



Federal Communications Commission
Washington, D.C. 20554

December 14, 2004

DA 04-3907
Released: December 15, 2004

Mr. Saul Levine
Mt. Wilson FM Broadcasters, Inc.
1500 Cotner Ave.
Los Angeles, CA 90025

Re: SDARS Program Content Rulemaking Petition

Dear Mr. Levine:

This letter acknowledges receipt of the petition you filed, dated October 28, 2004, asking the Commission to commence a rulemaking proceeding to amend the Satellite Digital Audio Radio Service ("SDARS") rules to include an "indecenty" provision analogous to that found in Section 73.3999 of the Commission's rules.

Both SDARS licensees, as is permitted under the Commission's rules (*Establishment of Rules and Policies for the Digital Audio Radio Satellite Service*, 12 FCC Rcd 5754, 5788 (1997)), are providing service on a subscription basis. The Commission has previously ruled that "subscription-based services do not call into play the issue of indecenty," *Litigation Recovery Trust*, 17 FCC Rcd 21852, 21856 (2002), and that "[c]onsistent with existing case law, the Commission does not impose regulations regarding indecenty on services lacking the indiscriminate access to children that characterizes broadcasting." *Harriscope of Chicago, Inc.*, 3 FCC Rcd 757, 760 n.2 (1988), citing *Cruz v. Ferre*, 755 F.2d 1415, 1420 (11th Cir. 1985) and *Jones v. Wilkerson*, 800 F. 2d 989 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987). *See also FCC v. Pacifica Foundation*, 439 U.S. 726, 748-750 (1978). Your petition does not provide a basis to revisit that determination.

Based on these precedents and pursuant to Section 1.407 of the Commission's rules, we decline to grant your rulemaking request.

Sincerely,

W. Kenneth Ferree
Chief, Media Bureau