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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	IB Docket No. 95-91
	)	GEN Docket No. 90-357
Establishment of Rules and	)	RM No. 8610
Policies for the Digital Audio	)	PP-24
Radio Satellite Service in the	)	PP-86
2310-2360 MHz Frequency Band	)	PP-87

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COMMENTS OF DIGITAL SATELLITE BROADCASTING CORPORATION

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TABLE OF CONTENTS

SUMMARY 4

I. INTRODUCTION 10

II. DARS FURTHERS THE COMMISSION'S PUBLIC INTEREST MANDATE TO PROMOTE NEW TECHNOLOGIES, SERVICES AND COMPETITION. . . 14

A. The Act Favors Efficient Nationwide Radio Service and Encourages the Introduction of New Technologies and Services. 14

B. Commission Policy Favors Competition. 14

C. DARS Provides Public Interest Benefits -- Services to Consumers And Opportunities for Programmers and Conventional Radio. 16
1. Serves Underserved Areas 17
2. Serves Audiences Unaddressed by Conventional Radio 17
3. Expands Non-Entertainment Services 19
4. Enhances Public Safety Communications 20
5. Bolsters U.S. Economy and Leadership in Digital Communications Technologies 21
6. Expands Opportunities for Conventional Radio Stations 22

D. Nationwide Service Furthers the Equitable Distribution of Radio Services. . . 25

III. OPPONENTS BEAR A HEAVY BURDEN OF PROOF TO DEMONSTRATE THAT DARS IS NOT IN THE PUBLIC INTEREST 25

A. Opponents Face A Heavy Evidentiary Burden. 26

B. Analysis of Economic Impact Issues Must Consider Information Regarding the Relevant Industries. 29

IV. THE PUBLIC INTEREST WILL BE BEST SERVED BY THE IMMEDIATE GRANT OF LICENSES TO PENDING APPLICANTS. 34

A. The Available Spectrum Will Accommodate All Pending DARS Applicants. 35

B. The Act's Auction Criteria Have Not, And Cannot, Be Satisfied. 38
1. Auction Criteria. 38
2. Both Law and Equity Prohibit The Commission From Reopening the Cut-Off Window. 42
a. Reopening the Current Applicant Pool Violates Well-Established Cut-Off Procedures and Rights and Undermines Commission Policy. 43
b. Reopening the Filing Window Will Guarantee Years of Delay. 45
3. The Commission's Proposal Violates Decades of Domestic Satellite Processing Procedures. 45

V. FLEXIBLE DARS REGULATIONS WILL PERMIT LICENSEES TO OFFER EFFICIENT, AFFORDABLE AND RESPONSIVE SERVICE TO THE PUBLIC. 47

A. Minimal and Flexible Technical Rules Will Foster DARS Service. 47

B. Minimal and Flexible Service Rules Will Foster DARS Service. 51

C. Rules Applicable to Licensing Current Applicants. 53

VI. CONCLUSION 54

SUMMARY

There are two major issues in this proceeding: First, what will be the impact upon broadcasters, and does it matter? Second, can and should the Commission auction the spectrum? Although these two seminal issues are important and controversial, their resolution is compelling and self-evident, *if* the Commission adheres to the dictates of the Communications Act, as amplified by established regulatory and judicial precedent.

I. All of the evidence to-date predicts that DARS will have a minimal impact upon the economic well-being of the broadcast industry.

(A) *But regardless,* injury to existing broadcasters is irrelevant and immaterial *unless and until* broadcasters prove by:

(1) "strong evidence" that

(2) DARS, and DARS alone, will produce a "significant net reduction" in service to the public, adding the services provided by DARS to the terrestrial services alleged to be lost.

(B) Even though the Commission has granted the broadcast lobbyists one last opportunity to prove their case, there is no way they should prevail under the established standards, given:

(1) the plethora of new DARS services to rural and other underserved areas and to underserved demographic groups;

(2) the economic health and well-demonstrated resiliency of the conventional radio industry;

(3) the survival and indeed substantial rebound of broadcasters from the onslaught of other means of competition;

(4) the Commission's decision to foster unrestricted competition to the television industry in the completely analogous case of satellite-based competition from Digital Broadcasting Satellites;

(5) the universal agreement among all segments of the political spectrum, gained through 60 years of painful trial and error, that

(a)competition always produces a net gain to the public,

(b) protectionism always injures the public through delay and fewer choices, while ultimately not saving those who are inefficient and

(c) the public interest and not the survival of competitors is paramount;

(6) the codification in Section 7(a) of the Act of the "policy of the United States to encourage the provision of new technologies and services to the public";

(7) the fact that this proceeding already has consumed five times the time mandated by Section 7(b) of the Act;

(8) the fact that the Commission deliberately delayed action beyond the statutory deadline in order to protect the established broadcasters -- "[DARS] was long delayed by the Commission primarily in order to let in-band digital radio develop in a similar time frame;"

(9) the testimony from the chief lobbyist for broadcast industry that conventional radio "has evolved and thrived in the face of competition that would have felled others" and that "as long as we provide the public with relevant programming . . . America's love affair with radio will only be enhanced."

II However seductive the holy grail of millions of dollars of auction revenues might appear, the sobering and decisive facts are that auctions would be illegal *and* highly inequitable:

(A) the DARS proceeding *does not and can not* satisfy the Congressional tri-partite auction criteria:

(1) the applications are not mutually exclusive;

(2) the auction legislation (Section 309(j)(6)(E) of the Act) prohibits the Commission from artificially forcing mutual exclusivity;

(3) the public interest would not be served in light, *inter alia,* of the guaranteed delay, including well-founded court appeals, engendered by auctions;

(B) reopening the filing window to allow additional applicants in the circumstances of this proceeding would:

(1) violate directly-applicable Commission precedent, both in the finality rules of "cut-off" cases and the unique "invitation" to players in nascent satellite services to spend time and resources in substantial,

technically-complex applications well prior to any assurance that the Commission would authorize the service in reliance upon being the only eligible players;

(2) severely chill the implementation of future satellite services by discouraging the necessary input into service rules and confrontation to the establishment from highly-motivated entities;

(3) discriminate against these applicants in light of the Commission's eschewing of auctions in the analogous "Big Leo" cases;

(4) unfairly deny these applicants the well-justified reward for their collective expenditures of tens of millions of dollars in reliance upon the Commission adhering to precedent.

In sum, the issues, while difficult politically, can be well defended, and indeed are undeniably compelled, by: (a) the dictates of the Act, including newly-enacted Section 7; (b) judicially-approved Commission precedent; (c) years of costly regulatory experience; (d) the public interest in early initiation of promising new services to new audiences; and (e) fundamental fairness to the existing applicants.

There are four applicants ready, willing and able to compete with each other to initiate innovative Digital Audio Services by satellite. Their applications have now been waiting five years for a Commission decision. They have spent tens of millions of dollars themselves, induced the spending of as much probably more by their satellite manufacturing partners and committed untold hours of time, in faith that the sufficient members of the public will find DARS attractive and fulfilling and in reliance upon Commission precedent that they would

have a fair opportunity to be licensed consistent with past approaches in satellite licensing and commensurate with their efforts and patience.

The time is long overdue for the Commission to act quickly to adopt comprehensive but flexible rules, as suggested herein and in the Joint Comments submitted simultaneously herewith, and immediately commence the processing of these four applicants.

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COMMENTS OF DIGITAL SATELLITE BROADCASTING CORPORATION

Digital Satellite Broadcasting Corporation ("DSBC"), by its attorneys, hereby submits its Comments concerning the *Notice of Proposed Rulemaking* in the above referenced proceeding.[1] The *DARS NPRM* proposes license assignment procedures and service and technical rules for the Digital Audio Radio Services ("DARS"). The record in this proceeding fully supports the assignment of the full 50 MHz of spectrum allocated for DARS to the four pending applicants without employing competitive bidding.

[1] *In the Matter of Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, FCC 95-229, Released June 15, 1995 [hereinafter *DARS NPRM*].

I. INTRODUCTION

Advances in technology over the past two decades have fostered rapid deployment of new communications services. Consumers have greatly benefitted from the advent of long distance and growing local telephone competition, cellular telephony and cable and satellite-delivered television, both of the latter in direct competition to terrestrial broadcast television.

The Commission has successfully ushered in these and other worthwhile new services by heeding the Act's mandate -- new services are good, choice is good, competition is good.[2] Consumers have benefitted, new communications services have flourished, jobs have been created, ad the U.S. has maintained leadership in these areas of telecommunications. Indeed, the Commission has accomplished so much in fostering competitive telecommunications markets that Chairman Hundt has referred to the agency as the "Federal Communications Competition Commission."

It is rather surprising and extremely disheartening, then, that the Commission has consumed five years pondering and now repondering the alleged effects of Digital Audio Radio Service ("DARS") on broadcasters.[3] Indeed, despite its record as the "Competition

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[2] For example, cellular was originally viewed as a service for the wealthy. Today, the industry employs over 50,000 people, has expended in excess of $18 billion in capital expenditures and generates more than $14 billion in revenue last year. *CTIA Annual Survey*, 1995.

[3] The Commission has admitted that this proceeding already has been delayed primarily in order to protect broadcasters. "[DARS] was long delayed by the Commission primarily in order to let in-band digital radio develop in a similar time frame. But now its time has come." Remarks of Chairman Reed E. Hundt to the NAB Radio Show, Sept. 8, 1995. This proceeding already has occupied five times the amount of time Congress prescribed for consideration of new services. 47 U.S.C. § 157(b) (The Commission "shall determine whether any new technology or service proposed in a petition or application is in the public

Commission" and the universal agreement regarding the detriments of protectionism,[4] the Commission apparently is once again considering severely handicapping a new technology based on time-worn arguments by entrenched interests.

The issues raised by the Commission in this docket should not prove difficult to resolve. It is beyond dispute that DARS service will offer many hours of new programming to new or underserved audiences (the "audio disenfranchised") and we believe that it is clear that these public benefits will outweigh any speculative effects on existing service providers. The record compiled over the past several years contains comments from a broad variety of entities that support DARS, including manufacturers, programmers, trucking and recreational vehicle associations, rural associations, and even broadcasters. They maintain that DARS will provide a variety of services to underserved audiences, create new and diverse radio services, spur innovative technologies, and create jobs in the aerospace, programming and manufacturing industries.

Broadcast industry representatives, in contrast, offer a parade of imaginary horrors ranging from the demise of many individual broadcast stations to the reduction of local programming to the collapse of free-over-the-air broadcasting -- all allegedly stemming from DARS. Broadcasters cry for protection from DARS and additional regulatory freedom for themselves while offering a variety of suggestions, all in the guise of "assisting" the implementation of DARS. Their proposals share a common goal -- they would impose

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interest within one year after such petition or application is filed . . .")

[4] Commission after Commission has ultimately rejected these protectionist arguments as unproven and far too costly to the public interest.

licensing, service and technical constraints that would further delay the DARS service or saddle it with fatal regulations.

These tried (and tired) arguments have been used in some instances in past years to hobble the development of new services. Broadcasters argued that consumers might choose a service other than theirs. The Commission listened and imposed stifling regulations on the offending service providers.

However, when the "competing" industry[5] was ultimately unfettered, new services flourished, consumer choices expanded, and the public interest was served. Innovative and skilled broadcasters and the broadcast industry as a whole thrived and used the advent of competition to spur technical advances and win release from regulatory constraints on ownership and programming. Here too, the broadcast industry will thrive and in fact benefit from the supposed threat of some competition.

These benefits from prospective DARS competition already are quite evident. The possibility of a DARS launch some four or more years hence has greatly expedited the development of "in-band, on-channel" digital radio and permitted broadcasters to successfully lobby Congress to propose bills eliminating all ownership restrictions on the radio industry.[6] The ultimate result of any actual competition from DARS will be substantial increases in local

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[5] *See, e.g., 1994 Multichannel Video Services Competition Report*, 9 FCC Rcd 7442 (1994); *Proposals for New or Revised Classes of Interstate Foreign Message Toll Service ad Wide Area Telephone Service*, 56 FCC 2d 593 (1975) (FCC's deregulatory policies led to highly competitive markets for video services and customer premises equipment.).

[6] During the Senate debate on S.652, which eliminates all radio ownership restrictions, immediate action was deemed "critical" because of the Commission's allocation of DARS spectrum. Congressional Record, June 15, 1995, S 8430. The House has passed a similar measure.

programming by existing broadcasters.

In short, in view of: (1) the authorization of Direct Broadcast Satellite ("DBS") service, whose relevant regulatory issues are indistinguishable from those implicated in DARS; (2) the Commission's well-enshrined pro-competitive stance, especially as manifested in telephony and multichannel video services; (3) its statutory mandate to promote new technologies and services; (4) the broadcasters' inability to satisfy the heavy burden of proof set forth in DBS and the DARS Notice of Proposed Rulemaking; and, (5) the prevailing opinion on both sides of the political and economic spectrum that lobbying by vested interests should not be permitted to slow the introduction of new services to United States consumers, the Commission should proceed expeditiously to adopt service rules and to process the four existing applications for 50 MHz of DARS spectrum.[7]

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[7] The Commission must not fall prey to the broadcaster's arguments and impose restrictions on DARS that are more onerous than those imposed on DBS, which were minimal and flexible. In fact, a more accurate analogy would be the regulatory freedom afforded other similar service providers, cable and satellite multichannel audio providers, which have never been subject to the economic scrutiny or regulatory oversight proposed for DARS. To do otherwise elevates the protection of audio services over the protection of video services and disserves the public interest in increased choice among audio service providers.

II. DARS FURTHERS THE COMMISSION'S PUBLIC INTEREST MANDATE TO PROMOTE NEW TECHNOLOGIES, SERVICES AND COMPETITION.

A. The Act Favors Efficient Nationwide Radio Service and Encourages the Introduction of New Technologies and Services.

The Commission's analysis of DARS must proceed within the context of the Communications Act ("Act"), which sets the guidelines to resolve the major issues relevant to this proceeding. As Congress made abundantly clear when it added Section 7 of the Act more than a decade ago, the Act above all favors new technologies, new services, and increased competition to existing services.[8] The Act thus presumes that new technologies will further the public interest and that protectionism under any guise is contrary to the public interest. Furthermore, the Act mandates the widest possible distribution of radio services, including nationwide services,[9] among the states and communities.[10]

B. Commission Policy Favors Competition.

By now there is little doubt that the Commission is firmly committed to protecting competition, though not competitors.[11] It arrived at this conviction slowly but surely as a result of 60 years of often painful lessons. The litany of failed attempts at stemming the use

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[8] "It shall be the policy of the United States to encourage the provision of new technologies and services to the public." 47 U.S.C. § 157, added by Public Law 98-214, 97 Stat. 1467, Sect. 12, Dec. 8, 1983.

[9] 47 U.S.C. § 1.

[10] 47 U.S.C. § 307(b).

[11] "Promoting competition is one of our main purposes at the FCC. Commission Chairman Reed Hundt, Remarks at Comnet 1995 (Jan. 26, 1995). There is not a single instance (in 60 years of regulation) where protectionism was successful. Indeed, this is true even beyond the communications industry.

of new technologies in the mistaken belief that the public would be served is sufficiently well-known not to need extensive repetition.[12] It should suffice here to point to the major episodes:

- o the intermixture and deintermixture of VHF and UHF, which satisfied no one while delaying the growth of television for years;
- o the attempts to preserve the telephone monopoly against the illusory horrors of foreign attachments and additional service providers, which served only to keep service and equipment prices artificially high and ensure that everyone had a choice of one model of black telephone;
- o the Top 100 market hearings and other attempts to restrict competition from cable television, which for a time enabled the television networks to stymie the development of alternative cable programming such as CNN, the Discovery Channel, the Weather Channel, A&E, Home Team Sports, C-SPAN etc., while maintaining their profits and those of their consultants.

In more recent proceedings -- such as the Domestic Satellite Service, Competitive Carrier and Cable Deregulation proceedings -- the Commission has reiterated its newly-found position that competitive markets serve both consumers and the economy as a whole by reducing costs and prices, increasing quality and availability of services, promoting innovation and fostering

[12] The Chairman has recognized that the older Commissions favored restrictions on competition, but that the "FCC should [not] exist in order to protect incumbents from what is euphemistically called 'too much competition.'" Chairman Reed Hundt, Remarks Before the Museum of Television & Radio, May 23, 1995.

rapid responses to consumer demands and tastes.[13] In many of these areas the Commission's key premise was to allow the market to determine the number of competitors, the services offered and the prices charged. As a result, consumers have benefited from a much greater variety of more efficient and less costly service.

Further delay in DARS is diametrically opposed to this by now entrenched Commission policy.

C. DARS Provides Public Interest Benefits -- Services to Consumers And Opportunities for Programmers and Conventional Radio.

In the *DARS NPRM*, the Commission defined the public interest as "the provision of services of value to the listening public . . ." and tentatively concluded that DARS will meet this standard.[14] The record leaves absolutely no option but for the Commission to affirm its conclusion that DARS will provide valuable new services and increased choice for consumers.[15]

DARS operators propose services that will create a qualitative and quantitative improvement in audio services throughout the nation, with significant benefits to the public

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[13] *Registration Programs*, *supra* note 5; *Cable Television Services*, 67 RR 2d 1771 (1990)(deregulation increased program service quantity); *Price Cap Regulation of AT&T*, 76 RR 2d 1375 (1995).

[14] *DARS NPRM*, *supra* note , para. 11.

[15] *See*, generally, comments (Jan. 29, 1993) and replies (Mar. 1, 1993) filed in Docket 90-357 offering overwhelming and broad-based support for an allocation of spectrum for DARS. Comments supporting DARS have been filed well in advance of the deadline in this proceeding by program and service providers, recreational vehicle, trucker and rural associations, arts councils, data service providers, electronics and aerospace companies and even a niche broadcaster forced to go dark after decades of public service and now looking to go back on the air through DARS.

particularly in rural areas of the country where audio services are scarce and among ethic and cultural groups too geographically dispersed to support service from a localized or regional terrestrial broadcaster. A competitive audio services environment will serve the public interest by increasing consumer choice and access to valuable new services.

The DARS applicants, collectively and individually, have proposed to:

1. Serves Underserved Areas. Many rural areas of the country are served by only a few conventional radio stations.[16] Listeners are also located or travel beyond the reach of the local stations that provide their preferred formats. Such sparsely populated areas can not support additional stations or varied formats. The universal reach of DARS satellite systems will for the first time enable radio programmers to surmount these economic-based handicaps by providing the same degree of multichannel, high-quality audio entertainment and information programming to mobile and fixed audiences regardless of their geographic location.

2. Serves Audiences Unaddressed by Conventional Radio. The increase that DARS will bring in the number and variety of programming will produce benefits akin to the substantial increases in program variety and consumer choice stimulated by the advent of multichannel video delivery.[17] DSBC's market research indicates, for instance, that there is

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[16] Almost two and one-half million Americans currently receive one or no FM signals and twenty-two million receive less than five FM signals. Jules Cohen & Associates.

[17] Most households have access to competing multichannel video service providers including broadcast TV, DBS, cable, multichannel multipoint distribution systems and even VCRs. DBS alone provides hundreds of channels of programming (DirecTV now offers 175 channels) to all markets throughout the country. Satellite distribution systems and cable offer hundreds of niche oriented channels including audio formats to fixed receivers.

significant pent-up demand for audio programming that is not available or limited in many conventional broadcast markets. According to a nationwide survey sponsored by DSBC,[18] between 10% and 27% of the survey respondents indicated a strong interest in accessing programming formats that are not widely available. (The numbers in parentheses are nationwide numbers of formats of programming that are terrestrially broadcast more than 20 hours per week) For example, childrens (17), seniors(0), visually impaired(0), literature readings(2), farming(95), continuing education services(245), international channels(74), and hobby information(0).[19]

Satellite delivery of audio programming directly to end-users permits DARS operators to provide narrowcast formats by aggregating geographically dispersed audiences with common interests that cannot be economically served by terrestrial radio. DSBC's fielded market survey, for instance, indicates that channels aimed at pre-teen and post-65 audiences are likely to find audiences among the 60 million people in those demographics. Similarly, specialized audiences will be found among 31 million people who speak a language other than English at home.[20]

Few, if any, conventional radio stations devote their programming day to these

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[18] DSBC sponsored a nationwide survey with a final sample size of 1100 interviews. The survey sampling was proportionate to the geographical distribution of the U.S. population. The sample pool of phone numbers allowed for the inclusion of unlisted phone numbers and newly listed residential numbers. The sample was "worked" so that each phone number had a minimum of seven attempts at contact. This methodology ensured that all people in the potential pool had an equal chance of being included.

[19] *Broadcasting & Cable Yearbook 1995*, B-592.

[20] Population statistics are derived from the *Statistical Abstract of the United States - 1994*.

demographics. Throughout the United States there are only seventeen stations that provide service aimed at children. It appears that no stations are specifically formatted to cater to the tastes of older Americans, despite the "graying" of the population. Similarly, stations providing specific foreign language and ethnic formats are limited and certainly do not cover all of those groups throughout the country.[21] In contrast, satellite delivery permits a variety of audio programming to be received. For example, ethnic programs, foreign language and radio reading services are now available on Ku-Band satellites. However, these services can not serve mobile audiences and equipment costs greatly exceed the projected costs for DARS receivers and services. The void can be readily filled by DARS.[22]

3. Expands Non-Entertainment Services. DSBC has found strong demand for services beyond entertainment offerings. Channels devoted to educational services, lecture series, news, business and political affairs all rank high on service lists generated by potential DARS users. DARS can devote significant amounts of airtime to long term coverage of breaking news stories. Rather than the hourly updates or program interruptions currently employed by radio to inform listeners, DARS services can cover news stories as long as necessary, similar

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[21] For example, there are about 500,000 Vietnamese living in the U.S. Yet, there is only one Vietnamese radio station. Similarly, there are 1.2 million Chinese in the U.S. and no radio stations that are dedicated to that community. Half a million Koreans are served by only four stations, all in California. *Statistical Abstract of the United States - 1994.*

[22] Even NAB recognizes that DARS will expand the audience base. In a letter to the Commission, the NAB claims that the public interest will not be served by DARS "cream-skimming new users at the expense of local broadcasters." Letter from the National Association of Broadcasters to Chairman Reed Hundt (May 3, 1995).

to CNN's coverage of Desert Storm.[23] The economics of terrestrial radio dictate that such services appear only rarely on conventional radio stations or are not found in the quantity desired by the listening audience.

4. Enhances Public Safety Communications. One of the more important public interest benefits of DARS is its much greater ability to disseminate emergency information. DARS can reach more interested officials and civilians over a longer period of time than conventional radio, and with much less of an impact upon its economic viability. Both the Commission and the Congress have repeatedly emphasized the importance of public safety communications. For instance, Section 11 of the Commission's rules provides for an Emergency Alert System that enables the President to provide immediate communications and information to the general public at national, local and state levels. 47 C.F.R. §11.1. Moreover, Congress and the Commission often except public safety entities from various regulatory requirements (See Section 309(j)) or offer them increased protection from dislocation or interference. In general, DARS should enhance the nation's public safety and disaster communications infrastructure by providing an additional, addressable digital communications service. The Commission's proposal to permit ancillary data services will permit DARS operators to disseminate important weather and emergency information for

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[23] Nationwide multichannel distribution systems enable increased diversity. Cable television systems dedicate channels to public affairs, news, weather and political programming that could not exist in a conventional broadcast environment. These programs thrive with very low ratings and are provided without regulatory "incentives" or government support. In addition,nationwide satellite also facilitates niche services. For example, according to the Broadcasting & Cable Yearbook 1995, there are no stations that provide radio reading services over twenty hours per week. In contrast, these services are offered on C band transponders to large (and expensive) backyard dishes.

campers, hikers and people in rural areas not reached by terrestrial radio services. DSBC's spot beam approach to DARS will be an especially useful and cost effective method of transmitting regional emergency information.[24]

5. Bolsters U.S. Economy and Leadership in Digital Communications Technologies. DARS will have a direct beneficial effect on the U.S. economy and on U.S. world technical leadership. The four applicants propose over a billion dollars of new satellite construction, which will replace diminishing defense contracts among United States aerospace companies. Moreover, while the radio industry is in a prolonged consolidation and downsizing phase in order to cut costs, the advent of DARS will increase the number of programming related jobs. Finally, the U.S. is once again in danger of loosing technical and manufacturing leadership in a high tech industry to overseas interests. Although DARS development was originally led by the United States, in the past two years U.S. advances have been overtaken by developments and implementation plans in Europe and Canada.[25] In both regions countries are implementing systems that utilize standards that are incompatible with the U.S. systems. If these standards become the *de facto* leaders by virtue of U.S. development lag, U.S. industry will have a difficult time in supplying the U.S. DARS applicants with equipment at a cost effective price and U.S. industry will be handicapped in competing against their overseas counterparts. The U.S. is now undeniably in a "catch-up" situation. The only solution is an

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[24] In particular, DSBC's spot beam design can direct messages to key distress areas (*e.g.*, tornado watch areas) and can provide this function without interrupting its programming to unaffected areas of the country.

[25] *Call for Applications for a Broadcasting License to Carry On a Pay Audio Programming Undertaking*, Public Notice CRTC 1995-88, June 1, 1995.

early licensing of DARS.

6. Expands Opportunities for Conventional Radio Stations. As consolidation continues across radio markets, stations not part of this trend will seek creative new methods to survive.[26] DARS will provide myriad opportunities for conventional radio stations seeking new revenue streams. Some broadcasters, for instance, may wish to switch to digital and expand their coverage area, or offer services unsustainable on a local station by utilizing DARS. Indeed, despite the opprobrium from their fellow broadcasters, several of the more innovative and enlightened broadcasters have filed in favor of DARS for precisely these reasons. [27] One broadcaster that has gone dark in an effort to provide mainstream jazz programming now looks to DARS for new audience possibilities. *See*, Comments of KJAZ. In addition, a sports-oriented regional radio network (owned by a multistation operator) and a national association of state radio networks covering 25 states as well as an FM cable superstation currently serving 35 states have expressed interest in providing service over DARS. The launch of DARS undoubtedly will bring other frustrated radio broadcasters out of the woodwork to take advantage of the unique complementary nature of DARS.

7. Creates Incentives for Conventional Radio Stations and Drive Them to Do What They Have the Unique Capability to Do. In addition, DARS has, and will continue to have, a salutary effect on conventional broadcasting -- it creates competitive incentives with public

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[26] One example of such efforts are real time radio service over computers. "EZ Sees Money in the Net," *Broadcasting & Cable*, July 31, 1995, at 31; "Talk Radio Network Goes on the Web," *Id.*, at 35 (offering four niche talk show services).

[27] *See* Comments of WHUR; Comments of WPFW in Docket No. 90-357 (January 29, 1993).

benefits. The future advent of DARS has already fomented the classic reaction to a competitive threat, DARS will continue to do so as its launch date nears.

DARS has spurred otherwise satiated broadcasters to accelerate their conversion of terrestrial broadcasting from analog to digital. Until DARS appeared as a viable new service, broadcasters expressed little interest in improving the quality of AM and FM transmissions. Since, and largely because, DARS applications were filed, broadcasters have made great strides in developing digital audio systems. The Electronics Industry Association recently completed laboratory tests of digital audio broadcasting and have progressed to field tests.[28] Standards recommendations are expected to be delivered to the Commission early in 1996. The accelerated activity of broadcasters in combination with the three year post-license lead times necessary to construct satellites ensures that digital AM and FM will be available and well established before DARS.[29]

Moreover, radio stations have a unique and unassailable advantage over DARS. DARS is unable to provide locally-oriented programming. Thus, broadcasters can easily differentiate themselves from DARS by increasing local programming that appeals to their communities of license, such as news, weather, and sports.[30] More and more local radio

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[28] "EIA Releases Positive DAB Test Results," *Communications Daily*, August 29, 1995.

[29] Just as the U.S. has lost its lead in DARS technology and service development due to Commission inaction, the entrepreneurs that developed DARS systems and served as the incentive to digital developments in broadcasting have lost their slim lead to entrenched broadcasters.

[30] Competitive pressures from direct broadcast satellite services that do not provide local news has caused several cable systems to add local news channels for a competitive advantage. "Cablevision to Expand Local News In N.Y. Market," *Multichannel News*, March 27, 1995.

broadcasters are already devoting more airtime to local news coverage because "listeners are interested in what's happening in their own backyards." [31]

That the unique advantage of local radio stations can and will be exploited to maintain a healthy radio broadcasting industry (and increase their service to the public) was confirmed by the President of the National Association of Broadcasters. In a recent speech he concluded that the advent of competition from new technologies will not be the "death knell for radio" because of radio's strong relationships with its audience. "As long as we provide the public with relevant programming I predict America's love affair with radio will only be enhanced."[32]

The broadcast industries own actions and remarks are a compelling demonstration of the surety of the benefits and concomitant absence of detriments from DARS. The record is clear that broadcasters will be spurred to develop or improve those services that the Act intends they provide, without an adverse impact upon those broadcasters who are presenting programming that is in the public interest. This should have a beneficial effect by stemming the prevailing trend toward satellite-delivered non-local "canned" programming.[33]

In summary, DARS will combine new technology and new service capabilities to produce public interest benefits to users nationwide, whether mobile or at fixed locations. It will create new opportunities for programmers and promote a competitive environment that

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[31] "Radio Services Don't Stop With Traffic," *Broadcasting & Cable*, July 18, 1993 at 48. ("CNN won't tell you what the school board in Queens decided to do. . .")

[32] Remarks of Eddie Fritts, Radio 95, Sept. 7, 1995. He also commented that radio "has evolved and thrived in the face of competition that would have felled others."

[33] In recognition of this trend, the NAB held a seminar titled "How to Make Satellite Programming Sound Local" at its April 1995 convention.

will spawn increased consumer choice among low-cost, innovative services. It will drive the conventional broadcast industry to do what it does best and uniquely -- local programming -- and thereby fully insulate itself from any significant audience fragmentation or revenue loss.

D. Nationwide Service Furthers the Equitable Distribution of Radio Services.

The Commission has concluded that satellite DARS furthers the dictates of Section 307(b) of the Act which directs it to equitably distribute radio services to communities throughout the U.S.[34] The Commission should affirm this commitment to new nationwide and regional services. DARS permits a view of 307(b) that is factually different from the technologies extant 60 years ago, but which is consistent with the fundamental premises underlying Section 307(b) of the Act and Commission precedent. DARS enables the constraints of conventional radio, which limit the distribution of services to geographic communities, to be broken. Thus, services may be offered to communities of interest that are homogeneous but geographically dispersed. By aggregating economically-unattractive audiences throughout the country, DARS can offer services to listeners with tastes that are largely unserved by current programming formats and distribution methods.

III. OPPONENTS BEAR A HEAVY BURDEN OF PROOF TO DEMONSTRATE THAT DARS IS NOT IN THE PUBLIC INTEREST.

The opponents of DARS allege that it will siphon market share from conventional radio, reduce station revenues and make it difficult or impossible for stations to provide

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[34] *Amendment of the Commission's Rules with Regard to the Establishment of New Digital Audio Radio Services*, 10 FCC Rcd 2310 (1995) [hereinafter *Allocation Order*] at para. 23, (*citing National Association of Broadcasters v FCC*, 740 F.2d 1190, 1198 (1984) [hereinafter *NAB v. FCC*]).