

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF
BENTON FOUNDATION, CAMPAIGN LEGAL CENTER, CENTER FOR GOVERN-
MENTAL STUDIES, COMMON CAUSE, NEW AMERICA FOUNDATION, OFFICE OF
COMMUNICATION OF THE UNITED CHURCH OF CHRIST, INC., AND
PROMETHEUS RADIO PROJECT

These Reply Comments are submitted on behalf of Benton Foundation, Campaign Legal Center, Center for Governmental Studies, Common Cause, Office of Communication of the United Church of Christ, Inc., and Prometheus Radio Project (collectively “Public Interest Coalition” or “PIC”) in the Commission’s Second Further Notice of Proposed Rulemaking on *Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, MM Docket No. 99-325, 22 FCCRcd 10344 (2007) (“*Second FNPRM*”).

I. THE COMMISSION MUST ACT NOW TO ESTABLISH A PUBLIC INTEREST FRAMEWORK FOR DIGITAL AUDIO BROADCASTERS.

Some Commenters have stated that the Commission should refrain from adopting public interest requirements while the transition to digital is still under way.¹ They argue they need “regulatory flexibility” because the development of digital audio broadcasting (“DAB”) will be

¹*See, e.g.*, Comments of National Association of Broadcasters at 9, Comments of Clear Channel at 9-13; Comments of Microsoft Corporation at 5-9; Comments of Cox Radio at 5-8; Joint Comments of the North Carolina, Ohio, and Virginia Associations of Broadcasters at 4-5; Comments of iBiquity Digital Corporation at 6.

impeded. However, as part of the transition, broadcasters continue to have a fundamental obligation to serve their communities of license,² and the Commission continues to have a statutory duty to ensure that broadcasters fulfill their public interest mandate.

A. The Commission Must Not Delay in Developing Public Interest Obligations for DAB.

Some Commenters argue that adoption of public interest obligations for the hybrid mode of DAB will stifle development of innovative services and retard continued deployment.³ This is based on some Commenters' belief that they should be able to experiment with the new DAB technology however they please. Under this theory, the Commission would never have the incentive to adopt public interest obligations. Technological innovation is a constant reality which should not prevent the Commission from ensuring that broadcasters are employing this technology to serve their communities.

Contrary to the notion that public interest obligations will impede the deployment of DAB, prescribing public interest obligations will help to provide stability for both broadcasters and the communities they are obligated to serve; broadcasters and the communities they serve will understand exactly what the Commission will expect from DAB. One broadcaster who appreciated its role as a trustee of the public airwaves has said, "[i]n return for a license to use a public asset for private financial gain, a broadcaster agrees to serve the public interest....*As with all contracts, both parties*

²Broadcasters are required to serve their communities based on the long-standing principle that broadcasters serve as trustees for the exclusive use of limited spectrum. *See* 47 USC §307(b); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380 (1969).

³*See, e.g.*, Comments of National Association of Broadcasters at 3, 9; Comments of Microsoft Corporation at 5-9; Comments of Cox Radio at 5-8; Comments of iBiquity Digital Corporation at 6.

to the agreement need to know exactly the responsibilities that they have to each other.”⁴ With the knowledge of what is expected from the beginning, broadcasters can tailor their use of the spectrum accordingly and plan ahead as to how they will meet their obligations, rather than possibly abandon a business plan that will not satisfy the public interest requirements put forth by the Commission. Adopting public interest obligations after DAB practices have become entrenched will be disruptive to DAB operations, and surely, broadcasters will then argue it would be unfair and impractical to impose public interest obligations after investing resources into their business plans.

Clear rules will also make the license renewal process more meaningful and certain. Adopting specific guidelines to ensure that broadcasters meet their obligations to their communities will enable the Commission to determine whether a broadcaster has actually served the public interest and deserves a license renewal. Thus, specific guidelines would provide substance to the Congressional requirement that broadcasters serve their local communities.⁵

The Commission can not expect that the public wait for public service that it is owed while broadcasters reap the rewards of new programming capabilities, financial opportunities, and use of additional spectrum as broadcasters transition to digital mode. For these reasons, now is certainly the appropriate time for the Commission to adopt public interest obligations.

B. Broadcasters Providing Free and Subscription-based Services Must Be Subject to Increased Public Interest Obligations.

Regardless of whether the Commission defers adopting public interest obligations,

⁴Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, *Charting the Digital Broadcasting Future: Final Report of the Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters* (1998), Separate Statement of James Goodman at 86 (emphasis in original).

⁵See 47 USC 309.

Commenters nonetheless argue that the Commission should refrain from adopting any new public service obligations.⁶ These Commenters seem to suggest that the current framework already requires broadcasters to serve the public interest and that broadcasters are doing a fine job in serving the public interest. However, as broadcasters reap additional benefits from the use of additional spectrum, the public should similarly reap additional benefits.

1. All digital radio services must be subject to additional public interest obligations.

Broadcasters assert they will merely be making more efficient use of their current spectrum allocation and therefore the current framework need not be adjusted.⁷ In actuality, though, the DAB transition effectively provides broadcasters with the use of additional spectrum.⁸ By the time a full digital transition takes place, broadcasters will be occupying more spectrum than they did previously. Thus, the use of additional spectrum must confer additional public service to the listening public.

Nonetheless, some Commenters suggest that imposing public interest obligations is somehow unfair.⁹ These Commenters rely on the Commission's decisions with respect to Satellite Digital Audio Radio ("SDARS") and Digital Television ("DTV") to suggest that public interest requirements would be out of the norm. They state the Commission adopted a minimum of current public interest

⁶*See, e.g.*, Comments of National Association of Broadcasters at 9, Comments of Clear Channel at 9-13; Comments of Microsoft Corporation at 5-9; Comments of Cox Radio at 5-8; Joint Comments of the North Carolina, Ohio, and Virginia Associations of Broadcasters at 4-5; Comments of iBiquity Digital Corporation at 6.

⁷*See, e.g.*, Comments of National Association of Broadcasters at 8; Comments of iBiquity Digital Corporation at 11-12.

⁸*See* Public Interest Coalition, *Petition for Reconsideration*, MM Docket No. 99-325 (Sept. 14, 2007) (Reconsideration based on radio licensees occupying additional spectrum rather than the false premise that no additional spectrum is involved).

⁹*See, e.g.*, Comments of Clear Channel at 11-12; Comments of Microsoft Corporation at 6-7.

obligations in SDARS and did not adopt any new public interest obligations in SDARS. Similarly, since the Commission has yet to adopt public interest obligations for DTV, these Commenters argue the Commission must refrain from adopting public interest obligations for DAB. These comparisons are without merit.

SDARS is not a broadcast service and cannot be equated with the obligations broadcasters are required to provide for the free and exclusive use of the spectrum. Moreover, the Commission has chosen to adopt additional requirements for another “new” technology, Direct Broadcast Satellite (“DBS”) service. The Commission required DBS providers to set-aside 4% of their channel capacity for noncommercial programming.¹⁰ With respect to DTV, contrary to the assertions of some Commenters, DTV licensees, in fact, are subject to public interest obligations. For instance, DTV licensees are subject to a 5% fee for all non-broadcast services. Also, the Commission already has adopted some public interest obligations for DTV; the Commission adopted additional public interest obligations regarding children’s television.¹¹ While it is unfortunate that the Commission has not yet resolved its rulemaking regarding additional public interest obligations for DTV, that is no reason for the Commission to delay in adopting public interest obligations for DAB.

2. *Subscription-based services must be limited and subject to additional public interest obligations.*

With respect to subscription-based services specifically, some Commenters suggest that the only restriction on these services should be the Commission’s requirement that the station provide at least one free over-the-air stream. However, that limited requirement cannot ensure that the public

¹⁰See *Direct Broadcast Satellite Public Interest Obligations*, 13 FCCRcd 23254 (1998).

¹¹See, e.g., *In the Matter of Children’s Television Obligations of Digital Broadcasters*, 22 FCCRcd 13601 (2006).

receives appropriate benefits from the new service. Stations that choose to offer subscription-based services will reap increased benefits and therefore should offer commensurate benefits to the public.

To be clear, the Coalition does not suggest that broadcasters be denied the ability to offer subscription-based services; rather, stations that choose to provide subscription-based services should also accept additional public interest obligations. The menu concept proposed by the PIC provides an extremely flexible model for broadcasters to tailor their additional public interest obligations based on the market, format, and specific community needs. Additional public interest obligations are especially necessary if the Commission chooses not to limit subscription-based services, otherwise a broadcaster can escape substantial public interest obligations by using almost all of its capacity for revenue enhancing services.

For similar reasons, the Commission must limit the amount of subscription based services a station can offer. Some have argued that such a limitation will force stations to make choices as to what types of services they offer, effectively forcing broadcasters to forgo services to benefit the public in favor of more lucrative services.¹² This argument, however, misses two basic points. First, broadcasters are obligated to serve the public interest, and the notion that broadcasters would provide services simply based on financial wants underscores the need for the Commission to adopt public interest obligations to ensure the public is not getting the short end of the deal. Second, while it is still unclear as to how many additional streams a broadcaster will have to provide programming services, the expectation is that stations could have eight, if not more, extra programming streams.¹³ To allow broadcasters to potentially use all but one stream to provide subscription-based services

¹²See, e.g., Comments of National Public Radio, Inc. at 11-12.

¹³See *Second FNPRM* at 10357.

would erode the value of free over the air radio.

II. THE COMMISSION MUST REQUIRE PUBLIC DISCLOSURE AND WEB ACCESS TO PUBLIC INTEREST FILES.

Some Commenters argue that requiring public disclosure of the station's service to the community and providing public inspection files on websites is burdensome to the broadcasters.¹⁴ Broadcasters promise to serve the public interest as they transition to digital and expect the public to merely trust that they will serve the public. However, the Commission has a duty to ensure that broadcasters are in fact serving the public interest. To that end, the Commission must have some reliable means for gathering and evaluating information on how radio broadcasters use their new digital systems to serve the public. Quarterly reports proposed by the PIC will allow both the Commission and the public to evaluate whether licensees are serving their communities.

Broadcasters also find issue with requiring public files to be placed on the internet as a burden.¹⁵ PIC recognizes that some stations, especially stations with minimal staff and resources, may not have websites. This is the reason the PIC has proposed that radio stations without their own websites could receive exemptions or the Commission could post those stations' filings on its own website.

In fact, the Commission has acknowledged the importance of having standardized, quarterly reports available over the Internet.¹⁶ The Commission has adopted a standardized form for quarterly

¹⁴*See, e.g.*, Comments of National Association of Broadcasters at 10-11; Comments of Cox Radio at 8-9; Comments of State Broadcasters Associations at 7-8; Joint Comments of the North Carolina, Ohio, and Virginia Associations of Broadcasters at 5-8.

¹⁵*See id.*

¹⁶*See Policies and Rules Concerning Children's Television Programming*, 11 FCCRcd 10660, 10692-10695 (1996).

reporting regarding children’s programming and is exploring the feasibility of placing those reports on the Commission’s website. The Commission has also encouraged broadcasters to post the children’s programming report on the station’s website.

State Broadcasters suggest that somehow requiring public files on the internet is a violation of constitutional laws when they state the Commission lacks authority to “regulate the content of websites.”¹⁷ Such a requirement does not raise any constitutional issues since a reporting requirement merely requests information from the broadcasters.

Some Commenters argue that there is no benefit to having the public files accessible over the internet. However, there is a significant benefit to having the ability to access these files over the internet. The ability to access the files will hold the station accountable in ensuring the files are appropriately kept. Moreover, some in the community may not have the ability to access the public files during the hours that the station makes them available.

III. CONCLUSION.

In addition to the requests made in the initial Comments, the Public Interest Coalition respectfully requests the Commission adopt additional public interest obligations for all digital transmissions and adopt meaningful reporting requirements.

¹⁷Joint Comments of State Broadcasters Associations at 7-8.

Respectfully submitted,

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