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

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

APPLICATION FOR REVIEW

Submitted by:

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November 10, 1997

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SUMMARY

Primosphere urges the Commission to overrule the Order and Authorization of the Chief, International Bureau, granting authority to Satellite CD Radio, Inc. ("CD Radio") to launch and operate a satellite system in the Satellite Digital Audio Radio Service ("SDARS") and denying Primosphere's Petition to Deny the application of CD Radio.

The Bureau's reliance on the 1987 Subscription Video decision to determine that the foreign ownership restrictions of Section 310(b)(4) of the Communications Act do not apply to SDARS ignores the fact that since 1987, when STV broadcast stations had all but vanished from the scene and no DBS systems were in operation, there has been an explosion of subscription services. Subscription services may well become primary means by which television and radio will be provided to the public. The Subscription Video decision can no longer be used as a guide to determine whether a licensee is a broadcaster.

The Bureau also erred when it applied common carrier policies to conclude that, regardless of the foreign investment in CD Radio, a grant of its application is in the public interest. The Commission has already determined that SDARS is not a common carrier service. Rather than finding "instructive" the common carrier policy of determining the "home market" of the foreign investor, the Bureau should have used for guidance the Commission's decision in FTS II, where the public interest finding was based on unique circumstances and not likely to be repeated.

Primosphere pointed out to the Bureau that the Commission has granted SDARS operators the flexibility to choose their own service classification and that it was very possible

that CD Radio would choose to abandon its subscription business plan in the future. Thus, application of broadcast policies now, including application of the foreign ownership restrictions, is essential. The Bureau's argument that if CD Radio chooses to operate as a broadcaster it would have to seek Commission approval is not supported by the SDARS Report and Order. In any event, a future Commission should not be burdened with the necessity of ruling on the foreign ownership issue after CD Radio has made additional investment. The time for considering foreign ownership is now.

The Bureau held that, because CD Radio plans a public stock offering that will dilute the degree of foreign ownership, there would be no violation of foreign ownership restrictions in the future. This position is merely an excuse to avoid dealing with the present reality of a degree of foreign ownership in violation of Section 310(b)(4). The Commission does not know how much stock will be sold, when it will be sold or who will buy it. A contingency of this magnitude should not be determinative in the Commission's decision-making process.

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To: The Commission

APPLICATION FOR REVIEW

Primosphere Limited Partnership ("Primosphere"), by its attorneys and pursuant to Section 1.115 of the Commission's rules, hereby files this Application For Review of the Order and Authorization of the Chief, International Bureau (DA 97-2191, released October 10, 1997) ("Order"), granting authority to Satellite CD Radio, Inc. ("CD Radio") to launch and operate a satellite system in the Satellite Digital Audio Radio Service ("SDARS") and denying Primosphere's Petition to Deny the application of CD Radio.

Background. On September 25, 1992, CD Radio filed an application for authority to construct two satellites operating in the 2310-2360 MHz band to provide simultaneous transmission of audio programming throughout the continental United States. CD Radio proposed to offer its service on a subscription basis and urged that it not be regulated as a broadcaster or a common carrier. Presumably, it chose this course, at least in part, because even in 1992 a significant percentage of CD Radio was owned by non-U.S. citizens. Based on information provided in CD Radio's original application, 42.75 percent of CD Radio was owned

by aliens, with the possibility, upon exercise of warrants, for that alien ownership to exceed 50 percent.

On November 13, 1992, Primosphere filed a petition to deny CD Radio's application. Primosphere argued then, as it does now, that the public interest requires that Section 310(b) of the Communications Act apply to all applicants in the SDARS service and that choosing a classification of service that was neither broadcast nor common carrier was a device to avoid the law.

After the Commission's April 1-2, 1997 auction for SDARS, in which CD Radio was one of the two high bidders, the Commission issued a public notice (dated May 23, 1997) specifying a date for additional petitions against CD Radio's application. On June 23, 1997 Primosphere submitted a Petition to Deny Application, again asserting that CD Radio's application should be denied because it does not comply with the Communications Act's alien ownership restriction. On September 8, 1997, Primosphere submitted a Supplement regarding Mr. Robert Friedland.

CD Radio has amended its ownership several times.[1] On two occasions since 1992, CD Radio has applied for and been granted transfer of control applications.[2] On each occasion the percentage of alien ownership changed. As of August 31, 1997, as the Bureau has observed, the percentage of foreign equity investment in CD Radio exceeds the statutory benchmark of Section 310(b)(4) by more than 6 percent. As demonstrated below, this foreign equity investment, should the Commission ever decide to investigate it, may be even greater.

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[1] See CD Radio's Form 430s submitted to the Commission in September 1997, May 1997, September 1996, October 1995, January 1995, December 1994, October 1993, December 1992, and October 1992.

[2] See CD Radio's Form 430s submitted to the Commission in December 1992 and December 1994.

The Bureau's October 10, 1997, Order held that Section 310(b)(4) is not applicable because CD Radio proposes neither a broadcast nor a common carrier service. That ruling is based on the 1987 Subscription Video Report and Order which determined that a service would be classified as broadcast or non-broadcast based on the *intent* of the purveyor.[3] Thus, a service intended to be received only by those who pay for it and which requires some special reception equipment (decoder, etc.) would not be considered a broadcast service. The Subscription Video decision specifically applied to DBS as well as STV service, and much of the Bureau's discussion of the Subscription Video rationale is in that context. The Bureau cites its own decisions where it has held that because DBS operators supply subscription services, Section 310(b) does not apply.[4] There is an Application for Review pending before the Commission in the MCI case,[5] and the Bureau, in Loral and the present case, has duly noted that its decisions will be subject to the outcome of that Review. That outcome is not a matter of mere routine. As Primosphere has pointed out in its Petition, on May 5, 1997, in a letter to Chairman Hundt, State Department International Communications Coordinator Vonya B. McCann, Department of Commerce Assistant Secretary for Communications and Information Larry Irving, and Deputy U.S. Trade Representative Jeffrey M. Lang joined the call for the review of the Bureau's MCI decision. They reminded the Commission that "significant policy questions continue to exist regarding foreign ownership of DBS subscription services on U.S. licensed satellites," and urged

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[3] 2 FCC Rcd. 1001, 1006 (1987).

[4] E.g., *Application of MCI Telecommunications Corporation for Authority to Construct, Launch and Operate a Direct Broadcast Satellite System at 110 degrees W.L.*, DA 96-1793 (released December 6, 1996) ("MCI Order"); *Loral Corporation Request for a Declaratory Ruling Concerning Section 310(b) of the Communications Act of 1934*, DA 97-725 (released May 14, 1997)("Loral DBS Order").

[5] EchoStar Satellite Corporation, Directsat Corporation, EchoStar DBS Corporation, National Association for Better Broadcasting and PRIMESTAR Partners L.P. submitted applications for review of the MCI Order.

a full Commission review, "before reaching a final determination on any application that involves foreign ownership above the statutory levels applicable to common carriers or broadcast licensees." The review called for by the Administration is overdue and, logically, SDARS, the audio counterpart of DBS, must be included.

The Subscription Video Decision Must Be Re-visited.

The U.S. Court of Appeals, even as it upheld the Subscription Video decision, warned that "a mass exodus of transmitting services from 'free' broadcasting to subscription viewing" might cause the Commission to revisit its definition of broadcasting. In the decade since the Subscription Video decision, DBS has become a reality. Had there been a DBS system in 1987 (and, it is important to remember, there was not) it would have "competed" with very few channels.[6] Current DBS systems, taking advantage of digital compression techniques, provide 150 channels to over five and one-half million viewers.[7] Moreover, Nielsen Media Research indicates that the broadcast networks continue to lose popularity in the DTH markets as viewers turn to the numerous subscription channels provided by satellite.[8] MMDS systems, beginning their own use of digital transmission, will be providing more than 100 channels of programming. The two SDARS systems will provide (depending on the level of compression chosen) at least 20 channels each of audio programming, considerably more than the number of radio stations licensed to most communities. Even the new SDTV channels (should broadcasters choose the

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[6] Proposed DBS systems a decade ago promised no more than 16 channels. *Television and Cable Factbook 1986*, Television Digest, Inc., A-147 (1986).

[7] SkyREPORT, October, 1997. (Note, this figure does not include C-Band DTH subscribers.)

[8] SkyREPORT, September 1997.

option to provide them) may be provided on a subscription basis.[9] The movement is clear. A greater and greater percentage of programming, both audio and video, will be delivered by subscription.

In 1987, the Video Subscription decision was determined against a backdrop where there were a few remaining -- and failing -- subscription television stations and the mere promise of DBS as a niche service. Now, any DBS system provides ten times the number of channels as are licensed to even the largest communities. Some presume it inevitable that DBS will provide local broadcast channels along with the present complement of satellite services. Under these circumstances, the Commission can no longer define a non-broadcast service in terms of an intent to serve only the few who are willing to pay for it. Similarly, if SDARS lives up to expectations, it may well provide many people with the bulk of their radio service. It is not unreasonable to envision a time, fast approaching, when much of the audio and video service received in this country will be received by subscription, even though radio and television stations may still be broadcasting "free" service.

Thus, it appears that the Court of Appeals' warning in its review of the Subscription Video decision was prescient. The Subscription Video decision should be re-visited, either in the context of this case, the on-going review of the MCI decision, or in a new proceeding. Until such a review is completed, the Commission should hold in abeyance any action that would permit multi-channel video or audio transmissions without the application of the traditional safeguards that have always been applied. Surely, the question of who shall sit astride hundreds

[9] The DTV rules provide that a television broadcast licensee may provide some number of SDTV channels instead of an HDTV channel as long as one channel is provided free. It is not at all clear what contortions will be necessary to reconcile the Subscription Video decision with a situation where a single licensee provides both free and subscription channels.

of channels of audio and video programming is at least as important as who shall be a licensee of a single broadcast station. Surely it would be bizarre were the Commission to cling to a policy where a licensee serving 100,000 persons is subjected to great scrutiny and held to strict standards, but a licensee serving many millions of persons is subjected to no scrutiny at all, save its ability to stand behind a winning bid.

Now is the Time to Consider CD Radio's Foreign Ownership.

The Bureau has argued that in the event CD Radio elects to change its classification (i.e., become a broadcaster), it then must seek an appropriate ruling from the Commission and its ownership structure would be subject to review at that time. The Commission, in the SDARS Report and Order, declined to mandate a service classification for SDARS, stating: "Flexibility for licensees to meet market demands is crucial and it may be that the viability of a satellite DARS service will depend on offering a mix of advertiser supported and subscription service."[10] The Report and Order does not require a licensee to obtain a ruling from the Commission in order to change its classification. It may be that the International Bureau believes such a process would be a good idea, but it certainly has no authority to require it. Thus, assuming CD Radio finds, as Primosphere believes to be the case, that the best business model for SDARS is an advertiser supported, non-subscription service, CD Radio is not required to seek approval to change. The Commission would then be faced with the strange prospect of a broadcaster operating in compliance with its rules but in violation of the Act. Even if the Commission, presumably through notice and comment rulemaking, requires a SDARS licensee to obtain

[10] *Digital Audio Radio Satellite Service in the 2310-2360 MHZ Frequency Band*, Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd. 5754 ¶83 (1997).

approval should it exercise the flexibility granted in the Report and Order, some subsequent date is hardly the best time to determine the legality of ownership interests. Indeed, if Commission precedent is any guide, there would be a presumption that the extent of foreign ownership in CD Radio was unjustified and restructuring would have to occur before the Commission granted permission for CD Radio to operate as a broadcaster. [11] If restructuring must happen, it should happen now, before the Commission is constrained by the pleas of heavy investment in an operating system. In the absence of restructuring the Commission must deny the CD Radio application.

The Bureau Erred in Applying Common Carrier Concepts to SDARS.

The Bureau determined that even if Section 310(b)(4) applies to CD Radio, grant of its application would be in the public interest. Based on the latest CD Radio submission, Loral Space and Communications Ltd. ("Loral") owns 15.2 percent of CD Radio and David Margolese, a Canadian citizen, owns 12.7 percent. The Bureau noted that eleven other individual Canadian citizens and corporations own a combined interest of less than three percent. Addressing Mr. Margolese, the Bureau held, with no discussion or explanation, that "he is not in a position to exercise significant control over the licensee." With respect to Loral, the Bureau noted that in the common carrier context, it uses the "home market" test to determine the required public interest finding. That test essentially uses five factors to determine the effective home market of a foreign investor. If it is determined that the home market is the U.S., the Bureau will find that alien ownership in an amount exceeding 25 percent is in the public interest. The Bureau had

[11] See *Fox Television Stations, Inc. II* (FTS II), 11 FCC Rcd. 5714 (1995).

already found it "instructive" to apply the "home market" test to Loral in the context of two other decisions, one in the common carrier context and one involving another DBS system, and found that Loral's home market was the U.S. [12] The Bureau considered the "home market" test "the most analogous precedent" in determining Loral's DBS investment.

In reaching its determination that even if CD Radio is subject to Section 310(b)(4), grant of CD Radio's application would be in the public interest, the Bureau applied the wrong law. The most "instructive" and "analogous" policy available would clearly be one applied to broadcasters, not common carriers.[13] Such a case, and it is important to emphasize that there has been only one, is the Commission's decision in FTS II. FTS II stands for the proposition that the Commission will not find, except in the most unique circumstances, that foreign ownership beyond the 25 percent benchmark is in the public interest. *FTS II* at ¶27. Indeed, unlike the common carrier context, where a routine application of the home market test is viewed as determinative, the Commission made clear that there is "a presumption in the broadcast area that, absent special considerations that outweigh the statutory concerns, the public interest will be served by denying licenses to entities with alien ownership above 25%." *FTS II* at ¶21. (Emphasis added.)

The Commission ultimately held the foreign investment in FTS to be justified based on the unique equities of the case. In large measure FTS II was decided based on FTS's

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[12] *AT&T Corp. and Loral SpaceCom Corporation for Authority to Assign the Licenses for Telestars 302, 303, 401, 402R, 5 and 6, and Associated Earth Station and Common Carrier Authorizations*, DA 97-125 (released January 17, 1997); *Loral DBS Order, supra* n.2.

[13] In the SDARS Report and Order ¶83 the Commission stated: "Nor does satellite DARS appear to be a common carrier service because much of the programming offered would be subject to the editorial control of the provider." A foreign ownership test devised for common carriers would seem under these circumstances to have little relevance to SDARS.

considerable and good faith reliance on Commission precedent available at the time FTS was structured, ten years earlier, and the cost to investors if FTS were required to restructure. The Commission also took into account the fact that Rupert Murdoch, an American Citizen, exercises *de jure* and *de facto* control over FTS. The Commission found that there had been no evidence of alien influence over a ten year period and that there was no reason to believe that permitting the foreign investment would implicate national security concerns. The Commission stated: "Our decision here is based upon unique equitable factors that the Commission does not expect to face again." *FTS II* at ¶27.

It is clear then that in the broadcast area there is a very heavy presumption to be overcome in order to justify foreign investment above the 25 percent benchmark. It should be noted that before reaching its decision in *Fox Television Stations, Inc. I*[14] and FTS II, the Mass Media Bureau "engaged in extensive discovery, asking for and reviewing hundreds of documents and deposing 17 witnesses, both current and former FTS and News Corp. employees and outside counsel who were involved in every aspect of the creation of FTS's ownership structure to the Commission from 1985 to 1994."[15] No such scrutiny was applied by the Bureau in this case. It was more convenient to rely on a common carrier model to determine whether a grant of CD Radio's application would be in the public interest.

Future Stock Offerings by CD Radio Should Not Have Been Considered.

The Bureau's final reason for ignoring CD Radio's violation of Section 310(b)(4) is reliance on another updated ownership filing stating that CD Radio intends to implement a public

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[14] 10 FCC Rcd. 8452 (1995).

[15] *Fox Television Stations, Inc. III*, 11 FCC Rcd. 7773, ¶13 (1996).

offering and preferred share conversion. This, claims the Bureau, will bring non-U.S. ownership below the 25 percent benchmark. This is certainly possible -- but it has not happened. CD Radio's foreign ownership remains above the benchmark now, and there is no assurance that it will not remain so. Until and unless a public offering in fact results in a change in the percentage of foreign ownership, the Bureau has no right to rely on the eventuality.[16] At the very least, the Commission should condition its license grant on the necessary reduction of foreign ownership. In other contexts, the Commission has declined to consider future interests in an analysis of foreign ownership interests.[17] Indeed, removed from the strange circumstances of applications to operate satellite services, where the Commission permits applications before the adoption of service rules, the Commission has normally held that an application showing non-compliance with Section 310(b) cannot be filed, and certainly cannot be "fixed" later.[18]

The Commission Should Investigate the Ownership Interests of Robert and Darlene Friedland.

As noted above, the percent of foreign ownership of CD Radio is not as clear as its FCC filings suggest, and may well exceed the 31 percent figure accepted by the Bureau. The original CD Radio application listed a director, Robert Friedland, as a Canadian citizen whose corporation, Ivanhoe Capital Corporation, owned 17 percent of CD Radio. In an amendment to the application CD Radio noted that Mr. Friedland was a U.S. citizen and owned 39.5 percent.[19]

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[16] For instance, it is not clear who, including non-U.S. citizens will buy CD Radio stock, nor that an offering will actually occur. Moreover, based on CD Radio's obvious attempts to solidify foreign control, the Commission's attitude should be, "We'll believe it when we see it."

[17] E.g., *Applications of NextWave Personal Communications, Inc. for various C-Block broadband PCS Licenses*, 12 FCC Rcd. 2030, 2050-51 (1997); *Applications of DCR PCS, Inc.*, 11 FCC Rcd. 16849, 16858 (1996).

[18] E.g., *Applications of Algreg Cellular Engineering et. al.*, 9 FCC Rcd. 5098, 5147 (1994).

[19] CD Radio Form 430 Exhibit VIII, submitted to the Commission on December 14, 1992.

The issue, of course, is whether Mr. Friedland is a U.S. citizen or not. Possibly because Mr. Friedland has fled the country to avoid the continuing unpleasantry of legal entanglements with the federal government, the record contains no affidavit from him affirming the status of his citizenship.[20] By 1994, in yet another amendment to CD Radio's application, Mr. Friedland (either a U.S. citizen or a Canadian -- the Commission still doesn't know) disappeared from the rolls of directors and stockholders.[21] The family Friedland remained represented, however, in the person of Darlene Friedland, Robert Friedland's wife. She was now listed as a director and owner of 28 percent of CD Radio's stock. There is indeed an affidavit in the record from Mrs. Friedland. She states that she is a U.S. citizen and that her husband has no legal or beneficial interest in her stock. She does not state, nor has the Bureau seen fit to question, whether or how she paid for the stock. As Primosphere noted in its 1997 Petition, CD Radio, in a Form 10-K report filed with the SEC in 1996, stated that it had borrowed $2,292,955 from an unidentified shareholder of the company and later issued a promissory note to evidence a loan to the shareholder. The shareholder assigned the note "to a relative" who accepted 60,000 shares of the Company's stock as payment of the note. It is not a significant stretch of the imagination to presume that the unidentified shareholder was Mr. Friedland and that the "relative" was Darlene Friedland. The Bureau seems uninterested in whether the stock was transferred because Mr.

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[20] On September 8, 1997, in a Supplement to its Petition to its Reply to Opposition to Petition to Deny, Primosphere attempted to bring some of Mr. Friedland's sordid legal difficulties to the Bureau's attention. That Supplement is hereby incorporated by reference. The Bureau questioned the relevance of the information because the Bureau maintains that because CD Radio is not a broadcaster, a normal broadcast character inquiry is not applicable. Of course, this position just highlights the problem. It would be unthinkable to grant a broadcast license to someone who has apparently moved to Australia to escape federal and state civil proceedings alleging his personal responsibility for one of this nation's most significant environmental disasters. In a broadcast proceeding, the Commission certainly would be justified in considering these matters. See *TV 9 v. F.C.C.*, 495 F.2d 929, 28 Rad. Reg. 1115 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974).

[21] CD Radio Form 430 Exhibit VIII, submitted to the Commission on December 1, 1994.

Friedland is not a U.S. citizen, or because Mr. Friedland found it necessary to hide his assets from U.S. and state agencies. At issue, of course, is whether Mr. Friedland is in fact a U.S. citizen, whether the transfer of stock was real, and whether Mr. and Mrs. Friedland should be deemed to have joint control of the stock. [22] In the context of a broadcast proceeding these questions would be investigated.[23]

Even as CD Radio was persuading the Bureau that a new public offering of stock would reduce its percentage of foreign ownership to an acceptable level, it was taking steps to assure continued foreign control.

On October 16, 1997, less than one week after the Bureau's decision to grant CD Radio a license, CD Radio filed with the SEC a Schedule 13E-4, revealing that on August 26, 1997, Darlene Friedland (now living in Sydney, presumably with her fugitive husband) and David Margolese executed a voting trust agreement in which Mrs. Friedland agreed to permit Mr. Margolese (upon certain conditions) to vote all of the CD Radio stock Mrs. Friedland acquired from her husband plus any other shares of capital stock that may be acquired or beneficially owned by Darlene, Robert, or any member of their immediate family. Of course, the impact of this arrangement is profound. Now, adding the stock owned by Mr. Margolese (a Canadian citizen), Mrs. Friedland and Loral, as well as the 3 percent owned by various other Canadian citizens, more than 50 percent of CD Radio's stock is voted by foreign interests.

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[22] The least CD Radio could have done is supply an affidavit from Mr. Friedland. The least the Bureau could have done is investigate his citizenship. This is a real issue. After all, it was the original filing of CD Radio that listed Mr. Friedland as a Canadian citizen. Surely, this is a matter that needs resolution.

[23] As would criminal convictions. Robert M. Friedland was convicted of unlawfully delivering and disposing of a quantity of LSD in 1970. See US v. Robert M. Friedland, 444 F. 2d 710 (1971). Perhaps the Commission should investigate this aspect of Mr Friedland's background as well.

As if the voting trust agreement is not tell-tale enough, we find that the agreement was consented to by none other than Robert Friedland, the man was described in the earlier affidavit of Darlene as having no legal or beneficial interest in her stock.[24] CD Radio may argue that ownership is not relevant, but what about truth? Can it be that willingness to pay $83,346,000 for a license means that one can treat the Commission with contempt? But the pattern is clear. CD Radio will make whatever argument it thinks will resonate with the Commission and then pursue its own path: Robert Friedland is a Canadian citizen. Robert Friedland is a U.S. citizen. Robert Friedland owns stock and is a director. Darlene Friedland owns stock and is a director. Robert Friedland owns no legal or beneficial interest in Darlene Friedland's stock. Robert Friedland signs a consent to the voting trust agreement permitting Darlene Friedland's stock to be voted by Mr. Margolese. The percentage of foreign ownership will be acceptable after a public stock offering. The percentage of foreign control is increased when Darlene Friedland gives David Margolese, a Canadian citizen, the right to vote her stock.

At some point, the Commission must say, "Enough!" The investigation of the Friedlands and the foreign control of CD Radio is long overdue. Even should the Commission determine that it will continue to invoke the outdated Subscription Video definition of broadcaster and ignore Section 310(b)(4) of the Act, it surely must be concerned about an applicant in any service who repeatedly comes before the Commission saying one thing and doing another. CD Radio, at the least, has exhibited not merely a lack of candor but an intention to mislead the Commission and abuse its processes.

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[24] The record gives one no reason to suppose that Darlene Friedland is a minor or is otherwise incompetent to sign a voting trust agreement without her husband's consent.

Conclusion.

Throughout this proceeding, Primosphere has urged the Bureau to investigate the degree of foreign ownership in CD Radio and the citizenship of Robert Friedland. In order to avoid these issues, CD Radio has clung to the argument that if CD Radio is not a broadcaster, foreign ownership is not relevant. As Primosphere has shown, however, the subscription video policy is outmoded, would not have been adopted in today's multichannel video and audio environment, and should be changed. Moreover, pursuant to the SDARS Report and Order, CD Radio may elect at any time to change its business plan and become a true broadcaster by any definition. Thus, the issue of foreign ownership is relevant indeed and, as Primosphere maintains, the information (or lack thereof) CD Radio has provided to the Commission is characterized at least by a lack of candor and, more probably, an intent to deceive.

Primosphere urges the Commission to find that Section 310(b)(4) of the Act is applicable to SDARS. As a matter of policy, any interpretation of the Subscription Video decision that permits more than 25 percent foreign ownership of a multi-channel audio or video service should be overruled. If the Commission believes that a policy change should be considered in a separate, broader proceeding, or in its pending review of the Bureau's MCI decision, then the Bureau's decision to award CD Radio a license should be held in abeyance until the conclusion of such a proceeding.

Regulation of CD Radio as a broadcaster is all the more important because, however its planned mode of operation is interpreted, the Commission has given it the right to become a broadcaster. The Bureau's argument that, in effect, "sufficient unto the day is the evil thereof," inevitably places this or a future Commission in the unpleasant position of having to enforce

Section 310(b)(4) after even more significant investment has been made and equities established. At issue here is how the Commission is to regulate over-the-air subscription services that are, in all other respects, clearly broadcast services. Whatever the notion in 1987 when the Subscription Video decision was made, time and technology have rendered that decision obsolete.

Assuming the Commission finds that Section 310(b)(4) does indeed apply to SDARS, then it should also find that it is in the public interest to deny CD Radio's application. The Bureau's reliance on foreign ownership considerations applied in the common carrier context was misplaced. CD radio must be treated as a broadcaster. As FTS II indicates, broadcast licensees have always been held to strict compliance with Section 310(b)(4), and only the unique circumstances of that case warranted a finding that an excess of foreign ownership was in the public interest. The Commission warned that such a finding was not likely to occur again.

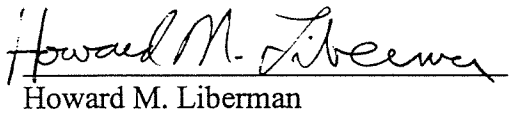
In addition, the Commission should find that the Bureau erred in its reliance on the possible results of any future stock offering to cure CD Radio's violation of the law. To permit an applicant to cure an application, illegal on its face, would overturn Commission precedents.

Finally, the Commission should consider the nature and implications of Robert Friedland's involvement in CD Radio. One arm of the U.S. government, the Department of Justice, claims that Mr. Friedland is personally responsible for one of our country's worst environmental disasters and is unable, so far, to pursue him because he remains outside of our country. It is inconsistent for another arm of our government to be enriching Mr. Friedland's pocketbook by many of millions of dollars by awarding a valuable license to a company in which he has a major interest (or his wife, unless they can establish "non-attribution" under the Commission's criteria).

THEREFORE, for the reasons stated herein, Primosphere requests that the Commission review the International Bureau's Order, released on October 10, 1997 in this proceeding.

Respectfully submitted,

PRIMOSPHERE LIMITED PARTNERSHIP

By: 

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November 10, 1997

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CERTIFICATE OF SERVICE

I, Nellie Martinez-Redicks, a secretary at the law firm of Arter & Hadden, hereby certify that a true copy of the foregoing Application for Review has been mailed by First Class United States mail, postage prepaid, this 10th day of November, 1997 to:

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Nellie Martinez-Redicks

Nellie Martinez-Redicks