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May 9, 1997

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MAY - 9 1997

Federal Communications Commission  
Office of Secretary  
FACSIMILE  
(202) 429-7049

BY HAND

William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: Satellite CD Radio, Inc.  
File Nos. 49/50-DSS-P/L-90,  
58/59-DSS-AMEND-90, 44/45-DSS-AMEND-92  
Request for Further Exemption Pursuant to  
47 C.F.R. 25.116(c)(2) and Expedited Consideration

Dear Mr. Caton:

Enclosed for filing, on behalf of Satellite CD Radio, Inc., is an original and three copies of a request for further exemption of Section 25.116(c) of the Commission's rules. CD Radio also respectfully requests expedited consideration, urging the Commission to act on this matter by July 9, 1997. Expedited consideration is necessary to permit CD Radio to continue to attract capital from the public capital markets to fund development of its satellite DARS system.

Commission rules do not require that a fee be submitted with this request. In order to aid the Commission in promptly processing CD Radio's request, CD Radio has taken the liberty of attaching suggested drafts of a Public Notice and a Memorandum Opinion and Order in this matter. Electronic copies of these documents have been included with a courtesy copy of this petition that was delivered to John Stern, Assistant Bureau Chief, International Bureau.

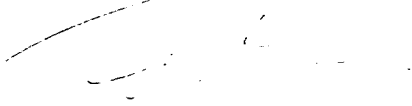
William F. Caton

May 9, 1997

Page 2

Please direct any questions about this matter to the undersigned.

Respectfully submitted,



Carl R. Frank  
Counsel for Satellite CD Radio, Inc.

Enclosures

cc: John Stern, Assistant Bureau Chief,  
International Bureau

MAY - 9 1997

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

Federal Communications Commission  
Office of Secretary

In the Matter of:

**Satellite CD Radio, Inc.**

Application to Construct, Launch  
and Operate a Digital Audio Radio  
Satellite Service in the  
2320-2332.5 MHz Frequency Band

49/50-DSS-P/L-90  
58/59-DSS-AMEND-90  
44/45-DSS-AMEND-92

**Request for Further Exemption  
Pursuant to 47 C.F.R. § 25.116(c)(2)  
and Expedited Consideration**

Satellite CD Radio, Inc. ("CD Radio"), through its counsel, herein requests a further exemption from Section 25.116(c) of the Commission's rules ("the cut-off rule"), which generally would result in the assignment of a new file number in the event of a major amendment to an application filed following the applicable cut-off date.<sup>1</sup> The Commission previously granted an exemption to CD Radio, finding that it would serve the public interest for CD Radio to issue additional shares to fund the continued prosecution of its satellite DARS application. CD Radio requests that the Commission reaffirm its previous decision by granting CD Radio a further exemption from the cut-off rule to continue raising capital through the public capital markets for its satellite DARS system.<sup>2</sup>

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<sup>1</sup> See 47 C.F.R. § 25.116(c). The Commission has the authority to grant exemptions to the cut-off rule where a major amendment results from a substantial change in beneficial ownership or control of an applicant and the Commission determines that such change would serve the public interest. See 47 C.F.R. § 25.116(c)(2).

<sup>2</sup> Alternatively, if the Commission grants CD Radio's above captioned application to construct and launch a satellite DARS system prior to acting on this petition, CD Radio herein requests that the Commission authorize a transfer of control of CD Radio pursuant to 47 C.F.R. § 25.118 of the Commission's rules. Grant of a transfer of control would be in the public interest for the reasons stated in this petition. Indeed, in applying Section 25.118 to transfers of control in the

(continued . . .)

CD Radio also seeks expedited consideration of its request for further exemption and in particular respectfully requests a decision before July 9, 1997. Expedited consideration is necessary to permit CD Radio to continue to attract capital from the public capital markets for its long-awaited satellite DARS system. In today's time-sensitive, competitive capital markets CD Radio faces substantial financial penalties if Commission consent is not provided within that time.<sup>3</sup> Thus, CD Radio strongly urges the Commission to promptly grant CD Radio's request for further exemption of the cut-off rule.

The circumstances prompting CD Radio to request a further exemption are virtually identical to those that justified CD Radio's previous exemption. As the Commission has recognized, the prosecution of an application to construct and launch a satellite DARS system requires the expenditure of substantial funds.<sup>4</sup> CD Radio spent more than \$20 million dollars proving the viability of the satellite DARS service, made millions of dollars in upfront and down payments and pledged at auction to pay millions more for a license. CD Radio has also begun constructing its space stations and executing agreements for associated hardware.<sup>5</sup> All of these activities are tremendously expensive and cannot be paid for solely through debt financing, or the

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(continued . . .)

satellite DARS service, the Commission stated: "we do not intend to preclude licensees from proposing widely dispersed equity offerings to raise capital." See *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, IB Docket No. 95-91, Gen Docket No. 90-357, ¶ 169 n.300 (March 3, 1997) ("*Satellite DARS Order*"). In doing so, the Commission cited its previous decision to grant a Section 25.116(c)(2) exemption to CD Radio. *Id.* (citing *Satellite CD Radio, Inc.*, 9 FCC Rcd 2569 (Common Carrier Bureau) (1994)).

<sup>3</sup> Pursuant to CD Radio's preferred shareholder agreement (excerpt attached), CD Radio must pay a 3% penalty every 30 days if the herein requested Commission consent is not granted by July 9, 1997 (90 days following the first closing on the preferred shares).

<sup>4</sup> See *Satellite CD Radio, Inc.*, 9 FCC Rcd at 2571.

<sup>5</sup> See News Release, "*Digital Radio Satellite Under Construction*," Loral Space & Communications Ltd. (May 2, 1997) (included hereto as an attachment).

investments of a few entrepreneurs. Additional capital must be generated through the public markets.

Specifically, CD Radio is considering raising additional capital through debt and the public issuance of up to 15 million shares of common stock in its parent company, CD Radio Inc. It has also issued 5,400,000 shares of 5% delayed convertible preferred shares, some of which may be converted into voting shares in the near future either directly or through one or more exchanges of securities. All of these stock offerings will have no effect on the day-to-day management and business plan of CD Radio. The same individuals that have controlled substantial blocks of equity in CD Radio and have held positions on the executive board and in senior management will retain their substantial equity stakes and decision-making executive positions.

CD Radio is aware that at some point in the near future these transactions could result in a substantial change in the beneficial ownership of CD Radio's parent company by diluting the existing shareholders' equity stake.<sup>6</sup> Thus, CD Radio seeks a further exemption of the cut-off rule permitting it to amend its application to reflect a change in beneficial ownership without affecting its qualification to become a satellite DARS licensee.

The Commission acknowledged the tremendous costs involved in prosecuting a satellite DARS application when it granted CD Radio a previous exemption of the cut-off rule. In a June 8, 1994 decision, the Commission concluded that it would be in the public interest to permit a substantial change in beneficial ownership in CD Radio through the public offering of 4,500,000 shares of common stock.<sup>7</sup> In finding the grant of an exemption warranted, the Commission

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<sup>6</sup> It cannot be determined exactly when a change in beneficial ownership would take place due to the discretionary nature of the conversion option of the preferred shares. It is likely, however, that if a sizable number of the preferred shareholders elect to convert to voting equity shares, then a substantial change in beneficial ownership would result.

<sup>7</sup> See *Satellite CD Radio, Inc.*, 9 FCC Rcd 2569.

considered two factors: 1) whether the proposed transaction had a legitimate business purpose; and 2) whether the change in ownership was in the public interest.<sup>8</sup>

First, the Commission concluded that the issuance of additional equity shares by CD Radio clearly had a legitimate business purpose, “to provide continuing financing to allow the company to pursue its application.”<sup>9</sup> The Commission noted that CD Radio had represented that its day-to-day management, operational team and service proposal would remain the same.<sup>10</sup> Based on these representations the Commission found that the current principals would remain in actual control of the applicant.<sup>11</sup> Additionally, the Commission found that CD Radio was not trafficking in bare applications or planning to sell control to third parties, but that the evidence indicated that it was thereby using traditional capital sources to fund its business activities.<sup>12</sup> Second, the Commission found that any resulting change of beneficial ownership in CD Radio would further the public interest by permitting CD Radio to “strengthen its financial resources” and thus increase the likelihood that satellite DARS services would promptly be made available to the public.<sup>13</sup>

These same factors weigh strongly in favor of granting CD Radio a further exemption from the cut-off rule. With respect to the first factor, CD Radio clearly has a legitimate business purpose in issuing additional voting shares to widely dispersed parties through the public capital markets. CD Radio needs to accumulate additional capital in order to continue the successful

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<sup>8</sup> *See id.* at 2571.

<sup>9</sup> *Id.*

<sup>10</sup> *See id.*

<sup>11</sup> *See id.*

<sup>12</sup> *See id.*

<sup>13</sup> *Id.*

prosecution of its satellite DARS application. As the Commission is aware, on April 2, 1997, CD Radio pledged at auction to pay \$83,346,000 for one of two FCC licenses to operate satellite DARS systems.<sup>14</sup> CD Radio subsequently made a post-auction down payment of \$13,669,200 to the U.S. treasury, bringing its total down payment to \$16,669,200, twenty percent of its winning bid.<sup>15</sup> CD Radio will pay the remainder of its winning bid after the Commission determines that CD Radio is eligible to receive a license.<sup>16</sup> Moreover, CD Radio has already begun constructing its space stations and executing agreements for associated hardware. Each of these activities is consuming and will continue to consume substantial amounts of capital. Thus, CD Radio has a legitimate business purpose in supplementing its financial reserves through general equity offerings to the public.

Furthermore, as discussed above, any substantial change in ownership that would result would not alter CD Radio's management and operational team, nor would it change the applicant's service proposal to provide coast to coast, mobile, high quality audio programming. CD Radio would retain its existing business plan and its current principals would continue their day-to-day management functions. Any newly issued equity shares would be placed with the public capital market and institutional investors that would take no part in the management of the company. Clearly by these proposed stock transactions, CD Radio is not "trafficking in bare applications" or intending to "sell control to third parties."

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<sup>14</sup> See Public Notice, "*FCC Announces Auction Winners for Digital Audio Radio Service*," DA 97-656, Report No. AUC 97-05 (April 2, 1997) ("*April 2nd Public Notice*").

<sup>15</sup> See *id.* (instructing winning bidders to bring their down payments up to 20% of their winning bids by April 16, 1997); see also *Satellite DARS Order*, ¶ 165; see also 47 C.F.R. § 25.404.

<sup>16</sup> An amendment to CD Radio's pending application is being prepared providing the Commission with, *inter alia*, the updated information and certifications required to be filed under Sections 25.114 and 25.144 of the rules. That amendment will be filed separately.

With respect to the second factor considered by the Commission, any substantial change in ownership in CD Radio through the issuance of additional equity shares would clearly be in the public interest because it would aid CD Radio in making satellite DARS services rapidly available to the public. In this regard, the Commission recognized in its *Satellite DARS Order* that the provision of satellite DARS services would promote the public interest by providing consumers with a wide variety of valuable digital audio programming.<sup>17</sup> CD Radio seeks to fulfill this goal through the implementation of its rapid construction and development schedule designed to make state-of-the-art satellite DARS services available to consumers as early as the Fall of 1999. The execution of this development schedule is necessitating the expenditure of substantial sums, part of which CD Radio can most appropriately obtain through a general equity offering in the public markets. Thus, the public interest would clearly be served by granting CD Radio a further exemption from the cut-off rule so that it can obtain sufficient capital to finance the development of its satellite DARS system.

In requesting a further exemption from the cut-off rule, CD Radio assures the Commission that it will not alter its current day-to-day management and business plan. CD Radio's management and principals will retain their decision-making positions and substantial equity holdings. CD Radio is simply seeking a further exemption so that it can continue to raise capital through the issuance to widely dispersed parties of voting equity shares (including institutional and mutual funds) in CD Radio's parent company. In this regard, CD Radio also

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<sup>17</sup> See, e.g., *Satellite DARS Order*, ¶¶ 1, 10. The Commission noted that the channel capacity and nationwide scope of satellite DARS will enable the provision of niche programming services that cannot be supported on a cost-effective basis using locally-based terrestrial technologies. See, e.g., *id.*, ¶¶ 13-15. Satellite DARS operators would also be able to offer a wide range of audio programming options to rural and mountainous sections of the country that have historically been underserved. See, e.g., *id.*, ¶¶ 10-12.




seeks expedited consideration of its request for further exemption and a decision before July 9, 1997. Expedited consideration is warranted so that CD Radio can continue to attract the public investment capital that is necessary to rapidly bring the public interest benefits of high quality satellite DARS services to U.S. consumers.

Respectfully submitted,

**Satellite CD Radio, Inc.**

By: \_\_\_\_\_

  
Richard E. Wiley  
Michael Yourshaw  
Carl R. Frank  
Bruce A Olcott

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Of Counsel

Dated: May 9, 1997

**Satellite CD Radio, Inc.**  
Request for Further Exemption  
Pursuant to 47 C.F.R. § 25.116(c)(2)  
and Expedited Consideration  
May 9, 1997

ATTACHMENT 1

**News Release, “*Digital Radio Satellite Under Construction,*”  
Loral Space & Communications Ltd., May 2, 1997**

## Digital Radio Satellite Under Construction

\*\*\*\*Digital Radio Satellite Under Construction 05/02/97 PALO ALTO, CALIFORNIA, U.S.A., 1997 MAY 2 (NB) -- By Patrick McKenna. Sometime around the year 2000, digital radio, a CD-quality radio transmission service, will become available in the continental US. Satellite-builder Loral Space & Communications Ltd. [NYSE:LOR ] announced an agreement to build the first satellite for CD Radio Inc. [NASDAQ:CDRD ], one of two companies granted a license by the US government to operate digital audio radio service (DARS) satellites.



Loral's manager of public relations, David Benton, told Newsbytes, "Originally, we, along with a number of other companies, filed for one of the licenses to operate DARS satellites. We later retracted our application and pursued a contract to build DARS satellites for CD Radio."

Under terms of the contract, Loral will build two DARS satellites with an option for a third. By 1999, the first two satellites will be ready for delivery to a third-party launch.

According to CD Radio, DARS satellites will transmit a consistent CD-quality audio transmission to automobiles, eliminating common reception problems motorist experience with AM and FM radio frequencies. New radios capable of receiving DARS transmissions are expected to be installed in new cars and sold separately at retail.

Loral's CD Radio satellites will be based on Space Systems/Loral's FS-1300, three-axis stabilized spacecraft which has an expected mission life of more than 15 years. Benton said Loral has built or received orders for 61 satellites. Twenty-four are currently in production. A number of those satellites are low-earth orbit satellites positioned from 250 nautical miles to approximately 3,000 nautical miles. Typically, low-earth orbit satellites are used for communications such as cellular phones.

DARS satellites will orbit in what is called the Clark Orbit, named after Arthur C. Clark, at 22,300 nautical miles. The distance means Loral's DARS satellites will be in a geo-stationary orbit and capable of delivering a consistent transmission across the continental US. Satellites positioned in low-earth orbit circumscribe the globe approximately every 2 hours which means a phone call has to be handed-off to a series of following satellites to deliver consistent coverage.

Financial terms between Loral and CD Radio were not disclosed. CDRadio officials were unavailable to comment at this time.

(19970502/Press Contact: David Benton, Loral Space & Communications Ltd., tel 703-414-1045; Reported by Newsbytes News Network: <http://www.newsbytes.com/DIGRADSATT970502/PHOTO>)

### Additional sources of information

[Tell Me More - From Infoseek](#)

[Company Profile - From E\\*TRADE: CDRD, LOR](#)

[Stock Charts - From Quote.Com: CDRD, LOR](#)

[SEC Filings - From EDGAR Online: CDRD, LOR](#)

[Company Capsule - From Hoover's Online: CDRD, LOR](#)

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**Satellite CD Radio, Inc.**  
Request for Further Exemption  
Pursuant to 47 C.F.R. § 25.116(c)(2)  
and Expedited Consideration  
May 9, 1997

ATTACHMENT 2

**Excerpts from CD Radio Inc.  
Preferred Stock Investment Agreement**

CD RADIO INC.

PREFERRED STOCK INVESTMENT AGREEMENT

PREFERRED STOCK INVESTMENT AGREEMENT ("**Agreement**") dated as of October 23, 1996 between CD Radio Inc., a Delaware corporation ("**CDRD**"), and each entity listed as an investor on Schedule I attached to this Agreement (each individually an "**Investor**" and collectively the "**Investors**").

W I T N E S S E T H:

WHEREAS, CDRD desires to sell and issue to the Investors, and the Investors wish to purchase from CDRD, up to an aggregate of 2,500,000 shares of CDRD's 5% Delayed Convertible Preferred Stock having the rights, designations and preferences set forth in the Certificate of Designations of CDRD (the "**Certificate of Designations**") in the identical form and substance of Exhibit 1 attached to this Agreement (the "**Preferred Shares**"), on the terms and conditions set forth in this Agreement:

WHEREAS, CDRD initially desires to sell to the Investors up to 1,250,000 of the Preferred Shares ("**First Closing Shares**") in the event that it, or its subsidiary, receives notice with respect to the authority to provide satellite digital audio radio services ("**Satellite DARS License**") that either: (i) the Federal Communications Commission ("**FCC**") has issued an order stating that CDRD has been chosen to receive a Satellite DARS License by virtue of its having been designated a pioneer and will not need to participate in competitive bidding for such license (the "**Pioneer's Preference Order**"); or (ii) it is the winning bidder for a Satellite DARS License at the conclusion of an auction for Satellite DARS Licenses (a "**Winning Bid**"), all on the terms and conditions set forth in this Agreement:

WHEREAS, CDRD will have the option to sell to the Investors a number of Preferred Shares equal to the number of First Closing Shares ("**Second Closing Shares**") after the First Closing Shares have been sold, subject to the terms and conditions set forth in this Agreement:

WHEREAS, the Preferred Shares will be convertible into shares of common stock, par value \$.001, of CDRD ("**Common Shares**") and the Investors will have registration rights with respect to such Common Shares issuable upon conversion, and the Preferred Shares will be subject to certain rights of redemption of CDRD;

NOW, THEREFORE, in consideration of the foregoing premises and the covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:


**Section 3.11 FCC Approval.** CDRD shall, with the reasonable cooperation of the holders of the Preferred Shares, promptly and expeditiously after the First Closing apply for, and use its best efforts to obtain, any and all approvals, consents, authorizations or orders of, or make

any filings or registrations with the FCC (other than Acquisition of Control Approval) necessary to permit the conversion of all Preferred Shares in accordance with the Certificate of Designations and the exercise of all Warrants (if any) (the "FCC Approval"). If the FCC Approval is not obtained by the later of (1) the 90th calendar day after the First Closing Date and (2) February 15, 1997, CDRD shall, in addition to any other remedies available to such holders at law or equity (including pursuant to the provisions of Section 7.2(a)), pay each holder of Preferred Shares a cash payment in an amount per share equal to 3% of the Liquidation Preference for all Preferred Shares (or the equivalent in Underlying Shares) then held by such holder for each 30-day period thereafter until such FCC Approval is obtained. Such cash payment shall be pro-rated as to a period of less than 30 days. Any cash payment required to be made pursuant to this subsection 3.3 shall be due and payable within 10 days of the end of any month in which such event occurs. If the FCC Approval is not obtained by a date that is 270 days after the Initial Registration Deadline, then CDRD shall comply with its obligations as and to the extent required by Section 4(a) of the Certificate of Designations.

IN WITNESS WHEREOF, the parties to this Agreement have caused this Agreement to be duly executed by their respective authorized officers as of the date of this Agreement.

CDRD:

CD RADIO INC.

By:   
Name: David Margolese  
Its: President



**Satellite CD Radio, Inc.**  
Request for Further Exemption  
Pursuant to 47 C.F.R. § 25.116(c)(2)  
and Expedited Consideration  
May 9, 1997

ATTACHMENT 3

**Draft FCC Public Notice**

SATELLITE POLICY BRANCH INFORMATION:  
APPLICATIONS ACCEPTED FOR FILING

The applications listed below have been found, upon initial review, to be acceptable for filing. The Commission reserves the right to return any of the applications if, upon further examination, it is determined the application is not in conformance with the Commission's Rules or its policies. Petitions, oppositions and other pleadings filed in response to this notice should conform to Section 25.154 of the Commission's rules, unless otherwise noted. 47 C.F.R. § 25.154.

**Satellite CD Radio, Inc.**

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

Satellite CD Radio, Inc. ("CD Radio"), an applicant in the Satellite Digital Audio Radio Service ("Satellite DARS"), has filed a request for further exemption from Section 25.116(c) of the Commission's Rules, 47 C.F.R. § 25.116(c), which generally would result in the assignment of a new file number in the event of a major amendment filed following the applicable cut-off date. CD Radio indicated that it seeks a further exemption so that it can continue to raise capital for its satellite DARS system through debt and equity offerings in the public capital markets.

**Satellite CD Radio, Inc.**  
Request for Further Exemption  
Pursuant to 47 C.F.R. § 25.116(c)(2)  
and Expedited Consideration  
May 9, 1997

ATTACHMENT 4

**Draft FCC Memorandum Opinion and Order**

Before the  
**Federal Communications Commission**  
Washington, D.C. 20554

In the Matter of:

**Satellite CD Radio, Inc.**

Application to Construct, Launch  
and Operate a Digital Audio Radio  
Satellite Service in the  
2320-2332.5 MHz Frequency Band

49/50-DSS-P/L-90  
58/59-DSS-AMEND-90  
44/45-DSS-AMEND-92

**MEMORANDUM OPINION AND ORDER**

**Adopted:** \_\_\_\_\_, 1997;

**Released:** \_\_\_\_\_, 1997.

By the Chief, International Bureau:

1. Satellite CD Radio, Inc. ("CD Radio") has filed a request for a further exemption from Section 25.116(c) of the Commission's Rules ("the cut-off rule"), which generally would result in the assignment of a new file number in the event of a major amendment filed following the applicable cut-off date.<sup>1</sup> The Commission has the authority to grant such exemptions if we find that a change in ownership or control would be in the public interest.<sup>2</sup> We previously granted CD Radio an exemption of the cut-off rule in a case involving similar circumstances. For the reasons set forth below, we conditionally grant CD Radio's requests for a further exemption in order to permit CD Radio to engage in certain transactions designed to raise funds in public capital markets for the development of its satellite DARS system.

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<sup>1</sup> See 47 C.F.R. § 25.116(c). CD Radio's request was filed on May 9, 1997 and placed on Public Notice on [May \_\_, 1997. **No oppositions or comments were filed.**]

<sup>2</sup> See 47 C.F.R. § 25.116(c)(2).

## I. BACKGROUND

2. On April 2, 1997, CD Radio bid \$83,346,000 at auction for FCC license, EBN001, one of two licenses to construct, launch and operate a satellite DARS system.<sup>3</sup> CD Radio subsequently made a post-auction down payment of \$13,669,200 to the U.S. treasury, bringing its total down payment to \$16,669,200, twenty percent of its winning bid.<sup>4</sup> The remainder of its winning bid will be due ten days after the issuance of a Commission order indicating that CD Radio is eligible to be an FCC licensee and that the Commission is ready to issue a license.<sup>5</sup>

3. On May 9, 1997, CD Radio filed a request for a further exemption from the Commission's cut-off rule in order to permit CD Radio to continue raising capital through debt and equity offerings in the public capital markets. Specifically, CD Radio indicated that it seeks authority to make a public offering of up to 15 million shares of common stock in the applicant's parent company, CD Radio Inc. It has also issued 5,400,000 shares of 5% delayed convertible preferred stock, some of which may be converted into voting shares either directly or through one or more exchanges of securities.

4. CD Radio states that a further exemption from the cut-off rule is necessary because of the possibility that, at some point in the near future, the issuance of additional equity shares and/or the conversion of the preferred shares could result in a substantial change in beneficial ownership

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<sup>3</sup> See Public Notice, "FCC Announces Auction Winners for Digital Audio Radio Service," DA 97-656, Report No. AUC 97-05 (April 2, 1997) ("April 2nd Public Notice").

<sup>4</sup> See *id.* (instructing winning bidders to bring their down payments up to 20% of their winning bids by April 16, 1997); see also *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, IB Docket No. 95-91, Gen Docket No. 90-357, ¶ 165 (March 3, 1997) ("Satellite DARS Order"); see also 47 C.F.R. § 25.404.

<sup>5</sup> See *April 2nd Public Notice*. The Public Notice also instructed winning bidders in the satellite DARS auction to amend their pending applications by May 16, 1997 in order to provide the additional information required by the our rules. *Id.*

in the applicant's parent company by diluting the equity stake of the existing shareholders.<sup>6</sup>

Thus, CD Radio may be required to amend its application under Section 25.116(c) of the rules.

5. In support of its request, CD Radio indicates that it will place the voting equity shares issued in its parent company with widely dispersed parties, primarily institutional investors. CD Radio represents its equity offerings will have no effect on the day-to-day management and business plan of CD Radio. Thus, according to CD Radio's representations, the same individuals that have controlled substantial blocks of equity in CD Radio and have held positions on the executive board and in senior management, will retain their substantial equity stakes and decision-making executive positions.

## II. DISCUSSION

6. We previously granted CD Radio an exemption from the cut-off rule in a June 8, 1994 decision issued by the Chief, Common Carrier Bureau. In that decision, we concluded that an exemption would be in the public interest because it would permit CD Radio to continue to prosecute its pending satellite DARS application.<sup>7</sup> In finding the grant of an exemption warranted, we considered two factors: 1) whether the proposed transaction had a legitimate business purpose; and 2) whether the change in ownership was in the public interest.<sup>8</sup>

7. First, we concluded that the issuance of additional equity shares by CD Radio had a legitimate business purpose, "to provide continuing financing to allow the company to pursue its application."<sup>9</sup> We found that CD Radio was not "trafficking in bare applications" or planning to

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<sup>6</sup> CD Radio indicates that it cannot determine exactly when a change in beneficial ownership would take place due to the discretionary nature of the conversion option of the preferred shares.

<sup>7</sup> The decision allowed CD Radio to make a public offering of up to 4,500,000 shares of common stock. *See Satellite CD Radio, Inc.*, 9 FCC Rcd 2569 (Common Carrier Bureau 1994).

<sup>8</sup> *See id.* at 2571.

<sup>9</sup> *Id.* We noted that the prosecution of an application to construct and launch a satellite system can consume substantial revenue. *See id.*

sell control to third parties, but that the evidence indicated that it was using traditional capital sources to fund its business activities.<sup>10</sup> Our decision also took into account the representations made by CD Radio at the time that its day-to-day management, operational team and service proposal would not be affected by any substantial change in beneficial ownership that resulted.<sup>11</sup>

Second, we found that the change in ownership of CD Radio would further the public interest by permitting CD Radio to “strengthen its financial resources” and thus would increase the likelihood that satellite DARS services would promptly be made available to the public.<sup>12</sup>

8. We find that these same factors support the grant to CD Radio of a further exemption from the cut-off rule.<sup>13</sup> With respect to the first factor, CD Radio clearly has a legitimate business purpose in issuing additional voting shares to widely dispersed parties through public equity markets. On April 2, 1997, CD Radio made a winning bid of \$83,346,000 for the right to apply for one of two FCC licenses to operate satellite DARS systems.<sup>14</sup> CD Radio subsequently made a post-auction down payment of \$13,669,200 to the U.S. treasury, bringing its total down payment to \$16,669,200, twenty percent of its winning bid.<sup>15</sup> CD Radio has also indicated that it has initiated construction of its proposed satellite system and is executing agreements for

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<sup>10</sup> *Id.*

<sup>11</sup> *See id.*

<sup>12</sup> *Id.*

<sup>13</sup> In addition, such an exemption would be consistent with our statement in the *Satellite DARS Order* that by adopting transfer of control rules “we do not intend to preclude licensees from proposing widely dispersed equity offerings to raise capital.” *Satellite DARS Order*, ¶ 169 n.300.

<sup>14</sup> *See April 2nd Public Notice.*

<sup>15</sup> *See id.* (instructing winning bidders to bring their down payments up to 20% of their winning bids by April 16, 1997); *see also Satellite DARS Order*, ¶ 165; *see also* 47 C.F.R. § 25.404. CD Radio is required to pay the remainder of its winning bid following a Commission determination that CD Radio is eligible to receive a license.

associated hardware.<sup>16</sup> Each of these activities require substantial amounts of capital. Thus, CD Radio has a legitimate business purpose in supplementing its financial reserves through general equity offerings to the public. Furthermore, CD Radio has assured the Commission that any change in beneficial ownership that will result will not alter CD Radio's management and operational team, nor change its satellite DARS service proposal.

9. With respect to our second consideration, a change in beneficial ownership in CD Radio through the issuance of additional equity shares would be in the public interest because it would aid CD Radio in making satellite DARS services rapidly available to the public. In this regard, we recognized in our *Satellite DARS Order* that the provision of satellite DARS services would promote the public interest by providing consumers from coast-to-coast with digital audio programming.<sup>17</sup> CD Radio indicates that it is attempting to fulfill this goal through the implementation of an aggressive construction and development schedule designed to make state-of-the-art satellite DARS services available to consumers as soon as the Fall of 1999. Contingent on the grant of a license to CD Radio, the development of its satellite DARS system will necessitate the expenditure of substantial sums, which CD Radio seeks to obtain through a general offering in public capital markets. Thus, the public interest would be served by granting CD Radio a further exemption from the cut-off rule so that it can raise sufficient capital to fund the development of its satellite DARS system. Accordingly, we grant CD Radio a further exemption of Section 25.116(c) permitting CD Radio to make a public offering of up to 15

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<sup>16</sup> See Letter from Carl R. Frank, Counsel to Satellite CD Radio, Inc., to William F. Caton, Acting Secretary, Federal Communications Commission, dated May 6, 1997 (providing notification of commencement of space station construction at applicant's own risk pursuant to § 25.113(f) of our rules).

<sup>17</sup> See, e.g., *Satellite DARS Order*, ¶¶ 1, 10. The Commission noted that the channel capacity and nationwide scope of satellite DARS will enable the provision of niche programming services that cannot be supported on a cost-effective basis using locally-based terrestrial technologies. See, e.g., *id.*, ¶¶ 13-15. Satellite DARS operators would also be able to offer a wide range of audio programming options to rural and mountainous sections of the country that have historically been underserved. See, e.g., *id.*, ¶¶ 10-12.



million shares of common stock and complete the conversion of its delayed preferred shares into voting stock.

### III. CONCLUSION

10. Accordingly, IT IS ORDERED, pursuant to Section 0.261 of the Commission's rules, 47 C.F.R. § 0.261, that the request of CD Radio for a further exemption IS GRANTED, and that the issuance of up to 15 million shares of common stock in its parent corporation, along with the conversion of up to 5,400,000 delayed preferred shares will not result in a determination that the application is newly-filed pursuant to Section 25.116(c) of the Commission's rules. This ruling is conditioned on the current stockholders retaining substantial equity stakes in the corporation and the current officers exercising actual day-to-day management of the corporation.

FEDERAL COMMUNICATIONS COMMISSION

Peter Cowhey  
Acting Chief, International Bureau