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

CONSOLIDATED RESPONSE TO OPPOSITION AND REQUEST FOR STAY IN THE MATTER OF 99-325

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Opening comments

Press Communications LLC ("Press") files the following Reply in the above-captioned proceeding[1]. When someone has no facts to back up their position, or real facts to counter the arguments of others, I guess the best strategy is to ignore the facts altogether. That appears to be the strategy the three respondents, NAB, NPR and iBiquity have taken in opposition to the comments recently filed by Press (and others) in the matter of the HD power increase. Telling is the failure of the opposing parties to productively counter the legal and/or technical showings of Press and others. This should be considered empirical evidence that the opposing parties agree the 6 to 10 db increase in power in the Report and Order will be devastating to many analog stations, particularly in areas of the country where stations typically are at minimal spacings or are by definition, short spaced.

Contrary to what iBiquity might say in its retort, Press is not focused on "its overall displeasure with digital broadcasting rather than specific issues with the digital increase in the Order". We don't know how much more specific we could be. FROM A PURELY

1 Press hereby requests leave from normal filing requirements to reply to opposition of both its petitions for reconsideration and review in the matter of 99-325, HD power increase. Petitions for reconsideration are normally afforded 10 double space pages while those for review are given 5. The rationale is that petitions for review are normally submitted after the petitions for reconsideration have been addressed. Here both have been submitted and are being heard concurrently. Since many of the issues in both pleadings overlap, Press has chosen to consolidate its comments into one document, using the space allotted for both (15 double space pages) rather than file two separate documents. By making this request, Press does not concede, however, that its pleading and petition for review should be considered and/or be a part of a petition for reconsideration.

TECHNICAL STANDPOINT, A DIGITAL POWER INCREASE OF 6 db WILL CAUSE MASSIVE AMOUNTS OF NEW INTERFERENCE TO ANALOG CLASS A STATIONS THAT ARE MINIMALLY OR SHORT SPACED (*PARTICULARLY IN ZONE I*) be it Class A to Class B or in many instances, even Class A to Class A that are properly spaced (as will be further explained herein).

Press has not and continues not to be opposed to iBiquity's brand of digital radio as originally proposed and adopted and has stated so in all its pleadings (i.e., 20db down co-channel). Indeed, we advocate the changeover to all digital operation in FM, as was done with TV, by expanding the FM band to include all digital channels (for example, on white space low band VHF channels or vacated channels 5&6.)

The Media Bureau's Role

The outcome of this rulemaking has seemed predetermined, with little doubt as to whether there would be a power increase; it was only a question of how much. We seriously question how the Media Bureau simply accepted the "joint parties Agreement" and then adopted their recommendations literally without question. We believe it was improper for the Media Bureau to permit NPR or any of the other parties with a vested interest in HD technology to perform "testing" in a matter as important as this without drawing up specifications and putting the matter out for "bid" to an independent laboratory. At a minimum, the testing protocol should have been put out for public comment and the Media Bureau should have invited other interested parties to conduct similar testing and submit

their results to the Media Bureau to either confirm or counter the "joint parties" findings and "Agreement" in 2009. How and why were NPR and iBiquity given the role of arriving at the "compromise." Most importantly, why wasn't the "Agreement" they crafted put out for public comment before its adoption in the Report and Order? Especially since NPR's 2009 report differs so dramatically from their 2008 report.

We also ask, since when do the "joint parties" represent the best interests of the public or of the vast majority of broadcasters who serve them (certainly not the NAB who is seriously conflicted on this issue and should withdraw its comments and support; or NPR who expressed serious concerns about interference but then changed its tune with no explanation)? Since when have we relegated FM radio listening primarily to those in a mobile (car) environment and then allow the "joint parties" to be the final arbiter of opinion as to what is or is not objectionable interference? Better than a third of the FM audience still listens in fixed locations. Who is protecting their interests? We would like to think that should be the role of the Commission.

The Media Bureau notes that the broadcast component of the "joint parties" consists of 18 station groups of about 1200 stations. What about the other 8,000+ stations who have not adopted HD Radio or the 99% of the public who relies on analog FM? Did the Media Bureau put any bearing on whether most or all of the 18 station groups, or the NAB who has many of the same groups on its board, or NPR, or the manufacturers who have invested heavily in iBiquity, its technology or both. Under those circumstances, could the results have been

biased? The Bureau should have ensured that qualified engineers and other opposing parties be included in the "test" group to insure that the "testing" was done in a manner consistent with good engineering practice? Why were not independent listening panels included in the group? We think these are reasonable questions and the answers should be forthcoming.

The Case of Dr. Hardis and "Rulemaking"

We agree with Dr. Hardis that the Media Bureau erred in not having issued a further notice of proposed rulemaking when the NPR AICCS Report was filed at the Media Bureau and the "compromise" was reached. As far as Press is aware, no specifications were ever drawn or opportunities given to counter the final claims or "the agreement" of the "joint parties". Worse, the adopted rules all too closely parallel the recommended wording from the "joint parties".

iBiquity cites *Rural Cellular Assoc. vs the FCC* as an example of what the courts say about rule making procedures;

> " a general notice of proposed rulemaking 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 USC 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" The opportunity for comment must be a *meaningful* opportunity…and we have held that in order to satisfy that requirement, and agency must remain open minded…."

We would argue that the process did not provide a *meaningfu*l opportunity for comment as the Media Bureau did not invite opposing parties to conduct their own tests after NPR (and the joint parties) submitted its "revised" findings and the "agreement" was cut and submitted to the Media Bureau.

NPR's Confusion

NPR in its response says Press seems confused about its facts regarding HD Radio. "NPR says of Press' comments: "in one sentence it (Press) claims the signal replicates the analog FM and then several paragraphs removed says it is well known (HD) does not". To set the record straight those are not our words. The IBOC Coverage and Interference Seminar presented at the NAB Radio & Broadcasters Clinic in the Fall of 2006 was quoted as saying that IBOC was significantly more robust than analog…will exhibit full stereo under conditions when most analog receivers have blended to mono and the NRSC study concludes that IBOC has similar coverage to analog. The tests were conducted by iBiquity with the help of NRSC and NPR! What has happened since? The now well known issue of lack of coverage and building penetration is the very reason for the rulemaking. (See attachment)

The Supreme Court quote

iBiquity, in its opposition to Media Access Project (MAP), says MAP relied heavily on the Supreme Court decision in *Motor Vehicle Manufacturer's Association v. State Farm Mutual*

Automotive Insurance Co. iBiquity, citing the language in the case, says the Supreme Court did not state agencies are required to consider "*all" the relevant factors*. They claim the word "all" is conspicuously absent from the opinion.

According to the Court, "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 rational connection between the facts found and the choice made".

As a point of reference, the American Heritage Dictionary defines "***relevant"*** as: *that which has a bearing on the matter at hand.* Webster's says: *to afford evidence tending to prove or disprove the matters in issue.* iBiquity argues that the Media Bureau considered the relevant data in the record and presented a satisfactory explanation for its decision.

Press would side with MAP on this issue. Looking at the definition of "relevant" and applying it to the Supreme Court decision makes the outcome crystal clear. The word "all" is implied. ***Either data is relevant or it is not***. If the data is relevant the agency has no choice but to consider it in its deliberations and "articulate a satisfactory explanation for its action including the rational connection between the facts found and the choice made". In this case, the Media Bureau had many objectors but largely dismissed them with minor exception in its final decision without adequate explanation. The Order, as adopted, is also inconsistent with its own directives regarding protections. As taken, we agree with MAP, the action is arbitrary and capricious for a variety of reasons.

The 307(b) debate

iBiquity argues that Press' focus on 307(b) is misplaced and that Press mischaracterizes the digital power increase as a license modification under 307(b). iBiquity says Section 307(b) applies to individual station applications not rule making proceedings. They therefore argue that in this situation 307(b) is irrelevant. They then go on to state that 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 of station license as stations operating at -10db will continue to operate within the emission limits specified for FM stations (as a result of the subject rulemaking).

With all due respect, a clear reading of 307(b) states: "in considering applications for ***licenses***, ***and the modifications*** and renewals ***thereof".*** The word ***thereof*** in the second clause refers to ***licenses*** (plural) in the first clause, not an application from an individual licensee. Nor does it refer to the modification or renewal of an application, as iBiquity would lead us to believe. The change in interference standards and distribution of power is clearly a modification of *licenses* and as such is subject to the law governing same. Thus, the Commission has no choice but to consider 307(b) in any such modification.

The iBiquity assertion that 307(b) never comes into play in a rule making is clearly wrong. New commercial FM allotments can only happen through a modification of the FCC rules which is always done by rulemaking (i.e., the Table of allotments Section 73.202). In such

cases a 307(b) analysis always comes into play. Under either circumstance 307(b) is anything but *irrelevant.*

Likewise Press' reference to Dockets from 1964 and 1987 are very relevant to this proceeding and Press' arguments herein. As those rulemakings are the very basis for the protection ratios and contours used in this rulemaking they are more than relevant to the instant proceeding and argument. The process adopted by the Commission in the case of an HD power increase is to notify the Commission of a station increasing its digital power level. Blanket power increases provided for in the Order materially change the protections in place since 1964. Section 307 (b) involves the comparison of communities and proposed service areas. In most instances in Zone 1, the HD power increases authorized by the joint parties' agreement violate those service areas and accordingly the increase(s) have to be weighed by the fair and equitable language in 307(b) and the public interest need and convenience language in 307(a).

We also question iBiquity's issue about Commission decisions in Docket 14185 and 87-121 from 1987 being beyond the scope of this proceeding. Quite to the contrary, they are directly related to this proceeding as they form the basis of the mileage tables we will further examine herein. iBiquity should take note that petitioners are permitted to cite prior case law and Reports and Orders in pleadings, regardless of age, provided they are relevant to the matter at hand. Indeed, many of the sections the opposing parties have cited to support their positions are far older than those used in our pleading.

On a final 307 note, NPR says we in New Jersey are looking for pie in the sky. The allocations were made years ago and there is no reason to re-look at the inequities today. However, 307(b) talks in the present tense using the strong verb "shall". Because the Commission may have erred 40 years ago in applying the law does not get it off the hook for mistakes it may make going forward based on those decisions. It has the legal obligation under the Act to correct mistakes, or at a minimum, mitigate them or not make them worse.

Lack of Attack on the Technical Showings

It should be clear to the full Commission from the "joint parties" failure to attack the technical showings of Press, or for that matter, those of Mullaney Engineering who also submitted opposition to the new rules on technical grounds, should give them pause as to the validity of the joint parties' claims of no interference within the 60 dbu contours of Class A stations. We would argue in the absence of comment to the contrary; the "joint parties" essentially AGREE THAT THE INCREASE WILL SEVERELY IMPACT ADJACENT CHANNEL (CO-CHANNEL) ANALOG STATIONS AND WILL PARTICULARLY IMPACT MOST CLASS A STATIONS IN ZONE 1 TO THE POINT OF INVADING THEIR 60 dbu CONTOUR BY DESIGN. This problem not only applies to Class A to Class B but at the higher digital power levels A to A (in both cases please refer to the original filing and additional engineering attached). The attached engineering exhibit stands starkly against what the joint parties have presented and used to gain acceptance at the Media Bureau. The map, using NPR

ratios, shows the real world impact and the damage this increase will cost local Class A Broadcasters.

We should stop here for a moment and read NPR's Press release from June 7, 2009 where it submitted an "alternative" approach to upgrading HD power so it would not interfere with existing analog radio stations. NPR says it proposes to the FCC immediate interim power increase of up to 10 db *based on mileage and power safeguards*. (NPR) in proposing the increase goes on to state "NPR is committed to the successful implementation of HD Radio by increasing IBOC power to improve HD Radio coverage in a way that preserves existing analog service"…. "NPR's comments to the Commission yesterday call for the future of HD to be built on sound engineering practices that account for the unique broadcasting circumstances of all stations-public and commercial alike." *Petitioner can think of no more unique circumstances than those confronting New Jersey Class A broadcasters and their listeners.* Of course, NPR substantially changed its tune by the time the "agreement" was reached.

Mileage or Kilometers; Makes no Difference if They are Wrong

What the opposing parties and the Commission have failed to acknowledge or take into account is the mileage error in 73.207 from 1964. Here Class A and B separations contain an error where the distance between the classes of stations are actually 12 km short for both 3 kw and 6 kw. The current spacing of 105 km for the 3 kw stations should be 117 km; and for 6 kw Class A stations it should be 125 km instead of 113 km to provide

full protection between the A and the B operating on first adjacent channels. Thus, by definition the built in short spacings mean the level of overlap and resultant co-channel interference from the digital signal is going to be much greater than suggested by NPR, iBiquity, the NAB, or for that matter, believed to be the case at the FCC. Moreover, because of the power levels for digital operation (continuous RMS vs peak RMS for analog) are much higher, the protection afforded from digital signals should be greater rather than less.

The "Agreement" specifies that FM station eligibility for digital ERP increase beyond 6 db is based upon protection to an analog station's 60 dbu contour. The Media Bureau agrees it will base all predictions of maximum permissible FM digital ERP on calculations at the potentially affected analog FM station's 60 dbu contour but will mitigate and remediate all complaints of alleged interference "**within the protected contours"** of the affected stations. The Commission and the joint parties in the "agreement" assume that the 6db does not infringe on the 60 dbu contour of stations. Yet the Commission has failed in detailing what steps a broadcaster should take if the power increase intrudes on its 60 dbu contour by design. (See Report and Order page 8, paragraph 18). If 60 dbu is the standard the Media Bureau has adopted in the Order, then all predicted or actual intrusions into that contour whether 6 to 10 db or otherwise should be eliminated. Note: The adoption of a 60 dBu protected contour significantly reduces the "presumed" 54 dBu protection for Class B stations.

The other side argues that the new interference is not objectionable and that Press's arguments are superfluous and should be dismissed. Yet the instant proceeding flies in the face of every rule the Commission has on the books regarding interference. For example: Many stations in zone one come under Section 73.213 which governs grandfathered short spaced stations. Under 73.213, the Commission has spelled out the desired to undesired ratios for co and adjacent channel stations. In the case of co channel stations, the undesired field strength should be at least 20 db below the desired service which is where IBOC was prior to this rulemaking. 73.213 says that pre-1964 short spaced stations may be *modified* or relocated provided that any area predicted to receive interference lies completely within any area that currently receives it.

Paragraph (a)(2) of the section goes on to say that for *co-channel* stations, a showing that the public interest would be served by the changes proposed in an application must include exhibits demonstrating that the total area and population subject to co-channel interference, caused and received would be maintained or deceased. In addition, the showing must include exhibits demonstrating that the area and the population subject to the new interference caused by the proposed application is not increased to any existing short spaced station.

The concept of applying 73.213 and 307(b) in instances of power upgrades is not new. Indeed, it was the NAB who precisely suggested it in the Class A upgrade proceeding nearly 20 years ago in MM Docket No. 88-375. The NAB recommended that stations desirous of

upgrading notify co and adjacent channel stations of the change and should furnish the Commission affirmation of consent from the respective parties. NAB also asked the Commission to consider Section 307(b) in awarding power upgrades.

In this instance, we would argue that ***all*** non directional Class A stations authorized in Zone One that do not minimally meet 117 km for 3 kw stations (originally 105 km), and 125 km for 6 kw stations (currently 113km) to Class B's are, by definition, short spaced to meet the protection contours specified in the rules. As such they should be entitled to special protections from digital signals similar to those provided for under section 73.213. Under its own Order and the "Agreement" of the joint parties Press asks that the power levels sought be adjusted to provide full protection to the 60 dbu contours of Class A facilities in Zone 1. Please note that in the attached analysis for WHTG, *better than 60% of the station's audience lies outside the station's protected contour.*

Pity the Poor FM Listener

What about the impact on the poor analog listener who encounters digital interference. He is not going to know what hit him since there is no way to discern what is causing the interference. Thus the Commission's "six strikes and you're out" complaint procedure is a joke. *It is the equivalent of asking people to explain their sightings of UFOs.* Listeners, when their radio signal becomes unlistenable, will just turn off the station and/or either go to another station, **or even worse**, turn to a completely different alternate delivery method (such as digital satellite, CD player, iPod, or some similar device) for their in car, in home or

in office entertainment and information source. Moreover, no listener is going to stick around waiting for 5 other people to document their complaints and then endure 90 plus days following the sixth complaint to see if any action is going to be taken by the FCC. What the Media Bureau is saying "don't bother us with the details, we don't care". The Order should have used the standard for interference from the translator rules .

As was pointed out in the first round, it is also unlikely listeners who encounter interference will tune to HD radio since there are so few HD radios in existence, especially in automobiles. The Commission's rules for FM are largely based on the concept of "substitution of service". The Commission early on recognized that FM signals travel much further than what is provided for in the rules. It argued that providing strong local service was more important than weaker, more distant (out of market) service. Unlike analog FM, HD provides no such substitution of service. Service is plainly lost unless the listener invests in buying an HD capable receiver, which few have done, and then manually tunes in an HD signal. Thus HD the power increase does not meet the test for improving service to the local radio listeners or serving the public interest, need and convenience as contemplated in Section 307(a) of the Communications Act.

So Much for Consistency

It seems weird that the same Bureau only last week turned down a request for an across the board power increase for AM stations. AM radio is struggling to serve a third of American listeners above ever increasing amount of noise, interference and problems with

building penetration. They were summarily turned down for a similar across the board increase in co channel power, while a technology (HD radio), which on its best day serves less than 1% of the population, gets a 6db co-channel increase on FM using the same logic. Should not the same standard of allowing only the parties who benefit (AM station operators) conduct their own tests and submit the results to the Media Bureau for approval apply as it did for the "joint parties"? The Commission's logic on the AM turndown is that it would cause too much co-channel interference…huh!

Summary

The Commission's role, as dictated by its Congressional mandate, is to serve the public's interest, need and convenience. Protecting the public from interference has been one of the core principles of Commission policy from its inception. Indeed, it was one of the very reasons why the Federal Communications Commission was created under the Communications Act of 1934.

Here the true tragedy is that the Commission has been naïve enough to buy into what is a flawed technology and a failed business plan. Rather than admit its mistake leaving the system as originally promoted and approved, the Commission has decided to double down and risk the FM analog radio system the public relies upon every day as if the analog system were just chips on a gaming table. The American public has shown a willingness to quickly adopt new technologies when they fulfill a need and are well thought out. With 10 years experience we can safely say HD Radio is not among the winners in the technology race. Yet

we as an industry still have time to strive for an all digital solution for American Radio, a solution that could include, given wholly contained single channel operation, iBiquity's technology.

As an interim move, the Commission should re-analyze its criteria for digital to analog power levels, insuring such power levels completely protect Class A Broadcasters. It should also mandate the use of asymmetrical power distribution, which, according to sources at the NAB and iBiquity, should be ready for installation this Fall. Using the 1% injection level on the side of Class A stations adjacent to Class B's would minimize interference to Class A stations while offering a power increase to most if not all HD stations. As to the overlap between Class A to adjacent Class A, the Commission and "joint parties" will have to go back to the drawing board, limiting power to 1 % even in most fully spaced situations. As for asymmetrical power distribution itself, iBiquity has stated the change will only involve a software upgrade and will not require the replacement of existing equipment. The Commission should also re -examine other technologies that overcome the limitations of iBiquity's system.

Respectfully submitted

/s/
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