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		

RESPONSE TO OPPOSITION TO 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 submits its response to the "Opposition to Petitions to Deny and Response to Comments" filed by Satellite CD Radio, Inc. ("SCDR") on December 1, 1992. SCDR is an applicant for authorization to construct, launch and operate a satellite digital audio radio service ("DARS") system.

Primosphere, which is filing its own application for authorization to construct, launch and operate a satellite DARS system, filed a Petition to Deny against SCDR's application on November 13, 1992. In its Petition, Primosphere asserted, inter alia, that SCDR's application should be denied because SCDR's ownership structure is in violation of Section 310(b) of the Communications Act, as amended. SCDR's Opposition essentially makes three points in response to this aspect of Primosphere's Petition. Primosphere herein will address each in turn.

I. SCDR's Ownership Structure, As Amended, Remains in Violation of Section 310(b) of the Communications Act.

SCDR points out that on October 30, 1992, it filed an amendment which reported changes in its level of alien ownership, and that Primosphere's Petition was therefore based on outdated information. Although Primosphere based its November 13 Petition on SCDR's pre-amendment ownership structure, the ownership structure as reported in SCDR's October 30, 1992 amendment continues to violate Section 310(b) of the Act.

According to SCDR's October 30, 1992 amendment, 26 percent of SCDR's common stock is owned by aliens. In addition, one-third of SCDR's board of directors are non-U.S. citizens and the corporation's Chief Executive Officer is also a non-U.S. citizen. Since Section 310(b) prohibits non-U.S. citizens from serving as an officer or director of a corporate applicant/ licensee, SCDR's application, as amended, violates Section 310(b) based both on the level of equity owned by aliens and on the participation of aliens in positions of significant influence over decisions affecting policy as well as day-to-day management.

SCDR continues to ask the Commission to grant one of as few as three or four available authorizations for satellite DARS to a corporation with aliens in positions of ownership leadership and significant influence. Although SCDR's October 30, 1992 amendment asserts that the 26 percent equity owned by an alien does not give that individual "control over Satellite CD Radio," the applicable benchmark in Section 310(b) is 20 percent of the corporation's equity, not a controlling interest. Clearly, SCDR's October 30,

1992 amendment falls far short of resolving the alien ownership concerns raised by Primosphere in its Petition.

II. SCDR's Opposition Did Not Rebut the Legal and Policy Reasons Articulated by Primosphere as to Why the Act's Alien Ownership Restrictions Should Apply to SCDR's Proposal.

In its Petition, Primosphere asserted that there were both policy and precedential reasons to apply Section 310(b) to SCDR's proposed subscription-based service. Primosphere pointed out that, regardless of the ultimate classification of SCDR's service as broadcast or non-broadcast, satellite DARS was destined to be a pervasive and influential service, and one which will be provided by only a handful of licensees.[1] Furthermore, not applying Section 310(b) to SCDR's service while applying it, for example, to MMDS licensees, who typically have even less control over program content and whose signal reach is only 15 miles, would be a complete anomaly.[2]

SCDR responds essentially by focusing again on whether its service should be classified as broadcast or non-broadcast. Opposition at p. 25. This classificatory distinction misses the point. Whether or not SCDR's service is classified for regulatory

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[1] By SCDR's own estimates, its service has the potential to reach roughly 14.5 million people by the year 2003. SCDR Application, p. 38.

[2] In its Petition, Primosphere also questioned the logic in requiring, for example, a 250-watt, daytime-only AM broadcast station, perhaps serving only several thousand persons, to comply fully with Section 310(b) while exempting a satellite DARS radio service with the potential of serving in excess of 10 million persons. Many AM and FM stations typically transmit satellite delivered programming for a large portion of their broadcast day, and air very little, if any, locally produced programming, so SCDR's proposed subscription-based service is analogous to the way many radio stations currently operate.

purposes as a non-broadcast service, precedent supports applying Section 310(b) to the entity which holds the license for the channel by which a service is delivered. Indeed, SCDR quotes language from the Commission's rulemaking on whether to classify subscription-based video services as broadcast or non-broadcast. Opposition at p. 25, citing 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). Even though the Commission classified direct broadcast satellite and other video subscription services as non-broadcast, Section 100.11 of the Commission's rules makes Section 310(b) of the Act applicable to the licensees of DBS systems. See also Subscription Video Services, 4 FCC Rcd. 4948 (1989)(on reconsideration)(whereas customer-programmers are not subject to alien ownership restrictions, DBS licensees are).

The Commission has thus applied Section 310(b) to licensees in services directly analogous to SCDR's proposed service, recognizing that the licensee is the "gatekeeper" to the spectrum, regardless of whether the licensee also controls program content.[3]

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[3] SCDR also cites Orion Satellite Corporation, 5 FCC Rcd. 4937 (1990), in support of its ownership structure. Opposition, p. 25, n. 82. However, the two situations are readily distinguishable. In Orion, the Commission was dealing with an international satellite service where foreign ownership is the norm, rather than the exception. 5 FCC Rcd. at 4940. SCDR's proposed service does not have an international component. In addition, the equity owned by foreign investors in Orion was passive, and the Commission demanded, as a condition of grant, that the limited partnership agreement be amended to insulate the passive investors from any material involvement in the day-to-day affairs of the company. Id. The 26 percent of SCDR's equity owned by a non-U.S. citizen is voting, not passive stock, and there appear to be no applicable insulation provisions in SCDR's organizational documents. Furthermore, unlike in Orion, aliens occupy positions on SCDR's

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III. SCDR's Application Should Not Be Granted Until the Commission Adopts Rules to Govern Alien Ownership of Satellite DARS.

SCDR's final line of defense is that it can restructure its ownership if and when the Commission concludes a rulemaking proceeding in which the alien ownership issue is resolved. Thus, SCDR urges the Commission not to wait until a rulemaking proceeding is concluded to grant its application, even though its application, in all likelihood, will be violative of the rules eventually adopted. SCDR's request should not be granted for several reasons.

Granting SCDR's application prior to the conclusion of the rulemaking proceeding will place artificial and unnecessary pressure on the rulemaking process. The mere existence of a license to SCDR could influence the timing and content of the Commission's ultimate rules for this new service. Historically, the Communications Act's strict prohibition against "premature construction" of radio facilities stems from concerns that once a person constructs a station there will be undue pressure on the Commission to authorize the already-constructed but unauthorized facilities. The same kind of pressure would occur in the present situation -- once SCDR constructs and launches its satellites, the

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[3](...continued)
board and an alien will serve as the Chief Executive Officer. There is thus a far greater degree of involvement and influence by aliens in SCDR's organization than there was in Orion. And, notwithstanding all of the safeguards imposed on alien influence in Orion, the Commission expressly retained jurisdiction to review the matter if circumstances changed [id. at 4940], and one Commissioner expressed reservations about the foreign equity ownership in the licensee [see Separate Statement of Commissioner Barrett, 5 FCC Rcd. at 4946]. For all of these reasons, Orion does not stand as support for SCDR's ownership structure.

Commission will be pressured to adopt rules which permit SCDR's alien ownership (or to waive immediately whatever rules it adopts).

It is simply insufficient and unpersuasive for SCDR to promise to reform its proposal to conform with the eventual rules. The reality is that SCDR will aggressively try to shape the rules to match its plans, and will seek waivers if the rules do not conform to its ownership structure. Indeed, SCDR is expressly anticipating asking for a waiver of the alien ownership rules even before the rules are adopted. A contemplative, orderly process does not envision granting an application and then immediately thereafter addressing waivers of technical and non-technical rules adopted after the system has been constructed and/or been in operation.

WHEREFORE, for the reasons contained in Primosphere's Petition to Deny, and in this Response, SCDR's application should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michelle Jarrett, a secretary of the law firm of Arter & Hadden, hereby certify that on this day, December 15, 1992, a copy of the foregoing RESPONSE TO OPPOSITION TO PETITION TO DENY was served by first class U.S. mail, postage prepaid, upon the following persons:

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