

FCC Mail Room

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554-0005

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

To: The Commission

REPLY TO OPPOSITION OF NATIONAL PUBLIC RADIO
TO APPLICATION FOR REVIEW

1. My name is Jonathan E. Hardis, and on April 8, pursuant to § 1.115 of the Commission's rules, I applied for review of an Order adopted by Media Bureau under delegated authority in the above captioned proceeding.¹⁻² National Public Radio has filed an opposition,³ and I reply to it herein pursuant to § 1.115(d).

2. NPR begins by claiming (at p. 2) that consideration of the first question in the Application for Review "is precluded by the Commission Rules" because "at no time did he challenge the Bureau's authority to authorize a 10 dB or other power increase." This argument fails on two grounds. As a general principle, the purpose of public comment is to bring to an agency's attention facts and other information about which it might not have previously known.

There is no need in public comment to inform an agency about its own rules and procedures

¹ DA 10-208, Adopted January 27, 2010, Released January 29, 2010. Electronically at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-10-208A1.pdf. Hereinafter, the "Order." See also 75 FR 17874, April 8, 2010.

² Application for Review of Jonathan E. Hardis ("Application for Review"), April 8, 2010, MM Docket No. 99-325; at <http://fjallfoss.fcc.gov/ccfs/document/view?id=7020408278>.

³ Opposition of National Public Radio to Application for Review, ("Opposition") April 23, 2010, MM Docket No. 99-325. As of the evening of April 27, copy has not yet appeared on the ECFS.

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because they are already authoritative on them. However, in the instant matter, this is a moot point. Prior to issuance of the *Order* I had no indication that Media Bureau would issue a final order in a rulemaking proceeding on its own, notwithstanding § 0.283(a) of the Commission's rules, which requires it to be referred to the Commission en banc for disposition. This is the first opportunity to object. NPR's discussion of § 0.61 is all well and good, but it fails to distinguish between those matters on which Media Bureau "advises and recommends to the Commission," and those where it "acts for the Commission under delegated authority."

3. NPR proceeds (at p. 6) to reiterate the rationale for a power increase. While argument on technical points is best left for future public comment, I say again that under NPR's own data analysis in their Advanced IBOC Coverage and Compatibility Study (AICCS), any power level above –20 dBc did not, in fact, "avoid[] interference to protected analog service."⁴ Furthermore, the record is indeed "abundantly clear" that –20 dBc is sufficient level of power to replicate analog coverage, provided that the receiver meets the technical requirements of the *de facto* standard adopted by the Commission. These are the technical characteristics of the prototype receiver as tested, which were well documented.⁵

4. On the second question in the *Application for Review*, concerning a public comment requirement for the AICCS report, NPR does not dispute the fact that the *Order* takes credibility from its proximity to the AICCS report. (Neither does NPR dispute that the *Order* did not consider the report's actual experimental data and technical findings.) Instead, NPR merely argues that *ARRL v. FCC* is inapposite because it concerned a study conducted by *commission staff*, whereas AICCS was an NPR study. NPR is quite right that, in most cases, rules challenges based on lack of public review of technical studies and data have arisen from in-house research

⁴ See, Application for Review at 34.

⁵ See, Application for Review at 5.

conducted by the agencies themselves. However, the venue of the study has never been the controlling issue. *Chamber of Commerce v. SEC*, for example, concerned privately produced “Management Practice Inc. Bulletin[s].”⁶⁻⁷ The issue is the opportunity for public comment about technical studies relied upon for rulemaking, regardless of their source.

5. The circumstances here are perhaps unique in that a major study—one specifically designed for the rulemaking at hand—was conducted while the rulemaking was ongoing and was completed so late in the process. Nonetheless, Media Bureau declared that, “[w]e have reviewed the AICCS Project Report, the Agreement submitted by NPR and iBiquity, the *MAP 2010 Ex Parte* and the *Jurison Comments*,” the later three being derivatives of the AICCS. “Based on our analysis of these documents and data ... we are convinced that an immediate voluntary 6 dB increase in FM Digital ERP is appropriate for all FM stations except super-powered FM stations.” (*Order* at 15) This demonstrates conclusively that solicited public comment on the AICCS is required—regardless of previous comment that was solicited, and regardless of any *ex parte* comments that might have been received.

6. On this latter point, NPR faults me for not, myself, providing *ex parte* comments on the AICCS report. Citing *Echostar Satellite, LLC v. FCC*, they say that I had “ample opportunity.” In fact, I had every reason to expect that an additional comment period would be opened prior to issuance of a final order, as did others.⁸ In *Echostar*, there was a comment period in which the results of the NAB/AMST study were available for discussion, and there was no

⁶ *Chamber of Commerce v. SEC*, 443 F.3d 890 (D.C. Cir. 2006), online at <http://pacer.cadc.uscourts.gov/docs/common/opinions/200604/05-1240a.pdf>.

⁷ Ironically, later in the same paragraph NPR cites *Echostar Satellite, LLC v. FCC*, which concerned data generated by the NAB and the ASMT, rather than the Commission itself.

⁸ “It will take additional time for the Commission to receive the [AICCS] report and make it available for public comment. This entire process could take several months. Interested parties will then need to be given the opportunity to file comments and reply comments.” Comments of iBiquity Digital Corp., at pp. 6–7, July 6, 2009, MM Docket No. 99–325, electronically at <http://fjallfoss.fcc.gov/ccfs/document/view?id=7019808294>

expectation that there would be another. (The controversy in *Echostar* pertained to access to the raw data behind the study, which is not at issue here.) Furthermore, public comment is not something allowed for my personal benefit. Public comment is for the benefit of the agency, and perhaps later the courts, to acquire the broad swatch of knowledge that is required to make good decisions.⁹ Whether or not I personally chose to provide ex parte comments is totally irrelevant.

7. On the third question in the *Application for Review*, on whether the Order involves questions of law and policy that the Commission has not yet decided, NPR missed the point. They provided inapposite and incorrect analyses of both the *Application for Review* and the earlier Petitions for Reconsideration (PFRs). I am sorry if I was unclear. The actual issue, on which NPR did not comment, is that of exhaustion of administrative remedy with respect to the pending PFRs. Since the Commission (though delegated authority, if upheld) has reexamined its prior positions and reaffirmed them in a separate rulemaking, the *Order* constitutes conclusion of vicarious reconsideration. It evidences that the Commission had its “opportunity” to pass on questions of fact and law. (47 U.S.C. 405) Whatever the ultimate fate of the *Order* itself, after its own provisions are tested in reconsideration and appeal, its demonstration that the *Second Report and Order* was reconsidered will remain intact.

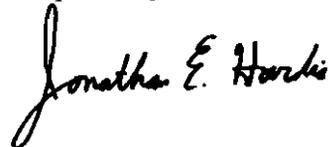
8. NPR construes a stay of the *Order* as something based on the merits of ultimately defeating the *Order*. (*Opposition* at Fn. 38) However, that would not be its role here. *Darby v. Cisneros*¹⁰ lays out the two methods by which an agency can avoid administrative finality for decisions under the Administrative Procedure Act: having a rule requiring agency appeals (which the Commission does), or providing that the decision will be inoperative (stayed) pending

⁹ Congress prescribed APA procedures “to ensure that the broadest base of information would be provided to the agency by those most interested and perhaps best informed on the subject of the rulemaking at hand.” (*Brown Express, Inc. v. United States*, 607 F.2d 695, 701 (5th Cir. 1979).)

¹⁰ *Darby et al. v. Cisneros et al.*, 509 U.S. 137 (1993)

agency appeal. With respect to the *Second Report and Order*, what I am suggesting is that if the Commission wishes to continue to avoid finality, its reconsideration having been effectively completed, a stay is the other route available. Since it would make no sense to stay an action that was just affirmed on reconsideration, what I am suggesting is that a stay of the *Order* instead would also avoid finality. That is, with respect to the *Order*, one cannot require mandatory reconsideration of whether or not it reconsidered a prior issue. However, if it did so improv-
dently or inadvertently, then it might be stayed by higher authority. I believe I might be obligated under § 1.115(b)(2)(ii) and § 1.115(k) to pop up the button box that says, "You are about to make the *Second Report and Order* administratively final. Are You Sure?" This ensures that the Commission itself has been properly notified and has been given opportunity to act.

Respectfully submitted,



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Dated: April 28, 2010

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CERTIFICATE OF SERVICE

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