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

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
SATELLITE CD RADIO, INC.	)	
	)	File Nos. 49/50-DSS-P/LA-90
Request for Waiver of	)	58/59-DSS-AMEND-90
Section 319(d) To Commence	)	44/45-DSS-AMEND-92
Construction of Digital	)	
Audio Radio Satellites	)	

OPPOSITION OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS

By letter dated May 17, 1993, Satellite CD Radio, Inc. ("SCDR") has requested a waiver of Section 319(d) of the Communications Act, 47 U.S.C. § 319(d) (1988), to begin construction of Digital Audio Radio Service ("DARS") satellites. The National Association of Broadcasters ("NAB")<sup>1/</sup> hereby opposes the grant of such a waiver, and does so in the strongest possible terms.

SCDR is asking the Commission to permit it to proceed with construction of its applied-for DARS satellites, specifically to spend up to \$10 million over ten months, assertedly to reap cost and time savings accruing from commencing construction now.

SCDR requests this waiver of Commission construction permit authority despite the fact that the Commission has not yet allocated spectrum for the putative satellite DAR service and despite the fact that the Commission has not yet begun to

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<sup>1/</sup> NAB is a nonprofit, incorporated association which serves and represents America's radio and television broadcast stations and networks.

consider, much less determine, the many policy issues concerning the authorization of digital radio service in the United States.

It does so despite the fact that there are Petitions to Deny this application, and, importantly, Petitions to Deny based on the desirability and timing of authorizing satellite DARS service at all. And it requests this headstart despite the fact that there are other DARS applicants which will be disadvantaged by SCDR's early initiation of construction.

But a headstart, and one that is premature, is of course what SCDR has been requesting all along. NAB has filed, at every turn, in opposition to SCDR's requests for a premature and prejudicial headstart on a course that may not be in the public interest, that is not yet planned and that, as we have said before, we all may be forced to follow.

I. Granting SCDR's Waiver Request May Prejudice Uncharted Policy.

NAB here reasserts its contentions that to allow this or any other applicant to move ahead of policy determinations for a service that will affect the future of radio in the United States is pure folly. We reassert our arguments that any action with regard to a DARS application, much less one permitting actual early construction, is premature and prejudicial in the extreme.

As NAB has warned before,<sup>2/</sup> should SCDR be permitted to begin construction of its proposed satellite DARS system, even at its own peril, the Commission will be unlikely later to ignore that decision and that investment and that "beginning" of DARS in making the yet undecided but critical issues as to the future and shape of digital radio in the United States.

Even, and most particularly, the basic issue of whether digital radio in the United States should be introduced as a satellite service (or, as NAB maintains, whether DAB should be introduced via the mature terrestrial radio service) would be prejudiced by early construction of a satellite system. Critical rule making and decision making simply could not be made on a "clean slate."

To assert that a waiver to begin construction of a DARS system likely will prejudice critical decision making is only common sense. No decisions as to a U.S. DAB service have yet been made. No proposals, save that for allocation, have been proffered by the Commission. Petitions to Deny are on file. Prejudice of those decisions from the grant of a waiver and from an applicant's construction is obvious and to be expected. As was said in a Commission case many years ago:

"Ordinary human experience tells us that these factors have a force which cannot always be set aside by the triers no matter how sincere their effort or intent. . . . To argue, as appellant does, that this may weigh in the balance of an otherwise close question is not a challenge to

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<sup>2/</sup> NAB Petition to Deny filed in File Nos. 8-DSS-MISC-91(2); 49/50-DSS-P/LA-90; 58/59-DSS-AMEND-90, March 18, 1991. See also NAB Petition to deny filed in File Nos. 8-DSS-AMEND-92; 9-DSS-AMEND-92, Jan. 17, 1992; NAB Petition to Deny, filed in File Nos. 49/50-DSS-P/LA-90; 58/59-DSS-AMEND-90; 44/55-DSS-AMEND-92, Nov. 13, 1992.

the good faith or integrity of the triers; it is a recognition that they are mortal men."<sup>3/</sup>

Once a waiver is granted and construction has begun, even conditionally, the Commission would be unlikely to decide issues contrary to SCDR's position. And it would be unlikely as well to later "pull the plug" on that particular applicant.<sup>4/</sup>

As was said in a Commission decision cited by SCDR in its waiver request, "one of the purposes of Section 319 of the Communications Act is to shield the Commission from pressure to grant an application based on expenditures made before the Commission action on the application."<sup>5/</sup> Thus the Commission itself has acknowledged the need to shelter itself from such pressure.

That decision, in the SBS waiver case, however, went on to grant a Section 319(d) waiver, as it said could be done, "[i]f this shield can be maintained in another way, and if sufficient justification for a waiver is presented." Such is not the case here.

## II. The Context Here Is Not Appropriate For a Waiver.

Unlike the SBS and other domsat waiver cases, the undetermined context of DARS makes this an inappropriate case for a Section 319(d) waiver. The context of

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<sup>3/</sup> Community Broadcasting Co. v. FCC, 274 F.2d 753, 761 (1960).

<sup>4/</sup> NAB is unaware of any situations where Section 319(d) waiver requests for communications satellites were granted and the underlying applications were later denied.

<sup>5/</sup> Satellite Business Systems, 61 FCC 2d 315, 317 (1976) ("SBS waiver case").

SBS waiver case, as with other domsat waiver cases, was quite different from the one before the Commission here. There, the Commission had established policy determinations, over ten years, to develop the domestic communications satellite industry by permitting limited open entry. It had invited applicants to apply, singly or jointly, subject only to a basic licensee fitness determination, and despite the fact that, as the Court later noted, the Commission "was aware that every one of the potential applicants for entry presented possible antitrust problems." It was these antitrust problems (which the Commission was prepared for) that were the basis of the "pending objections" and "serious public interest issues pertaining to the underlying applications" in the SBS case.<sup>67</sup> There, unlike here, expediting applicants' ability to provide service furthered Commission policy.

SCDR's waiver request similarly cited as "prior occasions" where the Commission has granted Section 319(d) waivers "in the face of pending objections and even in the face of serious public interest issues" American Satellite Corp., 67 FCC 2d 127 (1977), and American Satellite Corp., 64 FCC 2d 889 (1977). NAB finds these

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<sup>67</sup> SCDR cites in its waiver request the SBS waiver case as a "prior occasion" on which the Commission has granted Section 319(d) waivers "in the face of pending objections and even in the face of serious public interest issues pertaining to the underlying applications." Rather than supporting SCDR's contention that a 319(d) waiver request is "a proceeding separate and apart from the merits of the underlying application," the SBS waiver case would appear, at least in retrospect (see, for a retrospective view of the history of domsat policy and actions, United States v. FCC, 652 F.2d 72 (D.C. Cir. 1980)), to be an example of the Commission's granting a waiver, in part, because it expected, by virtue of its policy, to find the pending objections on the underlying application not disqualifying. See id. at 76,77. This observation is despite the protestations of the Commission in that and other decisions to the contrary. It would in fact appear that the waiver cases in the domestic communications satellite proceedings were part and parcel of the Commission's overall domsat policy.

domsat decisions more citable, as to waiver requests, for the proposition that "[w]hen the public interest requires expeditious action to begin site preparation or construction of a facility, considerations of orderly procedure and the policy underlying the general statutory requirement for a prior construction permit will be overridden. In those exceptional circumstances, a waiver will be granted." 67 FCC 2d 127, 128, 64 FCC 2d 889, 890.

With regard to satellite DARS and the SCDR application, there is no defined public interest or policy requiring expeditious action and there is no need, much less "exceptional circumstances," to justify a waiver. Here, in fact, the pending objections and serious public interest objections go to the very heart of the underlying authorization issue. They question whether, or when, the Commission should consider authorization of satellite DARS. Here, Commission policy is undetermined and open to question.<sup>27</sup> Here, there is no need for expeditious action, no need for early initiation of service, no certainty of the course the Commission intends. Rather than the public interest's requiring expeditious action, it requires careful, unbiased, reasoned policy making.

### III. There Is No Justification For A Waiver Here.

In the SBS waiver case, as SCDR recites, sufficient justification for a Section 319(d) waiver was found in "the need to avoid wasteful or unnecessary expenditures and the desirability of maintaining a technically competent staff." Here any need that exists, or benefit to be gained, is SCDR's alone.

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<sup>27</sup> See e.g. Commissioner Ervin Duggan, Digital Audio Broadcasting and the Paradox of New Technology, Remarks at the Public Radio Conference (May 7, 1993).

SCDR's cost and time savings appear to be gains common to any early construction, those otherwise achievable or of de minimus significance. One, SCDR recites in its request that it "faces practical marketplace realities in obtaining financing, hiring and maintaining staff, etc., which require resolution at the earliest possible date." NAB responds that these issues are present for most all applicants for most all services, and present nothing exceptional or worthy of waiving statutory requirements.

Two, SCDR states that, with a waiver, it will be able to shorten overall construction time by ten months through early procurement of components requiring long leadtimes. It states that the public will benefit from earlier service. But, as the Commission has not yet determined that satellite DARS would be the most efficacious way to bring digital radio to the public, this assertion of public benefit is unsupported. Further, a review of SCDR's "Interim Satellite Construction Plan," filed with its waiver request, reveals that there is in actuality only an asserted two month real time savings (realized from the fabrication schedule shortening) with "the remainder result[ing] from advancing the start of the assumed 36 month construction period." Shortening the construction schedule by starting earlier would seem to be per force obvious, common to any such request and a particularly unpersuasive reason for a waiver where the underlying service has not been considered by the Commission and where competitors would be disadvantaged by such a headstart.

Three, SCDR's asserted cost savings seem similarly specious. SCDR asserts that by avoiding an escalation in costs due to inflation it will save money. But there is not a real cost saving from this, as money always has a time value. Also, as this escalation for inflation was agreed to by SCDR in its contract with SS/L, it should

not now be able to assert something that was controllable by it as a reason for a waiver of a statutory requirement. And, SCDR's estimate of its cost savings as almost \$1 million from avoiding the "escalation" and from shortening the construction schedule (see page three of attachment to waiver request) is a completely conclusory statement, with no supporting detail provided.

Four, SCDR's asserted savings from the potential joint procurement with INTELSAT VII Flight 9 would appear to be not as unique as SCDR suggests. One would expect that there would be other satellites being constructed by SS/L in 1994 and beyond with which SCDR could jointly procure. Moreover, since SCDR states that these cost savings are obtainable for two units, and since SCDR itself is planning to construct two satellites, similar cost savings would presumably be available to it.

Finally, whatever cost savings could be here achieved would not necessarily redound to anyone's benefit but SCDR's. There is no necessary correlation between SCDR's cost savings and benefit to the public or to "future users" of its putative service. Presumably, SCDR would price its services competitively, rather than based on its costs, and thus there would be no necessary benefit to users. Certainly its competitors would be disadvantaged by SCDR's securing a headstart.

#### IV. Conclusion.

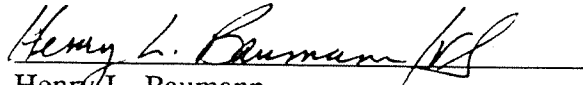
NAB has here presented important and cogent reasons for an immediate denial of SCDR's request for a waiver of Section 319(d). We would add, however, that consideration of a grant of a request for early construction in a service so yet

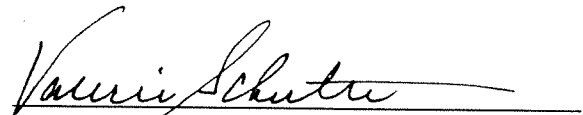


undetermined and controversial as satellite DARS should be entertained only by the full Commission (and not on delegated authority) and only after public notice and comment. NAB maintains, however, that more appropriate than such consideration would be an immediate denial of SCDR's request. It is that which NAB here respectfully requests.

Respectfully submitted,

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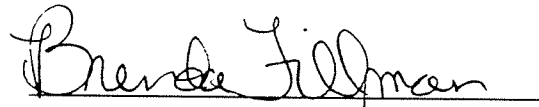
May 28, 1993

CERTIFICATE OF SERVICE

I, Brenda Fillman, do hereby certify that a true and correct copy of the foregoing. "Opposition of the National Association of Broadcasters", was hand delivered, on this date, May 28, 1993, to the following:

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