

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

)	
In the Matter of)	
)	
Development of Devices Capable of Supporting)	MB Docket No. 08-172
Multiple Audio Entertainment Services)	
)	

**COMMENTS
OF
NATIONAL PUBLIC RADIO, INC.**

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Summary

The Commission should mandate the inclusion of HD reception functionality in all SDARS receivers to ensure the availability of significant new local HD services and the success of the HD Radio transition itself. With a substantial proportion of terrestrial radio stations now having converted to HD Radio, the stage is set for a successful transition. A significant number of stations are already offering multicast services and experimenting with new program formats. NPR is working with iBiquity and the sensory disabled community to develop "accessible" radio services, and NPR and other broadcasters are working to develop new local traffic services. To realize the potential of HD Radio, however, there has to be widespread consumer adoption of HD Radio through the purchase of receivers to justify the significant expense of developing and offering new HD Radio services.

With the conversion of SDARS to a monopoly service, the Commission can no longer rely on the normal forces of a competitive SDARS marketplace to assure the widespread availability of HD Radio reception capability in SDARS receivers. The "open access" requirements imposed as part of the Sirius/XM merger approval will tend to protect SDARS subscribers, but an HD functionality mandate is necessary to protect and promote the public at large and its access to HD Radio. Like the obligation of cable systems to retransmit terrestrial broadcast signals, requiring the inclusion of HD functionality in SDARS receivers is necessary to preserve the nationwide system of free over-the-air terrestrial broadcasting. Unlike the cable must carry rules, however, an HD-in-SDARS receiver requirement imposes no burden on Sirius XM. It would also impose little economic cost on manufacturers of SDARS receivers.

Finally, the Commission possesses ample statutory authority to impose an HD functionality obligation. The Commission has asserted direct authority over SDARS receivers

since first establishing the service. In addition, the Commission may rely on its ancillary jurisdiction over interstate communications by wire or radio because the inclusion of HD functionality in SDARS receivers is reasonably ancillary to the effective performance of the Commission's statutory responsibility to promote a system of terrestrial broadcasting, particularly as it transitions to HD Radio.

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To: The Commission

**COMMENTS OF
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Introduction

Pursuant to Section 1.415 of the Commission’s Rules, 47 C.F.R. § 1.415, National Public Radio, Inc. (“NPR”) hereby submits its Comments in response to the Commission's Notice of Inquiry in the above-captioned proceeding.¹

NPR is a non-profit membership organization of more than 800 full-service noncommercial educational radio stations nationwide. In addition to producing and distributing such noncommercial educational ("NCE") programming as *All Things Considered*, *Morning Edition*, and *Talk Of The Nation*, NPR's member stations are, themselves, significant producers of NCE programming. NPR also operates the Public Radio Satellite System ("PRSS") and provides representation and other services to its Member stations.

¹ In the Matter of Development of Devices Capable of Supporting Multiple Audio Entertainment Services Applications, MB Docket 08-172, rel. Aug. 25, 2008 [hereinafter "NPRM"].

I. There Is A Substantial Federal Interest In The Successful Development of HD Radio

In authorizing terrestrial radio broadcast stations to implement the iBiquity digital audio broadcasting ("DAB") technology, or "HD Radio," the Commission has sought "to foster the development of a vibrant terrestrial digital radio service for the public and to ensure that radio stations successfully implement DAB."² In a relatively short time, substantial progress has been made. Of the approximately 14,000 commercial and noncommercial AM and FM stations licensed by the FCC,³ there are already 1,819 HD Radio stations in operation across the country.⁴ These stations are broadcasting 2,758 digital radio channels, with more on the way.⁵ In the case of public radio stations, the Corporation for Public Broadcasting had awarded digital conversion grant funds to almost 700 stations to date, more than 430 public radio stations have completed the conversion and are broadcasting digitally, and, of those, 137 are multicasting, for a total of 181 multicast streams.⁶

These figures only begin to tell the story. The HD Radio technology is transformational, offering individual stations the opportunity to transmit multiple channels of content, including variable combinations of broadcast and addressable high fidelity, voice-grade, and data services. Just as importantly, terrestrial radio stations, and public radio stations in particular, are uniquely

² In the Matter of Digital Audio Broadcasting Systems and their Impact on Terrestrial Radio Broadcast Service, Second Report and Order and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 10344, 46 (2007) [hereinafter "DAB Second Report and Order"].

³ Broadcast Station Totals as of June 30, 2008, www.fcc.gov/mb/audio/totals/index.html.

⁴ www.ibiquity.com/hd_radio/hdradio_find_a_station (accessed November 7, 2008)

⁵ www.ibiquity.com/hd_radio/hdradio_find_a_station?state=SA (accessed November 7, 2008).

⁶ <http://www.cpb.org/grants/grant.php?id=169> (accessed November 7, 2008).

local institutions offering local news, cultural programming and information. Together, HD Radio and local terrestrial broadcasting offer the prospect of innovative new services even more responsive to the needs of local communities across the country.

As one example of the promise of HD Radio, NPR is continuing to make radio more accessible to people with sensory disabilities.⁷ With the so-called "baby boomer" generation now reaching retirement age, the number of Americans with hearing or visual loss is expected to climb rapidly.⁸ The unique needs of this growing population for text display and audio services must be addressed in mainstream HD Radio receivers and by the provision of specialized services, such as radio reading services and audio description.

Through the work of NPR Labs, NPR is now in the final year of a 3-year grant from the National Institute on Disability and Rehabilitation Research ("NIDRR") to examine ways of making radio more accessible to both the print- and hearing-impaired communities. NPR is working with iBiquity and receiver manufacturers to enable stations to allocate a portion of the digital bitstream to the offering of radio reading services. This approach will allow print-impaired listeners to access radio reading services from the same HD receivers offered on a mass market basis to the general public.

⁷ See DAB Second R&O, 22 FCC Rcd. at 10376 (encouraging NPR to continue testing HD Radio as it affects those with sensory disabilities).

⁸ See Desai, Pratt, Lentzner, and Robinson, "Trends in Vision and Hearing Among Older Americans" (Centers for Disease Control and Prevention Mar. 2001), *available at* <http://www.cdc.gov/nchs/data/ahcd/agingtrends/02vision.pdf> (accessed November 7, 2008). According to U.S. Census Bureau estimates, the number of persons 65 years old and older is expected to double by the year 2040. <http://www.census.gov/population/www/projections/summarytables.html> (Projections of the Population by Selected Age Groups and Sex for the United States: 2010 to 2050) (accessed November 7, 2008).

Also as part of the NIDRR grant, NPR has developed the first live, over-the-air captioned radio during the past year. The first demonstration took place at the Consumer Electronics Show in Las Vegas in January 2008.⁹ Just last week, NPR offered the first radio captioned election night broadcast coverage to groups of hearing impaired "listeners" in five cities around the country via public radio HD stations, WTMD in Baltimore, WGBH in Boston, KJZZ in Phoenix, KCFR in Denver, and WAMU in Washington, DC.¹⁰ NPR intends to commence continuous captioning of its news programming by late 2009.

NPR's interest in pioneering accessible radio stems from a long history of public radio stations serving the sensory disabled community through radio reading services, and public radio stations are using the HD Radio technology to better serve community needs and interests in other ways. For instance, WAMU has created a multicast channel devoted to bluegrass music, and Minnesota Public Radio has established "Wonderground Radio" as a service for kids and parents to enjoy music together. NPR and the other members of the Broadcast Traffic Consortium are working to develop nationwide network to distribute local traffic data via HD Radio technology.

⁹ Subsequent demonstrations were held at the National Press Club in Washington, D.C., the North American Broadcasters Association Annual General Meeting, the National Association of Broadcasters convention, the National Council on Disability Board, and the Deaf and Hard of Hearing Consumer Advocacy Network board meeting. The demonstration unit remains in continuous display and operation at NPR Headquarters in Washington, D.C.

NPR published and distributed a paper entitled "Captioned Radio - Fundamentals of Digital Radio Captioning" following the first over-the-air demonstration during CES 08. This paper has been distributed to the Technical Committee of the North American Broadcasters Association, the National Radio Systems Committee, and to the public radio engineering community during the 2008 Public Radio Engineering Conference.

¹⁰ See <http://www.npr.org/about/press/2008/102118.CaptionedRadio.html> (accessed November 7, 2008).

While the future of HD Radio appears bright, it will ultimately depend on the public's willingness to invest in HD receiving equipment. That willingness, in turn, depends on the widespread availability of compelling new services. The Commission confronted a similar "chicken or egg" phenomenon in the digital television ("DTV") transition. The solution was to require the inclusion of digital tuners in all television receivers other than portable receivers.¹¹ While HD Radio receivers may be less expensive than DTV receivers, that difference reduces, but does not eliminate, the barrier to the widespread consumer adoption of HD Radio.¹² The Commission can and should facilitate that adoption by ensuring the availability of HD receivers in as many automobiles and households as possible, as soon as possible. Mandating the inclusion of HD functionality in SDARS receivers is an important step in that direction.¹³

¹¹ In re Review of the Commission's rules and Policies Affecting the Conversion to Digital Television, Report and Order, 17 FCC Rcd. 15978 (2002) ("Digital Tuner Report and Order"), aff'd Consumer Electronics Ass'n v. FCC, 347 F.3d 291 (D.C. Cir. 2003).

¹² Six years after the Commission commenced the HD Radio transition, In the Matter of Digital Audio Broadcasting Systems and their Impact on Terrestrial Radio Broadcast Service, First Report and Order, 17 FCC Rcd 19990 (2002), iBiquity announced only recently that it had surpassed the manufacturing milestone of 1 million HD Radio modules for retail radio receivers. Press Release: 1 Million HD Radio™ Modules Manufactured To Date (Oct. 8, 2008) http://www.ibiquity.com/press_room/news_releases/2008/1244 (accessed November 7, 2008).

¹³ See NPRM at ¶7. Regarding the Commission's original decision not to require the SDARS receivers to include the capability of receiving terrestrial broadcasting, id., while the then-current marketplace may not have warranted such a requirement, circumstances have obviously changed. As discussed below, SDARS is now a monopoly service and there is a compelling need to promote the development of a vibrant terrestrial HD Radio service.

II. The Conversion Of SDARS To A Monopoly Service Justifies The Inclusion Of HD Functionality In SDARS Receivers

The Commission's decision approving the merger of the only two SDARS providers and creating a spectrum-based communications monopoly was a profound departure from decades of Federal communications policy favoring competition in communications markets.¹⁴ Although one may debate the wisdom of that decision, this proceeding provides the first opportunity to address its direct consequences. Among the most important consequences is the threat the newly established SDARS monopoly poses to complementary audio programming services. NPR therefore urges the Commission to make sure the SDARS monopoly does not interfere with and, in fact, supports the nationwide system of over-the-air terrestrial broadcasting, including the transition to HD Radio.

Authorizing a spectrum-based monopoly service carries with it an obligation to exercise far greater regulatory oversight than what a competitive marketplace would otherwise require. The Commission's Merger Order concedes as much. In conditioning the merger on the applicants' voluntary commitment to maintain certain pricing limitations, for instance, the Commission promised to seek public input on the continuing need for those price caps prior to modifying or removing them.¹⁵ Furthermore, the Commission will necessarily be called upon to

¹⁴ While the proper definition of the relevant product market had been disputed, the Commission expressly did not define it to encompass terrestrial radio broadcasting, let alone "audio entertainment services," or anything broader than the SDARS service. In the Matter of Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings, Inc., Transferor, to Sirius Satellite Radio, Inc., Transferee, Memorandum Opinion and Order, MB Docket 07-57, at ¶¶ 42-43 & 49, rel. Aug. 5, 2008 [hereinafter "Merger Order"]. Accordingly, the Commission imposed a number of merger conditions premised on the understanding that "the merger is a merger to monopoly." Id. at ¶ 51.

¹⁵ Id. at ¶ 112.

resolve disputes over compliance with the various other merger conditions, including the requirement to lease access to third parties and to reserve channel capacity for NCE use.¹⁶

While the Commission's merger decision imposed certain "access" conditions on the manufacture of SDARS receivers, those conditions do not obviate the need to require the inclusion of HD functionality in SDARS receivers. The conditions imposed in the Merger Order generally prevent the new entity, Sirius XM, from wielding its monopoly power to the detriment of *SDARS subscribers*. Thus, Sirius XM is required to permit independent third parties to develop equipment that can receive the combined SDARS service, including equipment that offers additional functionality, such as HD reception, to do so without constraints on equipment distribution, and to provide commercially reasonable access to the necessary Sirius XM intellectual property.¹⁷ Together, these conditions seek to ensure that SDARS subscribers are offered a range of options for receiving SDARS services.

Requiring the inclusion of HD functionality in SDARS receivers would provide a number of public interest benefits to the *public* as a whole.¹⁸ First, mandating the universal availability of HD functionality among SDARS receivers will produce economies of scale and reduce the cost of SDARS and HD services and equipment.¹⁹ The Commission originally required receiver

¹⁶ See id. at ¶¶ 131-146. Cf. Communications Daily at 10, Oct. 24, 2008 (citing an FCC spokeswoman, reporting that "the FCC is not prepared to tell either Sirius XM or minority programmers the criteria for the satellite radio operator to meet a key merger condition"); Public Notice, Request for Comment on Petition for Declaratory Ruling Regarding RFD Communications, Inc. and its Eligibility to be Carried as a DBS Public Interest Noncommercial Programmer, MB Docket No. 06-92, Apr. 20, 2006.

¹⁷ See NPRM at ¶4.

¹⁸ See id. at ¶ 6 (inquiring about the benefits of requiring SDARS receivers to include HD functionality).

¹⁹ See id. at ¶¶ 6, 8.

inter-operability among the competing SDARS services for that very reason: "By promoting receiver inter-operability for satellite DARS, we are encouraging consumer investment in satellite DARS equipment and creating the economies of scale necessary to make satellite DARS receiving equipment affordable."²⁰ Similarly, in mandating the inclusion of digital tuners in all new television receivers, the Commission again found that the price of receivers "will decline even faster as economies of scale are achieved with increasing volumes of production and production efficiencies."²¹

Second, requiring HD functionality in SDARS receivers will promote the public's access to local terrestrial broadcast services which are offered universally and without charge to those with an apparatus to receive them.²² An HD reception mandate will promote, in particular, the widespread availability of the important new HD services described above, including "accessible" radio services and equipment for the print- and hearing-impaired and public safety services.²³

Finally, an HD functionality requirement will help assure one of the Commission's most important statutory mandates: the "fair, efficient, and equitable" distribution of broadcast service

²⁰ In the Matter of Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5754, 5796 (1997) [hereinafter "SDARS Order"].

²¹ Digital Tuner Report and Order, 17 FCC Rcd. at 15995.

²² By virtue of the HD technology, HD reception capability permits the reception of analog AM and FM transmissions. See DAB Second Report and Order, 22 FCC Rcd. at 10347 ("iBiquity's IBOC technology will also allow for new radios to be "backward and forward" compatible, allowing them to receive existing analog broadcasts from stations that have yet to convert and digital broadcasts from stations that have converted.").

²³ See NPRM at ¶ 6.

among "the several States and communities."²⁴ Local terrestrial radio's future depends on a successful digital radio transition. As the monopoly SDARS subscriber base grows, the loss of access to terrestrial radio stations could jeopardize the HD Radio transition and ultimately diminish the entire system of terrestrial radio broadcasting.

In this respect, requiring the inclusion of HD functionality in SDARS receivers would preserve and promote the system of terrestrial broadcasting much like the cable must carry requirements in the case of terrestrial television broadcasting. In enacting the current cable must carry requirements, Congress concluded that cable carriage of television broadcast signals was necessary to preserve the economic viability of over-the-air television broadcasting and its ability to offer quality local programming.²⁵ The market power enjoyed by the cable television monopoly threatened to siphon viewers away from television stations, to the detriment of television broadcasting generally.²⁶ The same rationale supported the Commission's original cable must carry requirements.²⁷

Though cable television and SDARS are monopoly services, there are differences between the two, to be sure. At the time the must carry requirements were enacted, over 60 percent of households with television sets subscribed to cable and, for those households, cable had replaced over-the-air television as the primary provider of video programming.²⁸ SDARS

²⁴ 47 U.S.C. § 307(b).

²⁵ See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, § 2(a)(16), 106 Stat. 1460, 1462 [hereinafter "CTCPA"].

²⁶ See Turner Broadcasting System v. FCC, 512 U.S. 622, 632-34 (1994) [hereinafter "Turner"].

²⁷ See In re Cable Television, Report and Order, 38 FCC 683, 699 (1965).

²⁸ Turner, 512 U.S. at 633 (*citing* CTCPA at § 2(a)(3), (17)).

and terrestrial radio, by comparison, are largely complementary services, although Sirius XM clearly viewed terrestrial broadcasting and SDARS as substitutes.²⁹ In any event, the principal difference between cable must carry and a mandatory HD functionality requirements -- the absence of an SDARS gatekeeper role -- also means that requiring HD functionality in SDARS receivers imposes essentially no burden on Sirius XM.

While cable must carry requires a cable system to devote a significant portion of its channel capacity to the retransmission of broadcast signals,³⁰ including HD functionality in SDARS receivers does not constrain in any way the program offerings of Sirius XM. It merely requires device manufacturers to add additional functionality at little economic cost and where there is no inherent limitation on the amount or type of reception functionality. Therefore, requiring the inclusion of HD functionality in SDARS receivers is far less intrusive as a First Amendment matter than mandating cable carriage of television broadcast signals.

At the same time, there is no justification for requiring SDARS functionality in all HD receiving equipment.³¹ As a threshold matter, there is no monopoly among terrestrial radio stations and therefore no opportunity to undermine the SDARS service through anticompetitive conduct. In addition, because SDARS service requires a paid subscription, the inclusion of SDARS functionality in HD receivers would only increase the cost of the receiver without any offsetting benefit for the vast majority of the public with no interest in purchasing and maintaining an SDARS subscription. Finally, and most importantly, the Commission does not

²⁹ Merger Order at § 41.

³⁰ See 47 U.S.C. §§ 534(a), 535 (b).

³¹ See NPRM at ¶¶ 14-20.

bear a statutory obligation to promote the SDARS service comparable to its obligation to establish and maintain a nationwide system of local radio broadcast stations.

For these reasons, the Commission should establish requirements for including HD functionality in SDARS receivers. Doing so will promote the HD Radio transition, assuring the continuation of the Nation's system of terrestrial broadcasting. Important broadcast services, such as radio reading for the print-impaired, captioned radio for the hearing impaired, and public safety alerts, would be assured wider deployment. Including the functionality can be accomplished without significantly increasing the cost of SDARS receivers,³² and at no cost to Sirius XM's own program offerings. Finally, assuring the continuing viability and availability of local terrestrial broadcast services should be considered a necessary consequence of the decision to convert the SDARS service to a spectrum monopoly.

III. The Commission Possesses The Authority To Require The Inclusion Of HD Functionality In SDARS Receivers

The Commission possesses ample statutory authority to require the inclusion of HD functionality in SDARS receivers. The Commission may rely on the same statutory authority it used to authorize the SDARS service originally and it may rely on its ancillary jurisdiction over interstate communications. Accordingly, the Commission should not hesitate to require the inclusion of HD functionality in SDARS receivers.

The Commission has asserted direct authority over SDARS receivers since first initiating the SDARS service. Indeed, the Commission mandated SDARS receiver inter-operability so that all consumers would be able to purchase any SDARS receiver and access any SDARS

³² According to iBiquity, the cost of including HD functionality could be substantially less than \$20 per receiver. Letter from Robert A. Mazer, Vinson & Elkins, Counsel for iBiquity, to Marlene H. Dortch, Secretary, FCC (May 1, 2008), at 3.

service.³³ The Commission declined to require the inclusion of analog terrestrial receiving capability at that time, not because it lacked sufficient authority, but because it believed it was not necessary or appropriate at that time. Circumstances have now changed, but Congress has not limited the Commission's statutory authority over the SDARS service in the interim.

Even absent express statutory authority, the Commission possesses ancillary jurisdiction based on the Commission's statutory obligation to promote the nationwide system of terrestrial broadcasting, including the transition to HD Radio. The Supreme Court first recognized the Commission's ancillary authority under the Communications Act in United States v. Southwestern Cable Co.³⁴ While the Court explored the parameters of the Commission's ancillary jurisdiction in two subsequent cases,³⁵ the analysis has remained the same.

Under that precedent, a reviewing court considers whether (1) the regulation falls within the Commission's general grant of authority over interstate or foreign communication by wire or radio and (2) the regulation is reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.³⁶ The Court in Southwestern Cable concluded that the Commission possessed ancillary jurisdiction to regulate cable television systems because (1) cable systems are involved in interstate communications by wire or radio and (2) at least some regulation of cable television systems was reasonably ancillary to the effective performance of the Commission's statutory responsibilities, specifically including the regulation of television

³³ SDARS Report and Order, 12 FCC Rcd. at 5795-96.

³⁴ 392 U.S. 157 (1968) ("Southwestern Cable").

³⁵ See United States v. Midwest Video Corp., 406 U.S. 649 (1972) ("Midwest Video I"); FCC v. Midwest Video Corp., 440 U.S. 689 (1979) ("Midwest Video II").

³⁶ Southwestern Cable, 392 U.S. at 168, 178. See also Midwest Video I, 406 U.S. at 662-63.

broadcasting.³⁷ The Court subsequently held that certain Commission local cable origination requirements were within its ancillary jurisdiction,³⁸ but that more extensive channel capacity and third party access requirements exceeded the Commission's authority.³⁹

In this proceeding, an obligation to include HD functionality in SDARS receivers falls well within the Commission's ancillary jurisdiction. Both the SDARS and HD services, from transmission to reception, involve interstate communication by radio and fall within the Commission's general authority under Title I of the Communications Act.⁴⁰ A mandatory HD functionality requirement is also reasonably related to the Commission's statutory obligation to assure the "fair, efficient, and equitable" distribution of broadcast service among "the several States and communities."⁴¹ The absence of HD functionality from SDARS receivers can only reduce the availability of important new HD Radio services, such as "accessible" radio services, and local traffic, weather, and emergency alerting services. Without broad availability of HD Radio receivers, moreover, terrestrial radio stations may not be able to justify the expense of developing and offering innovative new services. In short, including HD functionality in

³⁷ Southwestern Cable, 392 U.S. at 178.

³⁸ Midwest Video I, 406 U.S. at 667-68.

³⁹ Midwest Video II, 440 U.S. at 708-09.

⁴⁰ See 47 U.S.C. 151. See also 47 U.S.C. § 153 (33) (defining the term "radio communication" to mean "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission").

⁴¹ 47 U.S.C. § 307(b).

SDARS receivers is likely to play a critical role in the success of the HD Radio transition and the future of terrestrial broadcasting.

More recent case law addressing the scope of the Commission's ancillary jurisdiction is not to the contrary. Although the Court of Appeals for the District of Columbia Circuit reversed the Commission's invocation of ancillary jurisdiction to justify the so-called "broadcast flag" regulation, it did so because the regulation required the copyright protection of broadcast content *after* the broadcast transmission was complete.⁴² Indeed, the Commission had justified regulating television receivers even when those receivers were not engaged in the process of communication by wire or radio.⁴³ Here, by contrast, requiring the inclusion of HD functionality in SDARS receivers concerns the reception of the HD transmission itself. The adoption of such a regulatory requirement thus fits squarely within the D.C. Circuit's holding that the Commission "has general authority under Title I to regulate apparatus used for the receipt of radio or wire communication while those apparatus are engaged in communication."⁴⁴ Accordingly, this precedent underscores what is otherwise indisputable: the Commission enjoys abundant authority to require the inclusion of HD functionality in SDARS receivers.

⁴² Am. Library Ass'n v. FCC, 406 F.3d 689, 703 (D.C. Cir. 2005).

⁴³ Id., 406 F.3d at 695.

⁴⁴ Id., 406 F.3d at 704.

Conclusion

For these reasons, NPR urges the Commission to act expeditiously to require the inclusion of HD functionality in all SDARS receivers.

Respectfully submitted,

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