

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
National Association of Broadcasters Petition	)	MB Docket No. 04-160
for Declaratory Ruling Regarding Satellite	)	
Digital Audio Radio Service	)	
	)	

**REPLY COMMENTS OF THE WALT DISNEY COMPANY AND ABC, INC.**

The Walt Disney Company and ABC, Inc., by their attorneys, hereby submit reply comments in the above-captioned proceeding (“Comments”). These Comments address several of the issues raised in the National Association of Broadcasters (“NAB”) petition for declaratory rulings (“Petition”) concerning satellite-delivered digital audio radio service (“SDARS”) and the opposition thereto (“Opposition”) filed by Sirius Satellite Radio, Inc. (“Sirius”) and XM Radio, Inc. (“XM” and, together with Sirius, the “SDARS Operators”). ABC, Inc. (“ABC”), an indirect subsidiary of The Walt Disney Company, owns, directly or through subsidiaries, over seventy commercial radio broadcast stations in the United States.

**I. SDARS Operators’ Actions and Plans Disregard the National-Only Nature of Their Service and Therefore Justify a Declaratory Ruling**

In its Petition, NAB asks the Commission to re-state what already is clear—that satellite radio is a national-only service. Specifically, NAB requests a declaratory ruling that SDARS providers must: (i) provide national-only service; and (ii) deliver the same content to every receiver

regardless of the receiver's location.<sup>1</sup> NAB has sought declaratory rulings on these fundamental principles because recent actions and apparent future plans of the SDARS Operators—including XM's delivery of locally-oriented programming and traffic and weather information—are inconsistent with these principles. Although the SDARS Operators claim there is no controversy or uncertainty to be resolved, their actions demonstrate otherwise.<sup>2</sup> Were the SDARS Operators "certain" regarding the nature of their national-only service, they would not be in the process of changing their technology and their business model to offer locally-oriented programming and services. Given these actions, the NAB contends, and ABC agrees, that the Commission should issue the requested declaratory rulings to resolve this uncertainty and confirm the national-only nature of SDARS.

## **II. The Commission Authorized SDARS as a National-Only Service and Never Has Wavered From That Initial Position**

In their Opposition, the SDARS Operators fail to cite any Commission authority in support of their position that SDARS is something other than a national-only service. This absence of authority is inevitable because SDARS was authorized as, and always has been, a national-only service, as demonstrated in further detail below. When it originally allocated spectrum for SDARS, the Commission allocated spectrum for a national service. Later, in proposing and adopting SDARS service rules, the Commission again stated that SDARS was to provide programming on a national basis. At that time, the Commission contrasted SDARS to terrestrial radio, which of course

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<sup>1</sup> In the alternative, NAB requests that the Commission re-open the SDARS proceeding to consider the potential effects of the SDARS Operators' local service offerings on terrestrial broadcasters.

<sup>2</sup> See Opposition of Sirius Satellite Radio Inc. and XM Radio Inc. at 4-6, Docket No. MB 04-160 (filed June 4, 2004). As noted by NAB, XM has announced that it will use 21 of its channels to deliver local traffic and weather information targeted at listeners in large, urban areas and has applied for a patent to be used to provide locally-oriented programming.

provides local content. Finally, the Commission's most recent proceedings make it clear that the Commission never authorized the SDARS Operators to provide locally-oriented services or programming.

**A. The Commission Allocated Spectrum for a National-Only Service**

The Commission allocated SDARS spectrum for a national-only service. In its early 1995 report and order ("Allocation R&O"), the Commission concluded:

"We find that a nationwide or regional system such as satellite DARS, which serves even the most remote communities, is a furtherance of the Commission's commitment to an equitable distribution as set forth in Section 307(b)."<sup>3</sup>

Because the Commission authorized SDARS as a national- or regional-only service, it relied upon precedent indicating that the Commission could authorize national-only services without violating its Section 307(b) obligations.<sup>4</sup> If the Commission had thought of SDARS as offering any local service, it would have conducted its required Section 307(b) analysis differently. For example, given that SDARS would be a national-only service, the Commission did not consider in any detail whether SDARS would threaten terrestrial radio stations, stating:

"We continue to find that a nationwide service such as that being proposed in satellite DARS is in fact capable of furthering the Congressional intent to distribute radio services widely and thus supplement, rather than supplant, local broadcast stations..."<sup>5</sup>

The Commission would not have made such a statement concerning the lack of impact on terrestrial broadcast stations if the Commission was authorizing SDARS as a local service. Thus, based on

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<sup>3</sup> Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services, *Report and Order*, 10 FCC Rcd 2310, at ¶ 23 (1995).

<sup>4</sup> *Id.* at ¶ 23.

<sup>5</sup> *Id.* at ¶ 23.

these few examples, it is plainly apparent that the Commission authorized SDARS as a national-only service.

**B. The Commission Adopted Service Rules for a National-Only Service**

After allocating spectrum for a national-only SDARS service, the Commission next proposed national-only service rules. In its notice of proposed rulemaking concerning SDARS service rules (“Service Rules NPRM”), the Commission repeatedly distinguished SDARS, which it authorized as a national-only service, from terrestrial radio service, which was authorized to provide local content.<sup>6</sup> Specifically, the Commission stated that “[b]y offering a nationally based service, satellite DARS providers could target niche audiences that have not been served by traditional local radio but now could be served as an aggregate national audience.”<sup>7</sup> The Commission further posited that “[p]roposed satellite DARS systems will provide 30 or more channels of national digital audio programming to fixed and mobile receivers with the potential for each licensee to offer high quality audio channels throughout the country.”<sup>8</sup> The Commission never requested comment on whether it could or should permit SDARS to provide anything other than a national-only service; locally-oriented programming simply was not contemplated. Rather, the Commission specifically noted that “local news, weather, traffic and public affairs programming could not practically be provided via satellite DARS.”<sup>9</sup>

Given that the Commission did not contemplate SDARS-provided local programming, it is not surprising that in its order adopting service rules (“Service Rules Order”), the Commission also

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<sup>6</sup> Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, *Notice of Proposed Rulemaking*, 11 FCC Rcd 1 (1995).

<sup>7</sup> *Id.* at ¶ 2.

<sup>8</sup> *Id.* at ¶ 3.

<sup>9</sup> *Id.* at ¶ 19.

made it clear that SDARS was a national-only service. Specifically, the Commission noted that SDARS “promises to provide nationwide radio programming”<sup>10</sup> because SDARS licensees would introduce “a national distribution of radio programming to all areas.”<sup>11</sup> Indeed, the fact that SDARS would provide national programming to a national audience was the very characteristic of SDARS that distinguished it from terrestrial radio.<sup>12</sup> Specifically, the Commission stated:

“Given the distinguishing features of satellite DARS—it is a national service...—we find that the effect of satellite DARS on terrestrial radio is likely to be significantly smaller than the effect of additional terrestrial radio stations.”

In this respect, the Commission surmised that listeners would tune in to terrestrial radio for local content, that SDARS would not compete for local advertising revenue, and that terrestrial radio stations would increase their emphasis on local programming to differentiate their service from SDARS.<sup>13</sup> All of these statements confirm that the Commission adopted service rules for SDARS as a national-only service.<sup>14</sup>

### **C. The Commission Affirmed in Later Proceedings That SDARS Is a National-Only Service**

The Commission’s rulings and statements in later SDARS proceedings further demonstrate that SDARS was authorized as, and continues to be limited to, a national-only service. In the proceeding concerning the SDARS Operators’ proposed use of terrestrial repeaters to supplement their service, the Commission imposed a limitation critical to the instant proceeding. Specifically,

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<sup>10</sup> Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, *Report and Order*, 12 FCC Rcd 5754, at ¶ 1 (1997).

<sup>11</sup> *Id.* at ¶ 7.

<sup>12</sup> *Id.* at ¶ 18.

<sup>13</sup> *Id.* at ¶ 21 (local interest); *Id.* at ¶ 23 (local advertising); *Id.* at ¶ 30 (incentives).

<sup>14</sup> Indeed, if the Commission had authorized the SDARS Operators to provide local service, it would have considered what local service obligations should be imposed. The fact that it did not demonstrates that no local service was contemplated let alone authorized.

the Commission tentatively decided to “prohibit the use of terrestrial repeaters to transmit locally originated programming” because it “would be inconsistent with the allocation of [SDARS] spectrum.”<sup>15</sup> The Commission’s eventual ruling on XM’s terrestrial repeater special temporary authorization request made this tentative conclusion reality.<sup>16</sup> Thus, as recently as 2001, the Commission expressly stated that SDARS is a national-only service whose spectrum allocation does not include the right to transmit locally-oriented programming.

### **III. The SDARS Operators Expressly Acknowledged the National-Only Nature of Their Service and Associated Authorizations**

Although the Commission’s own pronouncements regarding the national-only nature of SDARS carry greater weight, the SDARS Operators’ own statements concerning their service remain relevant. The SDARS Operators have expressly acknowledged the national-only nature of their service and associated authorizations. For example, in 1995, Sirius’s predecessor entity plainly stated that “Satellite Radio is an inherently national service.”<sup>17</sup> Similarly, XM’s predecessor in interest declared that “[b]y its nature, DARS is a nationwide service that will not carry local news and information.”<sup>18</sup> Given this initial understanding, the SDARS Operators cannot now plausibly

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<sup>15</sup> Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, *Report and Order*, 12 FCC Rcd 5754, at ¶ 142 (1997).

<sup>16</sup> XM Radio Inc. Application for Special Temporary Authority to Operate Satellite Digital Audio Radio Service Complementary Terrestrial Repeaters, *Order and Authorization*, DA-01-2172, 2001 FCC LEXIS 4930 (September 17, 2001). In response to the NAB’s concerns about use of terrestrial repeaters for local programming, the Commission stated: “Under this STA, the use of repeaters is restricted to the simultaneous retransmission of programming, in its entirety, transmitted by the satellite directly to SDARS subscriber’s receivers.” *Id.*

<sup>17</sup> See Comments of Sirius Satellite Radio (f/k/a CD Radio, Inc.) at 6, IB Docket No. 90-357, (filed Jan. 3, 1995); see also NAB Petition at 6-7 (providing exhaustive list of prior comments).

<sup>18</sup> See Comments of XM Satellite Radio, Inc. (f/k/a American Mobile Radio Corporation) at 18, IB Docket No. 95-91 (Sept. 15, 1995); see also NAB Petition at 6-7 (providing exhaustive list of prior comments).

claim that there is any uncertainty concerning whether they may provide local programming and services.

#### **IV. Conclusion**

In every proceeding involving SDARS, the Commission has made it clear that SDARS is a national-only service. The SDARS Operators' own statements are further evidence of this principle. Despite their own prior understanding and the Commission's repeated directives, the SDARS Operators' recent actions and planned service changes appear to contradict the fundamental national-only nature of their service. In order to halt this progression, the Commission should issue the declaratory rulings sought by NAB and state that SDARS unequivocally is a national-only service.

Respectfully submitted,

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