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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

JUL 1 1993

In the Matter of )  
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SATELLITE CD RADIO, INC. )  
 )  
Request for Waiver of )  
Section 319(d) of )  
the Communications Act )

File Nos. 49/50-DSS-P/LA-90  
58/59-DSS-AMEND-90  
44/45-DSS-AMEND-92

OFFICE OF CHIEF  
OF POLITICAL AFFAIRS  
AND PUBLIC AFFAIRS

CONDITIONAL OPPOSITION TO REQUEST FOR WAIVER

Digital Satellite Broadcasting Corporation ("DSBC"), by its attorneys, hereby submits its Conditional Opposition to Satellite CD Radio, Inc., ("SCDR") Request for Waiver of Section 319(d) of the Communications Act, to begin construction of its Digital Audio Radio Service ("DARS") satellites.<sup>1</sup> DSBC opposes the grant of SCDR's waiver request unless (1) SCDR first amends its application to reflect the new satellite design it proposes in the Section 319(d) waiver request, and (2) is specifically conditioned on other limitations set forth herein.

By letter dated May 17, 1993, SCDR seeks to begin construction on its proposed DARS satellites. It requests authority to spend up to \$10 million dollars over a period of 10 months from the grant of its waiver request. SCDR maintains that grant of its waiver request will create cost and time savings that will redound to the public interest in the form of earlier and less costly initiation

<sup>1</sup> Letter from Lawrence F. Gilberti, President SCDR, to Donna Searcy Re: Request for Waiver of Section 319(d) (May 17, 1993).

of new digital audio services. SCDR commits to bear the risk that its application will be denied, notwithstanding its considerable resource expenditures.

In general, DSBC does not object to the grant of DARS waivers, including Section 319(d) waivers, that will serve the public interest. The record in the DARS proceeding demonstrates the demand for DARS and the public interest benefits that will be realized through rapid initiation of this new service.<sup>2</sup> However, the satellite industry is marked by long lead times and extended development and construction periods that may delay the introduction of new services. Waivers provide a tool by which the Commission may expedite the initiation of service. The ability to begin system development early, pursuant to a waiver, may attenuate the delays inherent in DARS authorization and launch. This will enable applicants to begin construction, and even service, sooner, if they are willing to bear the risk that their application to provide service may be denied.

However, the Commission should not grant waivers casually or without limitation. In DARS, the Commission must not grant a waiver that confers special status or favors a particular system design or technology before authorization, regardless of the attendant public interest benefits. It would be prejudicial to other DARS proponents to make these decisions through the issuance of waivers, rather than through considered rulemaking. Therefore, the Commission must carefully consider the nature of any DARS

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<sup>2</sup> See, generally, Comments filed in GEN Docket No. 90-357.

waiver request and be cautious to avoid such a result.

Additionally, and most importantly, any pre-authorization DARS waivers must be limited to the specific proposals contained in the application then on file. Applicants must not be permitted to proceed by waiver to construct systems different than those which are set forth in their applications. To do otherwise would create the distinct possibility that the Commission would be unable to enforce the application processing procedures set forth in its rules.<sup>3</sup> By granting a waiver based on a design different than the one set forth in a pending application, the Commission might find it difficult subsequently to hold that the design change constituted a major amendment requiring a reinitiation of processing procedures.<sup>4</sup>

The waiver requested by SCDR does not conform to the system parameters set forth in its application as amended.<sup>5</sup> SCDR seeks a waiver to commence construction of satellites by a satellite vendor different than that specified in its application and on which its

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<sup>3</sup> 47 C.F.R. Sections 1.65, 25.116 and 25.151 (1992).

<sup>4</sup> The Commission is committed to authorize construction of DARS satellites and it would appear that there is sufficient spectrum to grant all of the pending applications. Under these circumstances, the Commission is well within its authority to grant waivers to construct systems proposed in pending applications. On the other hand, the Commission should not grant a waiver where that waiver is to construct a system or components that otherwise would constitute a major amendment to a pending application. It is unclear, without more, whether SCDR's agreement with Space Systems/Loral and its waiver request rise to this level.

<sup>5</sup> SCDR Compendium of Applications, File Nos. 49/50-DSS-P/LA-90; 58/59-DSS-AMEND-90; 44/45-DSS-AMEND-92 (filed Sept. 14, 1992). ("SCDR Compendium").

application systems were based. A different vendor will necessarily result in a different satellite design and specifications than those set out in the application.

The specific components that SCDR seeks to begin constructing pursuant to its waiver request were based on its earlier proposal to utilize Hughes Aircraft Company 376W satellites.<sup>6</sup> SCDR has recently entered into a partnership with Space Systems/Loral ("SS/L"). In its waiver request, SCDR indicates that its satellites and components will be built by SS/L. SCDR has not stated which SS/L satellite it will purchase, but it is now seeking to begin construction of subsystems and components that are utilized in the SS/L INTELSAT VII. Thus, it is reasonable to suppose that SCDR will ultimately construct a satellite similar to either the INTELSAT VII or the FS 1300 that Loral proposed in its DARS application.

Neither of these two satellites is similar to the Hughes 376W proposed by SCDR in its application. For example, the FS 1300 is a three-axis stabilized design that is substantially more powerful than the Hughes spin-stabilized design. Up to now, SCDR has vociferously denigrated the use of high-powered satellites. In particular, SCDR has challenged applicants that propose satellite systems with a power flux density ("PFD") limit in excess of

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<sup>6</sup> See, SCDR Compendium at 19-33 (General Technical Information). Included in this design are specific design components SCDR has now contracted to have Space Systems/Loral ("SS/L") construct. E.g., earth and sun sensors (SCDR Compendium at 29), solar array components (SCDR Compendium at 30) and propulsion equipment (SCDR Compendium at 30-31).

-139dBW/m<sup>2</sup>/4kHz. The FS 1300 utilizes a PFD well above the limit SCDR supports. It is likely that, even if SCDR has not contracted for a FS 1300, there will be other substantial differences between the proposed SCDR satellites and the SS/L satellites, which must be reflected by an amendment of SCDR's application.<sup>7</sup>

SCDR has not amended its Compendium of Applications to reflect the satellite design changes that will result from its selection of, and contracting with, a new satellite vendor utilizing a different satellite design.<sup>8</sup> Instead, the waiver SCDR requests is tantamount to an amendment of its application. If the Commission grants SCDR's waiver, it will have effectively permitted amendment

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<sup>7</sup> SCDR is likely to respond that DSBC's assertions are purely speculative. That is exactly DSBC's point. Speculation is required because SCDR has nothing on file that permits informed discussion or analysis of its waiver request to construct SS/L satellites. No such information will be available until SCDR's application is modified to reflect the substitution of SS/L satellites. Thus, SCDR must amend its application before the Commission may grant it a 319(d) waiver. Otherwise, the Commission is equally uninformed about what will be constructed pursuant to the waiver. In fact, SCDR may currently be in violation of the Commission's Rules. Section 1.65 of the Commission's rules requires that an applicant maintain complete and accurate information in its pending application. Where the information is no longer "substantially accurate and complete in all significant respects" the applicant must file an amendment to update the application. 47 C.F.R. Section 1.65 (1982). It would appear from the few facts set forth in the 319(d) waiver that SCDR is obligated to submit a Section 1.65 amendment.

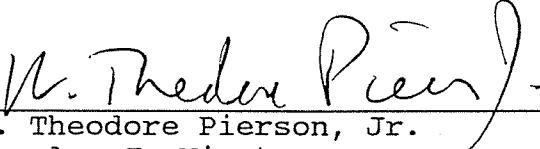
<sup>8</sup> SCDR has filed at the Commission a brief letter stating that it has changed satellite vendors and claiming that this change will not result in any significant alteration to the technical parameters of SCDR's proposed system. Letter from Lawrence F. Gilberti, President, SCDR, to Donna R. Searcy, Secretary of the Commission, dated March 10, 1993. It is difficult to believe that SS/L will build a satellite that is identical to the Hughes satellite in all significant respects. DSBC, therefore, maintains that SCDR has not satisfied the requirements of Section 1.65.

of SCDR's application without following the procedures specified in its Rules. Thus, SCDR's waiver request must be denied and dismissed without prejudice to refiling once its application is amended to conform to its new satellite system design.<sup>9</sup>

Accordingly, the Commission should deny the Section 319(d) waiver request of SCDR.

Respectfully Submitted,

DIGITAL SATELLITE BROADCASTING CORPORATION

  
\_\_\_\_\_  
W. Theodore Pierson, Jr.  
Douglas J. Minster

Pierson & Tuttle  
1200 19th Street, N.W.  
Suite 607  
Washington, D.C. 20036

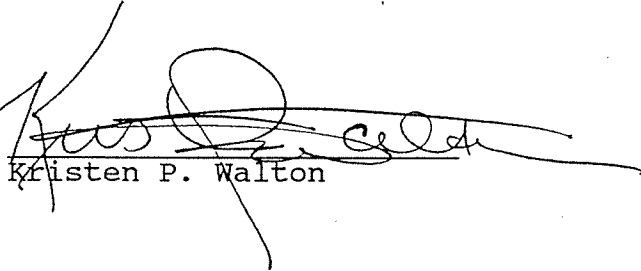
Its Attorneys

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<sup>9</sup> In a similar circumstance, a waiver applicant seeking a waiver of Section 319(d) also filed a modification request to alter its satellite vendor from that specified in its authorization, among other things. PanAmerican Satellite Corporation, 60 RR 2d 398 (1986). SCDR must follow a similar procedure here.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 1993, copies of the foregoing CONDITIONAL OPPOSITION TO SATELLITE CD RADIO'S REQUEST FOR WAIVER OF SECTION 319(d) of Digital Satellite Broadcasting Corporation were served via hand delivery\* or first class mail, postage prepaid, to the parties on the following service list.

  
Kristen P. Walton

Richard E. Wiley  
Michael Yourshaw  
Carl R. Frank  
Edward A. Yorkgitis, Jr.  
Attorneys for Satellite CD Radio, Inc.  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, DC 20006

Lawrence F. Gilberti  
President  
Satellite CD Radio, Inc.  
1001 22nd Street, N.W.  
Washington, D.C. 20037