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**VIA HAND DELIVERY**

William F. Caton  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: Notification of Permitted Written Ex Parte  
Presentation in IB Docket No. 95-91

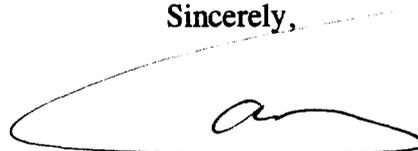
Dear Mr. Caton:

CD Radio Incorporated, by its attorneys and pursuant to Section 1.1206(a)(2) of the Commission's rules, hereby provides notice of a permitted written ex parte presentation to Commission officials regarding IB Docket No. 95-91.

Today, written summaries of comments submitted in response to the FCC's Notice of Proposed Rulemaking in regards to 95-91, were delivered by hand to Scott Harris, William Wiltshire, Rosalee Chiara and Fern Jarmulnek. The comment summaries were prepared by CD Radio's attorneys at Wiley, Rein & Fielding.

Kindly direct any questions regarding this matter to the undersigned.

Sincerely,



Carl R. Frank

Enclosure

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In the Matter of:

Establishment of Rules and Policies for  
the Digital Audio Radio Satellite Service  
in the 2310-2360 MHz Frequency Band

IB Docket No. 95-91  
GEN Docket No. 90-357  
RM No. 8610

**Summary of Comments**  
in response to:  
Notice of Proposed Rulemaking

WILEY, REIN & FIELDING  
1776 K Street, N.W.  
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September 22, 1995



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## **American Mobile Radio Corporation**

**Interest:** DARS applicant.

### **Licensing policies:**

- The four applicants have relied tremendously on the FCC's cut-off. For the FCC now to accept new applications would be unfair and inimical to the public interest. (5, 7-9)
- Cut-offs have been especially appropriate for satellite services. From the four pending applications, the FCC will be able to quickly identify the factors that are important in the provision of DARS. (5-7)
- No one has claimed that the cut-off unfairly excluded its application. (7)
- Acceptance of new applications will discourage future innovators, who will be loathe to file if, among other reasons, late-comers can simply copy their ideas. (9)
- Acceptance of new applications would yield no public benefit and will only delay the introduction of DARS to the public. (10)
- The only apparent justification for reopening the filing window is the potential for generating auction revenues. But this should be secondary to providing the public with the best communications services. (11)
- An auction would divert funds from the 100s of millions of dollars that will be needed to launch a DARS system. (12)
- Auctions would be illegal. (12ff)
  - There is no mutual exclusivity, § 309(j)(1)
  - Auctions would lead to delays, not the rapid development of service, thereby contravening § 309(j)(3)(A). (13-14)
- Auctions would require improper retroactive use of the FCC's auction authority. (15-17)
  - § 309(j) was enacted nearly a year after the DARS cut-off.
  - Retroactive application will not promote any public benefit but will harm existing applicants.

**Effect of SDARS on conventional broadcasters:**

- AMRC and CD Radio studies show that impact on terrestrial broadcasters from DARS will be minimal. (17)
- Input on terrestrial broadcasts is immaterial. The issue is the interests of the public; there can be no doubt that DARS will improve the overall level of audio service to the public. (18)
- Because DARS cannot provide local programming, the broadcasters most affected will be those that do *not* air local programming. (18)
  - Thus, DARS may promote an increase in local programming. (19)

**Technical standards:**

- FCC should promote a common receiver standard but not dictate one by regulation. (20)
  - DARS applicants have been working toward a common standard. (20)
- Service rules must permit substantial flexibility. (20-21)
  - FCC should limit regulation to matters affecting interference and coordination. (21)
  - FCC should not regulate link margin (see 24), service area, data rates and channel numbers (see 24-25), and issue of subscription vs. advertising. Market will dictate these parameters. (21)

**Regulatory classification:**

- Licensees must be allowed to determine, through market forces, the appropriate mix of subscriber and advertiser-supported service. (21)
- Advertiser-supported services will be necessary to launch SDARS systems. (22)
- Public interest obligations on DARS licensees acting as broadcasters are appropriate. (23)

**Appendix A**

Satellite DARS Impact Study: An Assessment of the Impact of Satellite DARS upon Terrestrial Radio.

## CD RADIO

**Interest:** SDARS applicant.

### **Licensing policies:**

- CD Radio supports licensing all 50 MHz allocated by establishing four 12.5 MHz spectrum assignments. (7)
- Based on consumer demand for comparable services, 12.5 MHz is the amount of spectrum necessary for each provider to provide 30-40 CD-quality channels and attain commercial viability. (7-11)
- CD Radio opposes the *NPRM's* proposal to not assign the lower 10 MHz of allocated spectrum because it: (1) is based on the FCC's misinterpretation of CD Radio's Canada/U.S. frequency coordination study; (2) is inconsistent with prior FCC decisions; (3) would threaten the commercial viability of SDARS; (4) robs the public of valuable new services; and (5) appears to be an impermissible attempt to create artificial mutual exclusivity and enrich the treasury with auctions. (11-16)
- Creating four SDARS "slots" will assure intra-service competition and increase diversity, while giving each licensee the 12.5 MHz barely sufficient for a viable service. (16-18)
- Licensees should not be permitted to aggregate spectrum because aggregation and consolidation will reduce competition. To preserve four "slots," licenses held by firms that fail should be made available non-SDARS firms (possibly through auction). (18-19)
- The FCC cannot legally re-open the SDARS cut-off; re-opening the cut-off is inequitable given CD Radio's expenditures of \$15 million, and constitutes poor public policy. (22-33)
- The FCC cannot legally auction SDARS spectrum because: (1) there is no mutual exclusivity; (2) the FCC has an obligation to avoid rather than create mutual exclusivity; (3) the FCC cannot auction solely to enrich the U.S. Treasury; (4) the use of auctions for applicants on file prior to July 26, 1993 would be an unjustified departure from prior FCC decisions. Auctions also are inequitable, even if a bidding credit is used. (34-45)

### **Effect of SDARS on conventional broadcasters:**

- The prompt licensing of SDARS will produced a number of public interest benefits: (1) diversity of radio programming; (2) service to underserved and

unserved areas; (3) high quality aural programming; (4) improved U.S. competitiveness and job creation; and (5) a spur to conventional broadcasters to go digital. (47-56)

- SDARS will have no more than a trivial impact on existing broadcasters. (56)
  - As a matter of law (the demise of the *Carroll* doctrine and the *DBS* decision) and policy, the FCC should not even consider the competitive effect of SDARS on radio. (57-63)
  - Radio stocks, cash flow multiples of stations sold, average radio station cash flow margins, advertising revenues, new stations' entry into the market, and the opinions of radio analysts all indicate that the broadcasting market is healthier than ever and that the coming of SDARS will not significantly affect radio. (62-73)
  - CD Radio's *Lilley Study* conclusively demonstrates that SDARS will have no more than a *de minimis* effect on radio. (72-76)

**Regulatory classification:**

- The FCC should permit SDARS licensees to choose their regulatory status; SDARS is inherently neither a common carrier nor a broadcast service. (78-82)
- SDARS providers offering subscription or non-broadcast services should not be subject to broadcaster public interest obligations. (83-85)
- The FCC adopt a flexible approach in allowing SDARS licensees to provide ancillary services. (85-87)

**Technical standards:**

- The FCC should not mandate a service area coverage requirement. (89-90)
- The FCC should not adopt a specific service link margin. SDARS applicants have incentives to minimize total system costs, including consumer receivers, so that the total demand can be maximized. (90-91)
- Standards for receiver inter-operability and tunability should be left to the marketplace. SDARS applicants have ample incentives to ensure broad consumer acceptance of the new radios. (91-92)
- SDARS licensees should be permitted to use different data rates to provide a diversity of programming formats. (92-94)

- CD Radio favors use, without prior FCC approval or notification, of terrestrial gap fillers on the same frequency and using the same bandwidth as satellite transmitters to retransmit signals received from satellites. (94-96)
- CD Radio supports *NPRM*'s flexible approach to cross-polarized emissions. (96)
- CD Radio supports FCC's proposals on inter-service sharing. (96-98)
- Sufficient spectrum can be found for feeder links, but urges agency to narrow the range of choices. (98-99)

**Financial qualifications and milestones:**

- CD Radio supports the FCC's proposed financial qualifications and construction milestones. (99-103)

**Miscellaneous issues:**

- The application of alien ownership rules to SDARS licensees depends on the type of service provided. (103)
- CD Radio favors license terms tailored to the proposed lifetimes of satellites. (104)
- A SDARS industry advisory committee is not needed at this time. (104)

APPENDIX A	<i>Satellite Radio</i> (the "Lilley Study" on the economic impact of satellite DARS on the radio industry)
APPENDIX B	<i>Satellite Radio CD Music Bandwidth Requirements</i>
APPENDIX C	<i>Canadian Radio Frequency Coordination with U.S. DARS</i>
APPENDIX D	Articles from the trade press and market analysts confirming the competitive strength of the traditional radio industry
APPENDIX E	Rules proposed in the <i>NPRM</i> red-lined to conform to CD Radio's comments
APPENDIX F	Coordination Study for Feeder Link Earth Station

## **Digital Satellite Broadcasting Corporation**

**Interest:** SDARS applicant

### **General support for SDARS:**

- DARS furthers the Commission's public interest mandate to promote new technologies, services, and competition. (14)
- The Communications Act favors nationwide service and encourages the introduction of new technologies and services. (14)
- Commission policy favors competition. (14-16)
- DARS furthers the equitable distribution of radio services to communities throughout the U.S., consistent with the fundamental premise of Section 307(b) of the Act and Commission precedent. (25)
- DARS applicants will qualitatively and quantitatively improve audio services
  - by serving underserved areas (17);
  - by providing substantial increases in program variety and consumer choice through narrowcast formats (17-19);
  - by moving beyond entertainment offerings and devoting channels to educational services, lecture series, news, business, and political affairs (19-20);
  - through its greater ability to disseminate emergency information; (20-21)
  - by bolstering the U.S. economy and leadership in digital communications technology (21-22);
  - by expanding opportunities for conventional radio stations to create new revenue streams, *e.g.* switching to digital, utilizing DARS to offer services unsustainable on a local station (22; and
  - by creating competition for conventional radio stations and, thus, providing incentives for broadcasters to improve the quality of AM and FM transmissions and local broadcasting. (22-25)

### **Licensing policies:**

- Four entities would be technically and economically viable in the 50 MHz of spectrum available for DARS and would ensure robust competition. If four is not the right number, the market (not the Commission) will adjust it accordingly. (33)
- The Commission has concluded that the DARS applications are not mutually exclusive, but now seeks comment on competitive bidding scenarios that are only an option where mutual exclusivity among applicants exist. (35)

- Reopening the application cut-off filing window is unsupported by the record, inconsistent with public interest, not permitted by the auction legislation, unsound public policy, and manifestly unfair to the existing applicants.
  - Accepting additional DARS applications will further delay this proceeding and the introduction of new services to the public, a consequence the cut-off rules were created to avoid.
  - The Commission has offered no legal or practical justification to waive a three-year-old cut-off date, especially in light of the lack of any additional filed applications or formal requests that the cut-off date be reopened.
  - Reopening the cut-off date would discourage the continued expenditure of substantial resources by satellite entrepreneurs. (35, 42-47)
- The record (including DBSC's appendix) demonstrates that existing applicants can successfully coordinate the lower 10 MHz. Thus, the Commission is free to define the usable bandwidth as the full 2310-2360 MHz and adopt the four 12.5 MHz band segment approach. (35-36)
- Grant of licenses to the four current applicants will achieve efficiency and recognizes the substantial and undeniable equities favoring the current DARS applicants, who have expended considerable time and financial resources and have foregone other substantial telecommunications opportunities in order to comply with Commission procedures, prosecute their applications, and develop DARS. (36-38)
- The auction criteria cannot be satisfied because
  - DARS applicants are not mutually exclusive; the Commission cannot create mutual exclusivity and reconcile its action with its decision regarding Big LEOs, auction legislation, and Section 7 of the Act;
  - there is no guarantee that the services ultimately authorized by DARS will be predominantly subscription based; and
  - assignment of the licenses to the current applicants will better serve the auction public interest criteria. (38-42)
- It is within the Commission's authority to grant DARS licenses without resorting to auctions and the equities demand that such authority be exercised. (41)
- DSBC supports the Commission's band sharing approach.

- Suggests an alternate approach in regard to telemetry beacons: DARS satellites should be authorized to use the band 3697-3699 MHz for telemetry beacons.
- Supports the Commission's decision to authorize specific satellite DARS frequencies upon grant of licenses.
- Supports the Commission's conclusion refusing to authorize interim use of other licensee's frequency assignments. (53-54)

**Effect of SDARS on conventional broadcasters:**

- Both the Act and Commission precedent reject the use of regulatory powers to protect the market share of segments of the communication industry from new communications technologies or from competitors within the same industry segment. (26)
- As in the Commission's decision authorizing DBS service (as confirmed by the DARS NPRM), economic impact on existing broadcasters cannot be considered unless "there is strong evidence that a significant net reduction in service to the public will result." (26-29)
- The broadcast industry is economically sound and stable; it has evolved and thrived in the face of competition. (29)
- Radio has demonstrated its ability to adapt to a changing marketplace because of its inherent strengths in the delivery of local content, its strong appeal to local broadcasters, its ability to rapidly change program formats to appeal to different audiences and advertisers, and its pervasiveness, affordability and portability. (29)
- DARS will not compete head to head with established broadcasters and audiences, but will aim their programming at geographically-dispersed, but demographically homogenous groups. Thus, DARS will be predominantly national programming and local programming will remain the strength of conventional radio. (30)
- Broadcasters will retain a unique and unassailable advantage over DARS through its ability to provide locally-oriented programming. (23-24)
- The Commission has never questioned the potential economic effect on broadcasters of existing multichannel subscription digital audio services, nor have broadcast lobbyists opposed these services. These services have made no discernible impact on conventional radio audiences. Similarly, DARS can be expected to have no discernible impact. (33-34)

### **Regulatory classification:**

- Licensees should be permitted to determine their own regulatory classification in order to tailor services to meet customer needs and respond to market demands. (51-52)
- DARS service should be permitted to accept advertising, but the Commission should leave to marketplace demand and the licensee's business judgment whether revenue will be generated by advertising, subscription fees, or a combination of the two. (52)
- The Commission should refrain from imposing public interest obligations, specifically in light of Daniels Cablevision v. FCC. (52)
- Ancillary services should be permitted subject to terms and conditions similar to those in DBS service. (52-53)

### **Technical standards:**

- The most prudent path would be to adopt a simple and flexible regulatory framework that would permit DARS licensees to investigate services and methods of financing and deploy technology that will ensure the development of a competitive service that is responsive to consumer demand. (47)
- *Service Area*. DBSC does not oppose the Commission's service coverage proposal since its system will offer service to all 50 states and Puerto Rico. (47)
- *Service Link Margin*. Applicants should not be required to provide a specific minimum service link margin, but should identify the service link margin for their systems in the geographic areas they intend to serve. (47)
- *Receiver Inter-Operability and Tunability*. Substantial benefits may be gained if a receiver is developed that is inter-operable among the DARS systems and tunable across the entire DARS band since it will make equipment affordable and encourage consumer investment. It is likely, though, that the industry will develop a standard without regulatory intervention.
- *Data Rates*. DBSC agrees with the Commission's decision to permit DARS operators to employ different data rates to provide a mix of audio formats. The Commission should refrain from imposing an abstract standard such as "CD-Quality" and must modify its definition of DARS accordingly. (48)
- *Terrestrial Gap Fillers*. Commission should not *a priori* prohibit terrestrial gap-fillers.

- DBSC proposes to provide service to urban and rural users utilizing a single satellite and link enhancement techniques that include Rake receivers, high link margins, and, possibly, terrestrial gap fillers.
- Terrestrial gap fillers are complementary to the satellite systems, are intended to fill in unidentified "white" areas, operate using the same frequencies, utilize the same bandwidth, and repeat the signal coming from the satellite.
- Additional spectrum is unnecessary.
- The gap-fillers would be transparent to the end user.
- Extensive repeater use will not be necessary with its system.
- Gap-fillers will be employed to enhance its link margin, and thus, improve coverage and service to customers. (48-49)
- *Cross-Polarization.* DBSC assumes the Commission intends to allow DARS applicants to employ orthogonal (cross) polarization in its assigned bandwidth. DBSC has no objection to the Commission's proposal to permit use of cross-polarization in other licensee's frequencies by mutual agreement. (50)
- *Inter-Service Sharing.* Inter-service sharing and acquisition of spectrum from other licensees should be permitted.
  - There is no international PFD limit, and there is no record to support one either domestically or internationally. The flexibility of the international coordination process is far superior to the rigidity of PFD limits.
  - DBSC recognizes the importance of the adjacent band service identified by the Commission but believes that, at this time, operations in these services need to make known their requirements before detailed comments can be made. It would be far more cost-effective, though, for the few operators in those services to protect themselves from allowable out-of-band emission levels than for DARS licensees to resort to extensive, cost intensive measures. (50-51)
- *Feeder Links.* The problem of feeder links for proposed DARS system should be far less severe than for the Big LEOs since the fact the same frequencies can be reused in the geostationary orbit should minimize problems of feeder link availability. There are no apparent problems with the feeder link bands proposed in its application, even in light of the U.S. proposal for that band (6428-6855 MHz) for WRC-95. (51)

**Financial qualifications and milestones:**

- DBSC agrees with the Commission's proposal that applicants submit evidence of financial capability to construct, launch, and operate for one year and that, within one year of grant, they demonstrate full funding. Estimated revenues from proposed operations should be permitted to support the initial showing.  
(54)

**Miscellaneous issues:**

- DBSC proposes a service comprised of a CONUS beam and multiple spot beams. Each beam will carry multiple channels of program information. Assuming a nominal data rate of 128 kbps and the current state of compression technology, DBSC can expect to provide at least 35 channels to any area of the country covered by the CONUS beam and a spot beam in its share of the spectrum available for DARS service. (31)
- Preliminary market research has shown that there is equal interest in DARS for both fixed and mobile locations; there is high demand for a wide variety of programming formats; consumers are most likely to purchase a receiver if it does not exceed the price of an AM/FM cassette deck by \$1000; some expressed a willingness to pay in excess of \$10 a month for DBSC's proposed multichannel service. (32)
- The Commission's proposed changes to Section 87.303(d)(1) are generally acceptable so long as no changes are made to 25.202(f) for DARS service. The last sentence of 87.303(d)(1) should read as follows: "In the 2360-2390 MHz band, all other telemetry and telecommand uses are secondary to the above stated launch vehicle uses." (54).

**Appendix: Economic and Financial Aspects of U.S. Commercial Radio Broadcasting**

## **Joint Comment of The DARS Applicants**

**Interest:** Existing SDARS applicants.

### **Licensing policies:**

- The four existing applicants can exist on the 50 MHz in question without interfering with each other's signals. (2)
- All 50 MHz should be licensed for SDARS. (2)
  - The four existing applicants do not believe that significant interference and coordination problem exists in the 2310-2320 band. (2)
  - The apparent willingness of the Commission to auction off the 2310-2320 band is an admission that the lower 10 MHz is suitable for use. (2)

### **Technical standards:**

- Gap fillers should be permitted in conjunction with operating SDARS and on DARS frequencies. (3)
  - Gap fillers should include terrestrial repeaters. (3)
  - Spectrum devoted to retransmission should be permitted only to improve existing services rather than offer a service in and of itself. (3)
- The use of auctions to issue SDARS licenses is against the public interest and not within the Commission's authority. (2)
- It is premature for the Commission to establish a uniform standard for DARS receivers. (3)
  - The four DARS applicants are committed to developing a satellite DARS receiver that is uniform and inter-operable. Therefore, the Commission does not need to set a uniform standard at this time. (3)

### **Regulatory classification:**

- The words "compact disc quality" should be removed from the definition of "satellite DARS" in order to prevent confusion about the service's permitted program and data content. (5)

### **Financial qualifications and milestones:**

- The four existing DARS applicants support financial qualifications and milestones, including: (4)
  - submitting evidence of ability to construct and launch.
  - using income and revenue estimates as evidence of financial ability.
  - demonstrating full funding within a year of license grant.  
  
satellite construction within one year; launch within four years, and full operations within six years.
- The licensees should be allowed to use orthogonally polarized transmissions both in their own bandwidths and in the bandwidths of other licensees, subject to agreement between the parties. (4)
- The Commission should not specify service link margins and data rates, but permit the licensees to make the determinations and identify them to the Commission. (5)

## **Primosphere Limited Partnership**

**Interest:** current DARS license applicant.

### **General support for SDARS:**

- SDARS will benefit the public.
  - Local terrestrial broadcasting has left a number of unserved audiences including: rural residents, children, senior citizens, ethnic groups, and fans of roots rock, blues, and jazz. (4-5)
  - A technology that serves these audiences will provide new outlets for advertisers, rather than replacing current outlets. (6)
  - The construction and deployment of SDARS and the receivers needed to receive DARS signals will greatly benefit the economy. (6)
- Protecting terrestrial radio will not preserve localism. (29)
  - Many radio stations have abandoned local programming. Others devote only a small percentage of their time to local programming. (29)
  - The need for more diverse programming is evidenced by the number of public interest groups that support SDARS. (30)

### **Licensing policies:**

- The entire 50 MHz should be licensed. The sharing study submitted by Satellite CD Radio, Inc. demonstrates that any conflict problems are trivial and can be resolved by the applicants. (17-19)
- Each qualified applicant should be licensed to operate in a 12.5 MHz segment. (19)
- The Commission should not reopen the application period. (8)
  - Application cut-offs are efficient for several reasons. (9)
  - Issuing licenses now would allow SDARS to be provided to the public as quickly as possible. (10)
  - Reopening would be inappropriate and unprecedented under these circumstances. (10)

- The SDARS applicants have acted in reliance on the 1992 cut-off. Primosphere has spent more than \$650,000 in the filing and prosecution of its application. (10)
- Reopening would allow free riders to benefit off the current applicants' work. (11)
- Auctions should not be used.
  - Mutual exclusivity does not exist. Therefore, an auction would not be legal. (11)
  - It would also be illegal and not supported by the record to take steps to create mutual exclusivity either through a finding that the available spectrum is insufficient to serve four applicants, or that the available spectrum would be able to serve more than four applicants. (12-14)
  - A goal of the auction process is to accelerate licensing. This would not occur in this situation. (15)
- Licensing four SDARS providers will provide sufficient competition. (20)
  - This is particularly true when the other consumer sources of recorded music are taken into account. (21)

**Effect of SDARS on conventional broadcasters:**

- It would be inappropriate for the Commission to delay SDARS solely because of economic harm to terrestrial radio. (23)
- There is no evidence or actual studies showing that SDARS will cause significant economic harm to terrestrial radio. (22-23)
  - Despite similar predictions regarding DBS and local television broadcasting, DBS has not harmed local television. (24)
  - The threat created by SDARS is relatively small when considered in combination with other competing audio services such as cable, CDs, etc. (25)
- The MTA/EMCI study found that after eight years net revenues for terrestrial FM radio in the smallest markets will have be reduced by only one-half of one percent. (28)
- The MTA/EMCI study is flawed because it makes extraordinarily pessimistic assumptions. (27) The assumptions include:

- SDARS will achieve remarkable market penetration in its first years.
- All SDARS systems will be advertiser supported and not subscription based.
- Terrestrial radio will remain analog rather than switch to digital.
- SDARS will receive a 30% share of the audio broadcast market within eight years, even though it took cable TV 30 years to achieve a 30 percent share of the television market.
- SDARS will not effect terrestrial radio.
  - There will be no short term effect because it will take four years to deploy SDARS, sufficient time for terrestrial radio to prepare for the new competition. (25-26)
  - The threat will be lessened by the need for consumers to purchase new SDARS receivers. (26)
  - Economic data shows that there will be only trivial long-term effect. (27)
- The introduction of SDARS will prompt terrestrial radio to adapt and improve, as the industry did in response to the introduction of prior technology. (7)
  - Terrestrial radio will accelerate investment in in-band, on-channel digital audio radio service. (7)
  - It will also increase locally oriented programming in order to distinguish itself from SDARS. (8)

**Regulatory classification:**

- The Commission should permit market forces to address service pricing, number of suppliers, and number of channels on each system. (21)
- The Commission should adopt minimal service rules for SDARS and allow the market to control. (30-31)
  - Licensees must be permitted to decide whether to operate as subscription or non-subscription services. (32-33)
- SDARS should not be classified as a common carrier service. (32)