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

In re Application of	)	
	)	
SATELLITE CD RADIO, INC.	)	File Nos. 49/50-DSS-P/LA-90
	)	58/59-DSS-AMEND-90
For Authority to Construct and	)	44/45-DSS-AMEND-92
Operate a Digital Audio Radio	)	
Service Satellite System Using	)	
the 2310 to 2360 MHz Frequency	)	
Band	)	
	)	

To: Chief, Common Carrier Bureau

PETITION TO DENY

Submitted by

Howard M. Liberman
Gerald Stevens-Kittner
Arter & Hadden
1801 K Street, N.W.
Suite 400 K
Washington, D.C. 20006
(202) 775-7100

and

Leslie A. Taylor
Leslie Taylor Associates
6800 Carlynn Court
Bethesda, MD 20817-4302
(301) 229-9342

Attorneys for
PRIMOSPHERE LIMITED PARTNERSHIP

November 13, 1992

TABLE OF CONTENTS

SUMMARY OF ARGUMENT

Primosphere Limited Partnership ("Primosphere") hereby petitions to deny the application of Satellite CD Radio, Inc. ("SCDR") for authorization to construct and operate a satellite, subscription-based digital audio radio service. Primosphere intends to file its own application to be considered concurrently with SCDR's application by December 15, 1992, the due date established for such applications.

SCDR is a company which is owned, in substantial part, by non-U.S. citizens. Indeed, potentially more than half of SCDR's equity may be owned by aliens. Consequently, SCDR urges the Commission not to classify its service as either a broadcast or common carrier service in order to escape the statutory restrictions on alien ownership of communications facilities contained in Section 310(b) of the Communications Act of 1934, as amended.

SCDR's service, if implemented, would be one of only a handful of national satellite-delivered digital audio programming services. By SCDR's own estimates, its service could, within ten years, achieve a subscriber base of almost fifteen million people. Regardless of the ultimate classification of satellite digital audio radio services, the Commission must apply the statutory alien ownership restrictions to this application. In analogous circumstances, with services that face much greater competition and that have a far less pervasive reach than would SCDR's proposed services, the Commission has applied Section 310(b) of the Act. The Commission has done so regardless of the particular classification scheme. There is no basis in logic or in the

Commission's existing regulations to exempt SCDR's proposed services from the alien ownership restrictions of the Communications Act.

Primosphere also believes that it would be grossly premature and unwise to grant SCDR's application prior to the completion of rulemaking proceedings designed to establish a comprehensive regulatory framework for satellite-delivered digital audio radio services. Satellite digital radio has far reaching implications which demand a careful, well thought-out approach to myriad technical and non-technical issues. These complex issues should not be resolved in the procedural context of a decision on SCDR's application. Accordingly, even assuming arguendo that SCDR's application could be granted consistent with Section 310(b) of the Communications Act, Primosphere urges the Commission to forebear from granting SCDR's application until the various rulemaking proceedings addressing satellite-delivered digital radio are completed.

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

In re Application of	)	
	)	
SATELLITE CD RADIO, INC.	)	File Nos. 49/50-DSS-P/LA-90
	)	58/59-DSS-AMEND-90
For Authority to Construct and	)	44/45-DSS-AMEND-92
Operate a Digital Audio Radio	)	
Service Satellite System Using	)	
the 2310 to 2360 MHz Frequency	)	
Band	)	
	)	

To: Chief, Common Carrier Bureau

PETITION TO DENY

Primosphere Limited Partnership ("Primosphere"), by its attorneys, pursuant to the Public Notice, DA 92-1408, Report No. DS-1244, released October 13, 1992, hereby Petitions to Deny the application of Satellite CD Radio, Inc. ("SCDR") to construct a digital audio radio satellite system.[1]

SCDR proposes to provide high rate digital information to subscribers, including compact disc quality audio programming, to portable, mobile and fixed radio receivers in the 2310-2360 MHz band throughout the United States. As SCDR acknowledges, its application does not comply with the alien ownership restrictions of Section 310(b) of the Communications Act of 1934, as amended. In addition, the application violates the Commission's requirements for domestic satellite service applications contained in Section 25.114 of the Commission's rules, which require demonstration of compliance with Section 310(b). For these reasons, the application should be denied.

---

[1] Primosphere is in the process of formalizing its organizational structure as a limited partnership.

Alternatively, SCDR's application, at the very least, should be deferred pending the adoption of a comprehensive set of rules governing the Commission's proposed satellite Digital Audio Radio Service ("DARS"). Rules governing the spectrum allocation, licensing, service and technical requirements must be adopted in order to ensure that the public interest is served by the orderly implementation of this unprecedented and pervasive new service. With spectrum that may accommodate as few as four nationwide competitors, grant of a satellite DARS application at this time would be grossly premature and have adverse, potentially irrevocable, public interest consequences.

I. Primosphere's Interest.

Primosphere intends to file an application on December 15, 1992, for a license to provide satellite-based DARS, in response to the Commission's Public Notice, DA 92-1408, released October 13, 1992.[2] Primosphere will propose operation as a broadcaster and suggest that the Commission address the issue of regulatory treatment of licensees in the DARS prior to the issuance of any licenses.

Consequently, Primosphere has a direct interest in the Commission's disposition of SCDR's application.

II. Background.

On September 25, 1992, SCDR filed an application for authority to construct two satellites operating in the 2310-2360 MHz band,

---

[2] The Commission's Public Notice established a cut-off date of December 15, 1992 for the filing of applications to be considered concurrently with that of SCDR.

with feeder links in the 7034-7055 MHz band.[3] These satellites would be used to provide simultaneous transmission of 30 channels of audio programming throughout the continental United States. SCDR proposes to offer its service on a subscription basis and states that it will "select a careful set of subscription narrowcast signals that will result in an optimum market response."[4] However, SCDR says that it will not participate in the program content of these signals. SCDR urges that it not be regulated as either a common carrier or a broadcaster, but rather that it be treated as a "private carrier." At least part of the motivation for this request is that a significant percentage of the equity in SCDR, potentially exceeding 50 percent, is owned by non-U.S. citizens.

Because Primosphere believes (1) that regardless of the regulatory classification the Commission adopts, the alien ownership restrictions of Section 310(b) should be applied to all applicants for licenses in this service, and (2) that rules governing the important new DARS should be adopted prior to consideration of any applications for license, the Commission should not grant SCDR's application as requested.

SCDR's ownership structure violates Section 310(b) of the Communications Act of 1934 and the Commission's rules for domestic communications satellite systems which require demonstration of compliance with Section 310(b). For an important new service such

---

[3] SCDR has previously filed applications for digital audio radio service. See 49/50-DSS-P/LA-90, 58/59-DSS-AMEND-90 and 8-DSS-MISC-91(2). SCDR also has pending a rulemaking petition, RM-7400.

[4] SCDR Application, p. 74.

as DARS, nationwide in scope, but which can be provided by only a few entities because of the limited spectrum available, SCDR's proposal that it be granted a license without being subject to even the most basic statutory requirements cannot withstand scrutiny.

Furthermore, SCDR's application raises a number of technical and non-technical issues which should be addressed in the context of a rulemaking proceeding before individual system applications can be fully evaluated. Because these regulatory issues relate to the potential number of service providers, the quality of the new service, and a broad range of other public interest considerations, these issues should not be dealt with in the context of a proceeding which addresses a single application.

III. SCDR's Application Violates the Alien Ownership Restrictions of the Communications Act and of the Commission's Rules for Domestic Satellite Systems.

According to SCDR's application, the company is directly or indirectly owned as follows:

Owner	Percent	Nationality
Era-Mar, Inc.	43%	25% French*
David Margolese	15%	Canadian
Ivanhoe Capital	17%	Canadian

* The French owner of Era-Mar, New Era Corporation, has warrants to purchase up to 50% interest in Era-Mar.

This ownership structure results in 42.75% of SCDR being presently owned by aliens (15% + 17% + (25% x 43%)). If New Era were to exercise its warrants, the level of alien ownership would constitute 53.5% of SCDR. The present and potential alien ownership is depicted in Appendix A of this Petition.

Although SCDR urges, without support or extensive discussion, that the alien ownership restrictions of Section 310(b) of the Communications Act of 1934, as amended, should not apply to its proposal, the public interest demands otherwise.

SCDR seeks a license to provide communications service to a broad audience spread over the entire continental United States. The Digital Audio Radio Service will have a limited number of providers, based on the spectrum allocated at the 1992 World Administrative Radio Conference proposed by the Commission to be incorporated in the U.S. Table of Allocations.[5]

SCDR reaches its conclusion that it should not be subject to Title III of the Communications Act, including Section 310(b), by urging that its proposed service should not be regulated as either a broadcast or a common carrier service. Rather, SCDR urges that it be treated as a private satellite carrier.

Primosphere firmly believes that however SCDR's service is ultimately classified, SCDR should be subject to the alien ownership provisions of the Communications Act. Support for this proposition is found in the manner in which the Commission has applied Section 310(b) to similar services. Specifically, although the Multipoint Distribution Service ("MDS"), the Operational Fixed Service ("OFS"), and the Direct Broadcast Satellite service ("DBS") are not necessarily classified as broadcast or common carrier

---

[5] See Notice of Proposed Rulemaking and Further Notice of Inquiry, General Docket No. 90-357, FCC 92-466, released November 6, 1992. In fact, in contrast to SCDR's assertion that 50 MHz of spectrum is available for this service, the Final Acts of the 1992 World Administrative Radio Conference provide that only 25 MHz can be used prior to 1998. See Final Acts of the World Administrative Radio Conference, Malaga-Torremolinos, 1992.

services, nonetheless, because the licensees in each service are accorded the status of public trustees to use and control spectrum by the government, the licensees are subject to the statutory alien ownership provisions. See Sections 21.4 (MDS), 94.7 (OFS), and 100.11 (DBS) of the Commission's rules.

To exempt from the alien ownership restrictions a service with the reach and potential impact of satellite DARS would be counter-intuitive as well as inconsistent with analogous regulations. By SCDR's estimates, its service will reach roughly 14.5 million subscribers by the year 2003. SCDR Application, p. 38. In all probability, assuming its application is granted, SCDR will be one of only four satellite digital radio service providers in the U.S.

By contrast, an MMDS licensee, which holds a non-broadcast, and possibly non-common carrier authorization for four terrestrial microwave channels with a protected radius of 15 miles, is fortunate if it has 5,000 to 10,000 subscribers. The MMDS licensee usually leases its spectrum to other entities which in turn enter into contracts with program suppliers. If anything, the MMDS licensee is even further removed from control over the programs transmitted over its channels than SCDR will be. Yet, despite a multitude of MMDS licensees and alternative video choices in each market and throughout the U.S., MMDS is subject to the Communications Act's alien ownership restrictions.

Similar facts and circumstances apply to the Commission's treatment of DBS and other subscription video services, which are subject to Section 310(b).[6] In its rulemaking to consider the regulatory treatment of a DBS service, the Commission sought to apply a flexible regulatory approach. See Direct Broadcast Satellite, 90 FCC2d 676, 51 RR2d 1341, 1364 (1982)(applicants not required to structure proposals according to any particular regulatory model)("DBS Policy Statement"). Indeed, the DBS Policy Statement contemplated that certain deployments of DBS frequencies and services would not be classified as broadcast services. 51 RR2d at 1364 and n. 79. Nevertheless, the Commission applied the alien ownership restrictions of Section 310(b) of the Act to all DBS services, regardless of classification. See Section 100.11 of the Commission's rules.[7]

Clearly, while the Commission has sought to strike a balance between ensuring that the public interest is served through appropriate regulation, while not impeding the timely introduction of new and innovative services, the Commission has insured that the

---

[6] Indeed, virtually all broadcast licensees devote a substantial portion of their broadcast day to programming purchased from third parties. It seems highly anomalous to require an AM station with an audience of several thousand people to comply with the alien ownership restrictions but not a nationwide service which has the real potential to serve roughly 10 to 15 percent of the country's entire population.

[7] The Commission thereby distinguished the license holder from the customer-programmer, as to whom the alien ownership provisions do not apply. See Subscription Video Services, 2 FCC Rcd 1001 (1987), aff'd sub nom. National Association for Better Broadcasting v. FCC, 849 F.2d 665 (D.C. Cir. 1988), petitions for reconsideration denied, 4 FCC Rcd 4948 (1989). The Commission took pains to point out that, unlike the customer-programmer, the entity which controls the communications facility is subject to alien ownership restrictions. 4 FCC Rcd at 4948.

holder of the FCC license, whether or not that entity programs its facilities, is subject to Section 310(b). There are compelling reasons to insure that the holder of a license for as pervasive, and as scarce a spectrum resource as the frequency band to be used for nationwide digital audio program distribution, comply with the Communications Act's alien ownership restrictions. Since SCDR's does not, the application must be denied.

IV. SCDR's Proposal to Provide Service on a Non-Broadcasting Basis Is Inconsistent with the WARC-92 Outcome.

The 1992 World Administrative Radio Conference (WARC-92)[8] adopted allocations for the broadcasting-satellite service (sound) and complementary terrestrial sound broadcasting service on a primary basis. Specifically, the footnote that provides for the use of the band 2310-2360 MHz for this service in the United States (Footnote 750B) states that "such use is limited to digital audio broadcasting." The International Radio Regulations define Broadcasting-satellite service as:

> A radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public. In the broadcasting-satellite service, the term "direct reception" shall encompass both individual reception and community reception.

RR 1-6, Section 3.17 Radio Regulations, 1990 Edition.

---

[8] See Final Acts of the World Administrative Radio Conference, Malaga-Torremolinos, 1992.

SCDR proposes to provide a service that is not encompassed by this definition. While the Commission has to consider the adoption of the WARC-92 allocation in its recently-initiated rulemaking proceeding,[9] the allocation placed in the International Table of Allocations for service in the United States was drafted by the U.S. delegation. SCDR can hardly argue that the U.S. should diverge from the approach to this allocation taken within the past year.

V. SCDR's Application Should Not be Considered Until a Rulemaking Proceeding Adopting Allocation, Service and Technical Rules Is Concluded.

SCDR asks the Commission to act on its application expeditiously and to grant it authority to construct its system at its own risk, before adoption of a United States allocation scheme and before conclusion of a rulemaking adopting service and technical rules. Primosphere urges that the Commission not follow this course of action.

Apart from the regulatory classification issue discussed in the previous section, the Commission should consider technical and service rules for this important new service. It should not authorize the construction of any system which could create de facto technical and service rules by virtue of its system concept or design. A de facto approach could result in less efficient use of the spectrum, lower service quality and/or less opportunity for

---

[9] See Notice of Proposed Rulemaking and Further Notice of Inquiry, General Docket No. 90-357, FCC 92-466, released November 6, 1992.

multiple entry in the provision of digital audio satellite service, and a compromise in public interest benefits to be gained from the service.

Some of the technical issues the Commission should consider include:

(1) Can non-directional 3 dBi user antennas provide sufficient cross-polarization isolation in practice to allow both LHCP and RHCP? What degradations from the cross-polarization isolation available on board a single satellite in orbit are introduced to the cross polarization isolation available in practice between different satellites, either collocated or at different orbital locations, and when located at different relative north-south excursions?

(2) Should all users be required to time division multiplex their signals onto one composite transmission, or should single channel per carrier or narrow band formats be permitted? If narrow band formats are permitted, how much frequency interleaving is needed between LHCP and RHCP signals?

(3) Is a 128 kbps data rate for a digitized audio channel sufficient to provide the high level of signal quality needed to differentiate digital sound broadcasting satellite service from other sound broadcast media?

(4) Should common technical standards be adopted for digital sound broadcasting satellite service to maximize opportunities for rapid market development through compatible receiver designs? Is a similar treatment

needed for scrambling and encryption schemes in light of the experience with current satellite television services?

The Commission also should consider eligibility requirements and other regulatory issues. Should the Commission regulate DARS licensees as common carriers or broadcasters, or should the applicants be permitted to choose? Must all DARS licensees utilize the same amount of bandwidth on their satellites? These and other questions are integral to the implementation of DARS in a manner which promotes the public interest.

Authorizing an application such as SCDR's prior to consideration of these important issues is not in the public interest, and is not consistent with past practices in similar circumstances. E.g., Subscription Video Services, supra.

VI. Conclusion.

Satellite CD Radio, Inc.'s ownership structure violates Section 310(b) of the Communications Act of 1934, as amended, and for that reason alone should be denied. Not only would a precipitous grant of its application be in derogation of the Communications Act, it also would prejudge the outcome of the Commission's pending Notice of Proposed Rulemaking on Digital Audio Radio Service and subsequent rulemakings which will consider eligibility, service and technical criteria.

A rulemaking proceeding is the proper mechanism to decide these vital issues. To decide them in the context of a single application would inevitably impede the implementation of this

important new service in a manner which would be most likely to promote the public interest.

Respectfully submitted,

PRIMOSPHERE LIMITED PARTNERSHIP

By: G. Stevens-Kittner

Howard M. Liberman
Gerald Stevens-Kittner
Arter & Hadden
1801 K Street, N.W.
Suite 400 K
Washington, D.C. 20006
(202) 775-7100

and

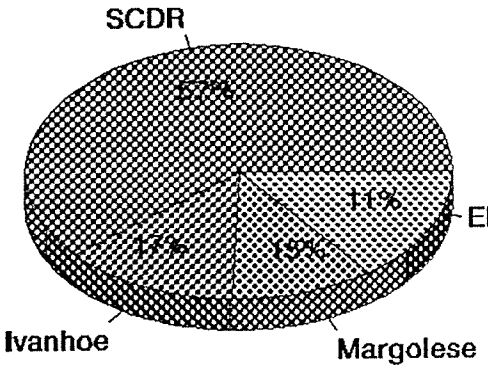
Leslie A. Taylor
Leslie Taylor Associates
6800 Carlynn Court
Bethesda, MD 20817-4302
(301) 229-9342

Its Attorneys

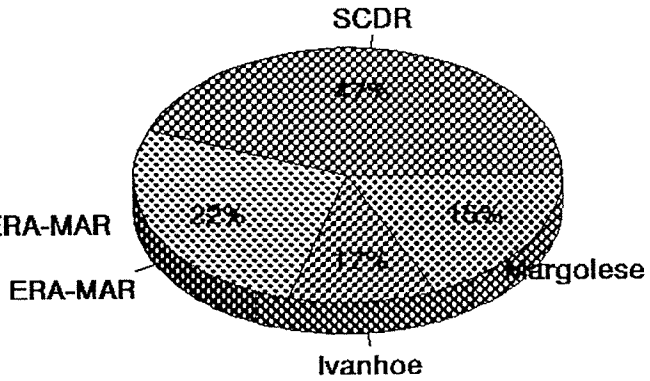
November 13, 1992

APPENDIX A

Alien Ownership of Satellite CD Radio Inc.



Current Alien Ownership:
42.75% of SCDR



After New Era exercises its warrants:
53.5 % Alien Ownership

ERA-MAR: 25% French
Margolese: Canadian
Ivanhoe: Canadian

CERTIFICATE OF SERVICE

I, Michelle Jarrett, a secretary of the law firm of Arter & Hadden, certify that on this day, November 13, 1992, a copy of the foregoing PETITION TO DENY was served by U.S. Postal Service, first class, postage prepaid, upon the following persons:

Robert D. Briskman
Satellite CD Radio, Inc.
1001 22nd Street, N.W.
Washington, D.C. 20037

James G. Ennis
Fletcher, Heald & Hildreth
1225 Connecticut Ave., N.W.
Suite 400
Washington, D.C. 20036

Michelle Jarrett