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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C.

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

**COMMENTS OF
AMERICAN MOBILE RADIO CORPORATION**

AMERICAN MOBILE RADIO CORP.

Bruce D. Jacobs
Scott R. Flick
Fisher Wayland Cooper Leader
& Zaragoza L.L.P.
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006

Lon C. Levin
Vice President and Regulatory Counsel
American Mobile Radio Corp.
10802 Parkridge Boulevard
Reston, Virginia 22091

Its Attorneys

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SUMMARY

As one of four applicants for a DARS authorization, American Mobile Radio Corporation (“AMRC”) is awaiting Commission authorization to commence construction of its proposed system. AMRC therefore strongly disagrees with the Commission’s proposal to accept additional DARS applications, as well as the Commission’s proposal to select DARS licensees through a competitive bidding procedure. Such actions would be inequitable in the extreme and would violate the Communications Act of 1934 as well. In order to bring the benefits of DARS to the American public as quickly as possible, AMRC urges the Commission to grant the four pending DARS applications and create flexible service rules that will accommodate the evolution of DARS and allow licensees to adapt their systems to the demands of the listening public.

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American Mobile Radio Corporation (“AMRC”), by its attorneys, hereby submits its comments on the Commission’s Notice of Proposed Rulemaking (“NPRM”) in the above-referenced proceeding. AMRC is one of four applicants seeking authorizations to operate systems in the Digital Audio Radio Service (“DARS”). AMRC’s application, which was filed in response to a Commission cut-off notice, has been pending at the Commission since December of 1992. AMRC is therefore pleased that the Commission has allocated spectrum and is working toward the adoption of service rules for DARS. AMRC is concerned, however, that the NPRM seems overly concerned with what have become, essentially, moot issues. Having accepted applications in order to understand the likely nature of the service from real-world system proposals, and having made a judgment based on those proposals that DARS is in the public interest, the Commission’s NPRM seems intent upon unnecessarily revisiting all of these decisions rather than focussing exclusively on the creation of service rules. In particular, the

NPRM dwells on the method to be used to select DARS licensees, when in fact, no selection is necessary. The Commission issued an official cut-off based on Satellite CD Radio's filed application, and several applicants expended substantial resources designing, budgeting, and proposing highly complex systems to provide a new audio service that, as a review of the comments in the allocation rulemaking reveals, is strongly supported by segments of the public currently unserved or underserved by traditional broadcast stations.

Discussions among the four pending applicants regarding the respective technical requirements of their proposed systems has now made clear that each is capable of operating in 12 ½ MHz of spectrum, and that all four applicants believe that the entire 50 MHz of spectrum allocated to DARS by the Commission is usable. As a result, there is no mutual exclusivity among the existing applicants and thus no reason to contemplate schemes for selecting among mutually exclusive applicants. AMRC therefore urges the Commission to promote the public interest in expedient deployment of DARS by licensing the four existing applicants to utilize the full 50 MHz of allocated spectrum (12 ½ MHz each), and to adopt flexible service rules that will allow DARS to develop to meet the needs of a diverse public.

Introduction

1. AMRC is a subsidiary of American Mobile Satellite Corporation ("AMSC"), which, through a separate subsidiary, has been licensed by the Commission to provide Mobile Satellite Service to the United States. When the Commission published its 1992 cut-off notice allowing applicants a single opportunity to file for an authorization to operate a DARS system, AMSC considered both the pioneering challenges and opportunities involved in successfully launching a DARS satellite system. Given its substantial expertise in the mobile satellite field, AMSC recognized that it was uniquely suited to meet the challenge of creating a cutting edge

audio delivery system and -- no easy task -- creating and marketing a new mobile communications service to the public.

2. Having decided to expend precious resources on the development of a DARS system capable of providing service to the contiguous United States as well as Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands, AMSC established AMRC and set about designing a first generation DARS system. Despite the relatively short development period allowed by the Commission's cut-off notice, AMRC was able to overcome numerous technical and service issues that had to be resolved to create a viable first generation DARS system. These efforts ultimately led to the system proposed in AMRC's application -- a two-satellite system capable of achieving broad geographic coverage while maximizing spectrum efficiency by using variable data rates for the different types of audio services to be carried on the system. On December 15, 1992, AMRC filed its system proposal with the Commission and, as required by the Commission, shortly thereafter submitted \$140,000 to the Commission to cover the launch fees for the two satellites.

3. Now, almost three years later, AMRC remains committed to its goal of launching a state-of-the-art DARS system. AMRC does not make this commitment lightly, as it means tremendous additional expenditures of money and resources over the several year period necessary to build and launch satellites for the service. AMRC has, however, grown in experience while awaiting Commission action in this proceeding, and it has followed closely numerous advances in technology that can be incorporated into its basic system design to assure state-of-the-art performance once a license is obtained. AMRC firmly believes that no one is better qualified to launch this new service, and looks forward to the refinements of the service and the technology that competition with the three other proposed licensees will invariably bring.

4. What AMRC does not welcome, however, is the Commission's contemplations in the NPRM regarding the acceptance of additional applicants. Such "johnny-come-lately" applicants would serve no purpose other than to create mutual-exclusivity, thereby requiring the otherwise unnecessary adoption and execution of a licensee selection scheme. In short, the result would be yet more delay. This result is patently unacceptable to the public interest where five years have already passed since the filing of Satellite CD Radio's original application and where it will take several more years to build and launch the satellites necessary to operate a DARS system.

5. The Commission has before it four applicants that are not mutually-exclusive and who have spent the last three to five years developing and refining their proposed DARS systems so as to be able to move as quickly as possible with the construction of their respective systems once Commission authorization is obtained. It is difficult to imagine what benefit to the public would result from now wiping that slate clean and starting DARS from scratch. This is particularly true where the Commission has already found, based upon the system proposals of the four applicants, that initiation of DARS is in the public interest. Finally, the tremendous expenditure of resources by the existing applicants in reliance upon the Commission's cut-off notice provides yet further equities in favor of granting the long-pending applications of AMRC and the other existing applicants.

I. Having Issued a Cut-Off Notice That Has Been Relied Upon by the Pending Applicants, the Commission Cannot Accept Further Applications

6. The Commission issued a Public Notice on October 13, 1992, accepting for filing the application of Satellite CD Radio, Inc. and inviting all other interested parties to file an application by December 15, 1992. AMRC, along with four other parties, filed prior to the cut-

off, bringing the total number of applicants to six. Upon filing their proposals, these applicants began the process of examining each other's applications in order to identify and assess issues of spectrum compatibility; to determine what operational issues could be resolved through cooperation; and to determine whether any of their applications might be mutually exclusive. All of the applicants contemplated their business plans in light of the number and types of proposals tendered to the Commission, and proceeded based on that information. Two of the initial applicants, perhaps recognizing that six DARS systems would be unlikely to survive, agreed to dismiss their applications. The remaining four applicants continued to expend funds and resources, and make business decisions, based on the premise of four applicants with concrete system proposals. Given that the total projected costs for the four systems is just under \$2 billion dollars, the importance of every one of these decisions and expenditures, made in reliance on the Commission's formally announced cut-off, cannot be overstated. The Commission's delay in acting on these applications for literally years has further aggravated the situation, forcing the applicants to continuously react to ever-changing technological and competitive factors and to stay always poised to leap as soon as Commission authorizations were obtained. Given the advance planning necessary for such an immense project, the applicants had no choice but to rely on the Commission's cut-off notice. For the Commission to now contemplate acceptance of new applications with an eye toward conducting competitive bidding for the DARS spectrum, a regulatory option not even available at the time of the cut-off notice, would be unfair and inimical to the public interest.

A. The Cut-Off Procedure Is Clearly Proper in This Case

7. The Commission has long used cut-off procedures as a method for awarding licenses because of their administrative efficiency and clarity. See, e.g., Radio Athens (WATH)

v. FCC, 401 F.2d 398, 400 (D.C. Cir. 1968). While such procedures sometimes require expedited preparation of applications (as was the case here) and occasionally produce apparently harsh results, their clear-cut simplicity has been found by the courts to more than compensate for such harshness. See Ridge Radio Corp. v. FCC, 292 F.2d 770 (D.C. Cir. 1961); Century Broadcasting Corp. v. FCC, 310 F.2d 864 (D.C. Cir. 1962).

8. The Commission has specifically found that the cut-off procedure is a particularly good method for awarding satellite licenses. For instance, in Mobile Satellite Service, 6 FCC Rcd 4900 (1991), the Commission determined that awarding a Mobile Satellite Service license by cut-off would avoid the possibility of a flood of late-filed applications and the resultant delay in resolution of both spectrum and service questions. Id. at 4914. More recently, the Commission stated:

Applications for use of the electromagnetic spectrum for satellite services often propose innovative technologies and services. The use of cut-off deadlines for the submission of applications to use specific frequencies allows the Commission to consider a finite set of concrete proposals when formulating licensing and service rules. Until a group of applicants is defined, it is often not possible to determine what regulatory approach and technical requirements are appropriate. Further, without a cut-off, the Commission may find itself ready to establish rules for a new service and to license systems, and be forced by last minute, mutually-exclusive filings to delay this action. This would severely impede the availability of new satellite services to the public, especially given the two to three year construction period needed for space stations. Thus, use of cut-off deadlines is an appropriate regulatory action.

LEOSAT Corp., 8 FCC Rcd 668, 670 (1993).

9. In accepting applications for an innovative new satellite service, the use of the cut-off notice procedure serves the public interest by allowing the Commission to confine its examination to a relatively small number of applications, from which it can more quickly resolve issues of spectrum allocation, system coordination, service rules, and future licensing procedures.

In the present case, the Commission has before it four applications filed pursuant to the 1992 filing window. From these four applications, the Commission will be able to quickly identify and analyze the factors that are important in the provision of DARS. Furthermore, through the cooperation of the applicants and the relatively limited burdens placed on the Commission's resources by these four applications, the Commission may quickly issue service rules and expeditiously bring this new service to the public.

10. It is also important to note that not one entity has claimed that the cut-off unfairly excluded its application. Nor has anyone asked the Commission to negate the cut-off and allow additional applications to be filed. It is therefore a mystery as to why the Commission is now contemplating such a course of action, particularly since there is no reason to believe that any additional applicants would provide better service than the existing applicants, and the delay inherent in processing new applications guarantee yet further delay in the initiation of DARS service.

B. Each of the Pending Applicants Has Relied on the Validity of the Commission's Cut-Off Notice

11. An applicant for a communications license has an expectation that the Commission will adhere to its licensing rules in a given proceeding. See McElroy Electronics Corp. v. FCC, 990 F.2d 1351 (D.C. Cir. 1993). The clearer the rules, the greater the expectation of consistency. The courts have recognized this expectation in cases where notice and cut-off rules apply. See Florida Institute of Technology v. FCC, 952 F.2d 549 (D.C. Cir. 1992).

12. When the application of Satellite CD Radio, Inc. appeared on public notice, any entity which chose to do so was given the opportunity to file its own DARS application. Each of the applicants who filed in response to the notice put forth the time, energy and money necessary

to develop a DARS system capable of providing service comparable to Satellite CD Radio's proposal. As discussed above, with the closing of the filing window, each applicant was able to assess the proposals of the other applicants and to begin to identify and define the technical parameters of the new service. Eventually, the parties were able to work out a spectrum sharing scheme which would allow all four systems to operate within the confines of the spectrum allocated to DARS, thus ensuring ample DARS competition that might not have existed under a different licensing scheme.

13. A major underpinning of this endeavor was the Commission's continued adherence to the cut-off rule insofar as that rule clearly defined who the DARS players are and the dimensions of the field on which they are expected to compete. Without such certainty, DARS development would have been severely hindered. While the original applications might still have been filed, no interaction would have been undertaken among the parties given that other applicants might appear in the future with new proposals.

14. It is also quite possible that the four existing applicants would not have applied in the first place had they been told that additional applicants would be allowed to drift in and out of the process based on the whims of the Commission. Development, construction, and deployment of a new DARS system has already cost each applicant a considerable amount of money, and will ultimately cost much more. The decision whether to proceed is dependant, in large part, on the competition each applicant is likely to face. The parties with pending DARS applications have chosen to continue with the prosecution of their applications, in part based on an analysis of the competition they would face in the field, an analysis which is necessarily based on the premise that no further applications will be accepted. To upset that calculation now would totally undercut the reliance of these parties on the Commission's rules, and would waste the

large amounts of time and effort expended based on that reliance. Such action would be inequitable in the extreme to the pending applicants, and, as is discussed below, would set a precedent certain to discourage potential applicants in the future from investing in the development of new services to the public.

C. Acceptance of Further Applications Now Would Discourage Future Innovators

15. Were the Commission to accept new DARS applications at this late date, it would send a dangerous signal regarding the Commission's licensing procedures. As the Commission has previously recognized,^{1/} parties willing to take the risks of initiating new and innovative services to the public should be encouraged to come forward and do so. By the use of notice and cut-off, the Commission has created an orderly regulatory process to encourage such entities to come forth contemporaneously so that the Commission can intelligently license the spectrum among them in the most efficient fashion. However, when the Commission undercuts this procedure by opening up the gates to late-filed applications, it makes it impossible for potential applicants to quantify the already substantial risk in initiating new services. Faced with such unnecessary uncertainties, many such entities will decide that their money and energies are better spent in ventures with more controllable risks. Moreover, since late-filing applicants are presented with an excellent opportunity to copy the innovator's ideas, there is a strong disincentive to file unless the applicant can be sure that there will be no further filing windows. Under the precedent the NPRM suggests be established, an entity could never know when that

^{1/} Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 6 FCC Rcd 3488 (1991), Order on Recons., 7 FCC Rcd 1808 (1992).

last filing window will occur. The end result will be lesser availability of new services to the public, with innovators being penalized and late-comers rewarded.

D. The Commission Should Not Accept Late-Filed Applications

16. Were the Commission to now accept further applications for DARS, it would virtually destroy all efforts at mutual coordination and development undertaken by the current applicants over the past three to five years. Any new applicants would have equal standing to those already on file, and would bring about the need to examine and consider a different and potentially incompatible set of service proposals. Such a late-filed proposition would greatly delay the ultimate initiation of DARS service to the public.

17. As in the LEOSAT case,^{2/} the Commission currently has before it a finite set of proposals. Many questions regarding technical specifications and service parameters have already been sorted out by the mere existence of those four applications. Were the Commission to process these applications alone, it would have comparatively little trouble in examining the proposals and establishing service and licensing rules. On the other hand, were the Commission to accept new proposals at this late period, considerable Commission effort and yet more time would be necessary to resolve the service and licensing issues. This delay is especially detrimental in the satellite setting, where satellite procurement and construction requires several years before a launch can even be attempted.

18. Furthermore, were the Commission to accept additional applications, it is probable that some of these applications would be mutually exclusive, thus requiring a further procedure (auction, lottery or comparative hearing) prior to establishment of service. The delay would in no way benefit the public.

^{2/} LEOSAT Corp., 8 FCC Rcd 668 (1993).

19. Mutual exclusivity among additional applications also decreases the likelihood of achieving finality in the licensing/service rule process. Each additional applicant, particularly where mutual exclusivity exists, increases the likelihood of further challenges to Commission decisions. Such challenges divert valuable Commission and licensee resources and create regulatory uncertainty that can be devastating to applicants and licensees seeking financing to cover the immense development and construction costs for a DARS system. Such delay and uncertainty in no way serve the public interest in expeditious establishment of DARS.

II. Section 309 of the Communications Act Prohibits the Use of an Auction to Select DARS Licensees

20. The only apparent justification for nullifying the earlier application cut-off appears to be the opportunity for the Commission to auction the allocated spectrum to those entities that believe themselves capable of designing and financing the construction of a DARS system. Generating revenue is, however, clearly secondary to the Commission's statutory mission of providing the public with the best communications services technology allows. Few potential applicants will bother to expend resources in the future for such tremendously expensive and time-consuming undertakings as DARS once the Commission establishes the precedent of negating all of an applicant's planning and expense merely to hand the license to the highest bidder.

21. Even if, as the NPRM suggests, the pending applicants were allowed to participate in any auction for DARS authorizations, DARS service to the public would be harmed. The Commission has long recognized in the broadcast multiple ownership context that the public often benefits from operating efficiencies achieved by broadcasters because the extra funds created by those efficiencies often go to create improvements in the service or allow a

station that might otherwise go off the air to continue to provide service to the public.^{3/} In the DARS context, adding the expense of a successful bid in a spectrum auction to the hundreds of millions of dollars already necessary to launch a DARS system will clearly divert funds from the service itself, thereby harming the public. Moreover, this additional expense, along with the risk that this new service could fail (particularly if saddled with such regulatory costs), could easily prevent any system from ever being launched. Given the somewhat risky and expensive nature of this venture, the desire to bring additional funds to the federal treasury is clearly at odds with the Commission's primary duty -- to facilitate the availability of communications technology to the public.

22. Moreover, while there are certainly good policy reasons not to utilize an auction to select DARS licensees, there is also an even more compelling reason for not utilizing an auction scheme -- it would be illegal. The acceptance of additional applications through a competitive bidding process used to select licensees would, as discussed below, violate the Communications Act itself.

A. In Order for the Commission to Conduct an Auction, There Must Be Mutually Exclusive Applications

23. As discussed above, the four DARS applicants have determined that their respective systems can each be operated within 12 ½ MHz bands of spectrum, and that the entire

^{3/} See Revision of Radio Rules and Policies, 9 FCC Rcd 7183, 7186 (1994) (noting that group ownership of radio stations lowers operating costs, thus allowing group owners to spend more money on quality programming); Broadcast Multiple Ownership Rules, 4 FCC Rcd 1741, 1746, 1748 (1989) (relaxing prohibition against common ownership of radio and television stations in the same market to further the public interest benefits of improved programming created through cost efficiencies); see, e.g., Secret Communications Limited Partnership, 10 FCC Rcd 6874, 6876 (1995) (approving the assignment of a radio station based on the public service benefits, such as cost savings and technical and programming advantages, that joint ownership of three radio stations would produce).

50 MHz of spectrum allocated to DARS is usable for the proposed DARS systems. Thus, all four pending system proposals can be accommodated within the Commission's existing spectrum allocation for DARS, and licenses could be granted today to each of the four applicants. In order for the Commission's competitive bidding authority under § 309(j) of the Communications Act to be activated, the Commission must first be faced with mutually-exclusive applications. See 47 U.S.C. § 309(j)(1). In the present case, there is no mutual-exclusivity and thus no need to select among applicants, whether by auction or by any other method. The Commission therefore lacks authority to conduct an auction to select DARS licensees.

B. In Order for the Commission to Conduct an Auction, the Auction Must Promote “the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays”

24. Under 47 U.S.C. § 309(j), the Commission, when faced with mutually-exclusive applications, may conduct competitive bidding to select licensees if such a bidding process would, among other things, promote “the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays.” 47 U.S.C. § 309(j)(3)(A). Initiation of a competitive bidding scheme in the present context would clearly not lead to that result.

25. First, the Commission already has before it four applications that it could grant today, thereby freeing four entities that have already engaged in years of planning to effectuate their plans. No other action by the Commission could possibly bring about a more rapid development and deployment of this new technology than expediently granting the pending applications.

26. Second, the special mention made in the statute regarding the rapid provision of service to “those residing in rural areas” is particularly applicable to DARS, which is designed to provide service to rural areas that are unserved or underserved by broadcast stations. The delays in deployment of DARS necessary to design and effectuate a competitive bidding scheme are particularly harmful to this segment of the public, and the Communications Act’s narrowly-drafted grant of authority to the Commission to conduct competitive bidding cannot be applied where competitive bidding would harm rather than promote achievement of the statutory goal.

27. Third, there can be no doubt that an immediate grant of authority to the four DARS applicants would result in swifter service to the public. If the Commission were to throw open the gates and invite new applicants/bidders, the Commission would have to expend time: (a) developing a competitive bidding scheme; (b) providing prospective bidders with enough time to develop system proposals and determine if they are viable; (c) executing the competitive bidding process; (d) developing a whole new set of service rules based on the applications of the winning bidders; and (e) engaging in the extensive administrative and judicial proceedings that would have to be completed prior to licensing entities whose applications were filed outside the official cut-off period and who were selected through an unauthorized competitive bidding process.

28. Fourth, and finally, given the delays that would be inherent in a competitive bidding scheme, it appears that the only possible benefit to the use of such a scheme would be to increase federal revenues. However, under 47 U.S.C. § 309(j)(7)(A), the Commission is specifically prohibited from considering such a “benefit” when making a public interest determination as to the use of a competitive bidding process. Moreover, as discussed above, the creation of such revenues through payments from successful applicants would divert financial

resources from the development of the proposed service. Given the immense expense of establishing a DARS system, such payments would detrimentally affect the availability and quality of DARS service to the public.

29. In short, in addition to the lack of mutual exclusivity among the four existing DARS applicants, the Commission cannot make the statutory showing required under 47 U.S.C. § 309(j)(2)(B) that use of the competitive bidding scheme would promote “the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays.” Thus, for this reason as well, competitive bidding cannot be used to select DARS licensees.

C. In Order for the Commission to Conduct an Auction, It Would Have to Improperly Utilize Its Competitive Bidding Authority Retroactively

30. Section 309(j) of the Communications Act, which is the basis of the Commission’s auction authority, was enacted on August 10, 1993, nearly a year after the Commission issued the cut-off notice for DARS applications. Nowhere in the language of §309(j) is there any indication that the Commission has the statutory authority to retroactively apply a competitive bidding process to applicants whose due process rights had been established long before spectrum auctioning was even possible.

31. In the absence of a statutory directive, a federal agency may apply a rule retroactively only in limited circumstances. In Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C. Cir. 1987), the Court of Appeals noted that retroactive application of a rule is improper where “the ill effect of the retroactive application` of the rule outweighs the ‘mischief’ of frustrating the interests the rule promotes.” Id. at 1554 (quoting SEC v. Chenery Corp., 332 U.S. 194, 203 (1947)). The U.S. Court of Appeals for the D.C. Circuit has recently reaffirmed

this position, stating that it “trust[s] that if . . . squarely confronted with the retroactivity question, the Commission will provide a reasoned justification for its decision that reflects its balancing of all the relevant interests involved in retroactivity decisions.” McElroy Electronics Corp. v. FCC, 990 F.2d 1351, 1365 (D.C. Cir. 1993). It is clear from these cases that the benefits brought about by retroactive application of a rule must outweigh the harm that will be incurred.

32. As noted above, retroactive imposition of competitive bidding for the DARS allocation will produce no benefit, but will instead cause hardship, delay, and confusion. None of the goals of the Commission’s competitive bidding authority identified in § 309(j)(3)(A)-(D) will be served by holding an auction with respect to DARS. Nor is there any other conceivable benefit to the public. Instead, those parties that have invested the time, energy, and money in developing their DARS proposals will be stripped of all that they have worked for over the past several years and service to the public will be yet further delayed. The ill effect of retroactivity in this context must be the determining factor, since use of competitive bidding here will not promote any identifiable public interest. Retroactive application of bidding procedures here would therefore be improper under the statute and case precedent.

33. It should also be added that, were the Commission to impose competitive bidding, recognition in the bidding process of the investment of the four current applicants would be impossible. In the NPRM, the Commission requested comments on whether or how “the investment of the four current satellite DARS applicants and accompanying equities in their favor could be recognized.” NPRM at ¶ 101. As argued throughout these comments, the investment of these applicants in the promotion of DARS extends far beyond the amount of money each has expended on its project. It includes a continuous diversion of resources from

other projects and several years of foregone opportunities. Translation of these factors into a quantifiable bidding credit would be impossible.

34. From this examination of the equities, it is clear that retroactive application of competitive bidding procedures to this proceeding cannot be justified under the standards established for such application by the courts. For this reason, as well as the many others discussed above, the Commission cannot exercise its competitive bidding authority with respect to DARS.

III. The Economic Effect of DARS on Terrestrial Broadcasters, While Minimal, Is Irrelevant; The True Public Interest Determination Revolves Around the Impact of DARS Upon the Quality and Availability of Local Broadcasting

35. As the NPRM states, the Commission's mission is to protect competition rather than protect competitors. NPRM at ¶ 11. Throughout the long and tortured process of making DARS a regulatory reality, the Commission has repeatedly faced arguments that the advent of satellite-based DARS will devastate local broadcasters. AMRC does not accept this conclusion, and believes that the economic analysis by Malarkey-Taylor Associates, Inc./Economic and Management Consultants International, Inc. (MTA/EMCI) attached hereto as Appendix A, as well as the analysis of InContext, Inc. being submitted to the Commission by Satellite CD Radio, present a compelling case that broadcasters face little threat from satellite DARS. Although Section 7 of the Communications Act makes clear that opponents of new technology bear the burden of demonstrating that licensing DARS is inconsistent with the public interest, AMRC is submitting the MTA/EMCI study to demonstrate just how minimal the impact of DARS on terrestrial broadcasters will be. AMRC does not believe that opponents of DARS will be able to meet their burden to show otherwise.

36. While AMRC expects that commenters in this proceeding will expend significant energies debating the financial impact of DARS upon terrestrial broadcasters, such a debate is, however, to a great extent immaterial to the public interest analysis which the Commission must perform. The issue, as the NPRM correctly frames it, is how any affect on broadcast stations will “affect the interests of the listening public.” NPRM at ¶ 11. As discussed below, when the ultimate impact is analyzed in relation to the listening public, there can be no doubt that DARS will, through its own provision of service and through the competitive spur it creates for local broadcasters, improve the overall level of audio service available to the local listening public.

37. Just as it is important for the Commission to distinguish between protecting competition and protecting competitors, it is also important for the Commission to distinguish between protecting local broadcasters, and protecting local broadcasting. This is a difference of enormous import. By its nature, DARS is a nationwide service that will not carry local news and information. It therefore is at a significant competitive disadvantage against local stations which have the ability to carry local news, sports, weather, and other local information which the Commission itself has repeatedly found to be a desirable form of programming that is in the public interest (both literally and figuratively).

38. Because DARS is disadvantaged against media airing local programming, the portion of local broadcasters that would be most susceptible to adverse financial impact from DARS would be those stations airing no local programming. To the extent a broadcast station fills its airtime with “canned” programming delivered by a satellite service, it is not providing the local public with any greater service than DARS can provide, and the Commission has no public interest basis for preferring one service over the other merely because one station has a local address. Whether the local public receives the programming directly from a DARS satellite or

through a radio station that obtains its programming from a neighboring satellite is inconsequential. While AMRC believes it unlikely that DARS will be able to have a significant adverse impact on the finances of radio stations, it seems fairly obvious that any impact that might occur would be felt almost exclusively by such satellite-fed stations.

39. Thus, to the extent that DARS could have an affect on local broadcasters, it would do so not by reducing overall service to the public, but by supplementing service to the public and, at worst, replacing one type of satellite-delivered service to the public with another type of satellite-delivered service. Even in the worst case scenario, the level of service to the public has not been harmed, and the Commission therefore has no reason to prevent the initiation of DARS service.

40. As mentioned above, however, what is far more important than how DARS affects local broadcasters, is how it affects local broadcasting. With regard to the availability of local programming, DARS will have one of two effects. It will either: (a) have no local competitive impact, thus leaving the amount of local programming undiminished; or (b) it will provide competition to non-locally-oriented radio stations, thus encouraging them to differentiate their service by providing what DARS cannot -- local programming. In the first situation, the amount of local programming remains unchanged while the diversity of audio services increases. In the second situation, the amount of local programming available to the public will increase as well. Thus, AMRC believes that the Commission's concerns regarding a diminished availability of local programming are misplaced. Local programming should flourish in such an environment.

41. In short, the advent of DARS can only benefit the listening public by providing a greater diversity of audio services (existing radio stations plus DARS) without any loss of local

programming, or by actually augmenting local programming through the effects of increased competition. To the extent that DARS may also provide a competitive spur for broadcasters to upgrade their facilities to digital once the Commission adopts a terrestrial standard, the public will be benefitted yet again.

IV. The Commission Should Encourage Creation of a Common Receiver Standard Among the Applicants But Should Not at This Time Attempt to Establish by Regulation a Receiver Standard

42. AMRC continues to believe that creation of a common receiver capable of tuning in the entire DARS band is important in promoting consumer acceptance of the technology. To this end, AMRC, along with the other three DARS applicants, have committed to working together and sharing information with the goal of creating a common receiver standard that will be capable of taking advantage of the then-current state-of-the-art in receiver and compression technology. AMRC believes that this process offers the best opportunity for establishing a market-driven standard without undue delay. For this reason, AMRC does not believe that the Commission should attempt at this time to establish a Commission-ordained DARS standard. AMRC will keep the Commission updated on the progress of the applicants' efforts to create a common receiver. For the present, however, AMRC is concerned that, given the rapid advances in digital technology, any Commission-established standard would not be sufficiently flexible to adapt to the ever-changing technology likely to be incorporated in future DARS systems.

V. The Commission Should Adopt Flexible Service Rules for DARS

43. As a new and untested service based on cutting-edge technology, DARS will undergo a rapid evolution from concept to reality once the Commission authorizes the service. In this evolutionary process, the licensees will be constantly reacting to changes in technology and changes in the marketplace. Given the long lead times required for launching satellite

systems, the end result of this process will likely vary significantly from the Commission's (and the applicants') current concept of the service. If DARS is to successfully evolve and provide a viable service to the public, the Commission's service rules must allow substantial flexibility in system design and operation. AMRC therefore urges the Commission to limit its regulation of DARS to issues such as interference and coordination, and avoid setting standards for link margin, service area, data rates, and subscription versus advertising-based service. Similarly, with regard to terrestrial repeaters, AMRC asks that the Commission allow DARS licensees to utilize such repeaters as the licensee deems necessary so long as they truly are "repeaters" and operate within the DARS spectrum.

A. Licensees Must Be Allowed to Choose the Appropriate Mix of Subscription and Advertiser-Supported Services

44. AMRC wishes to note at the outset that the NPRM incorrectly states that AMRC has proposed that its system operate as a subscription-only service. NPRM at ¶ 22. On page 3 of its application, AMRC stated that its system would be used largely for subscription services, but that it also intended to offer a number of advertiser-supported channels.

45. AMRC continues to believe that DARS systems must be allowed to determine through marketplace forces the appropriate mix of subscriber and advertiser-supported services, as both will be necessary for the successful launch of DARS. While it is true that, given the immense cost of building and operating a DARS system, as well as the limited audience available, individual subscription fees will likely be necessary to maintain system viability, it is also true that advertiser-supported services will be necessary to get the system off the ground and to ensure continued consumer interest in purchasing DARS receivers. Unlike subscription fees, which can fund the operation of a system only once it has established itself with a large base of