

this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center of the Federal Communications Commission, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

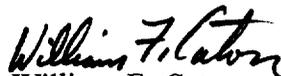
186. IT IS FURTHER ORDERED that, pursuant to 47 U.S.C. § 155(c), the Chiefs, Wireless Telecommunications Bureau and International Bureau, ARE DELEGATED AUTHORITY to implement and modify auction procedures in the DARS service, including the general design and timing of an auction, the manner of submitting bids, minimum opening bids and bid increments, activity and stopping rules, and application and payment requirements.

187. IT IS FURTHER ORDERED that the requests for pioneer's preference filed by Satellite CD Radio, Inc., Digital Satellite Broadcasting Corporation, and Primosphere Limited Partnership -- PP-24, PP-86 and PP-87, respectively, in GEN Docket No. 90-357 -- ARE DISMISSED.

188. IT IS FURTHER ORDERED that the petition for reconsideration filed on February 17, 1995 by Interep National Radio Sales, Inc. IS DENIED.

189. This action is taken pursuant to Sections 1, 4(i), 4(j), 7, 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154 (i), 154 (j), 157, 303(r) and 309 (j).

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

APPENDIX A**Amendments to
47 C.F.R. Part 25 and Part 87 of the Commission's Rules**

1. The Table of Contents for Part 25 is revised to read as follows:

**PART 25 - SATELLITE
COMMUNICATIONS****Subpart A - General**

Sec.	
25.101	Basis and Scope.
25.102	Station authorization required.
25.103	Definitions.
25.104	Preemption of local zoning of earth stations.
25.105-25.108	[Reserved]
25.109	Cross-reference.

Subpart B - Applications and Licenses

25.110	Filing of applications, fees, and number of copies.
25.111	Additional information.
25.112	Defective applications.
25.113	Construction permits.
25.114	Applications for space station authorizations.
25.115	Applications for earth station authorizations.
25.116	Amendments to applications.
25.117	Modification of station license.
25.118	Assignment or transfer of control of station authorization.
25.119	Application for special temporary authorization.
25.120	License term and renewals.

EARTH STATIONS

25.130	Filing requirements for transmitting earth stations.
25.131	Filing requirements for receive-only earth stations.
25.132	Verification of earth station antenna performance standards.
25.133	Period of construction; certification of commencement of operation.
25.134	Licensing provision of very small aperture terminal (VSAT) networks.

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- 25.135 Licensing provisions for earth station networks in the non-voice, non-geostationary mobile-satellite service.
- 25.136 Operating provisions for earth station networks in the 1.6/2.4 GHz mobile-satellite service.

SPACE STATIONS

- 25.140 Qualifications of domestic fixed-satellite space station licensees.
- 25.141 Licensing provisions for the radiodetermination satellite service
- 25.142 Licensing provisions for the non-voice, non-geostationary mobile-satellite service.
- 25.143 Licensing provisions for the 1.6/2.4 GHz mobile-satellite service.
- 25.144 Licensing provisions for the 2.3 GHz satellite digital audio radio service.

PROCESSING OF APPLICATIONS

- 25.150 Receipt of applications.
- 25.151 Public notice period.
- 25.152 Dismissal and return of applications.
- 25.153 Repetitious applications.
- 25.154 Opposition to applications and other pleadings.
- 25.155 Mutually exclusive applications.
- 25.156 Consideration of applications.

FORFEITURE, TERMINATION, AND REINSTATEMENT OF STATION AUTHORIZATION

- 25.160 Administrative sanctions.
- 25.161 Automatic termination of station authorization.
- 25.162 Cause for termination of interference protection.
- 25.163 Reinstatement.

Subpart C - Technical Standards

- 25.201 Definitions.
- 25.202 Frequencies, frequency tolerance and emission limitations.
- 25.203 Choice of sites and frequencies.
- 25.204 Power limits.
- 25.205 Minimum angle of antenna elevation.
- 25.206 Station identification.
- 25.207 Cessation of emissions.
- 25.208 Power flux density limits.

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- 25.209 Antenna performance standards.
 - 25.210 Technical requirements for space stations in the Fixed-Satellite Service.
 - 25.211 Video transmissions in the Domestic Fixed-Satellite Service.
 - 25.212 Narrowband transmission in the Fixed-Satellite Service.
 - 25.213 Inter-service coordination requirements for the 1.6/2.4 GHz Mobile-Satellite Service.
 - 25.214 Technical requirements for space stations in the satellite digital audio radio service.
 - 25.251 Special requirements for coordination.
 - 25.252 Maximum permissible interference power.
 - 25.253 Determination of coordination distance for near great circle propagation mechanisms.
 - 25.254 Computation of coordination distance contours for propagation modes associated with precipitation scatter.
 - 25.255 Guidelines for performing interference analyses for near great circle propagation mechanisms.
 - 25.256 Guidelines for performing interference analyses for precipitation scatter modes.

Subpart D - Technical Operations

- 25.271 Control of transmitting stations.
- 25.272 General inter-system coordination procedures.
- 25.273 Duties regarding space communications transmissions.
- 25.274 Procedures to be followed in the event of interference.
- 25.275 Particulars of operation.
- 25.276 Points of communication.
- 25.277 Temporary fixed earth station operations.
- 25.278 Additional coordination obligations for non-geostationary and geostationary satellite systems in frequencies allocated to the Fixed-Satellite Service.
- 25.279 Inter-Satellite Service

Subpart E - Developmental Operations

- 25.300 Developmental operation.
- 25.308 Automatic Transmitter Identification System (ATIS).

Subpart F - Competitive Bidding Procedures for DARS

- 25.401 DARS subject to competitive bidding.
- 25.402 Competitive bidding mechanisms.
- 25.403 Withdrawal, default and disqualification payments.
- 25.404 Bidding application and certification procedures

- 25.405 Submission of down payment and filing of long-form applications.
25.406 Prohibition of Collusion

Subpart G -- [Reserved]

**Subpart H - Authorization to own stock in
the Communications Satellite Corporation**

- 25.501 Scope of this sub-part.
25.502 Definitions.
25.503-25.504 [Reserved]
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25.506-25.514 [Reserved]
25.515 Method of securing authorization.
25.516-25.519 [Reserved]
25.520 Contents of application.
25.521 Who may sign applications.
25.522 Full disclosures.
25.523 Form of application, number of copies, fees, etc.
25.524 [Reserved]
25.525 Action upon applications.
25.526 Amendments.
25.527 Defective applications.
25.528-25.529 [Reserved]
25.530 Scope of authorization.
25.531 Revocation of authorization.

Subpart I -- Equal Employment Opportunities

- 25.601 Equal employment opportunity requirement.

2. The authority citation for Part 25 is modified to read as follows:

AUTHORITY: Sections. 101-404, 76 Stat. 419-427; 47 U.S.C. 701-744, Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interprets or applies sec. 303, 48 Stat. 1082, as amended; 47 U.S.C. 303. 47 U.S.C. sections 154, 301, 302, 303, 307, 309 and 332, unless otherwise noted.

3. A new Section 25.144 is added to read as follows:

§ 25.144 Licensing provisions for the 2.3 GHz satellite digital audio radio service.**(a) Qualification Requirements:**

(1) Satellite CD Radio, Primosphere Limited Partnership, Digital Satellite Broadcasting Corporation, and American Mobile Radio Corporation are the applicants eligible for licensing in the satellite digital audio radio service.

(2) **General Requirements:** Each application for a system authorization in the satellite digital audio radio service in the 2310-2360 MHz band shall describe in detail the proposed satellite digital audio radio system, setting forth all pertinent technical and operational aspects of the system, and the technical, legal, and financial qualifications of the applicant. In particular, applicants must file information demonstrating compliance with § 25.114 and all of the requirements of this section.

(3) **Technical Qualifications:** In addition to the information specified in paragraph (a)(1) of this section, each applicant shall:

(i) demonstrate that its system will, at a minimum, service the 48 contiguous states of the United States (full CONUS);

(ii) certify that its satellite DARS system includes a receiver that will permit end users to access all licensed satellite DARS systems that are operational or under construction; and/or

(iii) identify the compression rate it will use to transmit audio programming. If applicable, the applicant shall identify the compression rate it will use to transmit services that are ancillary to satellite DARS.

(b) Milestone Requirements.

Each applicant for system authorization in the satellite digital audio radio service must demonstrate within 10 days after a required implementation milestone as specified in the system authorization, and on the basis of the documentation contained in its application, certify to the Commission by affidavit that the milestone has been met or notify the Commission by letter that it has not been met. At its discretion, the Commission may require the submission of additional information (supported by affidavit of a person or

persons with knowledge thereof) to demonstrate that the milestone has been met. This showing shall include all information described in § 25.140 (c), (d) and (e). The satellite DARS milestones are as follows, based on the date of authorization:

- (1) One year: Complete contracting for construction of first space station or begin space station construction;
- (2) Two years: If applied for, complete contracting for construction of second space station or begin second space station construction;
- (3) Four years: In orbit operation of at least one space station; and/or
- (4) Six years: Full operation of the satellite system.

(c) Reporting requirements. All licensees of satellite digital audio radio service systems shall, on June 30 of each year, file a report with the International Bureau and the Commission's Laurel, Maryland field office containing the following information:

- (1) Status of space station construction and anticipated launch date, including any major problems or delay encountered;
- (2) A listing of any non-scheduled space station outages for more than thirty minutes and the cause(s) of such outages; and/or
- (3) Identification of any space station(s) not available for service or otherwise not performing to specifications, the cause(s) of these difficulties, and the date any space station was taken out of service or the malfunction identified.

(d) The license term for each digital audio radio service satellite shall commence when the satellite is launched and put into operation and the term will run for eight years.

4. A new paragraph is added, in alphabetical order Section 25.201 to read as follows (addition of this paragraph to Section 2.1 is consequential):

§ 25.201 Definitions

* * * * *

Satellite Digital Audio Radio Service ("DARS"). A radiocommunication service in which audio programming is digitally transmitted by one or more space stations directly to fixed, mobile, and/or portable stations, and which may involve complementary repeating terrestrial transmitters, telemetry, tracking and control facilities.

* * * * *

5. Section 25.202 is amended by adding a new paragraph (a)(6) to read as follows:

§ 25.202. Frequencies, frequency tolerance and emission limitations.

(a)(1) * * *

- (6) The following spectrum is available for exclusive use by the satellite digital audio radio service:

2320-2345 MHz: space-to-Earth (primary)

* * * * *

6. A new Section 25.214 is added to read as follows:

§ 25.214 Technical requirements for space stations in the satellite digital audio radio service.

(a) Definitions

(1) "Allocated bandwidth." The term "allocated bandwidth" refers to the entry in the Table of Frequency Allocations of a given frequency band for the purpose of its use by one or more terrestrial or space radiocommunication services under specified conditions. This term shall be applied to the 2310-2360 MHz band for satellite DARS.

(2) "Frequency Assignment." The term "frequency assignment" refers to the authorization given by the Commission for a radio station to use a radio frequency or radio frequency channel under specified conditions. This term

shall be applied to the two frequency bands (A) 2320.0 - 2332.5 MHz and (B) 2332.5 - 2340.0 MHz for satellite DARS.

- (b) Each system authorized under this section will be conditioned upon construction, launch and operation milestones as outlined in Section 25.144(b). The failure to meet any of the milestones contained in an authorization will result in its cancellation, unless such failure is due to circumstances beyond the licensee's control or unless otherwise determined by the Commission upon proper showing by the licensee in any particular case.
- (c) Frequency assignments will be made for each satellite DARS system as follows:
- (1) Exclusive satellite DARS licenses are limited to the 2320-2345 MHz band segment of the allocated bandwidth for satellite DARS;
 - (2) Two, 12.5 MHz frequency assignments are available for satellite DARS: 2320.0-2332.5 MHz and 2332.5-2345.0 MHz;
 - (3) Satellite DARS licensees may reduce their assigned bandwidth occupancy to provide telemetry beacons in their exclusive frequency assignments;
 - (4) Each licensee may employ cross polarization within its exclusive frequency assignment and/or may employ cross polarized transmissions in frequency assignments of other satellite DARS licensees under mutual agreement with those licensees. Licensees who come to mutual agreement to use cross-polarized transmissions shall apply to the Commission for approval of the agreement before coordination is initiated with other administrations by the licensee of the exclusive frequency assignment; and/or
 - (5) Feeder uplink networks are permitted in the following Fixed-Satellite Service frequency bands: 7025-7075 MHz and 6725-7025 MHz (101° W.L. orbital location only).

7. A new subpart F consisting of sections 25.401 through 25.406 is added to Part 25 to read as follows:

Subpart F -- Competitive Bidding Procedures for DARS

§ 25.401 Satellite DARS applications subject to competitive bidding.

Mutually exclusive initial applications filed by Satellite CD Radio, Primosphere Limited Partnership, Digital Satellite Broadcasting Corporation, and American Mobile Radio Corporation, to provide DARS service are subject to competitive bidding procedures. The procedures set forth in Part 1, Subpart Q of this chapter will apply unless otherwise specified in this subpart.

§ 25.402 Competitive bidding mechanisms.

(a) Tie Bids. Where a tie bid occurs, the high bidder will be determined by the order in which the bids were received by the Commission.

(b) Maximum Bid Increments. The Commission may, by announcement before or during the auction, establish maximum bid increments in dollar or percentage terms.

(c) Minimum Opening Bid. The Commission will establish a minimum opening bid for the DARS spectrum, and the amount of which will be announced by Public Notice prior to the auction.

(d) Activity rules. The Commission will establish activity rules which require a minimum amount of bidding activity. Bidders will be entitled to request and be granted waivers of such rule. The Commission will specify the number of waivers permitted in an auction, the frequency with which they may be exercised, and the method of operation of waivers by Public Notice prior to the auction.

§ 25.403 Bidding application and certification procedures.

Submission of Supplemental Application Information. In order to be eligible to bid, each pending applicant must timely submit certain supplemental information. All supplemental information shall be filed by the applicant five days after publication of these rules in the Federal Register. The supplemental information must be certified and include the following:

- a) Applicant's name;
- b) Mailing Address (no Post Office boxes);
- c) City;
- d) State;

- e) ZIP Code
- f) Auction Number 15;
- g) FCC Account Number;
- h) Person(s) authorized to make or withdraw a bid (list up to three individuals);
- i) Certifications and name and title of person certifying the information provided;
- j) Applicant's contact person and such person's telephone number, E-mail address and FAX number; and
- k) Signature and date.

§ 25.404 Submission of down payment and filing of long-form applications.

(a) After bidding has ended, the Commission will identify and notify the high bidder and declare the bidding closed.

(b) Within ten (10) business days of a Public Notice announcing the high bidder on a particular license(s), a high bidder must submit to the Commission's lockbox bank such additional funds (the "down payment") as are necessary to bring its total deposits (not including upfront payments applied to satisfy bid withdrawal or default payments) up to twenty (20) percent of its high bid(s). This down payment must be made by wire transfer or cashier's check drawn in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission. Down payments will be held by the Commission until the high bidder has been awarded the license and has paid the remaining balance due on the license, in which case it will not be returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it will be returned, less applicable payments. No interest on any down payment will be paid to a bidder.

(c) A high bidder that meets its down payment obligations in a timely manner must, within thirty (30) business days after being notified that it is a high bidder, submit an amendment to its pending application to provide the information required by § 25.144.

§ 25.405 Prohibition of collusion.

Upon the deadline for filing the supplemental information required by §25.403, all applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement

agreements, with other applicants until after the high bidder makes the required down payment.

§ 25.406 License Grant, Denial, Default, and Disqualification.

(a) Unless otherwise specified in these rules, auction winners are required to pay the balance of their winning bids in a lump sum within ten (10) business days following public notice by the Commission that it is prepared to award the licenses. Grant of the license will be conditioned on full and timely payment of the winning bid.

(b) If a winning bidder withdraws its bid after the Commission has declared competitive bidding closed or fails to remit the required down payment within ten (10) business days after the Commission has declared competitive bidding closed, the bidder will be deemed to have defaulted, its application will be dismissed, and it will be liable for the default payment specified in §1.2104(g)(2). In such event, the Commission may either re-auction the license to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids. The down payment obligations set forth in 25.404(b) will apply.

(c) A winning bidder who is found unqualified to be a licensee, fails to remit the balance of its winning bid in a timely manner, or defaults or is disqualified for any reason after having made the required down payment, will be deemed to have defaulted and will be liable for the penalty set forth in §1.2104(g)(2). In such event, the Commission will conduct another auction for the license, affording new parties an opportunity to file an application for the license.

(d) Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with their participation in the competitive bidding process may be subject, in addition to any other applicable sanctions, to forfeiture of their up front payment, down payment or full bid amount, and may be prohibited from participating in future auctions.

PART 87 -- AVIATION SERVICES

The authority citation in Part 87 continues to read as follows:

AUTHORITY: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-156, 301-609.

2. Paragraph (d)(1) of Section 87.303 is revised to read as follows:

PART 87 -- AVIATION SERVICES

* * * * *

Subpart J -- Flight Test Stations

§ 87.303 Frequencies.

* * * * *

(d)(1) Frequencies in the bands 1435-1525 MHz and 2360-2390 MHz are assigned primarily for telemetry and telecommand operations associated with the flight testing of manned or unmanned aircraft and missiles, or their major components. The band 1525-1535 MHz is also available for these purposes on a secondary basis. In the band 2320-2345 MHz, the mobile and radiolocation services are allocated on a primary basis until a Broadcast-Satellite (sound) service has been brought into use in such a manner as to affect or be affected by the mobile and radiolocation services in those service areas. Permissible uses of these bands include telemetry and telecommand transmissions associated with the launching and reentry into the earth's atmosphere as well as any incidental orbiting prior to reentry of manned or unmanned objects undergoing flight tests. In the 1435-1530 MHz band, the following frequencies are shared with flight telemetry mobile stations: 1444.5, 1453.5, 1501.5, 1515.5, 1524.5 and 1525.5 MHz. In the 2320-2345 MHz and 2360-2390 MHz bands, the following frequencies may be assigned on a co-equal basis for telemetry and associated telecommand operations in fully operational or expendable and re-usable launch vehicles whether or not such operations involve flight testing: 2332.5, 2364.5, 2370.5 and 2382.5 MHz. In the 2360-2390 MHz band, all other telemetry and telecommand uses are secondary to the above stated launch vehicle uses.

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APPENDIX B

**Final Regulatory Flexibility Analysis of
Report and Order and Memorandum Opinion and Order**

As required by Section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603 , we incorporated and sought comment on an Initial Regulatory Flexibility Analysis (IRFA) in Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, 11 FCC Rcd 1 (1995)(Notice). The Commission's Final Regulatory Flexibility Analysis (FRFA) in this Report and Order and Memorandum Opinion and Order (Order) conforms to the RFA, as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA).³¹⁶

I. Need for and Purpose of this Action:

In this Order, the Commission promulgates rules and assigns licenses for satellite Digital Audio Radio Service (DARS). Our objective in this proceeding is to help establish a new service to provide continuous nationwide radio programming with compact disc quality sound. This new service has the potential to increase the variety of programming available to the listening public by offering new niche channels. Satellite DARS also promises to serve listeners in areas of the country that have been underserved by terrestrial radio.

II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis:

No comments were filed in direct response to the IRFA. We received numerous comments on the wide variety of licensing and other issues raised by the Notice, none of which were directly related to the treatment of small entities. Although not directed to the IRFA, three entities proposing to provide satellite DARS have filed ex parte comments concerning the issue of whether the Commission should employ special auction provisions to aid small businesses. These comments are addressed in Section V of this analysis.

III. Description and Estimate of the Small Entities Subject to the Rules:

The Commission has not developed its own definition of "small entity" for purposes of licensing satellite delivered services. Accordingly, we rely on the definition of "small entity" provided under the Small Business Administration (SBA) rules applicable to Communications

³¹⁶ SBREFA was enacted as Subtitle II of the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA).

Services, Not Elsewhere Classified.³¹⁷ A "small entity" under these SBA rules is defined as an entity with \$11.0 million or less in annual receipts. Based on the record in this proceeding, we find that the four current satellite DARS applicants are all "small entities" under the SBA definition. Because of spectrum limitations, we do not foresee that there will be capacity for additional systems in the frequency band exclusively allocated for satellite DARS.

IV. Summary of Projected Reporting, Record Keeping and Other Compliance Requirements:

Satellite DARS licensees will be required to begin construction of their space stations within one year of license grant, launch and begin operating their first satellite within four years, and begin operating their entire system within six years. They will be required to file annual reports on the status of their progress. Entities will require knowledge of satellite operations in order to prepare these reports.

V. Significant Alternatives and Steps Taken By Agency to Minimize Significant Economic Impact on a Substantial Number of Small Entities Consistent with Stated Objectives:

The Notice proposed three possible licensing options for satellite DARS: 1) to license the available spectrum to the current four applicants; 2) to license less than the total available spectrum to the four applicants and auction the remainder; or, 3) to accept new applications and auction all licenses.

After the Notice was released, the Omnibus Consolidated Appropriations Act, 1997, P.L. 104-208, 110 Stat. 3009 (1996) (Appropriations Act) directed the Commission to reallocate spectrum at 2305-2320 MHz and 2345-2360 MHz for all services consistent with international allocations and to award licenses in that portion of the band using competitive bidding. As a consequence, the licenses designated pursuant to this Order will authorize satellite DARS operation in the spectrum between 2320 and 2345 MHz. Because the record indicates that 12.5 MHz is necessary for a licensee to provide a viable satellite DARS service and because only 25 MHz remains as an exclusive DARS allocation, we will award two licenses and use competitive bidding to resolve mutual exclusivity among the four current applicants. These applicants are CD Radio, Inc., Digital Satellite Broadcasting Corp., Primosphere Limited Partnership, and American Mobile Radio Corp.

In deciding how to proceed, we had two alternatives-either to reopen the filing window and accept additional applications or to limit eligibility to the four applicants that filed before

³¹⁷ 1987 Standard Industrial Classification Manual; 13 CFR Part 121.

our 1993 cut-off date. Because we are not permitting additional applications, the four applicants who filed applications in 1990 and 1993, all of which are small entities, are the only parties eligible to participate in the satellite DARS auction, and only two of these applicants will receive operating licenses. No other entities, including any small entities, will be able to participate in the subsequent auctions, or ultimately receive operating licenses. Our decision to not reopen the filing cut-off is based on sound satellite licensing policy and precedent and the equities of this particular proceeding. In this satellite proceeding, as in others, applicants require some measure of certainty to justify the inherently long-term investment of resources required by complex and lengthy international allocation and coordination procedures that must be completed prior to inauguration of service. This unique feature of satellite services, combined with the need to most expeditiously provide new services to the public, outweighs any benefits that would accrue from accepting additional applications.³¹⁸

Although one current applicant argues that special auction provisions are necessary,³¹⁹ two others state that as long as the auction is limited to the four applicants, the Commission should not employ bidding credits or installment payments.³²⁰ As we have explained,³²¹ we have not adopted special auction provisions for small businesses. We note, however, that the proposal adopted herein will promote the principal objectives of Section 309(j) because all those participating in the bidding for these licenses are small businesses under the SBA definition.

³¹⁸ See, *infra*, Report and Order at Section B.5.

³¹⁹ Letter from Counsel for CD Radio, December 13, 1996.

³²⁰ Letter from Counsel for Digital Satellite Broadcasting Corporation, December 20, 1996; Letter from Counsel for Primosphere Limited Partnership, December 19, 1996.

³²¹ Report and Order, *infra* at Section G.5.

APPENDIX C

**Proposed Rules and Regulations to Add to
47 C.F.R. Part 25 of the Commission's Rules**

[1. A new Section is proposed to be added to 25.144 to read as follows:

§ 25.144 Licensing provisions for the 2.3 GHz satellite digital audio radio service.

* * * * *

(e) Licensing of satellite DARS complementary terrestrial repeaters. Satellite DARS licensees may construct and operate terrestrial transmitters to retransmit signals received from their operating DARS satellite(s) on the exclusive frequency assignment of the licensee and for use of the same bandwidth as the satellite space station(s). Terrestrial gap-fillers shall not be used to originate programming or transmit signals other than those received from the authorized DARS satellite. Nor shall terrestrial gap fillers be used to extend satellite DARS coverage outside of the satellite systems' authorized service area. Terrestrial gap-fillers may be implemented by a satellite DARS licensee only after obtaining prior Commission authorization and the licensee demonstrates the following:

- (1) International coordination. Satellite DARS licensee must demonstrate that its repeating transmitter is located at a distance sufficiently away from the Canadian and Mexican borders or otherwise obtain prior coordination with adjacent country co-frequency systems;
- (2) Antenna structure clearance required. Satellite DARS licensees shall demonstrate that its repeating transmitter construction or alteration will comply with the requirements of Section 17.4 of the Commission's Rules;
- (3) Environmental. Satellite DARS licensee shall demonstrate that its repeating transmitter(s) comply with the Commission's Rules for environmental effects as defined by Sections 1.1301 through 1.1319 of the Commission's Rules.

* * * * *

2. The definition of satellite digital audio radio service is proposed to be amended in Section 25.201 to read as follows (amendment of this paragraph to Section 2.1 is consequential):

§ 25.201 Definitions

* * * *

Satellite Digital Audio Radio Service ("satellite DARS"). A radiocommunication service in which audio programming is digitally transmitted by one or more space stations directly to fixed, mobile, and/or portable stations, and which may involve complementary repeating terrestrial transmitters.

Statement
of
Chairman Reed E. Hundt

Establishment of Rules and Policies for the Digital Audio Radio Satellite Service,
IB Docket No. 95-91, GEN Docket No. 90-357, RM No. 8610

The Commission today sets rules for licensing the digital audio radio service (DARS). With one exception, we are unanimous on the new rules. The Commission unanimously applies to DARS licensees the candidate-access rules of Sections 312 and 315 of the Communications Act and it puts DARS licensees on clear and explicit notice that the Commission may adopt additional public interest obligations, including the 4-7 percent educational set-aside that applies to Direct Broadcast Satellite operators.

To my dismay, however, the Commission lacks a majority to allow any company that believes it can make a business of DARS to participate in the upcoming auction. The Commission is deadlocked two-to-two over whether the auction for two 12.5 MHz DARS licenses will be limited to the four companies that submitted applications five years ago. Because I do not want to delay the launch of DARS, I very reluctantly have voted to allow the item to move forward with that limitation.

In the three and one-half years I have been at the FCC I have dissented three times. In each case I disagreed with a Commission decision to reject the possibility of assigning spectrum by open auction. For the reasons well described in the Spectrum Policy Paper issued last month, auctions are by far the best way to assign spectrum licenses. They are fast, fair and efficient, and they recover for the public fair value for the use of their property.

On each past occasion, the Commission majority offered a demonstrably flawed rationale for its decision. For example, in the cellular unserved proceeding, the majority was of the view that an auction would be pointless because there was little or no valuable spectrum available.¹ Based on a staff analysis, it is now clear that the Commission gave away licenses that could have been auctioned for approximately \$22 million.

In this proceeding the fundamental reasons for my disagreement with my colleagues are the same: I would prefer to assign spectrum licenses through an auction open to all. Closing the auction is the wrong result. In view of the amount of time that has passed since the window for applications closed in 1992, there is no guarantee that the four applicants are the companies that have or can develop the best plans for making DARS a success. If other companies value the spectrum more but are arbitrarily excluded from the auction, it is safe to predict that the auction winners will simply sell their licenses to those companies. We have, however, rightly rejected the idea that private auctions of the public's spectrum are a suitable

¹Commissioners Ness and Chong did not participate in the cellular unserved decision.

replacement for public auctions.

If companies other than the fortunate four are interested in becoming DARS providers, we should not exclude them from the auction. We could hold such an auction as early as May. New applicants would bring additional competition to the service, with all the associated benefits to consumers. The decision to keep the auction door closed may needlessly cost the public millions of dollars.

This is not a criticism of the existing DARS applicants. They may well be the businesses that value the DARS spectrum the most. If so, however, there is no cost to opening the auction, except the cost to the public.

Fortunately, the decision against reopening the application window is of no precedential value because it does not have the support of a majority of the Commission. In addition, the rationale of the decision of my two colleagues is limited to the unique circumstances of satellite licensing and, indeed, the unique circumstances of this service.

**Approving in Part, Concurring in Part
Statement
of
Commissioner Susan Ness**

Re: Digital Audio Radio Service

The adoption today of this Report and Order for the rules governing a new, satellite-delivered digital audio radio (DARS) service enables the Commission finally to proceed to auction two nationwide licenses in the S-band. This completes the process begun at the 1992 World Administrative Radio Conference. There, together with industry, we successfully fought for this spectrum allocation for the United States, because the L-band, allocated world-wide for DARS, was unavailable for commercial use in this country.

It is now high time that the DARS service succeed or fail in the marketplace.

Opening the Auction to All Qualified Candidates

The rules we adopt provide for the four existing applicants to compete at auction for the two licenses available. As I noted at the NPRM stage, I would have strongly preferred that we hold an open auction, where any potential bidder would compete for the two licenses. The four applications were filed several years ago, before we had allocated spectrum or adopted service rules governing its use. Others might now wish to compete in the auction to provide a different package of DARS services to consumers. They should be allowed to do so.

But, because two of my colleagues firmly disagree on allowing all qualified applicants to bid for satellite DARS licenses, I reluctantly concur in the result for the sole reason that I do not wish to further delay the launch of DARS.

Public Interest Obligations

Throughout our proceedings, I have endeavored to ensure that the rules we adopt will maximize the unique public benefits of satellite DARS, yet minimize the potential for harm to locally-licensed, free, over-the-air AM and FM broadcast on which consumers rely for news and information. Each applicant has pledged to use the inherent ability of satellite to aggregate small audiences nationwide to address the special needs of under-served populations.

We have allowed licensees a measure of flexibility to supplement their offerings with ancillary services, provided that the service generally is consistent with the international

allocation for DARS satellite. Licensees will be subject to our Equal Employment Opportunity (EEO) and political broadcasting rules.

Because licenses for this nascent service are being auctioned, I have declined at this time to take an over-regulatory approach and impose additional, explicit public interest requirements, such as a capacity set-aside. I prefer to give the competitive marketplace -- without government intervention -- a chance to provide programming that is in the public interest. However, applicants are on notice that the Commission may revisit this issue at a later time.

Terrestrial Broadcasting

As we pave the way for DARS service, I note that terrestrial broadcasters have not yet found a viable way to convert from analog to digital transmission. I believe that competition within the existing AM and FM terrestrial radio services would be enhanced by such a conversion.

In 1990, when we initiated our proceeding on digital radio, we addressed both terrestrial and satellite services. If engineers working on in-band digital technologies cannot fashion an acceptable transmission system, we need to explore other options. While I prefer to use the existing bands, it remains to be seen how terrestrial radio broadcasters will get to a digital world if a satisfactory solution is not derived.

**SEPARATE STATEMENT OF
COMMISSIONER RACHELLE B. CHONG**

Re: Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services, IB Docket No. 95-91, GEN Docket No. 90-357, RM No. 8610

It is with great pleasure that I support the Commission's decision to move forward with the auction and licensing of Satellite Digital Audio Radio Service ("DARS"). I believe that licensing this service will help to fulfill the mandate of Section 151 of the Communications Act of 1934 that this Commission make available a rapid, efficient, nation-wide communications service.

As we have explained in the order, we anticipate that many benefits will flow from this new satellite radio service. Digital technology will produce better quality sound for listeners and make more efficient use of the spectrum. Moreover, satellite delivery of radio programming will provide service to areas that are unserved or underserved. In short, DARS will provide better service for the public. The public deserves the opportunity to receive this service.

I write separately to clarify two aspects of this decision. First, with regard to public interest programming obligations for the eventual DARS licensees, my colleagues and I chose not to impose quantified programming obligations. In my view, such regulation would improperly place the heavy hand of government on the programming decisions of the DARS providers.

While we have put the licensees on notice that the FCC could in the future decide to initiate a proceeding to consider imposing programming obligations, I wish to emphasize that such a proceeding is not imminent. I believe that the Commission should think long and hard before deciding to embark on such a highly regulatory course. At this time, we do not know which of the DARS applicants will win a license, nor do we know whether the service will be subscription or advertiser supported. Moreover, Congress has not directed the Commission to impose such obligations and I see no evidence of a compelling need to do so.

Second, with regard to reopening of the application window before auctioning the two satellite DARS slots, I have voted to go forward immediately to auction among the four existing applicants. As we explain in the item, it would be inequitable to reopen the application process at this time. These applicants have been ready and willing to move forward for some time. They have expended considerable resources in developing this technology. The first of these applications was filed seven years ago. Our decision to allocate the spectrum for satellite DARS was more than two years ago. These applicants have been the victims of regulatory delay and that delay should not continue. In my view, reopening would not bring any benefit to consumers, but would only create new

uncertainty and undermine the likelihood that this service will become a reality.