Testimony of

W. Russell Withers, Jr.

Withers Broadcasting Companies

Hearing on the Future of Radio

United States Senate
Committee on Commerce, Science & Transportation

October 24, 2007

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On behalf of the National Association of Broadcasters

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Good morning Chairman Inouye, Vice-Chairman Stevens, and members of the Committee, my name is W. Russell Withers, Jr., I am the founder and owner of the Withers Broadcasting Companies, which own and operate 30 local radio stations and six television stations in seven states. I am also a member of the Board of Directors of the National Association of Broadcasters (NAB) and the Chair of the NAB Radio Board. NAB is a trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission (FCC) and other federal agencies, and the Courts.

This is a hearing about the future of the radio industry, so let me start with a simple fact: radio, as an industry, is not the same as it was 10 years ago, 20 years ago or 40 years ago. I have been a part of this industry for more than 50 years, and I have watched the media industry change. How people listen to music has changed. How they receive and engage with the news has changed. And for radio owners like myself, the competitive pressures are very different.

Originally, we used to just compete with each other, and maybe a few local newspapers. Those days are long gone. Now, radio stations are competing for the same

advertising dollars as television, cable, newspapers, Internet sites and huge Internet aggregators like Google.

Even in the face of these changes and competitive pressures, however, my industry has not, and will not, forget that our primary task is service to the community. Our core product – top-quality music, news, local information, weather and emergency services for our local communities provided without charge – remains much the same. We are there for our local communities every day. We are there to help inform our communities when weather or other emergencies occur. And, importantly, we are there to help when the emergency is over. Unlike some national entities that show up to report disasters and such, we don't leave – we remain part of the community when the effects of the disaster linger on and on. In fact, broadcasters contribute more than ten billion dollars in community service every year. In short, you would be hard pressed to find an industry that contributes more to their local communities than broadcasters.

There are some other interests that will try to tell you a different story. Some vocal groups regularly contend that the radio industry in this country has been swallowed up by a few corporate giants who do not care about the communities they serve. Well, here is another fact: there are more radio stations today in the United States than at any point previously. In fact, despite all the boisterous complaints about media consolidation, there are more radio station owners today than there were in 1972. Sure there are some large companies, as there are in any industry worth investing in. But, there are also thousands of other radio station owners. And we all serve our local communities.

Media Ownership

As a radio owner, I can tell you that we need to have reasonable media ownership rules. The rules that govern this industry should reflect the undeniable changes in the media marketplace. It is easy to see the past through rose colored glasses. But everyday, radio stations owners like myself have to deal with reality. And the reality is that outdated regulations can hold us back from competing with industries that are not regulated like ours.

You here in Congress recognized the relationship between reasonable rules and a healthy radio industry back in 1996 when you mandated reform of the highly restrictive ownership rules then in place. Remember the state of the broadcast industry before 1996. In 1992, for example, the FCC found that, due to "market fragmentation," many in the radio industry were "experiencing serious economic stress." *Revision of Radio Rules and Policies*, Report and Order, 7 FCC Rcd 2755, 2756 (1992) (*FCC Radio Order*). Specifically, stations were experiencing "sharp decrease[s]" in operating profits and operating margins. *Id.* at 2759. By the early 1990s, "more than half of all stations" were losing money, and "almost 300 radio stations" had gone silent. *Id*. at 2760. Given that the radio industry's ability "to function in the 'public interest, convenience and necessity' is fundamentally premised on its economic viability," the Commission concluded that "radio's ability to serve the public interest" had become "substantially threatened." *Id*. Accordingly, the Commission believed that it was "time to allow the radio industry to adapt" to the modern information marketplace, "free of artificial constraints that prevent valuable efficiencies from being realized." *Id*.

Congress agreed. That is why, in 1996, you acted to "preserve and to promote the competitiveness of over-the-air broadcast stations."[1] Congress found that "significant changes" in the "audio and video marketplace" called for a "substantial reform of Congressional and Commission oversight of the way the broadcasting industry develops and competes." House Report at 54-55.

I submit that we should not ignore these important lessons of the past. Policies that would turn back the clock so that broadcasters are at a competitive disadvantage against other information and entertainment providers clearly would not serve the public interest.

Like any industry, radio has to adapt to the changes in the marketplace. We are embracing new technologies and new plans to remain relevant in our local communities for decades to come. We are embracing the future by investing significant financial and human resources in new technologies, including high definition digital radio or, HD Radio, and Internet streaming, so that we can continue to compete in a digital marketplace and improve our service to local communities and listeners. All we ask is that the policies you adopt here in Washington recognize the reality that we face. Let us embrace the future – resist the calls of those who would embalm us in the past.

XM and Sirius Merger

This Committee has held a hearing and heard perspectives on the proposed merger of XM Radio and Sirius Satellite Radio. We'd like to thank the many members of Congress who have opposed this proposed merger-to-monopoly. A monopoly in satellite

[1] H.R. Rep No. 204, 104th Cong., 2d Sess. at 48 (1995) ("*House Report*").

radio would clearly harm consumers by inviting subscription price increases, stifling innovation and reducing program diversity. This monopoly would jeopardize the valuable free over-the-air, advertiser-supported services provided by local radio stations and their ability to serve local communities and audiences. All local stations ask is for a fair opportunity to compete in today's digital marketplace on a level playing field.

Low Power FM Stations

Let me focus for a minute on another subject that I am sure you will hear about today - low power FM (LPFM) broadcasting. I will speak about two issues: the relationship between LPFM and full power FM service and the relationship between LPFM and FM translators.

Regarding the former, local broadcasters oppose S.1675, the *Local Community Radio Act of 2007*. We believe this legislation would allow the FCC to license thousands of micro-radio stations that will cause harmful interference to full power FM radio stations providing valuable services to local communities and listeners. The proposed bill is based on the results of a well-intentioned, but fatally flawed study intended to determine the amount of interference these new micro-radio stations would cause. That study, however, was deficient in its methodology, implementation and analysis of results in assessing the need for third adjacent channel interference protection.

To the contrary, multiple studies commissioned by NAB, the Consumer Electronics Association and others have all independently concluded that removal of the current adjacent channel protections is not practical because receivers will not be able to adequately reject the undesired signals that would be created.

Today, under its current policy, the FCC has licensed over 811 LPFM stations around the country, and with many additional granted construction permits and applications still pending at the FCC. Broadcasters have encouraged the FCC to act on any pending LPFM applications and facilitate those that have received construction permits. Clearly, there is already an efficient process in place for LPFM stations to be licensed and to operate within the current third adjacent protection policy that all stations, both low power and full power, must follow.

To be clear, local broadcasters do not oppose the licensing of LPFM stations. However, we do oppose the introduction of thousands of micro-radio stations that would cause significant harmful interference to existing full power FM radio stations. Third adjacent protection for all broadcasters exists for a reason – to guard against interference and to protect our lifeline service to communities.

Reducing interference protection for subsequently-authorized full power FM service could also deny thousands of listeners the benefits of FM station upgrades or new FM services, including digital radio. Often lost amid the clamor for more LPFM stations is the fact that full power FM stations provide vast amounts of community-responsive public service. FM stations are a primary source for local news and information, political discourse, music programming in a wide variety of formats and emergency information. And these valuable services will only increase in the future, as more stations convert to digital and offer CD-quality audio, additional free programming streams and new services such as datacasting.

We believe that, instead of risking significant interference to full power local FM stations, government should focus its efforts on creating constructive means by which an

operating LPFM station that is displaced by new or upgraded full power FM service can be relocated without creating harmful interference. Such means could include granting the displaced LPFM station priority and expedited processing over other LPFM applications without the need for opening an application window. Indeed, the FCC has already granted such displacement relief in the context of low power television, and given the minimal number of LPFM stations in this situation, we would encourage that this type of relief be examined first, before other more problematic avenues are explored.

With regard to FM translators, local broadcasters do not favor an approach where LPFM stations are granted preferential treatment over FM translators. Since the FCC first authorized FM translators in 1970 as a means of delivering radio service to areas and populations that were unable to receive FM signals because of distance and terrain obstacles, translators have proven to be a vital component for delivering essential news, weather, emergency information and Amber Alerts, as well as entertainment to many communities.

The FCC's current system of assigning FM frequencies on a first-come first-served basis has worked well, and there is no reason to think it will not continue to work well in the future. Affording preferential treatment to new LPFM stations would jeopardize FM stations' delivery of important, locally-oriented programming to many parts of the country via FM translators.

Broadcasters have also urged the FCC to lift the freeze on pending FM translator applications and quickly process these applications. In 2003, the FCC imposed a freeze on the processing of FM translator applications presumably because granting translator licenses might adversely affect the licensing of future LPFM stations. Nothing could be

farther from the truth, however. LPFM and translators are not mutually exclusive and both can be viable services alongside each other.

As mentioned, broadcasters do not oppose the licensing of LPFM stations. We recognize that some of these stations may provide niche programming to local communities. However, that does not diminish the fact that FM translators are important tools that local full power broadcasters need to provide a full complement of diverse, quality programming to listeners throughout the country, especially in remote areas. The FCC has explicitly recognized that translators "provide an opportunity to import programming formats otherwise unavailable" in local markets. In this light, the valuable service that translators provide should be recognized and fostered.

In sum, there is no demonstrated need for a change in regulatory priority status between LPFM stations and FM translators. Pending applications for FM translators have not impeded the FCC's ability to process LPFM applications under the existing rules. Moreover, to the extent that parties are urging Congress to change the law to enable LPFM stations to be placed on channels spaced third adjacent to full power FM stations, we would strongly encourage Congress to reject these calls.

Internet Streaming

Let me turn now to the issue of Internet streaming. A few moments ago, I mentioned Internet streaming as one way broadcasters can adapt their traditional business models to include new technologies that complement local free over-the-air radio. Unfortunately, current conditions make this difficult. Broadcasters are required to pay sound recording performance fees when they stream their signals on the Internet.

However, the most recent rates set by the Copyright Royalty Board (CRB) for these fees are so high that a viable business model for simulcast streaming is almost impossible. The increase in the sound recording performance fees over the next four years established by the CRB is unreasonable and debilitating to growing this exciting new service. There are numerous and serious flaws in the CRB's decision, but let me mention just two of them. First, the CRB gave NO credit to radio broadcasters for the tremendous promotional value we provide to the recording companies and artists. This is a major factor in record sales and revenues from concerts. Second, the CRB based the rates it established on rates paid to the recording industry by interactive webcasting services that provide the ability to purchase recordings online. We believe there are fundamental differences between such services and the free advertiser-supported services broadcasters provide.

This subject falls primarily within the purview of the Senate Judiciary Committee, and thus I will not dwell on it today. It is, however, very important for the future of radio, so let me briefly emphasize that the sound recording performance fee for Internet streaming– and the standard by which it is set – must be reformed. NAB supports H.R. 2060 and S. 1353 which would vacate the CRB decision, establish an interim royalty rate structure and change the current "willing buyer, willing seller" standard that has been a recipe for abuse and needlessly inflated royalty rates to levels that are suffocating radio streaming services. In fact, the "willing buyer, willing seller" standard has given rise to a presumption in favor of agreements negotiated by the major recording companies, acting under the antitrust exemption contained in the Copyright Act. The predictable result has been unreasonably high sound recording fees.

In addition, the conditions imposed on broadcasters that stream should be modified. The statutory performance license imposed nine conditions on broadcasters that stream, at least three of which are wholly incompatible with broadcasters' over-the-air business model. For example, one condition prohibits the playing of any three tracks from the same album within a three-hour period. Another condition prohibits DJs from "pre-announcing" songs, and a third requires the transmitting entity to use a player that displays in textual data the name of the sound recording, the featured artist and the name of the source phonorecord as it is being performed. These conditions are designed to prevent copying of sound recordings from distribution mechanisms far different than radio. Radio stations should not be forced to choose between either radically altering their over-the-air programming practices or risking uncertain and costly copyright infringement litigation.

Performance Tax

On a related subject, let me address the efforts of the recording industry to convince Congress to impose a new levy on local broadcasters, in the form of an additional fee for playing recorded music on free, over-the-air radio. The imposition of such a performance tax would be inequitable and unfair to radio broadcasters, and could substantially harm our ability to serve our local communities.

Radio broadcasters already contribute substantially to the United States' complex and carefully balanced music licensing system, a system which has evolved over many decades and has enabled the U.S. to produce the strongest music, recording and broadcasting industries in the world. For more than 80 years, Congress, for a number of

very good reasons, has rejected repeated calls by the recording industry to impose a tax on the public performance of sound recordings that would upset this balance. There is no reason to change this carefully considered and mutually beneficial policy at this time.

As we noted in NAB's July 2007 testimony before the House Judiciary Subcommittee on Courts, the Internet and Intellectual Property, the recording industry's pursuit of a performance tax at this time appears from losses that result in part from illegal peer-to-peer sharing of sound recordings, and in part from the loss of revenues from the sale of recorded music and an inability of record companies to timely adapt to rapid developments in digital technology and consumer demands. Broadcasters are not responsible for either one of these phenomena, and, particularly in the current highly competitive environment, it makes little sense to siphon revenues from local broadcasters to support international record labels.

For decades, radio broadcasters have substantially compensated the music and recording industries, including making annual payments of hundreds of millions of dollars in fees to music composers and publishers through ASCAP, BMI and SESAC and providing record labels and artists with free promotion of their recordings and concerts. Local radio stations have been the driving force behind record sales in this country for generations. Music producers and publishers receive royalty payments from producers of sound recordings who record their works, but those sums are small relative to the receipts by the record companies and artists who receive the vast majority of their revenues from the sale of sound recordings. In fact, the recording industry enjoys tremendous promotional value from radio airplay. From recording industry executives:

- "I have yet to see the big reaction you want to see to a hit until it goes on the radio. I'm a big, big fan of radio."

-- *Richard Palmese, Executive Vice President of Promotion RCA (2007)*

• "It's still the biggest way to break a band or sell records: airplay.. It's very difficult to get it, but when it happens, it's amazing."
-- *Erv Karwelis, Idol Records (2007)*

• "Radio has proven itself time and time again to be the biggest vehicle to expose new music."
-- *Ken Lane, Senior Vice President for Promotion, Island Def Jam Music Group (2005)*

• "It is clearly the number one way that we're getting our music exposed. Nothing else affects retail sales the way terrestrial radio does."
-- *Tom Biery, Senior Vice President for Promotion, Warner Bros. Records (2005)*

• "If a song's not on the radio, it'll never sell."
-- *Mark Wright, Senior Vice President, MCA Records (2001)*

Throughout the history of the debate over sound recording copyrights, Congress has consistently recognized the important and very significant promotional benefit from the exposure by radio stations, as well as the fact that placing burdensome restrictions on performances could alter that relationship, to the detriment of the music, sound recording and broadcasting industries. For that reason, in the 1920s and for five decades following, Congress regularly considered proposals to grant copyright rights in sound recordings, but repeatedly rejected such proposals.

When Congress first afforded limited copyright protection to sound recordings in 1971, it prohibited only unauthorized reproduction and distribution of records, but did not create a sound recording performance fee. During the comprehensive revision of the Copyright Act in 1976, Congress again considered, but rejected, granting a sound recording performance fee. Congress continued to refuse to provide any sound recording performance fee for another twenty years, not withstanding a plea by the recording

industry in the early 1990s that it do so. During that time, the recording industry thrived, due in large measure to the promotional value of radio performances of their records.[2]

It was not until the Digital Performance Rights in Sound Recordings Act of 1995 (DPRA) that even a limited performance fee in sound recordings was created. In granting this limited right, Congress stated it "should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries."[3] As explained in the Senate Report accompanying the bill, "[t]he underlying rationale for creation of this limited right is grounded in the way the market for prerecorded music has developed, and the potential impact on that market posed by subscriptions and interactive services – but not by broadcasting and related transmissions."[4]

Consistent with Congress' intent, the DPRA expressly did not include a sound recording performance fee for non-subscription, non-interactive transmissions, including "non-subscription broadcast transmission[s]" – transmission[s] made by FCC licensed radio broadcasters.[5] Congress made clear that the reason radio broadcasting was not

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[2] *See, e.g.*, S. Rep. No. 93-983, at 225-26 (1974) ("The financial success of recording companies and artists who contract with these companies is directly related to the volume of record sales, which, in turn, depends in great measure on the promotion efforts of broadcasters.").

[3] S. Rep. No. 104-129, at 15 ("1995 Senate Report"); *accord, id.* at 13 (Congress sought to ensure that extensions of copyright protection in favor of the recording industry did not "upset[] the long-standing business relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades.").

[4] *Id.* at 17.

[5] 17 U.S.C. §114(d)(1)(A).

subject to this new limited fee was to preserve the historical, mutually beneficial relationship among recording companies, radio stations and music composers:

> The Committee, in reviewing the record before it and the goals of this legislation, recognizes that the sale of many sound recordings and careers of many performers have benefited considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting. The Committee also recognizes that the radio industry has grown and prospered with the availability and use of prerecorded music. This legislation should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries.[6]

The Senate Report similarly confirmed that "[i]t is the Committee's intent to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings."[7]

Proponents of a performance tax for sound recordings in the U.S. often point to the laws of foreign jurisdictions to justify imposing such an additional fee on local radio broadcasters. This argument ignores key differences in the American industry structure, and simplistic comparisons using isolated provisions of foreign laws yield misleading results. For example, many foreign legal systems deny protection to sound recordings as works of “authorship,” while affording producers and performers a measure of protection under so-called “neighboring rights” schemes. While that protection may be more generous in some respects than sound recording copyright in the U.S., including the right

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[6] 1995 Senate Report, at 15.

[7] *Id.*

to collect royalties in connection with public performances, it is distinctly less generous in others. Additionally, in many neighboring rights jurisdictions the number of years sound recordings are protected is much shorter than under U.S. law. Further, broadcast systems in many other countries that have a performance tax are, or have been, owned or heavily subsidized by the government and have cultural and social mandates accompanied by content requirements.

The recording industry's legitimate difficulties with piracy and its failure to adjust to the public's changing patterns and habits in how it chooses to acquire sound recordings was not a problem created by broadcasters, and broadcasters should not be required, through a tax or fee, to provide a new funding source to make up for lost revenues of the record companies. Indeed, the imposition of such a tax could create the perverse result of less music being played on radio or a weakened radio industry. For example, to save money or avoid the tax, stations could cut back on the amount of pre-recorded music they play or change formats to all-talk, providing less exposure to music. This could not only adversely impact the recording industry, but the music composers and publishers as well. A performance tax would have a particularly adverse impact on radio stations in small and medium-sized markets that are already struggling financially. Were such additional royalties imposed, in the face of competition from other media, many of these stations would have to spend more time in search of off-setting revenues that could affect the time available for public service announcements for charities and other worthy causes, coverage of local news and public affairs and other valuable programming.

With respect to the performance of sound recordings on over-the-air broadcasting, NAB urges the Committee to recognize that a new performance tax on broadcasters is

neither warranted nor equitable. The frustrations of the recording industry in its inability to deal with piracy and an outdated business model are not sufficient justification for imposing a wealth transfer at the expense of the American broadcast industry, which has been instrumental in creating hit after hit for record labels and artists and whose significant contributions to the music and recording industries have been consistently recognized by Congress over the decades.

In conclusion, I firmly believe that the future of free over-the-air radio broadcasting is bright. Our commitment to our local communities, coupled with the momentum for consumers to realize the benefits of HD Radio, will propel our industry forward. But to do so, we must remain free from interference in our signals and from regulations that will hamper our ability to serve our local listeners. We look forward to working with this Committee and are happy to answer any questions you may have.