hereby submits an original and nine (9) copies of the enclosed Opposition of National Public Radio to Application for Review in the above-referenced proceeding.

Please direct any questions you may have to the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to read 'Gregory A. Lewis'.

Gregory A. Lewis
Associate General Counsel

cc: William Lake, Chief, Media Bureau (via electronic mail)
Peter Doyle, Chief, Audio Division (via electronic mail)

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Summary

The Media Bureau Order authorizing an increase in HD Radio transmission power represents an appropriate exercise of authority to fulfill the objectives, while respecting the policy choices, established by the Commission for digital audio broadcasting ("DAB"). In response to a request to increase digital power because of inadequate digital coverage, the Bureau conducted an extensive notice and comment proceeding and rendered a decision fully grounded in the resulting public record. The Order promises to improve digital coverage as envisioned by the Commission while protecting against interference to adjacent analog service and provides an interference remediation process to address any harmful interference that may arise.

The Application for Review seeks to upset this careful balance and, by Petitioner's own admission, the digital radio transition itself. The Commission should not sanction such an exercise.

As a threshold matter, the Application for Review is procedurally defective because Petitioner either failed to raise his objections to the Bureau or is challenging Commission inaction on a petition concerning a Commission decision on a matter unrelated to the Order.

Even considering the merits, the Application for Review fares no better. The Order falls squarely within the Media Bureau's authority to act for the Commission in matters pertaining to the development of radio and, in particular, the development of HD Radio. As directed by the Commission, the Bureau conducted an extensive notice and comment proceeding before issuing the Order, and there is no legal obligation to solicit additional comment on the NPR Labs Advanced IBOC Coverage and Compatibility Study ("AICCS"). Finally, there is no legal or policy justification for granting the Application for Review based on a pending petition for reconsideration of a prior Commission decision.

Accordingly, NPR urges the Commission to deny the Application for Review.

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**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
APPLICATION FOR REVIEW**

Introduction

National Public Radio, Inc. ("NPR") hereby files its Opposition to the Application for Review of the recent Media Bureau Order¹ filed by Jonathan E. Hardis ("Petitioner") in the above-captioned matter.²

Best known for producing such noncommercial programming as *All Things Considered*, *Morning Edition*, and *Talk of the Nation*, NPR is a non-profit membership 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 the transition to in-band, on-channel ("IBOC") digital audio broadcasting ("DAB"). NPR also

¹ In the Matter of Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service, Order, MM Docket 99-325, 25 FCC Rcd. 1182 (2010) (Media Bureau) [hereinafter "Order"].

² Application for Review of Jonathan E. Hardis, MM Docket No. 99-325 (filed April 8, 2010) [hereinafter "Application for Review"].

houses NPR Labs, the only not-for-profit broadcast technology research and development center in the United States.

I. The Order Is Squarely Within The Authority Delegated To The Media Bureau

The Application for Review first challenges the Order on the grounds that the Media Bureau exceeded the bounds of its delegated authority.³ As a threshold matter, the Application for Review on this basis is precluded by the Commission's Rules. Specifically, "[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." 47 C.F.R. § 1.115(c). While Petitioner submitted comments during various stages of the Bureau's consideration of the power increase matter,⁴ at no time did he challenge the Bureau's authority to authorize a 10 dB or other power increase.

Assuming the Commission addresses the substance of Petitioner's argument, there is no merit to it. Petitioner's argument that the Bureau lacked authority to issue the Order is based on a highly parsed reading of the delegation of authority contained in the Second Report and Order.⁵ In so doing, Petitioner ignores the broader context within which the Bureau acted, including the Bureau's general authority and the purpose of the specific delegation of authority in the Second

³ Application for Review at 3-16.

⁴ See Ex Parte Comments of Jonathan E. Hardis, MM Docket 99-325, filed Nov. 28, 2008 [hereinafter "Hardis Ex Parte Comments"]; Comments of Jonathan E. Hardis, MM Docket 99-325, filed July 6, 2009; Reply Comments of Jonathan E. Hardis, MM Docket 99-325, filed July 17, 2009.

⁵ 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, 22 FCC Rcd 10344, at 10383 (2007) [hereinafter "Second Report and Order"]

Report and Order. Properly understood, the Order constitutes a reasonable exercise of the Bureau's authority and should not be disturbed.

As a general matter, Section 5(c) of the Communications Act authorizes the Commission to delegate "any of its functions," subject to several narrow exceptions not implicated here. 47 U.S.C. § 5(c)(1). Section 0.61 of the Commission's Rules, in turn, authorizes the Media Bureau to "act[] for the Commission under delegated authority, in matters pertaining to the regulation and development of radio and television services." 47 C.F.R. § 0.61 Petitioner's suggestion that the Order concerns matters that can only be addressed by the Commission, such as spectrum use, is therefore mistaken.⁶

Similarly strained is Petitioner's portrayal of the Commission's specific delegation of authority in this proceeding as limited to "very minor" matters.⁷ In context, the express delegation is far broader:

We believe that DAB will continue to evolve rapidly in tandem with modifications by iBiquity to the IBOC system. In the interests of efficiency, we delegate to the Media Bureau the authority to issue Public Notices, seek public input, and review the range of permissible IBOC operations as circumstances warrant. After appropriate notice and comment, the staff is authorized to act on delegated authority on implementing new IBOC notification procedures to cover new IBOC configurations.⁸

The delegation of authority was made in recognition of the rapid evolution of HD Radio technology and the need to avoid administrative delay by facilitating implementation of the

⁶ See, e.g., Application for Review at 6 ("It falls to the Commission, not a delegated authority, to make the policy decisions on how this spectrum should be shared among those who want access.")

⁷ Id. at 4.

⁸ Second Report and Order, 22 FCC Rcd at 10386-87.

technical changes necessary to realize the benefits of HD Radio.

While the Application for Review seeks to portray the Order as a radical departure from the policy groundwork laid by the Commission, the reality is quite different. Petitioner's argument can be summarized as follows. First, "IBOC" is a misnomer because the technology transmits the digital information outside the analog signal on immediately adjacent spectrum.⁹ Second, stations are entitled to protection from interference outside their protected service contours.¹⁰ Third, the Order strikes a fundamentally new balance between HD Radio service and interference, a regulatory prerogative reserved to the Commission.¹¹ Each of these points is either incorrect or no longer relevant, and, collectively, the argument is without merit.

First, the Commission is well aware of how the HD Radio technology operates.¹² In fact, the Commission previously denied petitions for reconsideration of the First Report and Order that claimed the addition of digital channels adjacent to a station's main analog carrier would cause significant interference and that sought an alternative approach to IBOC that relied on a new spectrum band.¹³

Regarding Petitioner's second point, while NPR recognizes that many stations have listeners located well outside the station community, the First Report and Order decided that

⁹ Application for Review at 7.

¹⁰ Id. at 14.

¹¹ Id. at 15.

¹² 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, 19995 (2010) ("The digital portion of the hybrid IBOC signal is transmitted on frequencies immediately adjacent to the main analog signal.") [hereinafter "First Report and Order"].

¹³ Second Report and Order, 22 FCC Rcd at 10386-87.

stations were not entitled to protection against IBOC interference outside their protected service contour.

Our AM and FM technical regulatory schemes are designed, with certain minor exceptions not relevant here, to protect the reception of analog signals only where those signals meet or exceed certain signal strengths, i.e., within a station's protected service contour (or interference-free contour). This methodology does not ensure reception at every location within these contours and treats interference outside these contours as not objectionable.¹⁴

Petitioner's attempted distinction between "some" and "any" interference outside protected contours is therefore unavailing:¹⁵ "interference outside these contours [is] not objectionable."¹⁶

Third, the Order is entirely consistent with the Commission's prior policy judgments in this proceeding. As the Application for Review itself recounts,¹⁷ the First Report and Order assumed that a -20 dBc digital power level would enable a station to at least replicate its analog coverage area.¹⁸ The Commission also recognized, as noted above, that "the introduction of additional RF energy into the[] heavily used [AM and FM] bands can affect the reception of distant stations with its digital signal."¹⁹ The Commission nonetheless concluded that "the tradeoffs that hybrid mode operations may require are consistent with well-established broadcast

¹⁴ First Report and Order, 17 FCC Rcd at 19995.

¹⁵ Application for Review at 14.

¹⁶ First Report and Order, 17 FCC Rcd at 19995.

¹⁷ Application for Review at 3-4.

¹⁸ First Report and Order, 17 FCC Rcd. at 20001 ("Coverage for both [AM and FM] systems would be at least comparable to analog coverage.")

¹⁹ Id., 17 FCC Rcd. at 19995.

interference policies."²⁰ Thus, a station operating at -20 dBc was expected to be able to provide a quality digital signal over its protected analog coverage area without causing harmful interference to the analog service of adjacent stations within their protected service areas.

The request for increased digital transmission power was presented to the Media Bureau because, in practice, the -20 dBc power limit was insufficient for most stations to replicate their analog coverage.²¹ On this point, the record is abundantly clear.²² Significant time and care was taken, however, to understand the effect of increasing digital power so as to maximize digital coverage while avoiding interference to protected analog service. So understood, the Order achieves what the Commission originally intended: replication of analog coverage and compatibility with analog service.

The Order is therefore consistent with Commission Rules and policy, within the authority delegated by the Commission to the Media Bureau, and correctly decided.²³

II. The Bureau Amply Satisfied The Requirement To Conduct Appropriate Notice And Comment Proceedings

In delegating authority to the Media Bureau "to review the range of permissible IBOC operations" and "implement[] new IBOC notification procedures to cover new IBOC configurations," the Commission authorized the Bureau to issue public notices and solicit public

²⁰ Id.

²¹ Order, 25 FCC Rcd. at 1183 ("Despite the rigorous testing, it soon became apparent that hybrid FM IBOC digital coverage often did not replicate analog coverage, especially in mobile and indoor environments.")

²² See id., 25 FCC Rcd. at 1187 ("Both the iBiquity and NPR studies confirm these service limitations.")

²³ See 47 C.F.R. § 1.115(b)(2)(i), (iv).

input before taking regulatory action. As demonstrated above, the Order falls squarely within the scope of the Bureau's authority and, as demonstrated below, the Bureau acted only after "appropriate notice and comment."²⁴

Even though the purpose of the delegation was to expedite regulatory review of proposed changes to IBOC operations, the Bureau established what can only be described as a voluminous public record. The Bureau issued two Public Notices, each soliciting comment and reply comment on various aspects of the power increase matter.²⁵ More than 80 individuals or entities commented on the first Public Notice;²⁶ more than 70 commented on the second.²⁷ A timeline of the proceeding is illustrative.

6/10/08	across-the-board 10 dB power increase proposal
6/10/08	iBiquity Digital Corporation technical study
7/18/08	NPR Labs Digital Radio Coverage and Interference Analysis ("DRCIA") study
10/23/08	first Public Notice
12/5/08 & 1/12/09	comments and reply comments
5/22/09	second Public Notice
7/6/09 & 7/17/09	comments and reply comments
11/4/09	NPR Labs AICCS study
11/5/09	NPR and iBiquity compromise power increase proposal
11/5/10 -1/28/10	numerous ex parte communications on the NPR Labs testing, the NPR/iBiquity proposal, and the power increase issue generally
1/29/10	<u>Order</u> released

²⁴ Second Report and Order, 22 FCC Rcd at 10383.

²⁵ Order, 25 FCC Rcd. at 1184-86.

²⁶ Id., 25 FCC Rcd. at 1196.

²⁷ Id., 25 FCC Rcd. at 1197.

In delegating authority to the Media Bureau, there is nothing to suggest the Commission contemplated even more notice, comment, or procedure, yet that is what the Application for Review demands.

Petitioner's principal objection is that the Bureau failed to issue a third Public Notice soliciting public comment on the NPR Labs AICCS study.²⁸ In support of this contention, Petitioner relies on American Radio Relay League v. FCC, 524 F.3d 227 (D.C. Cir. 2008).²⁹ In so doing, Petitioner fundamentally misreads the decision. Rather than requiring public comment on *all* technical studies upon which an agency relies in a rulemaking, the 2-1 decision in ARRL specifically concerned technical studies conducted by *Commission staff* which had not been made publicly available.³⁰ In this case, the AICCS study was conducted by NPR, not the Commission. The testing process itself involved a wide array of entities with interests in terrestrial FM broadcasting, and the study report was filed in the docket of this proceeding and made publicly available more than two and a half months before the Order was released.³¹ That other entities commented on the AICCS study, in some cases extensively, demonstrates there was ample opportunity for Petitioner to have commented on the study, had he so chosen.³² Indeed, whatever

²⁸ Application for Review at 18 ("Accordingly, the Commission must vacate the *Order* and ensure an appropriate opportunity for comment on the AICCS report before deciding such rules.")

²⁹ Id.

³⁰ American Radio Relay League, 524 F.3d at 236-38.

³¹ See Order, 25 FCC Rcd. at 1186.

³² Compare Echostar Satellite, LLC v. FCC, 457 F.3d 31, 393 (D.C. Cir. 2006) ("Echostar could have criticized the study, or requested more time in which to do so, during the two months between the filing of the [comments describing the study] and the issuance of the Commission's decision.")

objections Petitioner may have to the AICCS study, the Bureau's consideration of it, or the absence of a Public Notice soliciting public comment, Petitioner's failure to raise these objections when he had the opportunity to do so precludes granting the Application for Review on any of those bases.³³

Review of the Order would not be warranted even if Petitioner had timely objected to the AICCS study or the Bureau's consideration of it. Although NPR questioned granting the original 10 dB power increase, iBiquity and a significant segment of the broadcast industry supported the proposal. In response to the second Public Notice, moreover, several commenters, including the original power increase proponents, endorsed a more modest 6 dB increase.³⁴ The principal difference between the power increase approved in the Order and the earlier proposals is the use of a contour protection formula for approving increases between 6 dB and 10 dB. In these circumstances, further notice and comment was and is not warranted to justify a more modest digital power increase than originally proposed, one supported by most of the interested parties and the record.

Accordingly, the Order is consistent with Commission Rules and policy and procedurally

³³ See 47 C.F.R. § 1.115(c).

³⁴ See Comments of Backyard Broadcasting, LLC, Beasley Broadcast Group, Inc., Black Crow Media Group, L.L.C., Bonneville International Corp., Broadcast Electronics, Inc., Broadcaster Traffic Consortium, L.L.C., CBS Radio Inc., Clear Channel Communications, Inc., Commonwealth Broadcasting Corporation, Continental Electronics Corp., Cox Radio, Inc., Emmis Communications Corp., Entercom Communications Corp., Greater Media, Inc., Harris Corporation, Journal Broadcast Corporation, Lincoln Financial Media Company, Nassau Broadcasting Partners, L.P., Nautel Maine Inc., NRG Media, LLC, Sacred Heart University, Inc., MM Docket 99-325, at 12, filed July 6, 2009; Comments of iBiquity Digital Corporation, MM Docket 99-325, at 5, filed July 6, 2009.

proper.³⁵

III. Resolution Of The Pending Petitions For Reconsideration Of The Second Report And Order Is Not Required

The Petitioner's final argument is directed not at the Order but at the Second Report and Order and the fact that the Commission has not acted on two pending petitions for reconsideration, including one filed by the Petitioner.³⁶ While NPR opposed those petitions as meritless,³⁷ even assuming otherwise provides no justification for reviewing the Order. If the Commission were to bar station use of HD Radio transmitters, as the reconsideration petitions request, it would reach that conclusion on the basis of the petitions for reconsideration. Until such a decision is reached, however, the Bureau is justified in implementing the Second Report and Order, including by rendering decisions, such as the Order.

It follows, therefore, that review of the Order based on the pendency of the petitions for reconsideration is neither required nor justified. Indeed, granting the Application for Review would be tantamount to staying the Second Report and Order without having established an entitlement to a stay under the rigorous standards that otherwise apply.³⁸ Such an action would have significant consequences in terms of the HD Radio transition, but also for Commission practice in general. In fact, if Petitioner's theory were validated, any time anyone objected to a

³⁵ See 47 C.F.R. § 1.115(b)(2)(i), (v).

³⁶ See Application for Review at 23

³⁷ See Opposition of National Public Radio to Petitions for Reconsideration, MM Docket No. 99-325, filed Feb. 11, 2008.

³⁸ See Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958); Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, Memorandum Opinion and Order, 66 F.C.C.2d 466 (1977).

Commission decision, they could block implementation of the decision merely by filing a petition for reconsideration. That has never been the case under the Communications Act or the Commission's Rules, and the Commission should not endorse such a strategy here.

Regarding the merits of Petitioner's reconsideration petition, reprised in the Application for Review, he challenges the Second Report and Order on the grounds that the IBOC system employs proprietary technology. There is nothing improper about the inclusion of propriety technology, a fact the Commission understood and acknowledged in the First Report and Order,³⁹ the First Order on Reconsideration,⁴⁰ and the Second Report and Order.⁴¹ Moreover, Petitioner has presented no evidence that iBiquity is exploiting the situation inappropriately. Having made the judgment to authorize radio stations and equipment manufacturers to move forward with the DAB transition, there is no reason for the Commission to reconsider the matter, especially in the context of the Application for Review of the Media Bureau Order.

Thus, Petitioner's petition for reconsideration of the Second Report and Order concerns a matter previously resolved by the Commission,⁴² and the pendency of the petition for reconsideration provides no basis for granting the Application for Review of the Order.

³⁹ First Report and Order, 17 FCC Rcd. 19996-97 (noting additional testing of iBiquity's PAC coding technology by the National Radio Systems Committee).

⁴⁰ In the Matter of Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service, First Order on Reconsideration, 22 FCC Rcd. 10344, 10387 (2007).

⁴¹ Second Report and Order, 22 FCC Rcd at 10384.

⁴² See 47 C.F.R. § 1.115(b)(2)(ii).

IV. The Order Constitutes Another Important Step Forward in the DAB Transition And Should Not Be Disturbed

The Media Bureau Order represents an important accomplishment, enabling stations to serve their communities with a quality digital signal without causing harmful interference to adjacent analog service. It is an accomplishment that required significant time and resources by the industry and Commission staff. While no decision can ever satisfy everyone, the Media Bureau struck a prudent balance between digital service and analog interference and incorporated an interference remediation process to ensure meaningful Commission oversight in the event interference problems should arise.

A decision granting the Application for Review would seriously disrupt the HD Radio transition. NPR itself is actively engaged in developing the HD Radio technology for a number of public interest purposes, including improving access to audio information for the print-disabled and developing captioned radio for the hearing-disabled. In pursuing these initiatives, NPR is relying on the continued build-out of the HD Radio infrastructure so that the public, including historically underserved audiences, can experience and appreciate the benefits DAB has to offer. Granting the Application for Review would send an unmistakable message that the future of HD Radio is in significant doubt. Such an outcome would disserve the public interest.

Ironically, in response to one of the many opportunities to comment on the Joint Parties' original proposal, Petitioner commented on the disparity between the testing conducted by iBiquity and NPR's DRCIA study: "It would be proper for the industry itself to seek a balance between improving hybrid digital coverage and maintaining legacy analog service."⁴³ That is precisely what NPR, iBiquity, and others in the radio broadcast industry sought to accomplish.

⁴³ Hardis Ex Parte Comments at 3.

Furthermore, Petitioner counseled the Commission to "seek out and give substantial weight to any industry compromise that might be achievable."⁴⁴ In this case, the industry compromise that resulted fell squarely within the range of potential outcomes supported by the record.

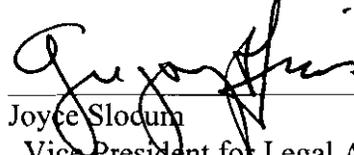
Accordingly, the Order is in the public interest and should be sustained.

Conclusion

Based on the foregoing, the Commission should deny the Application for Review.

Respectfully submitted,

NATIONAL PUBLIC RADIO, INC.



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⁴⁴ Id.

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I, Gregory A. Lewis, hereby certify that a copy of the foregoing Opposition of National Public Radio, Inc. to the Application for Review, was sent this 23rd day of April, 2010, by first class mail, postage prepaid to the following:

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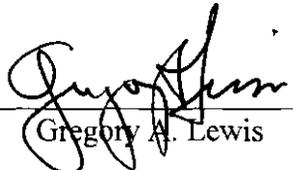
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