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

Federal Communications Commission
Office of Secretary

In the Matter of)	File Nos. 71-SAT-AMEND-97
)	49/50-DSS-P/LA-905
SATELLITE CD RADIO, INC.)	58/59-DSS-AMEND-90
)	8/9-DSS-AMEND-92
Application for Authority to Construct,)	12/13-DDS-AMEND-92
Launch and Operate Two Satellites in the)	44/55-DDS-AMEND-92
Digital Audio Radio Service)	42-SAT-AMEND-95
)	71-SAT-AMEND-97
To: The Commission		

REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

Primosphere Limited Partnership ("Primosphere"), by its attorneys, pursuant to Section 1.115 of the Commission's rules, hereby files its Reply to the Opposition to Application for Review filed on November 25, 1997, by Satellite CD Radio, Inc. ("CD Radio") in the above-captioned matter.

Background. On November 10, 1997, Primosphere filed an Application for Review of the Order and Authorization of the Chief, International Bureau, granting authority to CD Radio to launch and operate a satellite system in the Satellite Digital Radio Service ("SDARS") and denying Primosphere's Petition to Deny the application of CD Radio. Primosphere maintained that the percentage of foreign equity investment in CD Radio exceeds the statutory benchmark of Section 310(b)(4) of the Communications Act by more than six percent and that the Bureau erred in determining that because CD Radio proposed neither broadcast nor common carrier service, Section 310(b)(4) does not apply. Primosphere argued that the Bureau should not have used the decade-old Subscription Video decision to determine that CD Radio would not be a broadcaster, and that the Subscription Video decision should be overruled. Primosphere further noted that the

Bureau erred in applying common carrier law in order to determine that the foreign ownership was in the public interest, even if it considered CD Radio subject to Section 310(b)(4). Primosphere criticized the Bureau's reliance on CD Radio's assertion that a future public stock offering would result in the dilution of foreign ownership. And finally, Primosphere urged the Commission to investigate the ownership interests of Robert Friedland.

In its Opposition, CD Radio appears to have lost its patience with Commission processes, invoking the passage of seven years since it filed its application as at least one reason to "expeditiously" deny Primosphere's Application for Review. The mere passage of time is not a sufficient reason to ignore the infirmity of the Bureau's decision.

Primosphere is entitled to request that the Commission review and overturn its Subscription Video decision. The Bureau relied on the decade-old Subscription Video decision to determine that CD Radio would not be a broadcaster and therefore that the foreign ownership restriction of Section 310(b)(4) of the Act does not apply. Primosphere maintains that this decision is no longer applicable to today's multi-channel environment. CD Radio takes issue with this argument, arguing that Primosphere should have filed a petition for reconsideration of the Subscription Video decision or filed a petition for reconsideration of the SDARS Order itself. The notion that in order to request the Commission to change a policy it might be necessary to have filed in a ten-year-old proceeding must be dismissed out of hand. No party, including Primosphere (not even in existence in 1987), can be held to such an absurd standard. Nor should Primosphere be required to have argued for the revision of the Subscription Video decision in the SDARS proceeding.¹ Section 115(b)(2)(iii) of the Commission's rules specifically permits an

¹ It is well settled that the Commission may adopt or change a policy in an adjudicatory proceeding. See *Busse Broadcasting Corp. v. F.C.C.*, 87 F.3d 1456, 1465, 3 C.R. 1226 (D. C. Cir. 1996); *Columbia Broadcasting Sys., Inc. v. F.C.C.*, 454 F.2d 1018, 1026, 23 R.R. 2d 2019 (D.C. Cir. 1971).

application for review of a Bureau's decision where: "The action involves application of a precedent or policy which should be overturned or revised." This is precisely Primosphere's contention. Whether the Bureau had a right to rely on the Subscription Video decision is not at issue. Whether the Bureau should have relied on the decision is another matter altogether and one properly before the Commission for review.

Foreign ownership must be reviewed now. The Report and Order establishing the SDARS service permitted licensees the flexibility to choose whether or not to provide subscription service. It did not discuss the eventuality of a licensee changing from subscription to non-subscription service, and certainly adopted no administrative mechanism for doing so. In its Order, the Bureau apparently assumes such a mechanism -- a petition for declaratory ruling. Of course, the Bureau had no authority to adopt such a policy in the absence of any Commission statement on the issue and mis-read the Commission's intention to give licensees maximum flexibility to choose their own business plans. In spite of CD Radio's assurance in its Opposition that it will seek Commission approval, should CD Radio abandon subscription service, the fact remains that, under the rules, it need not do so. Thus, even under the Subscription Video definition, CD Radio could become a broadcaster with no opportunity for the Commission to determine whether its impermissible degree of foreign ownership is in the public interest.

CD Radio's foreign ownership will not decrease, as the Bureau was led to believe.

The Bureau gratefully accepted CD Radio's assurance that an imminent public stock offering would dilute the degree of foreign ownership, thus mooted the issue. We now find that perhaps the Bureau bought a pig in a poke. In its Opposition, CD Radio explains:

In just the past few days, as CD Radio's financing neared completion, it has become clear that these earlier *pro forma* estimates must be adjusted to account for the fact that many of CD Radio's preferred shareholders have not yet converted their shares to common stock and that the current public offering is not as large as had originally been projected.

Indeed. Based on CD Radio's own statements, the Commission has now learned that it cannot and should not rely on future events that may dilute the foreign ownership. Once again CD Radio has pled according to the dictates of convenience.

Why the Friedlands' interest in CD Radio must be examined. CD Radio continues to urge the irrelevance of Primosphere's emphasis on the citizenship and legal entanglements of Robert Friedland and his continuing relationship to CD Radio. The fact is, however, justifiable suspicions about Robert Friedland cannot be wished away. Robert Friedland was reported initially as owning 19 percent of CD Radio's stock as a Canadian citizen. Regardless of CD Radio's protestations, there has never been an affidavit from Mr. Friedland clarifying the question of his citizenship; only CD Radio's assertions that Mr. Friedland holds dual Canadian and U.S. citizenship. Furthermore, although Robert Friedland transferred his stock to his wife, Darlene (surely an unnecessary act if he were, indeed, a U.S. citizen), we have never been given any information about the terms of the transfer except for Darlene's statement that Robert has no legal or beneficial interest in the stock. Now, given that Darlene has transferred her voting rights in the stock to Mr. Margolese, a Canadian citizen, the circumstances and conditions under which she acquired her husband's stock become more important. As Primosphere noted in its Application for Review, the voting trust agreement brings combined total control of CD Radio by non-U.S. citizens to more than 50 percent. And, as noted above, CD Radio now admits that

the results of its public offering may not have the dramatic effect of diluting the percentage of foreign ownership so relied upon by the Bureau.

In its Opposition, CD Radio says nothing about the U.S. government suits against Robert Friedland, who, at the very least, is a former stockholder and director of CD Radio and whose continuing relationship with the company is still in doubt. The Bureau's reluctance to consider these suits because they are still pending was in error. These suits, which have not been dismissed, are pending because Mr. Friedland has fled the country! The U.S. government seeks to hold Mr. Friedland personally liable for one of the most significant environmental disasters in the nation's history. If, as Primosphere maintains, the Commission should properly be using the standards of a broadcast application process to examine the applicant's qualifications, then surely this matter is relevant.²

Conclusion. CD Radio decries the seven years it has taken the Commission to reach the point where it will grant licenses to provide a digital audio radio service. Primosphere urges that after seven years of effort it is now incumbent upon the Commission to make sure that it does the right thing. The Commission must step back from the heady excitement of the auction process and take the correct actions now: Reconsider the Subscription Video decision. Apply the Communications Act's foreign ownership restrictions to CD Radio. Investigate the circumstances of Robert Friedland's involvement with CD Radio. When the Commission fully

² So too, is the matter of Mr. Friedland's criminal conviction in 1971. Even where a minority owner's relationship with an applicant has been terminated, the Commission has held an investigation of character applicable. *See TV 9, Inc. v. F.C.C.*, 495 F.2d 929, 28 R.R. 2d 1115 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974).

considers these matters the Commission will conclude that it is not in the public interest to grant a license to CD Radio.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nellie Martinez-Redicks, a secretary at the law firm of Arter & Hadden LLP, hereby certify that a true copy of the foregoing Reply to Opposition to Application for Review has been mailed by First Class United States mail, postage prepaid, this 5th day of December, 1997 to:

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