

**DIGITAL AUDIO RADIO SERVICES:  
BOON OR BUST TO THE PUBLIC INTEREST?**

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**I. Introduction**

{ 1 }In May 1990, Satellite CD Radio, Inc. (CD Radio) filed a petition for rule making with the Federal Communications Commission (FCC) of the United States (US).[1] CD Radio sought frequencies for a new compact disk-quality radio service to be delivered via satellite directly to end-users.[2] For nearly five years the FCC pondered the effects of the proposed service on existing terrestrial radio. Finally, in January 1995, it released an order allocating frequency for Digital Audio Radio Services (DARS) in the 2310-2360 MHz band.[3]

{ 2 }In June 1995, the FCC released a Notice of Proposed Rule making (NPRM) to consider service and licensing rules to govern DARS.[4] Comments submitted to the FCC in response to the NPRM focused on the expected effect of DARS on existing terrestrial-based radio stations. Radio station owners argue that DARS will have a detrimental effect on existing terrestrial-based broadcast radio - particularly in

smaller markets - and will undermine the ability of many stations to compete and survive in a highly competitive environment. Further, the station owners argue that the public interest will be hampered by the demise of local radio stations which are uniquely capable of serving local community needs and interests.

{3}DARS applicants, on the other hand, contend that their proposed services will actually enhance the ability of existing broadcasters to compete by promoting and expediting the advent and implementation of new technologies such as digital transmission of radio signals. These advancements, the DARS providers argue, serve the public's interest in higher quality service. Moreover, they further contend that the public interest will be served by the expanded consumer choice provided by DARS systems.

{4}The arrival of DARS in the local broadcast radio market may indeed make it more difficult for existing terrestrial radio stations to compete for their audiences. The consuming public's interest in, and need for local programming, however, will neither be served by DARS nor disappear as the result of the availability of DARS programming. Local radio stations will remain uniquely capable of providing local programming. If, however, local communities fail to support even a single local broadcast station with their patronage, it will not be the fault of DARS programming; it will mean instead that the nature of the public interest has changed. If such an evolution of the public interest has occurred, the government has neither the right nor

the responsibility to protect the erstwhile servers of an older version of that interest. Indeed, the public interest "includes the protection of competition, not competitors."<sup>[5]</sup>

## **II. Background**

### **A. Elements of the DARS Proposal**

#### **1. Digital Audio Radio Services Defined**

{5}Currently proposed DARS systems are multi-channel, multi-format services with sound quality equivalent to that of compact disks. The services are deliverable by either satellite or terrestrial means. The rule making proceedings currently under consideration contemplate satellite delivery to a national audience. DARS encompasses a wide range of technologies used to provide sound quality much higher than is now provided by existing terrestrial broadcasting stations.<sup>[6]</sup>

#### **2. Digital Technology**

{6}Digitization technology has affected many segments of the communications industry. Digitizing involves using a computer to convert a traditional analog signal into a series of ones and zeros in a particular sequence. The string of ones and zeros is transmitted via wire or radio waves to a special digital receiver. The digital receiver interprets the ones and zeros and converts them back into their original form, whether

voice, data, or music. Any data, voice, television or radio signal can be transmitted in digital format.

### **3. National Broadcasting**

{7}The DARS systems currently proposed are designed to transmit digitized programming to a national audience at multiple locations simultaneously. The proposed broadcast of programming from DARS differs from network television and nationally syndicated radio programming because DARS programming will be transmitted directly from the DARS provider's satellite to end-users home receivers.

### **B. Regulatory Developments**

{8}In the early years of the twentieth century most segments of the communications industry were heavily regulated. Various economic rationales and social justifications were at play. For example, in the case of common carriers, many believed that the most efficient way to build a national telephone system was to grant a legal monopoly to one company. In radio, industry participants themselves called for regulation in order to ensure efficient use of the finite frequency spectrum. In recent years, both the FCC and Congress have moved towards deregulation of all segments of the communications industry. The ability of multiple participants to enter and compete effectively in different segments of the industry has served to justify" the dismantling of regulatory burdens. Further, with respect to radio, the FCC has recently

expressed concern that regulation may have prevented radio stations from "adapting quickly to changing market realities." [7] Thus, it was with an inclination towards cautious deregulation that the FCC began its DARS proceedings in 1990.

### **C. FCC Proceedings**

{9} In August 1990, the FCC issued a Notice of Inquiry (NOI) soliciting information to be used in identifying and developing technical rules and regulatory policies for DARS. From 1989 through 1991, in a series of parallel inquiries with the 1990 NOI, the FCC sought comment on appropriate positions to be advocated at the World Administrative Radio Conference held in Spain in 1992 (WARC-92). At the same time, the FCC and the National Telecommunications and Information Administration (NTIA) worked together to develop a position seeking frequency allocation for satellite and complementary terrestrial DARS systems in the 2310-2360 MHz band, an allocation adopted at WARC-92. In November 1992, the FCC released a NOI/NPRM proposing the allocation of the assignment adopted at WARC-92 to DARS systems planning to serve the US. In January 1995, the FCC officially allocated the 2310-2360 band for DARS. Six months later an NPRM was released seeking comment on appropriate service and licensing rules for DARS. [8]

#### **D. Position of the Existing Radio Station Owners**

{ 10 }The National Association of Broadcasters (NAB)[9] has argued vehemently that the establishment of DARS would contravene the public interest.[10] In the broadcasters' view, local radio stations "serve to promote and reinforce traditional American values of community cohesion and local identity." [11] NAB and its members contend that the public interest is best served in the "form of local programming, local announcements, local identity, local diversity and local connectedness." [12] The association has asked the FCC to consider the potential costs of authorizing satellite DARS and to develop that "preserve the fruits of fifty years of public policy promoting [ . . . ] local radio service." [13]

{ 11 }Moreover, the established broadcasters contend that it is unnecessary to endanger local community interests by authorizing satellite DARS in order to bring better quality sound and expanded programming to the listening public. Terrestrial radio, they argue, is prepared to bring the benefits of digital technology and CD-quality sound to the American people. NAB maintains that if local broadcasting can remain competitive and offer CD-quality sound, the American people "can have their cake and eat it too." [14]

{ 12 }Further, NAB argues that while the promise of increased programming choices would "seemingly most benefit the smaller markets with [currently] fewer programming choices, [ . . . ] it is precisely these smaller markets whose local radio

service [ . . . ] [is] most at risk from the flood of new DARS signals."[15] Radio stations in smaller markets, NAB warns, are already subject to "audience fragmentation" among their "relatively few pairs of ears" from larger radio markets with high-power signals.[16] A smaller market with perhaps a single surviving local radio station could see its "extraordinary amount of local quality [replaced with a satellite DARS-produced] homogeneous national diversity."[17]

{ 13 }If the FCC decides to authorize satellite DARS, however, the broadcasters urge that it be limited to a subscription-based service. Such a limitation will partly alleviate the threat to "free" local radio and its listeners. Further, NAB contends that "[t]he new technology landscape has changed radically in the years since the FCC opened and closed a narrow applications window for satellite DARS applications," and there is "no sound policy reason that the universe of satellite DARS providers should be limited to four favored applicants."[18]

### **E. Position of the Satellite DARS Providers**

{ 14 }Potential DARS providers question the broadcasters' view that satellite DARS will detrimentally affect the radio broadcast industry and claim, unapologetically, that even if it will, it doesn't matter. Evidence does not suggest, say the DARS applicants, that the economic well-being of the radio broadcast industry will be negatively impacted by the introduction of a new competing service. Moreover, regardless of potential injury, DARS must not be thwarted unless

broadcasters prove that "DARS and DARS alone will produce a 'significant net reduction' in service to the public."<sup>[19]</sup>

{ 15 } The DARS applicants believe that sixty years of communications policy has shown that competition always produces a net gain to the public, protectionism always injures the public and the public interest and not the survival of competitors is paramount.<sup>[20]</sup> Moreover, Section 7(a) of the Communications Act of 1934 compels the FCC to encourage the provision of new technologies and services to the public.<sup>[21]</sup> Further, because the FCC has admittedly delayed authorization of satellite DARS in order to allow terrestrial digital radio to develop, the existing broadcasters cannot now further stall DARS in order to buy more time to develop their own digital technology.

### **III. Analysis**

#### **A. Localism**

{ 16 } Much of the discussion from DARS applicants and broadcasters alike centers around the perceived threat to "localism," a concept lacking a clear definition, but which is generally understood to refer to the promotion and dissemination of local news and information through local television and radio broadcast stations. The broadcasters argue that the FCC and Congress's concept of localism has served as the "bedrock principle for radio service" in this country.<sup>[22]</sup> It is surprising, then, that

very little specific discussion of the concept can be found in either FCC proceedings or court cases. Nevertheless, most analysts would probably agree that "localism" can be understood as the Communication Act's public interest standard as applied to local radio.<sup>[23]</sup>

{17}The broadcasters further contend that local radio service has served and continues to serve to promote the traditional American values of "community cohesion and local identity."<sup>[24]</sup> NAB attributes to FCC Chairman Reed Hundt the belief that "government must concern itself with the search for American values."<sup>[25]</sup> Because important American values are found in small market radio, urge the broadcasters, public policy should be designed to foster rather than diminish those values.

{18}DARS applicants point out, however, that localism, far from being threatened by the prospect of satellite delivery of programming, actually affords broadcasters a "unique and unassailable advantage" over DARS.<sup>[26]</sup> Because DARS systems are by their nature unable to provide local programming, broadcasters can easily differentiate themselves by increasing local programming that appeals to their communities. Indeed, the President of NAB recently predicted that new technologies such as DARS will not undermine the ability of local radio to compete. He asserted that "[a]s long as we provide the public with relevant programming I predict American's love affair with radio will only be enhanced."<sup>[27]</sup>

## **B. Niche Programming**

{19}The satellite DARS applicants explain that delivery of audio programming directly to end-users permits DARS Systems to aggregate geographically disperse audiences with common interests that cannot be economically served by terrestrial radio. The niche programming that could be provided includes literature readings, continuing education services, international channels, and hobby information. In discussing DARS' ability to deliver niche programming, which would not be viable in smaller markets, the broadcasters question "how many niche programs will actually be offered."<sup>[28]</sup> The broadcasters point out as an illustration that current DARS applicants propose only one foreign language format. Moreover, they highlight that the planned language is Spanish - already widely available via terrestrial radio.

{20}It is submitted that this argument proffered by the broadcasters begs the question. If DARS will limit its foreign language niche programming to Spanish, does this not leave for the broadcasters the opportunity to provide programming in other languages, languages widely spoken in some of their individual markets? Indeed, many of the broadcasters' arguments assume that existing radio stations and DARS providers will be competing for the same market. As the DARS applicants make clear in their response, however, distinctions between the existing market for local radio and the potential market for DARS ensure a robust opportunity for terrestrial radio to continue to compete for listeners.

### **C. Reopening the Applications Window**

{21}The NAB urges that if the FCC is to proceed with the DARS proceeding, that it at least reopen the applications window and allow additional DARS applicants to make filings.[29] The current DARS applicants explain, however, that a long history of case law and FCC precedent hold that the cut-off rules are to be strictly enforced and should only be waived in compelling circumstances.[30] No such justification exists, and, in fact, no argument has been presented.

{22}All potential applicants for DARS have been on notice of the application window for at least three years. Indeed, in that time there has not been a single additional applicant. The call for the window's reopening comes from the NAB, an organization with an admitted interest in further delaying the authorization of DARS. At this stage of the proceedings any delay would be both unfair to the existing applicants and opposed to the public interest.

### **IV. Conclusion**

{23}Competition for local radio's listeners is not new. In the past, radio broadcasters have faced competition from television, cable, and from technological advances allowing higher power stations to reach more listeners. Local radio has survived and thrived. The advent of satellite DARS will not undermine local radio's ability to serve the needs of its communities. In fact, because of expedited advances in

digital radio technology, terrestrial radio is left in a better position than it was before the FCC's DARS proceedings.

{24} Local radio now faces a battle that it has successfully waged before: competition from a new and distinct service. The broadcasters' argument that the FCC should curtail DARS in the name of the public interest standard is unconvincing. The Communications Act, from which the standard was created, also seeks to promote competition and the advent of new technologies. Indeed, if the broadcasters mean to suggest that the availability of DARS may lead listeners to abandon local radio, then their appeal to the FCC amounts to a claim that the broadcasters are better judges of the public interest than are the American people. If the listening public still wants and needs local radio, they will vote with their patronage.

### **Attribution**

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**Notes**

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1 See USA, FCC, Petition for Rule making filed by Satellite CD Radio, Inc., RM-7400 (1990).

2 CD Radio's initial proposal contemplated a terrestrial based system to be made available to existing radio stations for broadcast, and a satellite system to be delivered directly to end-users.

3 See *In the Matter of 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. Rcd. 2310(18 January 1995) [hereinafter *Establishment of DARS Order*].

4 See *In the Matter of Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Notice of Proposed Rule making 'B Docket No. 95-91, GEN Docket No. 90-357, RM No. 8610(1995 WL 359103) (hereinafter *Frequency Establishment NPRM*'].

5 *Ibid.* at 3.

6 See *In the Matter of Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services*, Notice of Inquiry, 5 F.C.C. Rcd. 5237(21 August 1990) [hereinafter *DARS NOI*].

7 See *In Re Revision of Radio Rules and Policies*, Notice of Proposed Rule making, 6 F.C.C. Rcd. 3275 (30 May 1991) [hereinafter *Radio Rules NPRM*].

8 Specifically, the Commission solicited comment on:

- (1) how many licenses should be awarded;
- (2) how much spectrum should each licensee be assigned;
- (3) how licensees should be selected;
- (4) whether pending applications should be given preference;
- (5) how licensees should be classified;
- (6) whether licensees should be permitted to use some of their allocated spectrum for non-DARS services, and
- (7) what rules should govern DARS transmissions to ensure service in the public interest and prevent interference to competitors. See *Frequency Establishment NPRM* supra note 4 at 4-7.

9 NAB is a non-profit association serving and representing radio and television broadcast stations and networks in the US.

10 See USA, FCC, *Comments of the National Association of Broadcasters to Frequency Establishment NPRM*, GEN Docket No. 90-357, RM No. 8610 (1995) [hereinafter *NAB Comments*].

11 Ibid. at 3.

12 Ibid. at 2.

13 Ibid. at 3.

14 Ibid.

15 Ibid. at 4.

16 Ibid.

17 Ibid.

18 Ibid. at 9.

19 USA, FCC, Comments of Digital Satellite Broadcasting Corporation to Frequency Establishment NPRM, GEN Docket No. 90-357, RM No. 8610 (1995) [hereinafter DARS Comments].

20 See Ibid. at 5.

21 47 U.S.C. § 157.

22 See NAB Comments, supra note 10 at 2.

23 See 47 U.S.C. § 303(b): "The Commission [...] as public convenience, interest or necessity requires, shall ..... prescribe the nature of the service to be rendered by each class of licensed stations."

24 NAB Comments, supra note 10 at 3.

25 Ibid. at 3 (referring to Chairman Hundt's remarks to the Ad Council on 21 July 1995).

26 See DARS Comments, supra note 19 at 23.

27 E. Fritts, President, National Association of Broadcasters, Address (Radio 95 Convention, 7 September 1995) [unpublished].

28 See NAB Comments, supra note 10 at 43.

29 See Ibid. at 9.

30 See DARS Comments, *supra* note 19 at 43.

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