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BEFORE THE

# Federal Communications Commission

In the matter of )  
Establishment of Rules and Policies for the )  
Digital Audio Radio Satellite Service in the )  
2310-2360 MHz Frequency Band, Part 25 )

To: The Commission

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OCT 29 2004

Federal Communications Commission  
Office of Secretary

## PETITION FOR RULEMAKING

Mt. Wilson FM Broadcasters, Inc. ("Mt. Wilson"), licensee of Station KMZT-FM, Los Angeles, California and Stations KSUR(AM), Beverly Hills, California and KTIM(AM), Piedmont, California, respectfully requests that the Federal Communications Commission ("FCC") amend Part 25 of the Commission's Rules to include an "indecenty" provision analogous to Section 73.3999 of the Commission's Rules to be applicable to the Digital Audio Radio Satellite Service ("DARS"). In support thereof, the following is stated:

1. In 1997, the FCC adopted rules governing DARS (Report and Order, Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, 12 F.C.C. Rcd. 5754. The more salient FCC conclusions pertinent to the instant Mt. Wilson Petition are as follows:

a. "Flexibility for licensees to meet market demands is crucial and it may be that the viability of a satellite DARS service will depend on offering a mix of advertiser supported and subscription

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service. We find that a requirement that satellite DARS be entirely subscription is unwarranted. Mandating that providers charge for their services is not in the public interest. . . .” (Para. 84, pp. 5788-89);

- b. “We also have considered whether it is appropriate to apply to DARS public interest requirements similar or analogous to those that govern terrestrial radio broadcasters.” (Para. 90, p. 5791);
- c. “With regard to non-programming obligations, we conclude that satellite DARS licensees must comply with the Commission’s equal employment opportunity requirements. . . . Licensees in this service will be required to comply with the current rule and with any changes adopted when the rulemaking is completed.” (Para. 91, p. 5791);
- d. “With regard to programming obligations, we agree with some of the commenters that satellite DARS service is likely to provide a new forum for political debate in this country. To ensure that there is fair treatment of federal political candidates that may seek to use this new forum, we believe that satellite DARS licensees, whether they operate on a broadcast or subscription basis, should comply with the same substantive political debate provisions as broadcasters.<sup>163</sup>” (Para. 92, p. 5792) (footnote omitted);<sup>1</sup>
- e. “While we are not adopting additional public interest programming obligations at this time, we reserve the right to do so. Licensees are specifically on notice that the Commission may adopt public interest requirements at a later date.” (Para. 93, p. 5792).

2. The cited sections of the Report and Order clearly establish that the

FCC has the authority to adopt programming/public interest rules for DARS as

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<sup>1</sup> DARS is frequently available without an additional fee and without “blockage” to rental car users. It cannot be presumed, for example, that every rental car user (including, for example, “Fly and Drive” family vacationers) would bother to block the unwanted content on DARS. Sirius music is now available without an additional fee to DISH television satellite subscribers. The expansion of DARS audio programming without an additional fee to cable and satellite television subscribers, to hotel rooms (including radio receivers), etc., is only a matter of time. DARS providers have aggressively marketed their product in an effort to maximize audience and in a manner where the ultimate consumer does not pay for the DARS service. Subscription is not mandated (indeed, it was specifically rejected) and it can be reasonably assumed (as the Commission assumed in 1997) that “. . . satellite DARS service will depend on offering a mix of advertiser supported and subscription service (Report and Order, Para. 84).

exemplified by the fact that the satellite radio service was made subject to the EEO and political broadcasting rules and policies; that DARS classification as to the type of service (i.e., broadcast, common carrier, etc.) is not a relevant consideration to the imposition of programming/public interest rules; that whether DARS operates either as a broadcast or subscription service is not a relevant consideration to the imposition of programming/public interest rules; and that the FCC explicitly placed DARS licensees on notice in 1997 that the FCC may adopt additional public interest requirements at a later date.

3. The rationale for adopting EEO requirements applicable to DARS was “. . . a belief that a licensee can better fulfill the needs of the community, whether local or national, if it makes an effort to hire a diverse staff, including minorities and women.” (Report and Order, Para. 91). The rationale for requiring DARS licensees to adhere to Sections 312(a)(7) (access provision) and 315 (equal opportunities provision) of the Communications Act was “To ensure that there is fair treatment of federal political candidates. . . .” (Report and Order, Para. 92). Both rationales ultimately focus on the public interest.

4. The Mt. Wilson Petition requests the Commission to issue a Notice of Proposed Rulemaking (NPRM) to amend Part 25 of the Commission rules by adopting a rule intended to restrict the transmission of obscene and indecent material (consistent with the enforcement of 18 U.S.C. 1464), as follows:

- (a) No licensee of a digital audio radio satellite service facility shall transmit any material which is obscene; and

- (b) No licensee of a digital audio radio satellite facility shall transmit on any day between 6:00 a.m. and 10:00 p.m. any material which is indecent.

The adoption of such a rule would serve the public interest precisely to the same extent that Section 73.3999 of the Commission Rules (applicable to traditional broadcasters) functions to protect the public interest.

5. FCC authority to adopt the proposed rule (and which underlies Section 73.3999 of the Commission Rules) is founded upon Title 18 of the United States Code, Section 1464 – which prohibits the utterance of “any obscene, indecent or profane language by means of radio communication.” The DARS service is not cable. DARS provides radio communication utilizing the 2310-2360 MHz frequency band and is therefore subject to Title 18 of the United States Code, Section 1464.<sup>2</sup> In subjecting DARS to the political rules and policies, the FCC specifically stated that such programming obligations were warranted “. . . whether they [DARS] operate on a broadcast or subscription basis.” (Report and Order, Para. 92) The FCC clearly has characterized DARS as a radio service. The Report and Order is replete with repeated references which describe DARS service as a radio/programming service, i.e.,

“. . . high quality radio signals to listeners. . .” (Report and Order, Para. 10)

“. . . we have relied on the representations of satellite DARS applicants that they will provide audio programming . . . applicants have proposed new choices in audio programming. . .” (Report and Order, Para. 90)

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<sup>2</sup> DARS providers now utilize terrestrial repeaters to retransmit programming – a methodology associated with traditional broadcasting.

In the FCC Report and Order establishing the DARS service (Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services, Report and Order, 10 F.C.C. Rec. 2310 (1995)), the decision contemplates DARS as a radio service consistent with the mandate of Section 307(b), as follows:

“Section 307(b) of the Communications Act requires a dispersal of radio services among the several states and communities so as ‘to provide a fair, efficient, and equitable distribution of radio service to each of the same.’ 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>52</sup>. . . 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, and we reject the suggestion that we must protect one service at the expense of an entirely new technology.” (Footnote omitted.)

While DARS clearly constituted a new technology, the FCC decision creating the service is crystal clear that DARS is a radio service and in all respects consistent with the mandate of Section 307(b) of the Communications Act.

6. Indecent programming has been and continues to be an ongoing problem – as clearly evidenced by the number of monetary sanctions over the past few years. Policing of the traditional broadcast spectrum is effectuated through enforcement of Section 73.3999 of the Commission’s Rules. No analogous section applicable to satellite radio providers now exists.

7. The FCC should not allow DARS to become a “safe harbor” for the audio broadcast of obscene and indecent programming. DARS subscribers (and/or

“freebees”) now number in the millions and the numbers are projected to increase rapidly. Blockage (a defense relied upon by cable and television subscription services) would be an unreliable, inept method of protecting children from undesirable audio content.<sup>3</sup> Indeed, the term “blockage” is a subterfuge and is wholly irrelevant as to whether DARS is a radio service that should be subject to Title 18 of the United States Code, Section 1464. Insofar as DARS being classified as a subscription service, the FCC (a) affirmatively rejected such classification (Report and Order, Para. 84) and (b) concluded that DARS, “. . . whether they operate on a broadcast or subscription basis, should comply with the same substantive political debate provisions as broadcasters.<sup>163</sup>” (footnote omitted). Report and Order, Para. 92. The FCC’s authority to impose an indecency provision on the DARS service is consistent with its authority to impose both political and EEO rules on the DARS service. The manner in which DARS operators choose to operate (subscription or advertiser supported) is irrelevant.

8. The FCC in establishing DARS rules initially concluded (Report and Order, Paras. 10-12) that “. . . DARS will particularly benefit communities where terrestrial broadcast service is less abundant.” In fact, DARS providers primarily focus on major metropolitan areas. DARS program providers have expanded program content far beyond the “niche” programming suggested to the FCC by the addition of (for example) local weather and driving reports, major league baseball, “shock jocks.”

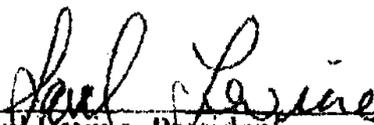
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<sup>3</sup> Moreover, absent an indecency rule, there is no party/entity to supervise the effect (or lack thereof) of “blockage.” Should the DARS provider fail to “block” indecent/obscene programming, such event would not be subject to any supervisory authority. The FCC has the jurisdiction and should exercise supervisory authority – as it now exercises over traditional broadcasters.

Mt. Wilson is not seeking reconsideration or suggesting revocation of the DARS service; it does seek, however, to establish a "level playing field." DARS is radio communication and should be subject to indecency/obscenity rules.

9. The FCC has the obligation to protect the public interest. Enforcement of the indecency rule against traditional broadcasters subject to Part 73 of the Commission Rules absent concomitant enforcement directed against DARS operators constitutes an inadequate and inequitable approach to an obviously serious and ever growing problem. In 1997, the FCC stated that it reserved the right to revisit the matter of adopting additional public interest program obligations and that DARS was on notice that the FCC might do so at a later date. The DARS service foreseen in 1997 is not the same DARS service broadcast in 2004 (and/or foreseeable in the immediate future). Whether additional public interest obligations should have been imposed in 1997 is not relevant. Public interest considerations in 2004 should be measured by DARS service in 2004. The FCC has the authority to adopt an indecency rule applicable to the DARS service; the FCC should utilize that authority in order to protect the public interest; the "later date" has arrived.

Respectfully submitted



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