

**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)	

**OPPOSITION OF
IBIQUITY DIGITAL CORPORATION**

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May 25, 2010

SUMMARY

iBiquity Digital Corporation (“iBiquity”) hereby submits this consolidated Opposition to the petitions for reconsideration and applications for review that were recently filed in this proceeding. Those petitions and applications were filed in response to the Media Bureau’s *Order* authorizing broadcasters to increase power levels for digital FM broadcasting. As is explained in greater detail below, the petitions and applications fail to demonstrate a procedural error, erroneous fact finding or conflict with past Commission precedent or case law that would warrant a reversal of the *Order*. Moreover, the filings do not provide a sufficient showing of good cause to justify the grant of a stay, as requested by some of the petitioners and applicants. iBiquity requests that the Commission dismiss the petitions for reconsideration and applications for review and uphold the Media Bureau’s findings and rules in the *Order*.

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iBiquity Digital Corporation (“iBiquity”) hereby submits this consolidated Opposition to the petitions for reconsideration and applications for review¹ that were recently filed in the above-referenced proceeding.² Those petitions and applications were filed in response to the Media Bureau’s *Order* authorizing broadcasters to increase power levels for digital FM broadcasting.³ As is explained in greater detail below, the petitions and applications fail to demonstrate a procedural error, erroneous fact finding or conflict with past Commission precedent or case law that would warrant a reversal of the *Order*. Moreover, the filings do

¹ Although iBiquity is including in this Opposition responses to the applications for review, iBiquity notes no action can be taken on those applications for review until the Commission has taken final action on the petitions for reconsideration. 47 C.F.R. §1.104(c).

² On April 22, 2010 iBiquity requested an extension of time until May 25, 2010 to file an Opposition to the Application for Review that Jonathan E. Hardis filed prematurely on April 8, 2010. Three petitions for reconsideration and two additional applications for review were filed by the May 10, 2010 deadline. Pursuant to Section 1.429 of the Commission’s Rules, 47 C.F.R. §1.429(f), oppositions to petitions for reconsideration in rulemaking proceedings must be filed within 15 days after the date of public notice of the petitions. Section 1.115 of the Commission’s Rules, 47 C.F.R. §1.115(d), specifies that oppositions to applications for review must be filed within 15 days after the application for review is filed. Because the petitions for reconsideration and the applications for review raise similar issues, iBiquity has addressed all the outstanding petitions for reconsideration and applications for review in this consolidated Opposition filed in accordance with its April 22, 2010 request for an extension of time.

³ *Digital Audio Broadcasting Systems And Their Impact on the Terrestrial Radio Broadcast Service*, MM Docket No. 99-325, *Order* (rel. Jan. 29, 2010)(“*Order*”).

not provide a sufficient showing of good cause to justify the grant of a stay, as requested by some of the petitioners and applicants. iBiquity requests that the Commission dismiss the petitions for reconsideration and applications for review and uphold the Media Bureau's findings and rules in the *Order*.

1. The Media Bureau Did Not Exceed the Bounds of Delegated Authority

The Media Bureau's decision in the *Order* was within the scope of authority the Commission delegated to the Media Bureau in the *Second R&O*.⁴ The Hardis Application⁵ incorrectly argues that the Media Bureau exceeded the grant of delegated authority in the *Second R&O*. The plain language of the *Second R&O* as well as the Commission's Rules rebut the Hardis Application argument and demonstrate the *Order* was within the scope of authority the Commission had delegated to the Media Bureau.

In the *Second R&O*, the Commission granted the Media Bureau broad delegated authority to continue to develop technical rules for digital radio:

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. Expansion of the notification procedures will allow stations to implement digital operations without unnecessary delay.⁶

⁴ *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 And Second Further Notice Of Proposed Rulemaking (rel. May 31, 2007)(“*Second R&O*”).

⁵ Application for Review of Jonathan E. Hardis, MM Docket No. 99-325 dated April 8, 2010 (“Hardis Application”).

⁶ *Second R&O* at ¶99.

The power increase authorized in the *Order* constitutes a “new IBOC configuration” for which the Media Bureau adopted “new IBOC notification procedures.” The plain language of the *Second R&O* states this type of decision is within the scope of authority delegated to the Media Bureau.

The language of the *Second R&O* and the Media Bureau’s action in the *Order* also are consistent with the Commission’s Rules. Section 0.203 of the Commission’s Rules specifies an entity receiving a grant of delegated authority shall assume all powers held by the Commission.⁷ The Hardis Application advocates an unnecessarily narrow reading of both the Commission’s *Second R&O* and the Commission’s Rules. There is no indication that the Commission reserved to itself decisions concerning digital radio spectrum usage. The Hardis Application provides no justification for the assertion that certain subject matters by their very nature could not have been delegated to the Media Bureau. This contradicts the wording and intention of Section 0.203 as well as the broad delegation of authority in the *Second R&O*. The Hardis Application complaints about delegation of authority must be rejected.⁸

2. The Media Bureau Was Not Obligated to Issue a Separate Public Notice for NPR’s AICCS Report

The Media Bureau complied with all procedural requirements and provided adequate opportunity for public comment on National Public Radio’s (“NPR”) AICCS Report. The Hardis Application incorrectly argues that the Media Bureau was obligated to issue a

⁷ 47 C.F.R. §0.203(a).

⁸ A significant portion of the Hardis Application discussion of delegated authority appears to be an argument about the validity of the Commission’s initial authorization of IBOC. Those arguments have been advanced and rejected repeatedly in this proceeding. iBiquity will refrain from addressing those arguments once again but in no way endorses or acquiesces in those arguments.

separate Public Notice to solicit comment on the AICCS Report. Nothing in the Commission's Rules or precedent supports this assertion.

The Commission's Rules classify comments and reports filed after the completion of a specified comment period as *ex parte* presentations.⁹ All *ex parte* presentations are included in the docket of the relevant proceeding and thus are available to the public. Although the Commission's Rules specify that the Secretary's Office will publish a list of post-reply comment period *ex parte* filings, the Rules note that some *ex parte* filings may be omitted from such public notices, and the public bears the burden of monitoring the docket of the proceeding for relevant *ex parte* filings:

Interested persons should be aware that some *ex parte* filings, for example, those not filed in accordance with the requirements of this paragraph (b), might not be placed on the referenced public notice. All *ex parte* presentations and memoranda filed under this section will be available for public inspection in the public file or record of the proceeding, and parties wishing to ensure awareness of all filings should review the public file or record.¹⁰

The FCC's *ex parte* Fact Sheet contains a similar warning:

The Commission's Secretary issues a public notice at least twice a week listing any written *ex parte* presentations or written summaries of oral *ex parte* presentations in permit-but-disclose proceedings. It is possible that some presentations might inadvertently be omitted from this list, so interested persons should review the public file or record in proceedings about which they are concerned, where the copies of written presentations and memoranda of oral presentations can be found.¹¹

⁹ 47 C.F.R. §1.1202 (defining an *ex parte* "presentation" as. "[a] communication directed to the merits or outcome of a proceeding.").

¹⁰ 47 C.F.R. §1.1206, Note 2 to Paragraph (b).

¹¹ Federal Communications Fact Sheet, FCC's *Ex Parte* Rules dated July 2001, available at http://www.fcc.gov/ogc/admain/ex_parte_factsheet.html.

NPR properly filed the AICCS Report with the Secretary's office. The Commission added the AICCS Report to the docket in this proceeding. Dr. Hardis and all other interested parties had access to the AICCS Report and all other filings in this proceeding. The Hardis Application does not claim that there was any deficiency in NPR's ex parte filing.¹² In fact, the sufficiency of the ex parte process is more than amply demonstrated by the fact that more than one party provided comments to the Commission on the AICCS report before release of the *Order*.¹³ Moreover, the Bureau discussed those filings in the *Order*.¹⁴

The Hardis Application offers an overly broad view of the Commission's public notice obligations, and its reliance on the D.C. Circuit's decision in *AARL v. FCC*¹⁵ is misplaced. That case involved the appropriate public notice for a number of internal staff studies the FCC relied on in a rulemaking. The D.C. Circuit did not take issue with the lack of a specific public notice of the studies. Rather, the case focused on the Commission's failure to make unredacted versions of the reports available by any means.¹⁶ The Court concluded that if the Commission intended to rely on a report or other input it needed to make it available to the public.¹⁷ Contrary to Dr. Hardis' implications, the Court did not

¹² Although it is not part of the FCC's proceeding, iBiquity notes Dr. Hardis had ample notice of the AICCS Report through his participation in the National Radio Systems Committee. Dr. Hardis, on behalf of the National Institute of Standards and Technology, attended the January 7, 2010 meeting of the NRSC's DRB Subcommittee. At that meeting, there was an extensive discussion of both iBiquity's and NPR's work to advance the FCC's consideration of proposals to increase digital FM power. See National Radio Systems Committee DRB Subcommittee minutes of January 7, 2010 meeting.

¹³ See e.g. Media Access Project Ex Parte Filing, MM Docket No. 99-325 dated Jan. 4, 2010.

¹⁴ *Order* at 7.

¹⁵ *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227 (D.C. Cir. 2008).

¹⁶ *Id.* at 237.

¹⁷ *Id.* ("It would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment.").

prescribe a particular means of providing public notice, it merely required some form of access to relevant documents.

A more instructive analysis can be found in the D.C. Circuit's opinion in *Rural Cellular Association v. Federal Communications Commission*.¹⁸ There, the Court explained the Commission's obligations as follows:

Under the APA, a “[g]eneral notice of proposed rule making shall be published in the Federal Register” and “shall include . . . either the terms of substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. §553(b). After publishing the required notice, the agency must “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.” *Id.* §553(c). The opportunity for comment must be a meaningful opportunity, *see Gerber v. Norton*, 294 F.3d 173, 179 (D.C. Cir. 2002), and we have held that in order to satisfy this requirement, an agency must also remain sufficiently open-minded. . . .¹⁹

As was the case in the *Rural Cellular* proceeding, the Media Bureau complied with each of these rulemaking requirements. The Bureau commenced this phase of the proceeding in 2008 with issuance of a Public Notice.²⁰ There was an extensive record developed over the course of more than one year with comments filed by approximately 75 parties. The Bureau considered these comments and issued an order after the proceeding was complete. As the Court noted in *Rural Cellular*, “Nothing else is required.”²¹ There was no obligation for the Bureau to issue a separate public notice of the filing of the AICCS report. The Bureau satisfied all its procedural obligations, and its decision should be upheld.

¹⁸ *Rural Cellular Association v. Federal Communications Commission*, 588 F.3d 1095 (D.C. Cir. 2009).

¹⁹ *Id.* at 1101.

²⁰ *Comment Sought on Joint Parties Request for FM Digital Power Increase and Associated Studies*, Public Notice, DA 08-2340 (MB rel. Oct. 23, 2008).

²¹ *Rural Cellular*, 588 F.3d at 1101.

3. The Bureau's Decision Was Not Arbitrary or Capricious

In the *Order* the Bureau considered and addressed the substantive arguments that were offered in relevant filings. The *Order* is a rational outcome of this proceeding and cannot be viewed as arbitrary or capricious, as asserted by Media Access Project (“MAP”).²²

The MAP Application appears to be focused on a concern that the Media Bureau did not accept MAP's arguments. Although the MAP Application claims the Bureau failed to address the issues MAP raised, a review of the *Order* demonstrates the opposite. The *Order* references MAP/Prometheus in at least 11 footnotes. Paragraph 15 of the *Order* is devoted to an extensive discussion of the Media Access Project 2010 ex parte filing.²³ Similarly, paragraphs 21 and 22 contain an extensive discussion of MAP/Prometheus arguments. The Bureau was obligated to consider the MAP/Prometheus arguments. It was not obligated to agree with them.

The MAP Application relies heavily on the Supreme Court's decision in *Motor Vehicle Manufacturer's Association v. State Farm Mutual Automobile Insurance Co.*²⁴ Contrary to the MAP Application assertion, the Supreme Court did not say agencies are “required to consider *all* the relevant factors.”²⁵ The word “all” is conspicuously absent from the opinion:

The scope of review under the “arbitrary and capricious” standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a

²² Application for Review of Prometheus Radio Project, MM Docket No. 99-325 dated May 10, 2010 (submitted by Media Access Project) (“MAP Application”).

²³ Ex Parte Notice, MM Docket No. 99-325 dated Jan. 4, 2010.

²⁴ 463 U.S. 29, 42-43 (1983).

²⁵ MAP Application at 5 (emphasis added).

“rational connection between the facts found and the choice made.”²⁶

In the *Order*, the Media Bureau considered the relevant data in the record and presented a satisfactory explanation for its decision. Its failure to adopt or argue with MAP/Prometheus’ arguments does not render the Bureau’s action arbitrary or capricious. The MAP Application should be dismissed.²⁷

4. The Commission Should Reject Filings that Go Beyond the Power Increase Issues Raised in the *Order*

The Commission should reject attempts to use the reconsideration or review process to reargue the need for digital broadcasting or to promote proposals that seek alternative digital radio solutions. The Application for Review of Press Communications²⁸ and the Petition for Reconsideration of Mullaney Engineering²⁹ focus principally on those parties’ overall displeasure with digital broadcasting rather than specific issues with the digital power increase authorized in the *Order*. The Mullaney Petition appears to express complaints about the process National Public Radio, the Joint Parties and iBiquity used to reach a consensus on the power increase. This has no bearing on the rules the Media Bureau adopted in the *Order*.

²⁶ *Motor Vehicle*, 463 U.S. at 43.

²⁷ The Petition for Reconsideration of Alan W. Jurison, MM Docket No. 99-325 dated May 10, 2010 (“Jurison Petition”) contains a similar request for the Media Bureau to reconsider arguments Mr. Jurison submitted that were not adopted in the *Order*. As with the MAP Application, the Media Bureau was under no obligation to accept Mr. Jurison’s arguments. In fact, there was no constraint on the Media Bureau’s ability to grant less than the full 10 dB increase in power that had been requested in this proceeding. NPR, iBiquity, the Joint Parties and the National Association of Broadcasters all supported the 6 dB increase with a potential for a full 10 dB increase as the Commission adopted in the *Order*. There is no reason to reconsider the *Order* at this time. The Media Bureau can consider additional increases in power at a later date if it feels further increases are warranted.

²⁸ Application for Review and Request for Stay of Press Communications, LLC, MM Docket No. 99-325 dated May 10, 2010.

²⁹ Comments of Mullaney Engineering, Inc., MM Docket No. 99-325 dated May 10, 2010.

Similarly, the Mullaney Petition discussions of alternative systems and reallocation of TV Channels 5 and 6 are irrelevant to the *Order*. This petition should be summarily dismissed.

The Press Communications Application appears to focus on a strained reading of Section 307 of the Communications Act.³⁰ Press Communications mischaracterizes the digital power increase as a license “modification” under Section 307.³¹ However, Section 307 applies to individual station *applications* not rulemaking proceedings.³² In this rulemaking proceeding, the Media Bureau adopted new rules to modify the technical specifications for all FM stations operating digitally. Stations commencing digital service or increasing digital power do not need to file station applications. Therefore, Section 307 of the Act is irrelevant. Even if stations notifying the Commission of power increases could somehow be construed to be filing applications, the digital power increase does not involve a modification to station licenses. Stations operating at -10 dBc will continue to operate within the emissions limits specified for FM stations.³³ Press Communication’s expansive reading of Section 307 of the Act is misplaced and should be rejected.

5. The Commission Should Dismiss Procedurally Defective Filings

The Petition for Reconsideration of Peter and John Radio Fellowship, Inc.³⁴ and the Petition of Givens & Bell³⁵ each raise issues that were not previously presented to the

³⁰ 47 U.S.C. §307(b). See Press Communications Petition at 10.

³¹ Press Communications Petition at 10.

³² Section 307 states, “In considering *applications* for licenses, and modifications. . . .” 47 U.S.C. §307(b)(emphasis added).

³³ 47 C.F.R. §73.317.

³⁴ Petition for Reconsideration of Peter and John Radio Fellowship, Inc., MM Docket No. 99-325 dated May 10, 2010.

³⁵ Petition of Sidney E. Shumate, President, Givens & Bell, Inc., MM Docket No. 99-325 dated May 7, 2010.

Commission in this proceeding. Similarly, the Press Communications Application raises requests to reconsider Commission decisions that are several decades old.³⁶ Thus, they are procedurally defective and should be dismissed. The Peter and John Petition requests reconsideration of the *Order* due to concerns about the potential for interference from WRBT-FM, Harrisburg, Pennsylvania into WRBS-FM, Baltimore, Maryland. The Givens & Bell Petition seeks imposition of additional reporting requirements on stations that opt to use higher digital power. In none of these cases does the petitioner satisfy the requirements of Section 1.429 of the Commission's Rules, which excludes new evidence first offered in a petition for reconsideration unless the petition demonstrates that (i) events have changed since the *Order*, (ii) the facts presented in the petition were unknown by the petitioner until after the adoption of the *Order* or (iii) a strong public interest in consideration of the petition.³⁷ Similarly, Section 1.115 of the Commission's Rules specifies that applications for review may not raise issues that were not presented to the designated authority.³⁸ None of these filings satisfies these requirements.

In the case of the Peter and John Petition and the Givens & Bell Petition, the filings contain new information that could have been presented earlier and considered by the Media Bureau in the *Order* if the petitioner had raised the issue during the extensive public comment period. The Press Communications Application takes issue with Commission decisions in Docket 14185 from 1964 and Docket 87-121 from 1987. Any requests to

³⁶ E.g. Press Communications Application at 15.

³⁷ 47 C.F.R. §1.429(b).

³⁸ 47 C.F.R. §1.115(c).

reexamine those decisions are beyond the scope of this proceeding and irrelevant to the *Order*. The Commission should dismiss all these filings as procedurally defective.

The petitions also should be dismissed on substantive grounds. The Peter and John Petition focuses on a potential interference situation that its own engineer characterizes as “one of the worst (if not the worst) grandfathered shore spacing situations of any FM station in the country.”³⁹ Moreover, the petition presents no evidence that WRBT-FM intends to increase its power. The Commission should not base its rules on outlier interference situations such as this station pair or speculation about events that may not occur. Any unexpected interference that may occur in a unique situation such as this can be addressed through the interference protection and complaint remediation rules the Media Bureau established in the *Order*. With regard to the reporting requirements Given & Bell request, the petition provides insufficient evidence of public benefit to warrant imposing new reporting requirements on stations that increase power. Both petitions should be denied.

6. The Bureau Was Not Required to Resolve Petitions for Reconsideration of the Second R&O Prior to Issuing the Order

The Bureau was not obligated to dispose of outstanding petitions for reconsideration of the *Second R&O* before addressing the request to increase FM digital power. Both the MAP Application and Hardis Application raise questions about outstanding petitions for reconsideration.⁴⁰ Neither party offers any support for its position that a delay in responding to a petition for reconsideration prevents further Commission action in the same proceeding. As National Public Radio recently noted, adopting this argument would be equivalent to

³⁹ Peter and John Petition, Attachment 1 Engineering Statement at 2.

⁴⁰ MAP Application at 8; Hardis Application at 21-25.

staying the proceeding because a petition for reconsideration had been filed.⁴¹ The Commission's Rules, however, explicitly state filing a petition for reconsideration does not "excuse any person from complying with any rule or operate in any manner to stay or postpone its enforcement."⁴² There is nothing in the Commission's Rules or precedent that would preclude the Commission from taking further actions while processing petitions for reconsideration. These arguments cannot serve as a basis for review of the *Order*.

7. Conclusion

The *Order* concluded an extensive consideration of the need for a power increase for FM digital radio. The power increase the Media Bureau authorized provides needed relief for FM broadcasters that require additional digital power to replicate their analog coverage. For the reasons stated above, the petitions for reconsideration and the applications for review should be rejected, and the *Order* upheld.

Respectfully submitted,

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⁴¹ Opposition of National Public Radio to Application for Review, MM Docket No. 99-325 dated April 23, 2010.

⁴² 47 C.F.R. §1.429(k).

CERTIFICATE OF SERVICE

I, Albert Shuldiner, hereby certify that true and correct copies of the foregoing

Opposition of iBiquity Digital Corporation were sent this 25th day of May, 2010, via first class mail, postage prepaid, to:

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