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VIA HAND DELIVERY

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

Dear Mr. Caton:

CD Radio Incorporated, by its attorneys 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, Fern Jarmulnek, Rosalee Chiara, Roy J. Stewart, Michael Katz, John Nakahata, David Siddall, Jane E. Mago, Pete Belvin and Lisa Smith. 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
Counsel for CD Radio

Enclosure

- | | | |
|-------------------|----------------|--------------|
| cc: Scott Harris | Roy J. Stewart | Jane E. Mago |
| William Wiltshire | Michael Katz | Pete Belvin |
| Fern Jarmulnek | John Nakahata | Lisa Smith |
| Rosalee Chiara | David Siddall | |

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

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American Mobile Radio Corporation

Interest: satellite DARS applicant

General support for SDARS:

- The NAB and other opponents of SDARS have failed to meet their burden of demonstrating that the licensing of SDARS is contrary to the public interest. (4)
 - While localism and audio communications is important, increased diversity also has strong public interest benefits. (5)
 - SDARS will encourage terrestrial radio stations to increase the local programming. (6)

Effect of SDARS on conventional broadcasters:

- NAB's studies indicating SDARS will significantly reduce station revenues is based upon erroneous conclusions drawn from flawed studies. (7)
 - The polling done in NAB Attachment Five is unpersuasive. (8)
 - The polling failed to address receiver costs. (8)
 - The polling asked only whether respondents were interested in the SDARS service, thus producing extremely flawed statistics. (8)
 - While NAB's study indicates 20% of the population would listen to less radio if SDARS is available, the study does not determine the average number of hours by which this 20% of the population would reduce their radio listening. To achieve NAB's 11.6% drop in radio listenership, the 20% of the population that would reduce its radio listening would have to reduce it by 58%. No evidence indicates this would happen. (10-11)
- Because SDARS will not significantly reduce radio revenues, NAB's claims that SDARS will harm localism and should not be authorized are in error. (14)

Licensing policies:

- The commenters in this proceeding have provided no legal or policy basis for accepting additional applications or licensing less than the full 50 MHz of DARS spectrum to the current four DARS applicants. (15-17)

- The commenters are incorrect in their assertion that accepting more applications and awarding more licenses will increase SDARS competition. (16)
- NAB's proposal to provide SDARS licensees with only 5 MHz of spectrum is designed to insure that SDARS will not be economically viable. (16)

Regulatory classification:

- The Commission should not grant any entity a right of carriage on SDARS or set aside spectrum for possible future systems. (22)
 - Since SDARS systems will cost between \$400 and \$600 million to construct and launch, each channel set aside greatly increases the likelihood that such a system will not be financially viable. (22)
- The Commission must reject the efforts of SDARS opponents to create service rules that will make SDARS technically and economically unfeasible. (18)
 - Many of the suggested service rules are not meant to make SDARS better serve the public but are instead aimed at making operation of a SDARS service impossible. (18)
- SDARS licensees must be allowed to choose their own mix of subscription and advertising supported services. (19)
 - Given the incredible expense building and deploying a SDARS system, SDARS licensees cannot afford to be restricted to subscription only status. (19)
- The Commission should not attempt to regulate program content. (20)
 - While niche programming will be an economically important part of a SDARS system, it is unlikely to be the sole form of programming. (20)
 - Rural residents who support SDARS would be disappointed to learn that SDARS might be restricted to 30 channels of exclusively foreign language programming. (20)

Technical standards:

- Terrestrial repeaters should be allowed. (21)

- Terrestrial repeaters do not extend SDARS coverage outside of their authorized service areas but merely fill in coverage gaps. (21)
- The public interest would be served by the use of terrestrial repeaters and no argument exist to oppose them except to make SDARS economically non-viable. (21)
- The Commission should not at this time attempt to establish regulations for receiver standards. (23)

CD Radio, Inc.

Interest: satellite DARS applicant

General support for SDARS:

- Satellite DARS will greatly improve the amount and quality of audio services in rural areas.
 - NAB's estimates of the availability of radio service in rural areas is flawed and misleading. (9)
- Satellite DARS will be capable of offering a broad selection of diverse programming. (10)
 - NAB's own statistics show that a tremendous disparity in program availability exists between smaller and larger communities. (10)
 - NAB's estimates of the total number of radio formats available for each market appear incorrect and misleading. (11)
- As NAB acknowledges, satellite DARS will be able to increase greatly the amount of specialized niche programming available through the aggregation of nationwide audiences.
 - NAB is incorrect in its claim that there is no need for more niche programming. (12)
 - CD Radio plans to offer 20 channels for niche programming, including educational, cultural, news and foreign language. (13)
 - The diverse range of commenters that have expressed support for satellite DARS in this proceeding is evidence of the public's confidence in the programming diversity that will be offered by satellite DARS. (14)
- Satellite DARS will generate a significant boost in economic growth in the United States and will create new employment opportunities. (16)

Licensing policies:

- The Commission should reject NAB's two alternate band plan proposals because they would fail to support viable satellite DARS systems.

- CD Radio suspects that NAB chose these figures precisely because such figures would not lead to a viable system. (37)
- The Commission should reject Cracker Barrel's ambiguous regional beam plan because it would diminish diversity and competition and adversely effect local broadcasters. (38)
 - Cracker Barrel fails to provide any technical basis for the assertion that through CDMA the band can support 465 channels. (39)
 - In support of its technical plan, Cracker touts numerous erroneous assertions and assumptions, including overestimating the number of channels that can be multiplexed into the spectrum. (40)
 - Because it proposes a local, regional beam system that could actually compete to provide local services, adoption of Cracker Barrel's plan actually could hurt local broadcasting. (42)
- A diverse majority of commenters in this proceeding have joined the satellite DARS applicants in opposing the reopening of the satellite DARS cut-off as both unlawful and poor public policy. (43)
- According to precedent, the Commission should not waive a cut-off except in the most narrow, extraordinary and compelling circumstances. No such conditions exist in this case. (45)
- Reopening the application window now would eviscerate the meaning and reliance of having cut-offs for application periods. (46)
- Cracker Barrel is attempting to free ride on the \$15 million in investment by CD Radio and its suggestion that the Commission should disregard the equities that favor the current applicants is disingenuous. (48)
 - Cracker Barrel does not show why four satellite DARS licensees is not sufficient. (49)
- In the absence of mutual exclusivity, the auctioning of satellite DARS spectrum would be contrary to both the Communications Act and prior FCC precedent. (50)
 - It is notable that virtually no commenters have favored auctioning SDARS licenses. (51)

- As commenters noted, conducting an auction would delay the deployment of satellite DARS. (51-52)
- In the event the FCC does auction satellite DARS spectrum, the Commission should award CD Radio a pioneer's preference for creating the service and generating value for the spectrum. (56)
 - The lengthy history of this proceeding leaves no doubt that CD Radio merits a satellite DARS pioneer's preference. (57)
 - CD Radio's contributions to the service technology and regulatory scheme were critical to the apparent near conclusion of this proceeding. (60)
 - A pioneer's preference for CD Radio is particularly appropriate if licenses are auctioned since every party that bids in such an auction will be utilizing the value they have gained from CD Radio's efforts and investments. (60)
 - The Commission should also adopt rules that allow a satellite DARS pioneer to pay for the spectrum over a period of five years. (61)
 - During the installment period or thereafter there should be no bar to the pioneer engaging in legitimate rounds of financing of its system through further sales of equity. (61-62)

Effect of SDARS on conventional broadcasters:

- The deployment of satellite DARS will reinvigorate competition in radio broadcasting. (18)
- Satellite DARS will not hurt terrestrial radio. (18)
 - The radio industry is healthier today than ever before. (19)
 - NAB has made virtually no attempt to dispute the findings of the Lilly study even though it has been available for more than a year. (20)
- NAB is incorrect in its claims that the radio industry is a beleaguered service and its studies are flawed and deserve little credence. (24)
 - A study by Dr. John Peterman of Law and Economics Consulting Group shows that NAB's assertions about the harm to terrestrial radio are unfounded. (25)

- The claims of NAB are also contradictory in that they argue both that satellite DARS is an unneeded service and also that satellite DARS will be so successfully received by consumers that it will destroy conventional radio. (25)
- NAB's own Kagan Study contradicts earlier statements by Kagan. (26-27)
- NAB artificially "cooks the books" by using 1991 numbers, the bottom of this country's worst recession in a decade. (29)
- NAB's Haring and Shooshan Report is anecdotal and valueless to this proceeding. (33-34)

Technical standards:

- The record supports FCC adoption of technical rules that allow satellite DARS licensees maximum flexibility to better serve the public. (53)
- The FCC does not need to regulate link margins since CD Radio, like all other satellite DARS providers, has a compelling incentive to ensure an adequate margin to its services. (54)
- The Commission does not need to formulate regulations for receiver standardization because industry participants have adequate incentive to ensure such standardization takes place. (55)

Appendix A: Impact Of CD Radio And Other SDARS Systems On Traditional Radio Service, Statement Of John L. Peterman, Principal, Law And Economics Consulting Group, Inc.

Appendix B: Supplement To Pioneer's Preference Request, Satellite CD Radio, Inc., Request For A Pioneer's Preference For Proposed Satellite Digital Audio Radio System, General Docket No. 90-357; PP-24 (filed June 2, 1993).

Appendix C: Supplement To Pioneer's Preference Request, Satellite CD Radio, Inc., Request For A Pioneer's Preference For Proposed Satellite Digital Audio Radio System, General Docket No. 90-357; PP-24 (filed September 20, 1995).

Digital Satellite Broadcasting Corporation

Interest: satellite DARS applicant

General support for SDARS:

- Notwithstanding NAB's claim that listeners are well served by terrestrial radio, the NAB's own Opinion Research Corporation Listener Survey demonstrates that the public is interested in SDARS in addition to their current radio service. (27)
 - For example, 20% of the respondents over age 65 indicated they were interested or very interested. (27)
 - The wide variety of comments filed in this proceeding indicate the extent of the consumer interest in SDARS. (28)

Licensing policies:

- No legal or policy justification has been offered that supports reopening the SDARS application cut-off window. (35)
 - Cracker Barrel is incorrect in alleging that in the past the Commission has not accepted applications for new service until after it has allocated spectrum and established service rules. (36)
- There is no legal or factual justification offered to support auctioning SDARS licenses. (38)
 - As demonstrated in DSBC's comments, the auction criteria enumerated in the Communications Act has not been met. (38)
- Reopening the cut-off window and auctioning SDARS licenses will guarantee further delay of the deployment of this service. (39)
 - Increased delay is the sole reason why NAB supports reopening the cut-off window and auctioning SDARS. (39)

Effect of SDARS on conventional broadcasters:

- The economic impact of SDARS on terrestrial broadcasters is relevant to the Commission's public interest analysis only "to the extent that such impact would predictably lead to serious loss of important services to consumers." (10)

- NAB does not meet this standard.
- While SDARS may cause some harm to some broadcasters, the harm will be outweighed by new benefits and value to consumers. (12)
- NAB's comments to the Commission are devoid of credible qualitative or quantitative evidence demonstrating that SDARS will result in a significant reduction in service to the public. (12)
 - The terrestrial radio industry is currently robust and highly profitable. (15)
 - The SPR study is anecdotal and selectively examines six markets that are not representative of the radio industry nationwide. (15)
 - NAB's use of Arbitron data vastly overestimates the number of stations the average rural resident receives. (23-24)
 - NAB's data on availability of format diversity is equally flawed. (25)
- SDARS will actually cause terrestrial broadcasters to increase local programming rather than eliminate it. (29)
 - The Kagan Media Appraisals study is flawed because it assumes that broadcasters will take no action to enhance their business, improve their market position or add revenue streams in reaction to SDARS. (30)
- NAB overstates the audience diversion impact of SDARS on conventional radio audiences. NAB ignores the fact that some of SDARS market will come from current users of cassettes, compact discs, and books on tape. (33)

Technical standards:

- The Commission should proceed cautiously and be careful not to impose regulations that may discourage investment or act as a disincentive to deployment of very expensive SDARS systems. (40)
- The use of minimal service regulations will benefit the public interest by increasing the speed with which a flexible SDARS industry can develop. (41)
 - Accordingly, the Commission should not designate types of service that must be offered, or types of advertising/subscription systems that must be utilized. (41-42)

- DSBC supports the Commission's proposal to permit DARS licensees to create relationships through inter- and intra-service sharing. (43)

Regulatory classification:

- Public interest programming obligations are not necessary to ensure that SDARS will provide diverse public oriented programming. (45)
 - The economic and distribution structure of SDARS makes it good business to offer programming that conventional broadcasters would not provide in the absence of regulatory incentives. (45)
 - Public interest obligations are not imposed on other multi-channel service providers such as DBS and Cable TV and other digital audio radio services. (46)

Technical standards:

- It is unnecessary for the Commission to impose technical requirements on DARS licensees beyond those absolutely necessary to ensure harmonious co-existence of competing DARS systems and users. (47)
 - Burdensome technical regulations may hinder DARS development, which may be exactly what NAB is hoping to accomplish. (47)
- Cracker Barrel has not presented sufficient information for DSBC, the CDM proponent and *de facto* expert among DARS applicants, to analyze completely its proposed "spectrum plan." (48)
- Crackle Barrel's proposal that CDM be adopted as the DARS standard is unnecessary and improper. (49)
- Ford Motor Company's proposal for an advisory committee to deal with link margins is unnecessary. (50)
- Contrary to NAB's claim, terrestrial gap fillers do not utilize spectrum other than that allocated exclusively to DARS. Additionally, they do not extend the authorized DARS service area. (50-51)

Financial qualifications and milestones:

- All applicants agree that the Commission should adopt financial qualifications as proposed. (44)

**Appendix I: Digital Audio Radio: Critique of Economic Harm Studies, statement of
Larry F. Darby, Darby Associates, Washington, D.C.**

Primosphere Limited Partnership

Interest: satellite DARS applicant

General support for SDARS:

- The comments in this proceeding overwhelmingly support prompt processing of the four pending satellite DARS applicants. (1)

Licensing policies:

- Commission precedent and public policy require that the cut-off not be reopened for new applicants. (4)
 - The arguments of NAB in support of reopening the application period are unconvincing. (6)
 - Cracker Barrel Old Country Store, the only party that has expressed interest in filing an application if the proceedings are reopened, has advanced no credible reason why the proceedings should be reopened. (6)
- The Commission cannot lawfully utilize auctions to license satellite DARS spectrum in this proceeding.
 - Because mutually exclusivity does not exist, statutory authority for auctions is not available. (8)
 - Auctions will delay rather than expedite implementation of satellite DARS. (9)

Effect of SDARS on conventional broadcasters:

- Broadcasters have failed to meet their burden of showing that the deployment of satellite DARS will harm the public interest. (10)
 - The economic impact on terrestrial broadcasters will be very small. (12)
 - Satellite DARS will provide many new services to the public and will spur terrestrial broadcasters to improve current services. (12)

- Advances in terrestrial broadcasting will make terrestrial radio an even better competitor. (12)
- NAB's studies are devoid of evidence and do not accurately estimate the effect satellite DARS will have on broadcasters. (14)
 - NAB's attempt to estimate the audience diversion created by satellite DARS is flawed because it fails to determine how much less people will listen to terrestrial radio if satellite DARS is deployed. (16)
 - Rather than a total decline of 11.6% in radio listenership, NAB's estimates point towards a decline of just 2.3% overall. (17)
- NAB's estimates of revenue diversion are seriously flawed and inaccurate. (18)

Regulatory classifications:

- Because of the high cost of deploying satellite DARS, the Commission should allow satellite DARS licensees to operate on either a subscription or advertiser-supported basis. (21)
- The Commission should allow spectrum aggregation because it would increase the likelihood of highly diverse program offerings and it would allow increased channel size and bit rates and therefore significantly improved audio services. (22)

Technical standards:

- Comments submitted by numerous parties support the adoption of minimal technical rules for satellite DARS.
 - Because of the long lead time required for satellite construction, the process of resolving technical issues should occur in parallel with satellite construction rather than delay licensing. (24)
- In order to facilitate coordination, the Commission should initiate international coordination in conjunction with all licensed satellite DARS systems and should assign specific frequency blocks following conclusion of this coordination. (24)
- Standards for receiver interoperability and tunability should be left to satellite DARS licensees and manufacturers to resolve.
 - The industry has already initiated this process on its own and Commission action is unnecessary. (25)

- While Primosphere agrees with most of CD Radio's proposals in regards to satellite DARS regulations, it does not agree with every proposal:
 - Primosphere does not believe that spectrum assignments should be made prior to coordination with Canada and Mexico. (25)
 - CD Radio's proposal that a licensee certify that its system "includes a receiver design that permits users to access all operational DARS systems" is not broad enough. This rule must be modified to also include all satellite DARS systems that are operational and under construction. (26)
- NAB's proposed channel plan is flawed and unsuitable for satellite DARS. (26)
- Cracker Barrel's channeling plan is unsupported, misleading and without engineering merit. Cracker Barrel's filing is merely an exercise in arithmetic based on the unsupported assumption that 465 channels can be accommodated in the band. (27)
 - The use of spot beams by Cracker Barrel makes its service regional and not national. (28)
 - Cracker Barrel's allegations of CDMA spectral efficiency are totally unfounded. (28)
- The Commission should authorize feeder lengths without delay. (30)
 - Coordination that is necessary can occur during construction and deployment.
 - Satellite DARS providers should not be forced to accept any interference caused by electronic news gathering or fixed point to point services. (31)

Attachment A: Statement Of Clifford N. Burnstein, Confessions Of A Satellite DARS Applicant, Part II

Attachment B: Affidavit Of Richard Cooperman, Engineer



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American Association for Adult and Continuing Education

Interest: developing adult education

General support for SDARS:

- SDARS will make available an increased number of channels to audiences.
 - Some of these channels could be devoted to adult learning, giving "at-risk" adults in rural areas more access and better quality reception to informational programming.

Association of American Geographers

Interest: advance professional studies of geography

General support for SDARS:

- SDARS can be used by educators, businesses, and entertainers to reach niche audiences and audiences in areas of the country that are not served by terrestrial radio.

American Council on Rural Special Education

Interest: enhancement of services to the disabled in rural areas

General support for SDARS:

- SDARS will help provide increased services to disabled people living in rural areas.
 - Many disabled live outside the reach of terrestrial radio.
 - Many others receive only one or two radio signals.
 - SDARS would provide the opportunity to supply these people with significantly more educational, cultural and entertainment oriented programming.