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December 15, 1992

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BY HAND DELIVERY

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

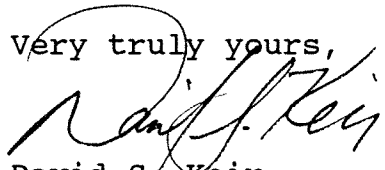
Re: Application of Satellite CD Radio, Inc.
for Authority to Construct, Launch and
Operate a Digital Audio Radio Service
Satellite System In the 2310-2360 MHz
Frequency Bands

Dear Ms. Searcy:

Transmitted herewith for filing with the Commission on behalf of the Joint Parties, licensees and permittees of radio stations located throughout the United States, are an original and four copies of their Response to Satellite CD Radio, Inc.'s Opposition to their Petition to Deny or Defer the above-referenced application.

In the event that there are any questions concerning this matter, please contact the undersigned.

Very truly yours,


David S. Keir

DSK/kkj
Enclosures

RECEIVED

BEFORE THE

Federal Communications Commission

DEC 15 1992

WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

To: Chief, Common Carrier Bureau

RESPONSE TO OPPOSITION TO PETITION TO DENY OR DEFER

The undersigned licensees and permittees of radio stations located in markets of varied size throughout the United States (hereinafter "Joint Parties"), by their attorneys, hereby respond to the "Opposition to Petitions to Deny and Response to Comments" filed by Satellite CD Radio, Inc. ("SCDR"). In its opposition to petitions to deny filed by the Joint Parties and numerous other parties opposing SCDR's application, SCDR has failed to provide any justification for Commission grant of its application at this point in time, prior to the establishment of any policies or rules to govern the proposed implementation of digital audio broadcasting ("DAB") services in the S-band, or even a final determination whether such services should be authorized.

Important Regulatory and Policy Issues Must First Be Addressed

At various points in its own Opposition, SCDR concedes the point, made by at least a half-dozen petitioners,^{1/} that numerous outstanding issues need to be dealt with in the context of the recently initiated rulemaking proceeding relating to DAB services. See Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Services, GEN Docket No. 90-357, FCC 92-466 (released November 6, 1992) ("NPRM"). Repeatedly, SCDR brushes off serious criticisms and questions concerning basic issues related to the implementation of DAB with the dismissive conclusion that "such concerns should be addressed in the rulemaking." See, e.g., SCDR Opposition at 16; see also SCDR Opposition at 11-12, 17, 25 and 33.

The Joint Parties agree, but differ as to when these questions should be considered. With so many basic policy and regulatory issues to be addressed, the Joint Parties believe that it is only logical and prudent that they be resolved before any final action is taken with respect to SCDR's specific proposal, or any others that may be filed by the December 15, 1992 cut-off date.

SCDR condemns such prudence as "delay," which could have dire consequences for the viability of its system, and cites as support Commissioner Duggan's recent statement that "delay is the enemy of new services." NPRM, Separate Statement of

^{1/} See, e.g., Joint Parties' Petition to Deny or Defer at 1-4; Comments of Digital Cable Radio at 1-2 and 4-5; National Association of Broadcasters' Petition to Deny at 4-7; Primosphere Limited Partnership Petition to Deny at 9-11; and Comments of the Radio Operator's Caucus at 2-3.

Commissioner Duggan at 1. It should be noted, however, that Commissioner Duggan's cautionary words were written in comment on the adoption of the Notice of Proposed Rule Making, not with reference to the grant of any particular application. Indeed, the Joint Parties support expeditious consideration in the rulemaking proceeding of the many issues raised in their Petition, including possible means of implementing DAB technology terrestrially, the need to preserve local broadcasting, and the determination of the appropriate regulatory scheme for DAB service. This is where expedition is warranted, not with respect to the particular proposal advanced by SCDR, which merely seeks to advance from the starting gate before other potential competitors.

The need to focus on these threshold questions deliberately and thoroughly is highlighted by SCDR's Opposition, in which it claims, contradictorily, that it would be considered a broadcaster for purposes of the international broadcast-satellite sound allocation, but should be regulated domestically as a private carrier. Although SCDR offers no specific authority to support its interpretation of the International Telecommunication Union regulations, even if it were correct, sound policy dictates against permitting such a broadcaster to be regulated as a private carrier in the United States. Such a system, which would operate over scarce radio frequency spectrum and compete for listeners with terrestrial radio broadcasters, ought not escape the more stringent regulations applicable to existing service providers. Moreover, in light of the tight controls placed on multiple ownership of terrestrial broadcasting

stations, it would be inconsistent to permit a single "non-broadcaster" to control thirty nationwide channels serving every market in the country.

SCDR's plaint that time may quickly pass it by certainly provides no justification to hasten its application's grant. If obsolescence comes so quickly, as indeed it may in such a new area of technology, it will be beneficial to reserve final judgment on SCDR's particular proposal until all other regulatory questions are fully resolved. It would be ill-advised to rush to judgment now and encourage the expenditure of millions of dollars on ephemeral technology that, by SCDR's own implication, "may become obsolete in just a few years." SCDR Opposition at 5 (quoting United States v. FCC, 652 F.2d 72, 95 (D.C. Cir. 1980)).^{2/}

Premature approval of SCDR's proposal before the rulemaking process has run its course risks pre-judgment of the issues that will be considered in that proceeding. By placing SCDR in the position of an incumbent, with the peculiarities of its system considered the norm, the Commission could commit itself to a regulatory and technical course that ultimately proves to be unwarranted. Once large sums of money are spent to put satellites in orbit, it becomes extremely difficult for decisionmakers to dislodge the party so favored. See, e.g., Community Broadcasting Co. v. FCC, 274 F.2d 753, 759 (D.C. Cir.

^{2/} See also Comments of Radio Satellite Corp. at 2-3 (describing the Commission's hasty approval of the ill-fated Geostar radiodetermination satellite proposal before the limitations of the service proposed were fully considered).

1960) (factors such as investment of time and money have an impact on the decisionmaking process, despite the good faith attempts of decisionmakers to remain objective); Southern California Rapid Transit District, 67 R.R.2d 328, 330 and n.12 (1990) (the very act of constructing a facility "often creates equities in its retention").

The Potential Impact of Satellite DAB on Existing Service Must Be Considered

Full exploration of all regulatory and policy issues prior to grant of individual applications is particularly necessary in this instance because of the possibly catastrophic impact of satellite-delivered radio on local terrestrial broadcasters and program diversity. The Commission must be absolutely sure that the potential benefits of implementing a space-based broadcasting service outweigh the potential costs, which could be considerable.

SCDR's claim that its service will "have a negligible impact on traditional broadcasting" is self-serving and meaningless. SCDR Opposition at 11. SCDR cannot predict with any degree of certainty whether its system would have an adverse impact on the radio industry. Particularly troubling are SCDR's apparently inconsistent claims that while it stands "poised to launch an entirely new industry," it could not possibly "dislodge the broadcast industry." SCDR Opposition at 10 and 12. SCDR's sanguine view is based on the existing infrastructure of the radio broadcasting industry and the industry's 1992 aggregate earnings. However, the more salient fact is that fifty-eight percent of all broadcast radio stations lost money in 1991, and

that almost 300 have been forced to suspend operation. See Revision of Radio Rules and Policies, 7 FCC Rcd 6387 and n.3 (1992). Into this bleak landscape, SCDR seeks to introduce thirty new radio stations per market that, with the addition of terrestrial repeaters within five years, would be capable of providing service and substantial competition to every market in the country.

Even without access to urban areas, satellite DAB would still have an adverse impact in small markets, where new satellite-delivered stations would likely have a dramatic effect. Radio outlets in small towns and rural areas owe their existence to their ability to deliver large percentages of the smaller local audience. Indeed, in such areas, existing and available allotments often remain dormant because they are not considered viable. It is into this environment that SCDR alone (to say nothing of possible competitors) plans to bring thirty new stations, with the capability of duplicating all formats generally available in larger markets.

While SCDR concedes that it will be unable to duplicate the important public interest benefits of these stations, such as local news, weather, traffic, and sports programming (see SCDR Opposition at 13), its addition of new station options will inevitably fragment the audiences that make the existing terrestrial stations possible. In turn, this will jeopardize the important benefits now provided by terrestrial broadcasters, the

very benefits that SCDR admits it cannot replicate.^{3/} It would be a poor public interest trade-off if the price of providing uninterrupted service to long distance travelers and specialty stations to rural communities was the loss of local service and competition among existing over-the-air broadcasters.

The Commission Must First Determine, As A Matter of Policy, How Best To Implement Digital Technology

SCDR argues that the Commission is not legally obligated to consider the economic impact of its proposal on existing service providers. See SCDR Opposition at 15-16 and n.42. While SCDR is correct that the demise of the so-called Carroll Doctrine no longer requires the Commission to consider the impact of a new broadcast station on existing stations,^{4/} the Commission is faced here with a much broader issue than whether a single new station will have an adverse impact on another station or group of stations in a single market. Rather, the Commission is faced with a policy determination that necessarily will have substantial and irreversible long-term impact on the entire broadcasting industry, an industry that by SCDR's own estimate generated \$8.5 billion in revenues last year (see SCDR Opposition at 12), to say nothing of the tens of thousands of jobs it provides. In turn, this impact will have an

^{3/} For these reasons, it would be appropriate for an evaluation of these issues to be undertaken by the Commission's Mass Media Bureau, as suggested by the National Association of Broadcasters ("NAB"). See NAB Petition to Deny at 7-9.

^{4/} See Detrimental Effects of Proposed New Broadcasting Stations on Existing Stations, 3 FCC Rcd 638 (1988), recon. 4 FCC Rcd 2276 (1989).

equally wide-ranging effect on the public-at-large and the manner in which it gains access to audio news, information, music and entertainment programming. The Commission is legally bound to consider these broader policy implications before it proceeds. See 47 U.S.C. § 303(g) and § 309(a). Contrary to SCDR's assertion that "the regulatory process must be made the servant" of entrepreneurs (SCDR Opposition at iv), regulators have a statutorily-mandated oversight responsibility to ensure that new technologies are implemented in a way that best serves the public interest and that new services, if necessary, are authorized in a well-reasoned and deliberative manner, not hastily and without due consideration.

Like advanced television, digital audio offers the promise of enhanced sound quality and more reliable service. These advances can be implemented to substantially improve an already high quality terrestrial service; however, they ought not be used as a justification for radically restructuring the means of delivering audio programming in the United States, to the detriment of listeners dependent on local service.

Conclusion

For the foregoing reasons, the Joint Parties respectfully request that the Commission either deny SCDR's application, or defer final action upon the application until the important regulatory and policy issues surrounding DAB are

resolved and until it is certain that this technology will be available to existing broadcasters.

Respectfully submitted,

SHAMROCK BROADCASTING, INC.

KABL(AM), Oakland, California
KABL-FM, San Francisco,
California

KUDL(FM), Kansas City, Kansas
WHB(AM), Kansas City, Missouri
KXRX(FM), Seattle, Washington
WWWW(AM and FM), Detroit,
Michigan

WFOX(FM), Gainesville (Atlanta),
Georgia

WWSW(AM and FM), Pittsburgh,
Pennsylvania

KZFX(FM), Lake Jackson (Houston),
Texas

KXKL(AM and FM), Denver, Colorado
KMLE(FM), Chandler (Phoenix),
Arizona

FRANKLIN COMMUNICATIONS

PARTNERS, L.P.

WCAW(AM), Charleston,
West Virginia

WVAF(FM), Charleston,
West Virginia

WRKA(FM), St. Matthews,
(Louisville), Kentucky

WKSJ-FM, Mobile, Alabama
WKSJ(AM), Prichard (Mobile),
Alabama

CLASSICAL ACQUISITION LIMITED
PARTNERSHIP

WTEM(AM), Bethesda, Maryland
WGMS-FM, Washington, D.C.

CLARKE BROADCASTING CORPORATION

WGAU(AM), Athens, Georgia

WNGC(FM), Athens, Georgia

KVML(AM), Sonora, California

KZSQ(FM), Sonora, California

GARAMELLA BROADCASTING COMPANY

and INTREPID, BROADCASTING INC.

KJJG(FM), Spencer, Iowa

WL0L(FM), Cambridge, Minnesota

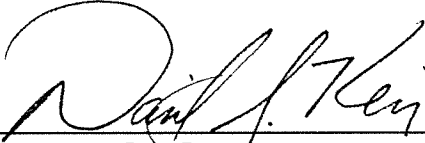
KMAP, INC.

KWAC(AM), Bakersfield, California

KIWI(FM), Bakersfield, California

KRZI, INC.
KRZI (AM), Waco, Texas
KEYR (FM), Marlin, Texas
L.M. COMMUNICATIONS, INC.
(and affiliates)
WLXG (AM), Lexington, Kentucky
WGKS (FM), Paris (Lexington),
Kentucky
WYBB (FM), Folly Beach
(Charleston), South Carolina
LOS CEREZOS TELEVISION COMPANY
WMDO (AM), Wheaton, Maryland
MOOSEY COMMUNICATIONS, INC.
KTIE (FM), Bakersfield,
California
ORANGE COUNTY BROADCASTING CORP.
KPLS (AM), Orange, California
RADIO TRIANGLE EAST COMPANY
WSAY-FM, Rocky Mount,
North Carolina
RUSTON BROADCASTING COMPANY, INC.
KRUS (AM), Ruston, Louisiana
KXKZ (FM), Ruston, Louisiana
SOUTH FORK BROADCASTING CORP.
WWHB (FM), Hampton Bays, New York
VANTAGE COMMUNICATIONS, INC.
KKCD-FM, Omaha, Nebraska
WKRK-TV, INC.
WKRK (AM and FM), Mobile, Alabama
WRMT, INC.
WRMT (AM), Rocky Mount,
North Carolina

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December 15, 1992

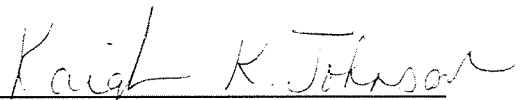
Its Attorneys

CERTIFICATE OF SERVICE

I, Kaigh K. Johnson, hereby certify that a true copy of the foregoing "Response to Opposition to Petition To Deny Or Defer" was mailed, postage prepaid this 15th day of December, 1992 to:

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Kaigh K. Johnson