1994.[149] This contradicts the NAB's claim that the soaring performance of radio stocks is not a reliable indicator of the health of smaller radio stations.

Fourth, radio station advertising revenues have been growing at record rates. Ad revenue rose 9.3 percent in 1993 alone and an additional 13 percent through May of 1994.[150] Notably, revenue for small-market radio stations has risen 22 percent since 1987 and is projected to continue its climb.[151] Given this growth, it is not surprising that the number of small market stations has increased 2.5 percent from 1986 to 1993.[152]

Fifth, the strong economic prospects for radio are demonstrated by continued entry into the market. Between 1990 and 1994, the number of radio stations increased by 1,000.[153] Even in small markets, the number of stations has increased 2.5 percent from 5,915 in 1986 to 6,066 in 1993.[154] The continued willingness of the financial markets to invest in radio is a cogent indicator of future prosperity.

Sixth, the radio industry has proven its ability to withstand an onslaught of new competitors. Since 1975, the number of on-air radio stations has increased by nearly 3,500 (and by 1,000 since 1990) -- a gain of 45 percent. Remarkably, this growth has not resulted

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[149] Kagan's Radio Deal Record 1995 at 5.

[150] *Id.* at 11.

[151] *Id.* at 14.

[152] *Id.*

[153] Lilley Study at 13.

[154] *Id.* at 14.

in cannibalism: advertising revenue per station has grown impressively over the same period and, as stated above, reached an all time high in 1994. Increasing the diversity of audio programming sources, therefore, does not necessarily lead to revenue loss for individual stations.

Seventh, Wall Street analysts remain bullish on radio. Since the preparation of the Lilley Study, prospects for the traditional radio industry have become even brighter. As the attached appendix of recent articles on the industry illustrates (Appendix D), "the radio industry is probably in the best position its been in for decades and will be the best-positioned medium for at least the next five years."[155] Indeed, the comments of radio industry analysts evidence an overwhelming consensus that the industry will continue to prosper despite increased competition.

Gary Fries, president of the Radio Advertising Bureau, dismissed any competitive threat to traditional radio from satellite radio, and further confirmed the enduring economic vitality of the radio industry:

- "'satellite will only be able to do one thing -- deliver music.' He said consumers have had ability in their cars to hear high-quality music for some time through CD players, allowing listeners to play music that they, not satellite programmers, choose . . . consumers like commercials and localism from stations, contrasting that situation to satellite services, which he called 'sterile.' . . . But Fries said he doesn't see 'on the horizon' satellite services replacing relationship of local radio to listeners. . . .

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[155] Donna Petrozzello, "Advertisers Expected to Favor Radio in '95," *Broadcasting & Cable* at 45 (March 20, 1995) (quoting Fritz Beesemeyer, senior vice president, media, Openheimer & Co.).

Fries said 'radio listenership has held steady through introduction of cassette and CD players in cars.'"[156]

- "RAB President Gary Fries says that 'the 38% growth in national spot revenue is just that -- pure incremental growth for an industry that continues to attract new advertisers and larger budgets.'. . . Fries adds that 'January's 15% jump is all the more significant when you consider that we're using as the basis for comparison January 1994, a month when radio revenue grew 12%.'"[157]

- RAB's year-end figures show radio advertising revenue grew at a rate of 11.3% in 1994, compared to 1993 figures. RAB estimates the industry's revenues reached $10.652 Billion. That's up from an already-healthy $9.568 Billion in 1993, which represented a 9.3% increase over 1992. . . . It's radio's biggest percentage jump since 1985. . . . The industry is 20% ahead of where it was in 1992.[158]

- "Fries said radio last year passed Yellow Pages in ad revenue, should post 8% - 9% growth this year: 'Will this prosperity last? Yes.' Fries said radio listenership has held steady through the introduction of cassette and CD players in cars . . . ."[159]

Similarly, the bible of the radio industry, *Kagan Radio Deal Record 1995,* reported unprecedented growth in the industry and was very bullish on radio's future:

- "From . . . humble beginnings to more than 10,000 stations nationwide today, radio is among the most dynamic mediums invented. . . . It has more than weathered the rise of several other communications and entertainment fields, notably motion pictures, TV and cable. And the airwaves appear as robust as ever in this new era of satellite and interactive. Against all contenders for media consumption radio's success is simple -- it's local, mobile, flexible and immediate. . . . In terms of

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[156] "National Semiconductor to Build Decoder Chips for DAB Radios," *Satellite Week*, April 17, 1995 at 6.

[157] Donna Petrozzello, "National Spot Revenue up 38%," *Broadcasting & Cable*, March 13, 1995 at 56.

[158] "Banner Year: Radio Breaks $10 Million in Revenue, 11.3% Jump Biggest Since '85," *Radio Business Report*, February 13, 1995 at 2.

[159] "National Semiconductor to Build Decoder Chips for DAB Radios," *Satellite Week*, April 17, 1995 at 6.

investment, radio's strong revenue growth and cash flow margins, low capital expenditures and positive regulatory environment make it a favorite."[160]

- "Cash flow margins in radio are some of the highest in any media. Duopoly has helped trim costs (and therefore boost margins) and so has good management. . . . . some stations operate in the 50% cash flow margin range and an elite few in the 60% range! . . . [L]arge stations (net rev. = $8 mil. to $10 mil.) enjoyed an average 37% cash flow margin, a steady increase from 1991 to 1994. . . . Meanwhile, medium-sized stations (net rev. = $3 mil. to $5 mil.) had 30% cash flow margins in 1994, on par with a high hit more than a decade ago. The trend line was still going up into 1995. Small stations (net rev. = $250K to $750K) average cash flow margin more than doubled from 1990's 7% to 1994's 17% high."[161]

The Veronis, Suhler & Associates Communications Industry Forecast/Radio Broadcasting, an authoritative chronicle of radio market statistics and analysis, noted the strong fundamentals of the radio industry today and forecasted a bright future for the industry:

- "Over the last two years, radio advertising increased by $1.6 billion, from $8.7 billion to $10.3 billion. . . . Local radio advertising, the predominant component of the segment with 77.7 percent of the total, rose 9.0 percent in 1994 to $8.0 billion, while national advertising - national spot and network - increased 8.5 percent. . . . [R]adio continues to be an attractive medium and should continue to benefit from the improved advertising environment. Consequently, we look for the pace of advertising growth to increase over the next five years, posting a 7.1 percent compound annual rate. By 1999, advertisers will spend an estimated $14.5 billion on radio. . . . Over the last two years, radio advertising has grown at a 9.1 percent compound annual rate, outpacing all other measured media (television, daily newspapers, magazines) except cable."[162]

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[160] Kagan's Radio Deal Record 1995 at 1.

[161] *Id.* at 5.

[162] The Veronis, Suhler & Associates Communications Industry Forecast/Radio Broadcasting (July 1995) at 124.

- "Over the 1975-1992 period, radio's share of measured media advertising showed surprisingly little fluctuation; its share varied by less than a percentage point - 10.0 percent to 10.9 percent. . . . We expect radio's share of measured media advertising to remain above the 11 percent level and to continue to expand over the forecast period. Other advertising media are not available in automobiles where much of radio listening occurs, and radio stations are quick to adapt their programming to changing public tastes. Radio has therefore retained its audience despite growth in competitive media. Even in automobiles, where tape decks and CD players are increasingly available, radio listening has risen. Overall audience levels in 1994 were only 4 percent lower than in 1981 despite rapid growth, radio's audience should expand over the next five years. In fact, radio listening rose in 1994 and was above its 1990 level. As radio audiences expand, radio's share of the advertising pie will also increase."[163]

- "The underlying appeal of radio as an advertising medium is strong. Radio adapts quickly to changing tastes, appeals to numerous demographic groups and advertisers, is affordable by advertisers who are seeking a less expensive alternative to television and newspapers, has a presence in the home but also travels with the listener, and retains its audience despite competition from other media. As a consequence of these attributes, radio has consistently garnered a steady share of the advertising pie despite the emergence of such new advertising media as cable and barter syndication."[164]

- "Total radio advertising will increase from $10.3 billion in 1994 to $14.5 billion in 1999, growing at a 7.1 percent compound annual rate. Local radio advertising will increase at an estimated 7.4 percent rate and national radio advertising at a 6.0 percent rate. . . . Radio's share of measured media advertising will rise to 11.8 percent."[165]

The opinions of these commentators and analysts, while representative, are far from exhaustive. Indeed, a number of trade press articles have made similar observations and conclusions about the health of the traditional radio industry. Appendix D to these Comments includes a number of such recent articles.

[163] *Id.* at 125.

[164] *Id.* at 132.

[165] *Id.* at 135.

Lastly, the Lilley Study found that economists and industry experts have long regarded the ability of the radio industry to accommodate change as one of its greatest strengths.[166] Despite competition from cassette and CD players in cars, radio's automobile audience has grown by nearly 50 percent over the last decade.[167] Radio's adaptability is exhibited by the fact that -- unlike any other media -- hundreds of radio stations switch formats each year.[168] The agility with which radio adapts to changing local needs strongly suggests that the industry will successfully adjust to the coming of satellite DARS.

2. CD Radio's Study Conclusively Demonstrates that the Introduction of Satellite DARS Will Have No Significant Effect on Traditional Broadcasting

The economic analysis that CD Radio submitted in the allocation proceeding offers compelling evidence that satellite DARS would have only a trivial effect on the financial prospects of traditional radio broadcasting. In this regard, as noted above, the Commission has already concluded that terrestrial broadcasters bear a heavy burden of overcoming the

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[166] Lilley Study at 16-22.

[167] *Id.* at 16,

[168] *Id.* at 17. *See, e.g., The Veronis, Suhler & Associates Communications Industry Forecast/Radio Broadcasting* (July 1995) at 135 ("During the average month in 1994, 118 stations changed their format in an effort to match the tastes of their market or reach a new market. This equals 1,416 format changes for the year, or more than 12 percent of commercial stations.").

findings discussed below by showing certain and significant economic harm to specific broadcasters under 47 U.S.C. § 157.[169]

The Lilley Study found that satellite radio will not hurt traditional radio for a number of reasons. Most fundamentally, satellite radio is an inherently national service and therefore offers no competitive threat whatsoever to traditional radio stations' local programming strengths, such as local news, weather, traffic, school closings, personalities, sports, talk and the like.[170] Satellite DARS licensees' lack of local programming, in turn, means that licensees will not be able to compete against traditional broadcasters for local advertising revenue.

Obviously, subscription-based services such as that proposed by CD Radio will not divert any advertising dollars in any event. CD Radio's Study found that given the radio industry's strong growth despite the advent of technologies such as car cassette and CD players, it is reasonable to conclude that subscriber-supported satellite radio likewise will have virtually no effect on the audience size that traditional radio stations deliver their advertisers.[171] This conclusion is buttressed by the fact that satellite DARS providers

[169] *See NPRM,* ¶ 10; 47 U.S.C. § 157 ("It shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under this chapter shall have the burden to demonstrate that such proposal is inconsistent with the public interest."). As the D.C. Circuit observed in affirming most of the Commission's interim DBS rules, "existing systems, like existing licensees, have no entitlement that permits them to deflect competitive pressure from innovative and effective technology." *National Ass'n of Broadcasters*, 740 F.2d at 1198 (1984).

[170] Lilley Study at 1.

[171] Lilley Study at 16, 19, and 30.

intend to target unserved, underserved and other niche audiences that are not served by traditional radio.

Moreover, even if a provider structured its satellite radio service as advertiser supported, the economic viability of traditional radio stations -- and their "cash cow" local advertising -- would be little affected. In 1993, radio stations derived 82 percent of their revenue from local advertisers and only 18 percent from national advertisers. Further, the percentage of total revenue attributable to local ad sales has increased from 77 percent in 1975 and appears to be continually increasing.[172] Thus, satellite DARS providers would not compete head-to-head with local radio stations for the great majority of their advertising revenue. For this same reason, small stations, which rely even more heavily on local advertising revenue (86% is local), would be less affected by a service supported by national advertising.[173]

In arriving at the conclusion that the impact of satellite DARS on conventional radio's revenues will be minimal, the Lilley Study used a series of assumptions to derive a "worst case" model. All licensees were assumed to offer advertising. Satellite radio was projected to penetrate the automobile market (the relevant market as explained below) by 3-10 percent by 2004, based on the growth of analogous technologies such as the audio CD player market and pay cable television.[174] Thus, the most optimistic assumption of satellite radio

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[172] *Id.* at 3.

[173] *Id.* at 4.

[174] *Id.* at 5.

penetration in the automobile market -- 10 percent by 2004 -- *would not even cause any decline in broadcast revenues,* only a slight (3.1 percent) slowing of revenue growth.

Further, conservative assumptions underlie the 10 percent estimate. First, satellite DARS listeners will need to purchase a new radio. Penetration of 10 percent by 2004 would require satellite DARS to realize a truly exceptional "take rate" in the factory installation market -- 30 percent per year -- and aftermarket receiver market -- 66 percent per year. A more realistic projection of satellite DARS' likely penetration by 2004 is the 3.2 percent penetration that CD players achieved in automobiles over a six-year period. CD Radio deliberately used the greater figure of 10 percent in its study.

In addition, the 10 percent estimate conservatively assumes that satellite radio will not attract new listeners who use the service as a complement to traditional radio, but will merely take listeners away from traditional radio. The Study also assumes that satellite DARS subscribers will never again listen to traditional radio.

The 3.1 percent estimate of "worst case" diversion of advertising revenues also is conservative because it equates a percentage point reduction in listening audience with a percentage point reduction in advertising revenue. However, reductions in audience and rating would not translate into a one-for-one reduction in revenue because the remaining local advertising media (cable, newspapers, and other print media) are not perfect substitutes for traditional radio advertising. Therefore, a reduction in local radio ratings would tend to exert upward pressure on local advertising prices, partially offsetting the reduction in lost revenues due to lost audiences.[175] It is reasonable to assume that this offsetting effect would be greater in small media markets where there will be fewer local advertising alternatives to traditional radio stations. As a result, the worst case economic impact on radio of 3.1 percent -- an impact greatly overstated -- is *de minimis* at worst.[176]

* * *

In short, the public interest strongly favors swift FCC action to license satellite DARS. There is absolutely no basis to stifle or delay satellite DARS in order to shield the powerful radio industry from a new competitor. CD Radio's Study is proof that even if the satellite service is wildly successful it will have no more than a trifling impact on conventional radio. All reliable indicators compel the conclusion that the radio industry will continue to flourish and does not need FCC protection.

Proof of this conclusion comes from current experience with radio competitors. As stated above, radio already faces competition from nationwide, multichannel digital subscription radio services distributed via direct broadcast satellite and cable.[177] "Music Choice" -- owned by a consortium of companies including Time Warner, Sony and EMI -- is distributed on Hughes DirecTV system directly into subscribers' homes as part of the basic

[175] *See* Lilley Study at Appendix A.

[176] Even if the introduction of satellite DARS reduced the profitability of some radio stations, harm to an individual broadcast station does not necessarily imply harm to the industry and, more importantly, the services provided to the public.

[177] By contrast, CD Radio and the other DARS applicants are designing systems targeting the mobile, *i.e.*, automobile, market.

programming packages. To date, DirecTV has attracted approximately 700,000 subscribers to its service.[178] Both Music Choice and DMX are available on cable systems throughout the country. Music Choice is available in 20 million homes with cable and has approximately 150,000 subscribers.[179] DMX is available in 40 million homes and has approximately 350,000 subscribers.[180] These companies each offer 60 channels of CD-quality subscription music and are planning to increase to 120 channels.[181]

Hence, traditional radio already faces competition in the homes and offices (where 70 percent of radio is listened to) market from services similar in quality and quantity to satellite DARS. Despite their wide availability Music Choice and DMX have not destroyed, or even damaged, conventional radio. Neither will satellite DARS. Even NAB president Edward Fritts as acknowledged as much:

> the death knell for radio has sounded before [and] radio has refused to answer that call. . . . As we provide the public with relevant programming, I predict America's love affair with radio will only be enhanced.[182]

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[178] McKenzie, "More Viewers Switching Over from Cable TV," *The Commercial Appeal*, August 25, 1995 at 5B.

[179] Randall Bloomquist, "New Waves," *Washington Post*, Fast Forward Section, November, 1994, at A8.

[180] Testimony of Jerold Rubenstein, Federal Document Cleaning House Congressional Testimony (June 21, 1995).

[181] *Id.*

[182] *Communications Daily*, Sept. 11, 1995 at 4 (quoting speech by Edward Fritts at NAB Radio Show).

Indeed, the negligible impact of Music Choice and DMX on traditional radio illustrates vividly the absurdity of claims that the "Goliath" radio industry will be felled by "David" in the form of fledgling satellite DARS. Both because radio is strong, and because DARS will not weaken it, the Commission should move forward to license CD Radio and other qualified applicants.

VI. THE COMMISSION SHOULD FORMULATE SATELLITE DARS RULES THAT PERMIT FLEXIBLE AND MARKET-BASED OFFERINGS

A. The Commission Should Permit Satellite DARS Licensees to Choose the Most Appropriate Regulatory Model

1. Regulatory Flexibility Is in the Public Interest

In the *NPRM*, the Commission came to two tentative conclusions regarding the proper classification of satellite radio service. First, it found no reason to require satellite radio providers to offer service in accordance with any predetermined regulatory scheme. Instead, the FCC proposed that such licensees be accorded flexibility in determining their regulatory classification according to the types of services they offer.[183] Second, the FCC tentatively concluded that satellite DARS is inherently neither a common carrier[184] nor a broadcast service.[185]

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[183] *NPRM*, ¶ 22.

[184] *Id.*, ¶ 23.

[185] *Id.*, ¶ 24.

CD Radio agrees with the Commission's tentative conclusion that licensees should be permitted to choose their own regulatory status according to the type of services they offer. This "self-classifying" regulatory scheme would mirror that used in DBS regulation,[186] and is in the public interest for the same reason as it was in DBS: a flexible regulatory approach is the most efficient means of overseeing a new technology, the applications of which remain somewhat uncertain. The advantage of such regulation is that it "will allow operators the flexibility to experiment with service offerings to find those that the public needs and wants, and to experiment with technical and organizational characteristics."[187]

On the other hand, "[t]he imposition of an *a priori* classification would determine the nature of the service at the outset and thus would foreclose the possibility of gathering valuable experimental data."[188] Such a rush to regulatory judgment will prevent the FCC from ascertaining whether satellite DARS "operators find it most feasible to operate as broadcasters, common carriers, private radio operators, or some combination or variant of these classifications."[189]

When the Commission licenses qualified applicants, its job is completed. For a satellite DARS licensee, however, the real work has just begun. In addition to securing financing, licensees must tailor their offerings to make them attractive to a public totally

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[186] Direct Broadcast Satellites, 86 F.C.C.2d 719 (1981), *aff'd sub nom.* National Ass'n of Broadcasters v. FCC, 740 F.2d 1190 (D.C. Cir. 1984) ("*NAB*").

[187] *DBS*, 90 F.C.C.2d at 707.

[188] *Id.* at 708.

[189] *Id.*

unfamiliar with the service. Until the potential configurations of this nascent service are explored, the FCC should affirm its tentative conclusion to avoid stringent regulatory classifications.

2. Satellite DARS Is Inherently Neither a Common Carrier Nor a Broadcast Service

CD Radio also agrees with the Commission's tentative conclusion that satellite DARS is, in and of itself, neither a common carrier[190] nor a broadcast service,[191] and therefore need not be regulated as either. Under the two-pronged test for ascertaining whether a service provider is a common carrier set forth in *NARUC I*,[192] a service must be classified as common carriage if there are reasons implicit in the nature of the service to expect an indifferent holding out of the service to the eligible user public. Alternatively, it may be classified as common carriage if there are any public interest requirements to serve the public indifferently.

As applied to satellite DARS, neither prong of the *NARUC I* test is satisfied by the nature of the technology itself. First, there is no reason to expect satellite DARS providers to offer their transmission facilities to other entities as a general rule. To the contrary, most of the applicants seek to offer their own choice of programming. If, however, a provider

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[190] *NPRM*, ¶ 23.

[191] *NPRM*, ¶ 24.

[192] *NARUC v. FCC*, 525 F.2d 630, 641-42 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) ("*NARUC I*").

chooses to hold itself out to the public as a common carrier, the Commission's well conceived flexible regulatory scheme would simply mandate that this applicant be regulated as a common carrier.

Nor is there any public interest rationale to require satellite DARS systems to serve the public indifferently. In *Mobile Satellite Service*,[193] where AMSC was required to operate as a common carrier, only one service provider could be accommodated in the spectrum available for mobile satellite service. By contrast, in this case the spectrum can accommodate four licensees. Therefore, there are a sufficient number of satellite radio providers to protect consumers from anti-competitive conduct, thereby avoiding any need for rigid regulatory classification. Further, satellite DARS will contend with an ever-increasing number of other providers of audio programming (*e.g.*, terrestrial radio, cable TV, DBS, CDs, and cassettes), further eliminating the ability of any satellite DARS operator to engage in anti-competitive conduct. Accordingly, there is no reason to mandate common carriage for this new audio service.

The FCC is also correct in its tentative conclusion that no properties of satellite radio require that it be classified as a broadcast service.[194] This tentative conclusion finds support in both the Communications Act and Commission precedent. According to the Act, a broadcast service is the transmission of programming "intended for direct reception by the

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[193] 2 F.C.C. Rcd 485, 490 (1987).

[194] *NPRM*, ¶ 24.

general public."[195] In its *Subscription Video* decision,[196] the Commission clarified that a subscription service which is offered by way of a scrambled signal is not broadcasting. The *Subscription Video* decision listed three "indicia" of a non-broadcast service: (1) supplying the subscriber with "special antennae and/or signal converters"; (2) sending "encrypted" signals; and (3) "a private contractual relationship" between the provider and customer.[197]

Under this test, the satellite DARS service is not broadcasting because it fails every prong. To the contrary, three of the four licensees -- including CD Radio -- intend to supply their customers with special converters, scramble their signals, and provide services pursuant to private contracts. However, the regulatory flexibility proposed by the Commission would permit particular licensees to act as broadcasters. Again, the possibility of different providers utilizing satellite radio technology in different fashions underscores the wisdom of the Commission's tentative conclusion to utilize a flexible regulatory scheme.[198]

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[195] 47 U.S.C. § 153(o) (1994). *See also NAB*, 740 F.2d at 1201 ("[t]he test for whether a particular activity constitutes broadcasting is whether there is 'an intent for *public* distribution' and whether the programming is 'of interest to the *general* . . . audience'" (emphasis in original) (quoting Functional Music Inc. v. FCC, 274 F.2d 543, 548 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959)).

[196] 2 F.C.C. Rcd 1001, 1006 (1987), *aff'd sub nom.* National Ass'n For Better Broadcasting, 849 F.2d 665 (D.C. Cir. 1988).

[197] Subscription Video, 2 F.C.C. Rcd at 1006.

[198] NAB has requested that satellite DARS be authorized on a "subscription only" basis, arguing that to do so would differentiate satellite radio from terrestrial stations, thereby helping to minimize harm to traditional broadcasting. *NPRM*, ¶ 25. As noted previously, CD Radio plans to offer a subscription-based service.

B. Satellite DARS Providers Offering Subscription or Non-Broadcast Services Should Not Be Subject to Broadcaster Public Interest Obligations

The Commission should not adopt public interest obligations for non-broadcast satellite DARS providers. Commission precedent essentially forbids the application of such obligations to subscription-based satellite DARS services. Moreover, as a policy matter, the costs of saddling a fledgling service with resource-consuming public interest obligations far outweigh the benefits, the vast majority of which would be present in the absence of specific rules.[199]

As an initial matter, the Commission's "subscription video" policy precludes the imposition of broadcast public interest obligations on non-broadcast, subscriber-supported satellite DARS providers. Under this policy, a service making transmissions available only to paying subscribers cannot be classified as "broadcasting" and is therefore beyond the purview of the broadcasting public interest obligations. In the *Subscription Video* decision, the FCC stated that the legislative intent of the Communications Act indicates that:

> licensees that take steps to prevent the general receipt of their service evidence the requisite intent that it not be received by the public and are therefore not broadcasting as defined by the Act. We believe that transmissions designed to be available only to paying subscribers clearly demonstrate the intent of the licensee, and provide a superior indicia of that intent than the content of the programming. Thus, we will depart from the content based approach of our earlier classification of STV, and adopt an approach which looks primarily to the mode of the licensee's operation to determine whether that operation evinces an intent that the service be available to the public (and thus is

[199] *National Ass'n of Broadcasters*, 740 F.2d at 1212.

> broadcasting) or demonstrates the licensee's intent to limit receipt and enjoyment only to paying subscribers.[200]

Subscription Video further clarifies that where a service cannot be classified as broadcasting, the broadcasting public interest obligations cannot be applied to the service. Again looking to the legislative intent of the Communications Act, the FCC found that Congress did not intend to subject non-broadcasters to the political access rule (47 U.S.C. § 312(a)(7)) or the rules mandating equal opportunities for candidates (47 U.S.C. § 315), or, for that matter, rules such as those governing equal employment opportunity.[201] Thus, *Subscription Video* expressly exempts non-broadcast services such as subscriber-supported satellite DARS from such rules.

That said, however, CD Radio will operate consistent with the intent of these rules. CD Radio does not intend to offer advertising on its music channels. If advertising were contemplated, however, CD Radio would *not* discriminate in terms of cost or time of advertisement on the basis of political affiliation. The agency, therefore, need not adopt rules requiring such non-discrimination. Nevertheless, CD Radio questions whether even advertiser-supported satellite DARS providers could lawfully be made to favor one class of speaker given the reasoning and holding in *Daniels Cablevision*.[202] Consistent with the

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[200] Subscription Video, 2 F.C.C. Rcd at 1005.

[201] *Id.*

[202] In *Daniels Cablevision*, the court struck down a provision of the 1992 Cable Act requiring DBS operators to devote channel space to educational programming. Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1 (D.D.C. 1993), *app. pending sub nom.*

goals of the FCC's EEO program, CD Radio intends to hire the most qualified and diverse group of personnel without respect to race, religion, national origin, or sex. Further, CD Radio intends to refrain from broadcasting any programming containing indecent or obscene material.

In any case, restrictions on a satellite DARS licensee's ability to select the content of its choosing for its service would be facially unconstitutional as an unjustifiable burden on the licensee's First Amendment rights. Certain broadcasters have in the past advocated such a restriction in thinly-veiled attempts to stave off competition. The Commission should flatly reject any such proposals in this proceeding.

C. The Commission Should Adopt a Flexible Approach in Permitting DARS Licensees to Offer Ancillary Services

CD Radio's business plan focuses exclusively on satellite radio offerings. Recognizing this fact, the *NPRM* questioned what, if any, rules should govern ancillary offerings by DARS licensees.[203] Fortunately, there is a ready-made model -- DBS -- that

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Time Warner Entertainment Co. L.P. v. FCC, No. 93-5349 (D.C. Cir. filed Nov. 11, 1993). The court determined that such a content-based burden on operators' First Amendment rights must be supported by a record documenting a valid regulatory purpose or other legitimate government interest. Yet none existed. Here, rules favoring political candidates over other speakers also would be classified as content based and would therefore have to be supported by a record indicating a compelling, or even legitimate, governmental interest. Because no such record has been compiled, CD Radio believes that an FCC rule imposing such requirements on satellite DARS providers would be constitutionally infirm.

[203] *NPRM,* ¶ 29-30.

permits satellite operators to offer ancillary services on a secondary basis. This regime should be adopted, with any necessary modifications, in this proceeding.[204]

Flexibility historically has been the Commission's touchstone for encouraging the development of new services. For example, during the early stage of the development of direct broadcast satellite (video) service, the Commission permitted operators to provide non-DBS services, including data, voice, and non-video services, on a secondary basis, subject to few restrictions.[205] Aeronautical and cellular service providers also have been permitted to offer ancillary services.[206] Recently, the Commission reaffirmed this historical approach in the rulemaking proceeding considering digital television services, recognizing that "[a]llowing at least some level of flexibility would increase the ability of broadcasters to compete in an increasingly competitive marketplace, and would allow them to serve the

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[204] In DBS, the Commission simply required the operator to begin DBS service during its first five year license term, during which there would be no restrictions on the delivery of alternative services. *USSB I*, 1 F.C.C. Rcd at 979. Thereafter, the DBS operator could continue to provide non-DBS service during the remainder of that satellite's life (assuming the license was renewed) on those transponders on which it continued to provide DBS service. Non-DBS service also could not exceed fifty-percent of each twenty-four hour day on any such transponder. *Id.*

[205] United States Satellite Broadcasting Company, Inc., 1 F.C.C. Rcd 977 (1986) ("*USSB I*"), *recon. denied*, 2 F.C.C. Rcd 3642 (1987) ("*USSB II*").

[206] *See* Digital Administrative Communications in the Aviation Service, 60 Rad. Reg. 2d 1313, 1316 (1986) (digital transmission of administrative messages permitted on aeronautical enroute frequencies, because it will "increase user flexibility in fulfilling their operational requirements without derogating the primary aeronautical enroute service."); Westcom Products, Inc., 102 F.C.C.2d 470 (1985) (cellular providers allowed to offer fixed services).

public with new and innovative services."[207] Indeed, the *Fourth HDTV NPRM* expressly contemplates broadcasters using digital transmission technology for any number of "alternative" uses, including the terrestrial local-area "broadcast of literally dozens of CD-quality audio signals."[208] It would be ironic, to say the least, if the Commission were to allow television broadcasters to offer terrestrial DARS, while precluding satellite DARS from offering other ancillary services.

Rather than adopt any new and rigid rule regarding the amount of non-DARS service, the Commission should borrow tested rules and policies already in place: specifically, the model established in DBS service for the delivery of ancillary services.

VII. TO ENSURE THAT SATELLITE DARS LICENSEES PROVIDE CONSUMERS WITH THE MOST USEFUL, EFFICIENT SERVICE, THE COMMISSION GENERALLY SHOULD REFRAIN FROM MANDATING TECHNICAL STANDARDS AND ALLOW LICENSEES MAXIMUM OPERATIONAL FLEXIBILITY.

In order to allow the satellite DARS industry the freedom it needs to develop into a competitive service, the Commission should afford providers maximum flexibility and refrain from adopting rigid technical standards. To attain this end, CD Radio believes that the most efficient way to resolve technical issues is to allow the marketplace to function freely to the greatest extent possible. Licensees have strong incentives to adopt and implement voluntarily

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[207] Advanced Television Systems and Their Impact Upon the Existing Television Broadcasting Service, MM Docket No. 87-268 (Aug. 9, 1995) ("*Fourth HDTV NPRM*").

[208] *Id.* at ¶ 4.

technical standards that further the utility of satellite DARS to consumers. Such standards are best fashioned on an "as needed" basis with a minimum of governmental involvement and through non-adversarial proceedings, such as voluntary industry fora.

The need for regulatory oversight is especially slight given the competition among satellite DARS providers and between such providers and Music Choice and DMX proposing to use divergent technologies, serve different areas, and target distinct market niches. The existence of such diverse service offerings will expand consumer options, while also allowing licensees to determine the service most valued by consumers. CD Radio is concerned that FCC adoption of technical rules at this nascent stage in the development of satellite DARS could restrict consumer choice and unduly constrain licensees' ability to ascertain and cater to consumer demand.

Notably, the Commission has explicitly recognized that such benefits flow from imposing minimal regulations on DBS providers. In crafting DBS rules, the Commission found that unnecessary regulation could

> reduce the desirability of the service to the public and increase the DBS operators' costs and risks. This, in turn, could reduce their ability to attract financing and might decrease the probability that DBS systems are initiated.[209]

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[209] *DBS*, 90 F.C.C.2d at 708.

The Commission reaffirmed this approach in later reviewing and rejecting proposed new DBS technical standards.[210] Consumers and the DBS industry have been well served by the resulting technical flexibility. As set forth below, CD Radio believes that such an approach to satellite DARS technical standards likewise would enhance consumer welfare.

A. The FCC Should Not Mandate a Service Area Coverage Requirement for Satellite DARS

The FCC should not mandate a service area coverage requirement for satellite DARS because providers have a clear market-based incentive to maximize coverage. As the *NPRM* notes, some satellite DARS applicants propose service solely to the 48 contiguous states, while others plan to serve CONUS, Alaska, Hawaii, Puerto Rico and/or the Virgin Islands.[211]

CD Radio's second generation with additional satellites will include expanded satellite-delivered service to 50-states plus Puerto Rico/Virgin Islands. Before that time, CD Radio is investigating alternatives to supply service to Alaska and Hawaii in the first generation, depending on the outcome of the service rules adopted in this proceeding. Given that other licensees will initially serve these areas, the market is working: listeners in those areas will have satellite radio and CD Radio faces compelling incentives to expand its service

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[210] *See* Technical Standards for the Direct Broadcast Satellite Service, 104 F.C.C.2d 1317 (1986).

[211] *NPRM*, ¶ 43.

as soon as practicable. Such marketplace incentives obviate the need for any regulatory oversight of licensees' coverage areas.

B. The FCC Should Not Adopt a Specific Service Link Margin

CD Radio believes that FCC adoption of a specific service link margin is unwarranted and in fact would be detrimental to the development of satellite DARS. As detailed in Appendix B, irrespective of any regulatory requirement, licensees will be strongly motivated to use a service link margin adequate to ensure reception of the transmitted signal throughout the intended service area.

As the *NPRM* notes, providers are pursuing several different technical solutions to the important issue of maintaining an adequate service link margin. Providers' service link margins differ, in part, according to the technology they employ. Hence, FCC adoption of specific values could have the unintended effect of dictating satellite DARS technology. But as the Commission noted in minimizing technical regulations for the DBS industry, FCC adoption of a single technical standard can harm both consumers and licensees: "by allowing[] operators to implement a variety of technical configurations, the Commission will provide entrepreneurs the best possible opportunity to provide the services most valued by viewers."[212] This logic is especially compelling where, as here, reasonable minds differ as to the optimal technological approach.

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[212] *See DBS*, 90 F.C.C.2d at 717.

All systems have incentives to ensure both that their signals can be clearly received and that overall system costs -- including consumer units -- are minimized.[213] But, no one entity has the "right" approach.[214]

C. Standards for Receiver Interoperability and Tunability Should Be Left to Satellite Radio Licensees and Manufacturers

The most efficient way to achieve the desirable goals of receiver interoperability and tunability is to leave the adoption of the necessary specifications to private industry working groups. The FCC need not attempt to impose a single standard for satellite DARS receivers because the interoperability of receivers is in the clear economic interest of all DARS providers. As with other technical issues, FCC adoption of interoperability standards could needlessly delay the commencement of satellite DARS.

Each provider has an obvious incentive to maximize the number of consumers who can receive its satellite DARS service. The availability of interoperable receivers will further this goal by ensuring the greatest possible deployed base of such equipment. For this reason,

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[213] Because consumers will be required to obtain satellite receivers before they can begin listening to satellite DARS, licensees have ample incentives to design system link margins that permit low-cost fabrication of consumer units.

[214] CD Radio has no objection to the *NPRM*'s proposal that applicants be required to identify the service link margin for their systems and to demonstrate that their systems will provide that service link margin in a mobile environment. Appendix E hereto includes CD Radio's recommended rewrite of the *NPRM*'s proposed rule (*see* proposed 47 C.F.R. § 25.144(b)(2)(i)).