

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)	
)	

**REPLY TO OPPOSITION TO APPLICATION FOR REVIEW
OF PROMETHEUS RADIO PROJECT**

Media Access Project, on behalf of the Prometheus Radio Project (“Prometheus”), respectfully submits this Reply to certain of the Oppositions to Prometheus’ Application for Review of the *Order* in which the Chief, Media Bureau (“Staff”), revised the Commission’s digital audio broadcasting technical rules to permit FM stations to increase their power. *See Order, In the Matter of Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, 25 FCCRcd 1182 (2010) (“*Order*”). Prometheus submitted the Application for Review since the Staff’s decision was arbitrary and capricious because the *Order* failed to discuss or consider any of the substantive concerns and recommendations submitted by Prometheus and other affected parties.

Some parties suggest that the Staff acted within its discretion since the Staff is not required to consider all arguments raised in a proceeding. Others suggest that Prometheus’ real motive for the Application for Review is because Prometheus disagrees with the Staff’s decision. However, the Staff’s failure to address adequately significant arguments makes it difficult to ascertain whether the decision was based on thoughtful analysis of the arguments raised (to which reasonable parties could agree to disagree) or simply a blanket dismissal of the issues raised, with no due consideration. A more detailed and thoughtful analysis of the arguments raised by various parties would have at least

provided interested parties a reasonable rationale regarding the Staff's decision to allow for a power increase. However, the failure to consider relevant arguments is arbitrary and capricious.

I. THE STAFF'S DECISION IS ARBITRARY AND CAPRICIOUS

Some parties suggest the Staff's decision was appropriate since the Staff is not obligated to consider all the arguments raised. *See, e.g.*, Opposition of National Public Radio to Applications for Review ("*NPR Opposition*"), Opposition of iBiquity Digital Corporation ("*iBiquity Opposition*"), and Comments of the National Association of Broadcasters. Prometheus has not and does not suggest the Staff is required to consider *all* arguments. However, with respect to the power increase, Prometheus (and others) raised significant concerns, and Courts have required that agencies consider significant comments advanced in the course of a proceeding. *See Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42-43 (1983).

In fact, the *NPR Opposition* attempts to address some of the arguments raised by Prometheus. It appears to do so to demonstrate that the Staff's decision was rational and appropriate. Prometheus appreciates NPR's attempts to address the concerns raised, however, it is the Staff that is required to demonstrate that its decision is rational based on the arguments and data submitted in the proceeding. *See Prometheus Radio Project v. FCC*, 373 F.3d 372, 389-390 (3d Cir. 2004) (Courts "must ensure that, in reaching its decision, the agency examined the relevant data and articulated a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'" (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))).

The *NPR Opposition* also suggests that the Staff was not required to address any of the recommendations that could limit the negative impact on the public interest because other alternatives are in active development. *See NPR Opposition* at 8. Again, without any mention or discussion by

the Staff about these active developments, Prometheus - or any other interested party - would have no way of determining how the Staff came to its decision or why it rejected the issues raised by Prometheus.

Finally, the *iBiquity Opposition* improperly suggests that Prometheus' only complaint is that the Staff did not accept Prometheus' argument and notes that the Staff decision referenced Prometheus numerous times. *See iBiquity Opposition* at 7-8. Prometheus submits that it is entirely reasonable for there to be legitimate disagreements and for reasonable minds to disagree. However, the issue here is not simply about disagreeing with the Staff's decision. Rather, without any explanation or discussion as to why or if Prometheus' arguments were rejected, there is no legitimate reason for Prometheus or any interested party simply to accept the Staff's decision when numerous concerns were raised.

It is a basic principle of administrative law that an agency cannot ignore significant comments advanced in the course of a proceeding. *See State Farm*, 463 U.S. at 42-43 (1983); *Iowa v. FCC*, 218 F.3d 756, 759 (D.C. Cir. 2000) (“[T]he Commission’s failure to address [commenters’] arguments requires that [the Court] remand this matter for the Commission’s further consideration.”). Thus, the Staff’s failure adequately to address Prometheus’ comments constitutes a prejudicial procedural error that warrants full Commission review. *See* 47 C.F.R. § 1.115(b)(v).

II. CONCLUSION

Administrative law requires the Staff to provide a reasoned factual and legal basis for its decision. This includes some substantive response to significant issues. Prometheus asks that the Commission vacate the Staff action, consider the objections and recommendations on their merits, and that the Commission grant all such other relief as may be just and proper.

Respectfully submitted,

/s/

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May 10, 2010

CERTIFICATE OF SERVICE

I, Parul P. Desai, hereby certify that I caused a copy of the foregoing *Reply to Opposition to Application for Review* to be sent this 9th day of June, 2010, via first class mail, postage prepaid, to:

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