competing radio station numbers through time, "rosy picture tends to disappear."[70] As the SPR Report submitted by NAB says,

> satellite DARS proponents appear to be guilty of the logical fallacy of composition in attempting to argue that since the radio industry in aggregate has thrived, the competitive impact of satellite DARS will be minimal. What is characteristic of the whole is, of course, not necessarily and, in this case, not actually true of the parts Certainly some stations do well, but these stations appear to be exceptions to the rule - most stations eke out an existence (what firms, of course, generally do under conditions of effective competition) and many stations are highly marginal operations barely and sometimes not surviving under their existing ownership.[71]

Between 1977 and 1993 inflation increased 24.9%, so, rather than CD Radio's claim that revenue for small market radio stations has risen 22 % since 1987,[72] the real change in small market radio revenue (on the whole) was a *negative 2.9%*. But that lower real revenue is spread around many more stations in smaller markets, due to the growth of stations from Docket 80-90. Therefore, contrary to CD Radio's claim, the average small market station has seen a dramatic decrease in real revenues at a time when station expenses have risen.

Media Access Project in its comments made this same point in urging appropriate safeguards and cautioning the Commission that the impact of DARS (which MAP says will almost certainly draw audiences away from local stations[73]) may be greatest on small market and rural stations -- precisely those, MAP says, who will be least able to withstand any decline in revenues.

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70 SPR Report at 41-43.

71 According to the NAB's last census of commercial radio stations (1992 Radio Financial Report, National Association of Broadcasters, 1992), 58.6 percent of the responding stations report losses. For 1991, half of all AM full-time stand-alone stations lost more than $19,000, half of all FM stand-alone stations lost more than $10,367, and half of all AM/FM combos lost more than $15,978. Id.

72 Comments of CD Radio, InContext Study at 4, 14.

73 Comments of Media Access Project at 11.

> [T]he outlook for small radio stations, which comprise the bulk of the radio industry, is particularly bleak. Industry revenue and profit are overwhelmingly concentrated in large radio stations....[T]he top 50 revenue producing stations, .5 percent of all stations, accounted for...an estimated 50 percent of total industry profit. At the same time, more than half of all stations, primarily those with less than $1 million in sales, lost money.[74]

CD Radio's[75] and Dr. Darby's reference to the "robust"[76] cash flow margins of small stations, once again, generalizes even about the overall health of the small market radio industry. As Dr. Darby himself notes, "these numbers are averages and that there is considerable dispersion about the means, . . .".[77] What this strongly supports is our claim that there are numerous stations, especially in smaller markets, which are perilously close to the financial edge.

Further, the analysis submitted by NAB and conducted by the accounting firm of Miller, Kaplan, Arase & Co. (MKA) highlights the financial straits in which many small radio broadcasters find themselves.[78] Even small decreases in revenues, brought on by the introduction of DARS, lead to significant numbers of these stations facing unprofitable futures.[79]

NAB refers the Commission to Attachment 13 of our initial comments, "Radio Station Financial Picture" for some indication of the financial straits of the weaker stations

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74 Id., quoting Report and Order in Revision of Radio Rules and Policies (Radio Ownership), 7 FCC Rcd. 2755, 2760 (1992).

75 CD Radio at 66.

76 Darby at 13.

77 Id.

78 See MKA Report, NAB Comments, Attachment 14 and Attachment 3 to these comments for further anlaysis.

79 Id.

generally. And, while the numbers of stations losing money give some indication of the financial conditions of a great proportion of stations in the industry, the"averages" referred to in this report still mask the far worse situation of the "typical" station.[80]

NAB further responds to DARS proponents characterization of the radio industry as a financially strong monolith by referring the Commission to the comments of local broadcasters describing the economic situations in their very small markets contained in the SPR Report for a real life picture of the financial straits of small market radio.[81] NAB also refers the Commission to the many letters filed by individual broadcasters in this docket, many of which give similar pictures of the economics of small market radio.

4. DARS Clearly *Will* Present Competition For Local Radio's Audience and Advertising.

As the Economic Analysis section of the SPR Report submitted by NAB makes clear, "the fundamental point remains the same - the implementation of satellite DARS implies greater competition for audiences."[82] Yet DARS proponents continue to assert that they "will have virtually no effect on the audience size that traditional radio stations deliver their advertisers."[83] As the SPR Report comments,

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80 SPR Study at 41. Also, a nationwide survey of radio stations conducted by Price Waterhouse for NAB in 1992 showed that nearly 60% of stations were losing money at that time. 1992 NAB Radio Financial Report. Unlike CD Radio's figures from publicly traded companies, InContext at 15, the NAB survey was based on a survey of the *entire* radio industry.

81 SPR Study at 48 et seq.

82 Id. at 37. "DARS will most definitely be competing for *listeners* and, unlike the digital audio services provided by some cable systems, will be competing for them during commutation time periods when terrestrial radio listenership peaks as well as during other periods of the day." Id.

83 Comments of CD Radio at 73. cf. Comments of DSBC at 33; Comments of Primosphere, Appendix B Burnstein Statement at 5 et seq.

Reading their advocacy material, one might be led to draw the conclusion that satellite DARS will be supported primarily by advertisers who do not currently advertise, and consumed by listeners who do not currently listen or will listen more than they currently do. To paraphrase H.L. Mecken's usual response to his critics, "they could be right," but there are a variety of considerations that suggest that they are likely to be wrong, not least the strong opposition to satellite DARS by radio broadcasters who plainly perceive a significant competitive threat. If there is no threat, how then account for the behavior of perceived competitors? The simplest and best explanations is that broadcasters can be relied upon to know one when they see one, and that there likely will be a competitive impact.

Industry information sources report very high levels of radio listening among the population. The Radio advertising Bureau reports that three-out-of four persons over the age of 12 listen to radio every day and that the average adult listens to more than 21 hours of radio a week.[84] Adults spend and average of three hours and 20 minutes listening to radio each day, and more than 95 percent of persons over the age of 12 listen to the radio in a given week.[85] Four-out-of-five adults listen to radio in their cars, and plurality of listening takes place in listeners' vehicles.[86] These figures understate listening by teenagers and young adults who comprise an important advertising subpopulation.[87] Surveys also indicate large amounts of television consumption.[88] Given the limited number of hours in a day and the percentage of the population who currently consume radio and television services (which are called "mass" media for a reason), the question naturally arises as to where any additional listening is going to come from.[89] Is it reasonable or plausible to assume that significant incremental audiences remain untapped? We think not.

This is not to suggest that there are no possible sources of demand for satellite DARS apart from the current radio listenership; only that it [is] unrealistic to anticipate that

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84 RADAR 50, Fall 1994 © Copyright Statistical Research, Inc.

85 Id.

86 Id. 41 percent of adults' listening is in their cars, 38 percent at home and the balance (21percent) in other places including at-work listening.

87 Unlike other media, younger people listen to more radio than their elders.

88 One recent survey conducted by the NDP Group, Inc., and reported in *The New York Time* ("Time Flies, but Where Does It Go?,") September 6, 1995, C-1), disclosed that the average adult spends 154 minutes daily watching TV and videos.

89 Studies submitted by the NAB in this proceeding suggest that satellite DARS will draw significant listenership from broadcast radio and, as a consequence, exert a significant adverse impact on local radio stations. See NAB, "Estimating the Audience Diversion from Broadcast Radio by the Introduction of Satellite Digital Audio Radio Service," July 1995; Ted Carlin, "Estimating the Impact of Satellite Digital Audio Radio Service on the Existing Radio Market by Product Analogy and Consumer Demand Analysis," August 1995; and Kagan Media Appraisals, Inc., *The Economic Impact of Satellite-Delivered Radio on Local Radio Stations,* August 31, 1995.

> this service can make economic sense (either as private investment or an economically rational allocation of spectrum) if it does not draw some significant support form current audience. Since investors in satellite DARS are not unintelligent, they presumably anticipate some minimal degree of success in attracting customers, notwithstanding the thrust of their advocacy, but even a minimal degree of success in attracting customers necessarily implies competitive impact on terrestrial radio broadcasting.
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> *   *   *   *
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> We very much doubt that satellite DARS suppliers would be willing to charge consumers (or advertisers) only in proportion to actual increments in total listening time attributable to their service. That is because incremental listening is likely to constitute only a small proportion of total listening time for the new service. If satellite DARS suppliers truly believed that their service were only going to affect terrestrial radio listenership minimally, that is , that their audiences would be largely incremental, they ought to be willing to charge only for incremental listening. The reality is more likely to be that many new satellite DARS listeners are likely to be current terrestrial radio listeners, and will benefit substantial part by substituting the new service for time formerly spent listening to terrestrial radio.[90]

NAB submits that DARS proponents claims that they will not compete for, nor successfully draw away, audience from local radio are ridiculous on their face. If DARS services are to be at all financially viable, recouping their hundreds of millions of dollars of investment, not to mention earning a decent rate of return on that tremendous investment (all within the ten year useful life of their satellites, before (or after) they invest yet several more hundreds of millions of dollars more for second generation satellites), they simply must expect to draw on current radio listeners and current radio listening.[91]

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90 SPR Study at 38 - 40.

91 Comments of Bonneville International Corp at 2; Comments of Susquehanna Radio Corp. at 2; Comments of Entercom at 3; Comments of Mt. Wilson FM Broadcasters, Inc. at 4; Tichenor Media System, Inc. at 3; Comments of WBEB at 1.

As Media Access Project says, "successful DARS services would almost certainly draw audience away from local stations."[92] Contrary to the similar assertions of DARS proponents that DARS will have an insignificant effect on local radio's advertising, Media Access Project also believes that "DARS will directly compete with radio stations for national advertisers" and that "any business would consider competition for 17% of its gross revenues to be a serious threat."[93]

A reading of the hundreds of letters that individual broadcasters have filed in this proceeding clearly shows that broadcasters firmly believe that DARS will compete for and draw away some of its national advertising. Similar beliefs can be seen in the case studies contained in the SPR Report. And SPR suggests that satellite DARS could be capable of offering national advertisers a significantly more transactionally convenient method of targeting specific audiences on a national basis, much as the cable industry is now attempting to do in both local and national advertising markets.[94]

As Tichenor Media System, Inc., owner of a number of Spanish language radio stations, puts it, DARS "would be in the position to drain revenues from us due to its inherently lower cost structure and ability to accept lower prices."[95] Similar sentiments are expressed by the owner/operator of KKGO, Los Angeles' only commercial all classical radio station. KKGO indicates that it receives "approximately 30-40% of its total advertising revenues from national advertisers, an approximation probably more realistic for classical

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92 Comments of Media Access Project at 11.

93 Id.

94 SPR Study at 37.

95 Comments of Tichenor at 2.

music stations (and, probably, most niche formatted stations) than the 17-18% set forth in the NPRM" and that "the availability of DARS services to a national advertiser would offer enhanced efficiency since a single advertising buy from a major advertiser to one DARS company could cover the entire United States."[96] Thus, *local niche* and foreign language broadcasters believe that their national advertising base would be affected by DARS ability to advertise.

5. DARS Proponents' Revenue Impact Assertions and Analyses Are Flawed.

NAB submits that the revenue impact assertions and analyses submitted by the DARS proponents are flawed in their assumptions and in their claims and are not credible evidence for the Commission to base a policy decision of such importance to the future public interest.

a. The Contention That Local Radio Won't Be Hurt Because DARS Can't Compete With Radio's Local Content and Information Is Wrong.

DARS proponents suggest that "listeners will continue to support local radio because it will remain the only form of radio that can provide local news and sports, weather, traffic reports and community information," implying thereby that local radio will not be hurt by DARS.[97] NAB responds that local stations could not survive, much less continue their widespread community service and expensive local service, with listeners listening primarily to their local content. Local content simply doesn't have the adequate revenue base to sustain the entire local station operation. Stations need an average quarter hour audience which generates income to support all station services, that is, sufficient audiences listening to their

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96 Comments of Mt. Wilson at 4.

97 Comments of Primosphere at 27. cf. Comments of CD Radio at 73, InContext at 1.

overall programming, not just to news, weather and traffic. Put another way, stations must have *overall* sufficient ratings, not just high ratings for news, local information, etc.[98]

b. The Arguments As To the Impact of CD's, Cassettes, Cable Audio and DBS Are Inapt.

DARS proponents argue that, despite the growth of CD and cassette players in cars, local radio has continued to grow and radio listenership in cars continues to grow.[99] NAB submits that the fact that radio listenership in cars continues to grow *does not mean* that the inclusion of CD and cassette players in cars has not diverted radio listenership in cars. We submit that the fact that radio listenership in autos has continued to grow is much more a function of the fact that over the last several years people have been experiencing longer commutes in their cars and therefore all listening in cars has dramatically increased. Moreover, CD's and cassettes are simply not fungible products with "radio," in that CD's and cassettes must be purchased, transported to the car and selected -- and, they do not have the "personality" or commentary of announcers.

DARS proponents also argue, as an analogy to the expected impact of DARS on local radio, that the availability of cable audio services has not damaged local radio.[100] NAB suggests that cable audio is not *thought of* (and therefore not treated) as "fungible" with or substitutable for radio *because* it is not mobile, irrespective to where the actual listening occurs.[101] Cable radio is also a relatively new phenomenon which has not yet become so

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98 See also Comments of Entercom at 6.

99 Comments of CD Radio at 73, InContext at 2.

100 Comments of CD Radio at 76, 77; Comments of DSBC at 34.

101 See Comments of Entercom at 3, 4.

familiar to even cable subscribers who have access to it. And, importantly, cable audio is not so available, as there is not much cable penetration in workplaces, where most of the 40% of out-of-home, out-of-car listening occurs.

DARS proponents also suggest that an analogy for purposes of forecasting harm to local radio from DARS exists with the experience of DBS and local television.[102] Primosphere argues that "local television has continued to grow in the face of DBS and other competition."[103] NAB responds that the local television marketplace, with its relatively few outlets, is a totally different animal from local radio markets, which have substantial numbers of competitors, fierce competition and a totally different product from video. Moreover, DBS is relatively new to the television marketplace and its impact is completely unknown. Further, although the analogy is not apt, cable television viewing has reduced the share of over-the-air television viewing by 30%.[104]

c. CD Radio's InContext Study Is Flawed In Significant Respects.

CD Radio has re-submitted the InContext Study which asserts that "satellite radio won't hurt traditional radio."[105] NAB hereby submits, as Attachment 1, in response and rebuttal to InContext's contentions and analyses an NAB report entitled "The Truth About Satellite Radio," which we previously submitted to the Commission in an earlier phase of this proceeding. There, NAB counters the claims and supporting data that the InContext Study presents.

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[102] Comments of Primosphere at 24.

[103] Id.

[104] MTA Study at 4.

[105] Comments of CD Radio at 72-78, InContext Study at 1-8.

d. AMRC's and Primosphere's MTA Revenue Impact Study Is Based On Faulty Assumptions and Must Be Completely Discounted.

DARS proponents AMRC and Primosphere have jointly submitted a study purporting to assess, by the use of spreadsheet analysis, the revenue impact of DARS on local radio in various market sizes.[106] NAB here points our serious and fatal flaws to this study, the combination require rejection of its consideration by the Commission as evidence of anything.

One, while the MTA Study purports to "forecast the economic impact of the development of Satellite DARS on terrestrial radio stations,"[107] they apply their analysis *only to FM stations and only to FM stations in rated (and therefore not the smallest) markets.* Were the rest of their analysis to hold up, it would say nothing about the impact on anything but FM stations in rated markets. As discussed above, radio is not the FM monolith that DARS proponents present. Nearly one-half of all commercial radio stations are AM stations and nearly 25% of all radio listening is to AM stations.[108] Moreover, most AM stations are in much more precarious financial condition than FM stations because of lower audiences available to them and therefore any decrease in audiences will have a greater impact on AM stations and therefore on the overall industry picture.

Further, while the MTA Study attempts to "justify" the omission of AM stations from its analysis by "assuming" that AM listening "will remain stable" and will not experience any

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106 "Satellite DARS Impact Study; An Assesment of the Impact of Satellite DARS Upon Terrestrial Radio," Malarkey-Taylor Association, Inc..-EMCI ("MTA Study"), Prepared for Promosphere Limited Partnership and American Mobile Radio Corporation, September 15, 1995.

107 MTA Study at 1.

108 See NAB Comments at fn. 38 and accompanying text; Statistical Research, Inc. (RADAR), Princeton, NJ.

audience diversion to DARS.[109] Quite an assumption and quite an omission. So much so that the Commission must "omit" the MTA Study from its consideration.

Two, the MTA Study purports to analyze DARS impact on the "typical"[110] or "average"[111] FM station. What they use, however, is neither the average nor the typical. Instead, they use only the average of stations that had ratings in each of the prior ratings period for the time examined.[112] Clearly, the average generated from this selected set of stations is not the "average" or "typical" FM station in each of these markets. Many stations, some of which are providing very niche formats, are unable to generate enough listening to meet the minimum reporting requirements of the syndicated audience research ratings firm. Of course, if one included these stations with essentially a zero audience share, the true average share of these FM stations in these markets would be noticeably lower, thus generating lower advertising revenues and earning lower profits, if any, prior to the introduction of DARS.

Moreover, by not including these radio stations having difficulty attracting mass audiences and advertising revenues, the MTA Study actually emphasizes NAB's point that the radio industry is not a monolithic industry. There are radio stations generating large audiences and revenues (included in the MTA analysis) and there are radio stations on the opposite end

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109 Contradicting this "assumption" is the radio listening chart contained in the Darby Statement, supra, at 11, appended to the DSBC comments, which indicates that AM listening has decreased by more than 50% since 1981.

110 MTA Study at 1.

111 Id. at 2.

112 Nowhere in the MTA Study are the requirements noted of the stations examined. This and other information was obtained in a phone conversation with Sue Donovan, on October 10, 1995, Malarkey-Taylor Associates, Inc.-EMCI, one of the authors of this study.

of the spectrum, serving small niche audiences and barely holding on (not included in the MTA Study). It is those stations, along with stations in the smallest markets,[113] that NAB submits are the most threatened by the introduction of DARS.

Three, the MTA Study indicates that "[t]he [operating expense] forecasts were based on data published in the 1992 NAB Radio Financial Report."[114] However, after examining the relevant tables in that cited report (based on the revenues for the "average FM stations" in the different markets examined), we were told unable to see how the NAB Report was being used. After inquiring, we were that MTA "did not use these data [NAB Financial Report] directly."[115] Instead MTA used some variation of those table to "reflect what was representative."[116]

By not using the NAB data, MTA understates the actual operating costs for these "average FM stations." For example, by not using the operating costs structure for the relevant station ($3 - $ 4 million in net revenues) in the cited 1992 NAB Radio Financial Report for the "average FM station" in the largest market (i.e., average net revenues of $3.8 million), MTA understates the operating costs by more than $350 thousand.[117] Consequently, the level of present operating income is lower than that suggested by the MTA-EITC analysis

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113 Since MTA only examined stations with ratings, they obviously did not analyze the impact of the 40-45% of stations located in areas where there are no quarterly audience surveys conducted, i.e., the unrated markets.

114 MTA Study at 7.

115 Donovan phone conversation, supra.

116 Id.

117 We generate the amount of the understatement by first multiplying the operating expenses as a percentage of net revenues obtained in Table 69, Revenue Size $3 - $4 Million, FM Stations, (1992 NAB Radio Financial Report) by the net revenues for the Average FM Station in Markets with $100 Million in Revenues, Exhibit B, MTA, EITC report. We compared those amounts with those offered by MTA, and the total amount understated was seen to be $350,122.

and the impact on these operating incomes will be substantially greater with the introduction of DARS.

Four, the MTA Study examines the impact on DARS for these "average" FM stations over a eight year time period. For those eight years they assume that "[t]he cost per thousand was forecast to increase at an annual rate of 5% per year, or at a real rate of 2% annually in addition to 3% inflationary growth"[118] (i.e., the price that radio stations charge their advertising customers for access to their audiences). At the same time, MTA assumes that "[a]nnual percentage increases were projected at 4% for all expenses, with the exception of technical expenses which grow by 3% per year. The introduction of Satellite DARS is forecast to spur operators to make increases in their programming and advertising/promotional budgets"[119]

Given that the price is assumed to increase by 5% and costs only increase 4%, even with a competitive response to DARS, it is not surprising to see that the impact of DARS over time is minimal to these "average" FM stations. Even assuming away all of the other problems discussed above, the MTA Study basically assumed their result by assuming that prices will rise at a faster rate than costs.

Finally, NAB notes that for the key audience diversion estimate MTA simply assumes, on no stated basis, diversion nubers -- which of course will pre-determine their "impact" outcomes.

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[118] MTA Study at 6.

[119] Id. at 7. Given the above-mentioned 3% inflation rate, MTA is assuming that the competitive response to the introduction of DARS will be only a 1% real increase in some of the radio station's expenses.

6. DARS *Will* Severely Impact the Financial Abilities of Broadcasters To Provide Local Service, Particularly in the Smaller Markets and Particularly For Niche and Spanish-language Broadcasters.

Particularly probative of the negative impact of DARS on broadcasters and their financial ability to provide local service, particularly those in smaller markets and those providing niche and Spanish-language programming are the comments of broadcasters themselves. NAB responds to the contentions of the DARS proponents to the contrary by referencing in particular the comments of specific broadcasters.

The comments of Entercom, Inc. are particularly salient and relevant to an understanding of fragmentation of audiences and its effects on listening and revenues in smaller markets.[120] Also instructive in understanding the actual effect on hypothetical and real station numbers of a loss of audience are the comments of Bonneville International.[121]

NAB particularly refers the Commission to the comments of three "niche" broadcasters for an appreciation of the broadcaster's view of the impact of DARS (of audience fragmentation and advertising drain) on the financial abilities of niche broadcasters and on the service they provide in their communities. WDKX is a black owned and operated station in Rochester, New York, which primarily serves the black and minority population of that community. WDKX believes DARS would be "devastating" to its station, to its high level of community service and to black radio ownership in general.[122]

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120 Comments of Entercom at 2-9.

121 Comments of Bonneville International at 2, 3.

122 See, Comments WDKX, attached hereto in Attachment 2.

KKGO-FM is the only commercial all-classical radio station is Los Angeles. KKGO explains in its comments the small share of the market of classical stations in general and the devastating effects of the loss of even a small percentage of audience, which it predicts from DARS presentation of one, two or three classical formats.[123] It also indicates the relatively high percentage of national advertising that it and niche formatted stations generally receive and the effect of a loss of advertising to DARS.[124] KKGO describes the extensive support it offers to local cultural institutions, all of which it believes would be jeopardized by DARS. KKGO states that "[n]iche-formatted stations located in a major market will be impacted upon as severely as general market stations located in medium and small markets.[125]

Tichenor Media System, Inc., the owner/operator of 13 Spanish language stations, indicates in its comments that DARS would precipitate a fragmentation of audience and loss of advertising revenue that would jeopardize the significant local public service contributions of the Tichenor stations to the Hispanic communities which they serve.[126]

7. Even Small Percentages of Audience Diverted to DARS from Local Radio Will Severely Impact Small Market Broadcasters.

NAB submitted with its initial comment an analysis of the impact of a 10% audience diversion from local radio to DARS in several specific small markets conducted by the accounting firm of Miller, Kaplan, Arase & Co. The 10% figure was based on the results of a

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123 See, Comments of Mt. Wilson FM Broadcasters, licensee of KKGO, at 3, 4, attached hereto in Attachment 2.

124 Id. at 4.

125 Id. at 7.

126 Comments of Tichenor Media System, Inc, at 2, 3, attached hereto in Attachment 2.

consumer survey NAB commissioned to estimate audience diversion from local radio to DARS. NAB has asked Miller Kaplan to perform the same analysis using hypothetical audience diversion numbers significantly lower than the estimated 10%. The results show that, even with much lower audience diversion (3.5% and 7%) than is estimated, there would be severe negative impacts on many of the stations in the small markets examined. We attach the results of that analysis to these comments.[127]

C. DARS *Will* Diminish Localism and Reduce the Amount and Quality of Local Service Provided by Radio Everywhere.

DARS proponents suggest that DARS will "spur" broadcasters to strengthen their local programming in response to the competition from DARS.[128] NAB rejects that outcome as highly improbable, given radio broadcasting's historical adaptations to increased competition and the relatively high costs of local programming. With broadcasters' experiencing severe financial impacts, it is highly unlikely that most -- particularly the more financially precarious stations in smaller markets and niche and foreign language stations in all markets -- would respond by investing in expensive programming rather than in economical satellite delivered programming as has been the typical competitive response.

The SPR Report attached to NAB's initial comments makes clear in its economic analysis section that, historically, broadcasters' competitive adaptions in response to different forms of increased competition "have *uniformly* consisted in attempts to economize on station

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127 Letter to Mark Fratrik from Miller, Kaplan, Arase & Co., October 12, 1995. appended hereto as Attachment 3.

128 Comments of CD Radio at 47; Comments of DSBC at 22; Comments of Primosphere at 28.

operating costs, *particularly program costs.*[129] As the SPR Report indicates, as competition intensified, broadcasters increasingly began to rely on packaged program services delivered by satellite to reduce their costs.[130] SPR concludes that

> there have, to be sure, been significant benefits from increased competition on radio broadcasting, but these benefits have not come without cost, particularly in terms of the Commission's local service objectives. Competition has compelled cost economizing, and cost economizing has necessarily entailed a reduction in the amount of locally produced, community-oriented programming. Satellite DARS represents additional competition for local broadcasters. It will, to the extent that it succeeds, compel additional economizing efforts by local broadcasters. Those efforts will likely take the form of additional reliance upon, *inter alia*, satellite-delivered programming. We could well approach a situation where we, in essence, have two satellite distribution system for radio broadcast programming -- one which delivers geographically undifferentiated programming indirectly to consumers via local broadcast outlets. The logic of competition appears almost to compel that result.
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> The question then is "whither localism." What is the value of what we have lost if there are further significant reductions in the amount of community-oriented programming? That is a loss that is not easily quantified, but the fact that it is difficult to quantify does not make the loss any less real. And for purposes of an enlightening cost benefit analysis, it is a cost that needs to be part of the Commission's calculus. The Commission may well decide that the benefits of satellite DARS, suitably conditioned, are worth any cost in terms of losses in diversity from the degradation of local radio service. In making that decision, it should not labor under the delusion that there are such costs.

The words of individual local broadcasters echo the comments of SPR. They are seen in the case studies contained in the SPR Report. They are also seen in the many broadcaster comments and letters filed with the Commission in this proceeding. The outpouring and personal, heartfelt reactions expressed by individual broadcasters, particularly from small markets, are the truest testament to their fears for their industry and for the local service and

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129 SPR Study at 44.

130 Id. at 45.

localism they have spend their lives serving. NAB commends the broadcaster letters, and the broadcaster voices in the SPR Report, to the Commission for its consideration.

II. Given The Enormous Potential Net Loss To The Public Interest, Satellite Dars Service Rules Should Be Designed To Minimize The Harm To Broadcasters And Local Public Service.

In its initial Comments, the NAB urged the Commission to adopt a service design that will minimize the potentially devastating impact that the introduction of satellite DARS could have on terrestrial broadcasters, and in particular, on these broadcasters' continued ability to provide locally produced, community oriented programming. The NAB has urged the Commission to ensure that satellite DARS develops as a service that truly is complementary with and not destructive to local terrestrial broadcasting and the invaluable public service benefits it provides.

A. The Commission Should Make Satellite DARS A Subscription-Only Service.

One way that the Commission can act to minimize the harmful effects of satellite DARS introduction is to structure it as a subscription-only service, as the NAB has proposed. Although satellite DARS will have a competitive impact on terrestrial stations in every radio market no matter what its regulatory classification,[131] the NAB has urged the Commission to

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131 Whether it is advertiser-supported or not, satellite DARS providers fundamentally will compete with terrestrial broadcasters for listeners. Because audience impacts are the primary driver in the radio business, smaller audiences translate into reduced sales of advertising to both local and national advertisers, notwithstanding DARS suppliers' focus of subscriptions or national advertisers for support. See Comments of the National Association of Broadcasters, Attachment 1 (SPR Study), at 23; see also Kagan Study at 5 ("Although subscriber supported services would not appear to propose a direct threat to local broadcasters' revenue base, the audience fragmentation likely to occur from the deluge of programming options could severely handicap traditional radio broadcasting at a time when the industry is just recovering from hundreds of frequency allocations made by the FCC in the 1980's.").

soften this blow to the greatest extent possible. Canvassing the Commission's available regulatory options, a subscription requirement will introduce at least some level of differentiation between satellite DARS service and terrestrial radio, and will help to minimize the direct impingement by satellite DARS providers into markets for advertising sales.[132] Furthermore, a subscription requirement will provide satellite DARS providers with the economic framework that will permit them to deliver on their promise of providing niche programming to specialized or geographically dispersed markets.

Although there is no uniform consensus in the record with respect to regulatory classification, many parties submitted comments which supported the NAB's position. A variety of broadcasters underscored the harm that advertiser-supported DARS would wreak on their operations, and urged the Commission to adopt a subscription-only requirement.[133] Moreover, as the Media Access Project observed, the Commission has the clear authority -- and in this case, the mandate -- to fashion safeguards that will protect terrestrial broadcasting in the name of localism.[134]

Although three of the four current DARS applicants have proposed subscriber-based systems,[135] all of them nevertheless take the position that DARS providers should be granted a

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132 See Kagan Study at 21 (concluding that advertiser-supported service would cause not only fragmentation losses but also bottom line losses from lost national billings).

133 Moreover, as Mt. Wilson FM Broadcasters observes, a subscription-only requirement is not a new phenomenon. The Commission's subscription television rules, for example, prohibit the carriage of commercial advertising altogether, except for promotion of subscription television programs before and after such programs. See Comments of Mt. Wilson FM Broadcasters at 5 n.4 (citing 47 C.F.R. § 73.643 and 14 Rad. Reg. 2d (P & F) (1968)).

134 See Comments of the Media Access Project at 8.

135 See Comments of CD Radio at 82 (noting that three of the four current applicants "intend to supply their customers with special converters, scramble their signals, and provide services pursuant to private contracts").

flexible regulatory classification akin to that of DBS providers.[136] Yet, as the NAB pointed out in its initial Comments, although DBS is in some respects a useful analogy in addressing satellite DARS issues, the history and competitive development of DBS service are quite different from satellite DARS.[137] Furthermore, unlike DBS, where the Commission concluded that the record did not "show that DBS systems will affect local broadcasters to a critical extent,"[138] the evidence presented in the record to date demonstrates a high probability that satellite DARS, if not properly introduced into the radio marketplace, will pose a substantial threat to many valuable aspects of local broadcasting.[139] The Commission can mitigate that threat to some extent by licensing satellite DARS on a subscription-only basis, and the NAB once again urges it to do so.

B. The Commission Should Make Satellite DARS Licensees Deliver on Their Promises to Serve Underserved, Ethnic and Niche Populations

With respect to the subject of satellite DARs public interest obligations, some parties have urged the Commission to impose formal public interest obligations and channel capacity requirements on satellite DARS licensees.[140] Others have proposed variations of the "promise versus performance" approach that the NAB has advocated.[141] And still others have urged

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[136] See, e.g., Comments of CD Radio at 78-79; Comments of Primosphere Limited Partnership at 32.

[137] See Comments of the National Association of Broadcasters at 48-50.

[138] DBS Report and Order, 90 FCC 2d at 691.

[139] See, e.g., SPR Study at 38.

[140] See, e.g., Comments of the Media Access Project at 12-21.

[141] See Comments of the National Association of Broadcasters at 51-54; Comments of National Public Radio at 4-5.

the Commission to restrict satellite DARS service only to communities and groupings whose needs are not being specifically addressed by local stations.[142]

Underlying all of these different flavors of public interest obligations is a common theme and a common suspicion to which the Commission should be especially attuned. From a public interest standpoint, given the dramatic impact that satellite DARS will have on local public service programming, the NAB has urged the Commission to ask: What is the public gaining in return for an inevitable loss of local programming? And in the NAB's view, the only unique public interest benefits to satellite DARS service -- which have been sold and touted like "snake oil" by the satellite DARS proponents since the service was proposed -- have been the "new services" that satellite DARS providers allegedly will offer to rural listeners, minority and ethnic groups, and non-English speaking audiences.[143] The concern, expressed by a variety of commenters, is that the promise of the DARS applicants to serve such constituencies is an utterly empty one.

In this regard, the current DARS applicants, in spite of their sweeping proclamations of intent to serve a variety of unserved and underserved ethnic and niche constituencies, plainly do not wish to be burdened by any hard commitment to do the very things they have

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142 See Comments of Entertainment Communications, Inc. at 10-12. Under this proposal DARS services would address various language, nationality, professional or subject matter groupings based upon showings by satellite DARS applicants that programming offered is not being provided to any significant extent by existing radio stations. Id.; see also Comments of the New Jersey Broadcasters Association at 1-2 (arguing that all satellite DARS service should be niche services which should be "narrowcasting in nature and provide for programming which is currently not available either in the private or public terrestrially based sector").

143 See Notice at ¶ 12; see also DARS Allocation Order, 10 FCC Rcd 2310, 2311-12, 2314, at ¶¶ 9-11, 22 (principal benefits of DARS allocation will be service to markets either unserved or underserved because of geographical, social or economic considerations, including minority ethnic and cultural interests that otherwise might not receive programming directed to a narrow audience).

used as the fundamental justification to promote this service to the Commission and the public. The current applicants wish to be regulated "flexibly," without public interest requirements;[144] they desire the Commission to adopt a "flexible" approach in allowing them to provide a broad range of "ancillary services," i.e., data services;[145] and they argue that if they are not handed extra spectrum (much more than they actually need), "it is the niche services that will suffer, making satellite DARS more similar to conventional radio."[146] Of course, this last statement by CD Radio simply underscores the degree to which the current applicants' core business plans are focused on mainstream, and not ethnic or niche, offerings.

The Commission has made a decision to authorize a score or more new channels of satellite-delivered programming to be dropped into every terrestrial radio market in the United States. The concerns expressed in the record -- indeed, since the service was a gleam in CD radio's eye -- are that the real agenda of the satellite DARS applicants is to simply replicate the formats of terrestrial broadcasters, all the while having bamboozled the Commission and the public (not to mention the variety of ethnic and niche organizations they have persuaded to comment in their favor) on the prospect that satellite DARS will do something good, innovative and unique with respect to the public interest.[147]

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[144] See, e.g., Comments of CD Radio at 83; Comments of DSBC at 52.

[145] See, e.g., Comments of CD Radio at 85.

[146] Id. at 32.

[147] See, e.g., Satellite DARS Allocation Order, 10 FCC Rcd at 2325, Separate Statement of Commissioner Rachelle B. Chong (noting that a "factor important in my decision to support satellite DARS is the fact that this service will have a nationwide or regional audience base" such that "DARS operators will be free to target their programming at audiences that may be underserved such as special interests or ethnic or racial groups that might not be large enough in a traditional broadcast community to support particularized programming. For example, operators might offer specialized programming targeted to foreign language communities such as those who speak Vietnamese or Armenian.").

Whatever public interest requirement the Commission adopts, the Commission should ensure that this is the case. Otherwise, the public will gain more mainstream radio programming, but suffer a severe and pointless reduction in the amount of local public service programming provided by terrestrial broadcasters. The Commission should not allow this to occur.

III. The Commission Should Open The Satellite Dars Spectrum To All Comers.

In its initial Comments, the NAB urged the Commission to re-open the satellite DARS processing window and to allow additional applicants to file satellite DARS applications. Predictably, this proposal has met with vigorous opposition from the four satellite DARS applicants. Notwithstanding the fact that the new technology landscape has changed dramatically in the time since they submitted their applications, and that there are other potential applicants that are ready willing and able to offer their own competitive uses for the satellite DARS spectrum, these parties invoke legal fictions, illusory "equities," and shifting capacity requirements to argue that the Commission should (1) insulate them from competing applicants -- regardless of whether new applicants might use the spectrum more efficiently; and (2) allow them to divide the spoils of a 50 MHz spectrum windfall among themselves -- regardless of their stated spectrum needs.

There is no sound legal or public policy reason to limit the universe of satellite DARS providers in this fashion. The Commission should not reward a transparent "spectrum grab" by applicants who have done little more than file paper with the Commission and now hope to engineer a spectrum windfall worth potentially hundreds of millions of dollars. Several years have elapsed since these applicants submitted their applications. Given the Commission's subsequent decision to allocate 50 MHz of prime spectrum to a satellite DARS service, the public interest will be best served by providing a fresh opportunity for as many applicants as possible -- including terrestrial broadcasters -- to apply for DARS licenses.[148] Licensing multiple applicants will bring more diversity of viewpoint and business capability to the emerging DARS industry.[149] It also will allow the marketplace to determine the most efficient uses of the DARS spectrum.

A. There is No Legal or Public Policy Basis for Affording Cut-Off Protection to Current Satellite DARS Applicants.

The DARS applicants have consistently sought to shield themselves from competition by wielding the fact that the Commission opened and closed a narrow "cut-off" window in 1992 for the filing of satellite DARS applications before spectrum was even allocated to the satellite DARS service. Notwithstanding the fact that circumstances have changed dramatically in the intervening years, these applicants claim that the Commission's re-opening of the satellite DARS processing round, with an accompanying invitation of additional satellite DARS applications, would be both "illegal" and "unfair." The current applicants are flatly wrong on both counts, and the Commission should not be swayed by the brazen efforts of these applicants to maximize their own interests at the public's expense.

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[148] The record to date already suggests that there would be several additional applicants for satellite DARS spectrum. See, e.g., Comments of Cracker Barrel Old Country Store, Inc. (225 store retail chain with $783 million in 1994-95 revenue, urges re-opening of DARS spectrum to provide satellite DARS service to interstate motorists); Comments of Noble Broadcast Group, Inc. at 6 (arguing that "by preventing new applicants from applying for DARS authorizations, the Commission is depriving itself of the opportunity of receiving proposals from terrestrial broadcasters, many of whom have programming experience that far exceeds that of the DARS applicants").

[149] See Comments of Cracker Barrel Old Country Store, Inc. at iii ("DARS should not be dominated by an oligopoly, when technology and creative policy-making can open the field to additional entrants, ensuring true competition and greater program diversity.").

First, as a legal matter, the Commission has been expressly delegated by Congress broad discretion to determine "the manner of conducting its business that would most fairly and reasonably accommodate the proper dispatch of its business and the ends of justice."[150] In general, cut-off rules are simply procedural tools which the Commission uses to promote orderliness and finality in its licensing processes. These procedures are always subject to the Commission's "broad discretion" in their use and implementation in particular proceedings.[151]

More importantly, cut-off procedures serve different functions with respect to different services. In the broadcast area for example, cut-off rules tend to be more strictly enforced (and waivers more narrowly constrained) because they are recognized as the "means by which the FCC may carry out its mandate of affording a comparative hearing to mutually exclusive broadcast applicants."[152] Because of this function, the cut-off procedures in the broadcast context afford timely-filed broadcast applicants "protected status" as they prepare for a time-consuming and expensive comparative hearing process.[153]

The same is not true, however, in the satellite area. Although cut-off procedures are used in satellite processing as a method of promoting orderliness and administrative finality, in "contrast to terrestrial broadcast services, there is no longstanding tradition of awarding

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150 FCC v. Schreiber, 381 U.S. 279 (1965); see also FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940) (choice of procedure is committed to agency discretion); 47 U.S.C. §§ 154(i),(j) (affording the Commission wide discretion in establishing procedures to facilitate the orderly conduct of business).

151 City of Angels Broadcasting, Inc. v. FCC, 745 F.2d 656, 663 (D.C. Cir. 1984) (Commission has "broad discretion" in deciding whether to waive cut-off rule).

152 Id.

153 See Id. at 663. Note, however, that even in the broadcast context, "protected status" does not mean that timely filed applicants have any substantive "vested rights" vis-a-vis later applicants who may file after the cut-off. It is always "manifestly within the Commission's discretion" to consider all of the effects, on both pending applicants and new entrants, in deciding whether a cut-off rule should be waived. Id. at 656 n.7.