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

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Satellite Policy Group

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*In the Matter of* )  
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**SATELLITE CD RADIO, INC.** )  
 )  
Application to Modify Authorization )  
To Launch and Operate a Digital )  
Audio Radio Satellite Service in the )  
2320.0-2332.5 MHz Frequency Band )  
\_\_\_\_\_)

File No. SAT-MOD-19981211-00099

**COMMENTS OF WCS RADIO, INC.**

WCS Radio, Inc. ("WCSR") submits the following comments on the request by Satellite CD Radio, Inc. ("CD Radio") to modify its authorization in the satellite Digital Audio Radio Service ("SDARS"). First, WCSR requests that the Commission condition any approval of a modification upon (1) a demonstration that CD Radio has progressed toward an interoperable receiver design to a point consistent with finalizing that design prior to launch of its first satellite, and (2) a concrete obligation to continue to engage in receiver interoperability negotiations with other operators intending to provide service in the SDARS band. Second, WCSR notes with concern that CD Radio's application does not seem to recognize the international regulatory implications of changing from a geostationary to a non-geostationary SDARS system. The Commission should not grant the pending application until CD Radio demonstrates that it will comply with the Commission's rules and that the international consequences of its proposed modification will not disserve the public interest.

## DISCUSSION

WCSR is a consortium of licensees in the Wireless Communications Service (“WCS”) that has filed an application for authority to construct, launch, and operate two space stations to provide nationwide SDARS service.<sup>1</sup> The WCS frequencies (2310-2320 MHz and 2345-2360 MHz) are part of the spectrum allocated internationally for use by SDARS systems in the United States. The Commission’s rules specifically authorize WCS licensees to provide SDARS service, subject to the rules governing that service.<sup>2</sup>

CD Radio holds a license to provide SDARS service in the United States using two satellites in geostationary orbit.<sup>3</sup> It now proposes to modify its system to use three satellites in inclined and elliptical (*i.e.*, non-geostationary) orbits. The Communications Act requires the Commission to determine whether the public interest, convenience, and necessity would be served by the proposed modification of a station license.<sup>4</sup> Clearly the public interest would not be served by granting the application of a company that has not complied and has no intention of complying with the Commission’s rules and its existing license. Accordingly, CD Radio’s intentions with respect to meeting the interoperability obligation are central to determining the public interest in this case. In addition, the Commission may not be able to make the required determination based on the current record due to CD Radio’s failure to address the public interest

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<sup>1</sup> See *Public Notice*, Report No. SAT-00006 (December 14, 1998) (assigning file numbers SAT-LOA-19981113-00085 and –00086 to the WCSR application).

<sup>2</sup> See 47 C.F.R. § 27.2; *Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service*, 12 FCC Rcd. 10785, 10846 (1997).

<sup>3</sup> *Satellite CD Radio, Inc.*, 12 FCC Rcd. 7971 (1997) (“*CD Radio*”).

<sup>4</sup> See 47 U.S.C. § 309(a).

implications of undertaking a modification that may require operation on a non-interference basis.

**A. The Commission Must Enforce CD Radio's Interoperability Obligations.**

According to its own filings with the Securities and Exchange Commission, CD Radio decided as early as May 1998 "to increase the number of satellites in its system from two to three and modify its orbital locations from geostationary to inclined, geosynchronous, elliptical, requiring modification of its FCC license."<sup>5</sup> In July 1998, CD Radio entered into a satellite construction contract that would conform to its new system design.<sup>6</sup> CD Radio did not file its application seeking leave to modify its system, however, until December 11, 1998. Nowhere in its application does CD Radio explain the seven-month delay between the time it began taking steps to modify its system and the time it sought the requisite Commission authorization to do so. WCSR is very concerned that CD Radio not fall into the habit of putting off compliance with its regulatory obligations while proceeding with its own operational – but unauthorized -- plans.

The Commission's rules require that each SDARS operator ensure that its system includes a receiver that will permit consumers to access all licensed SDARS systems that are operational or under construction.<sup>7</sup> By promoting system interoperability, the Commission sought to "encourag[e] consumer investment in

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<sup>5</sup> See Form 10-Q filed by Satellite CD Radio, Inc. for the period ending September 30, 1998 at p. 11 (filed Nov. 16, 1998).

<sup>6</sup> *Id.*

<sup>7</sup> See 47 C.F.R. § 25.144(a)(3)(ii).

satellite DARS equipment and creat[e] the economies of scale necessary to make satellite DARS receiving equipment affordable,” as well as to “promote competition by reducing transaction costs and enhancing consumers’ ability to switch between competing DARS providers.”<sup>8</sup> In the *SDARS Service Order* proceeding, CD Radio asserted that “receiver inter-operability is in the clear economic interests of all satellite DARS providers,”<sup>9</sup> and in its application CD Radio certified that its system would include an interoperable receiver.<sup>10</sup>

To date, neither CD Radio nor the other licensed SDARS system operator, XM Satellite Radio, Inc. (“XM Radio”), has announced agreement on the design for an interoperable receiver capable of accessing all systems operating in the band. Fortunately, among the changes CD Radio proposes in its SDARS system design is a switch from code division multiplexing to time division multiplexing – the same form of multiplexing proposed by WCSR and XM Radio. The resulting convergence of the SDARS systems to a single form of multiplexing may be a particularly opportune time to arrive at an interoperable receiver design. Unfortunately, in a recent article in the *New York Times*, the company’s Chairman and co-founder evidenced a remarkably cavalier attitude toward compliance with the interoperability rule (which is also a condition of CD Radio’s license).

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<sup>8</sup> *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service*, 12 FCC Rcd. 5754, 5796 ¶¶ 103 (1997) (“*SDARS Service Order*”).

<sup>9</sup> See *id.* at 5796-97 ¶¶105.

<sup>10</sup> See Submission and Amendment to Application of Satellite CD Radio, Inc. at Certifications of Applicant, 71-SAT-AMEND-97 (filed May 16, 1997).

An unresolved technical issue is the industry's development of a receiver that can accept either CD Radio's or XM Satellite's service, a requirement stipulated by the Federal Communications Commission when it granted the two companies satellite licenses last year.

"The odds are for the first generation, we won't get there," said David Margolese, chairman and co-founder of CD Radio, which is building its studios in Rockefeller Center. **"Whether we hit it or not, it's not that relevant,"** Margolese said, even though failure to find a common receiver would require a regulatory waiver.<sup>11</sup>

Apparently, WCSR takes the Commission's interoperability requirement more seriously than do the other SDARS licensees.

In May 1998, CD Radio announced an agreement for the development and supply of the communications chipset for its radio receiver.<sup>12</sup> As with the modifications to its satellite configuration, CD Radio appears to be proceeding with the development of its system as if it had no regulatory obligations. As luck would have it, CD Radio recently announced that the delivery of its chipsets has also been postponed by six months due to the need for additional design and development resources.<sup>13</sup> While unfortunate in most respects, this delay has one salutary effect – it extends the time available for all parties to design an interoperable receiver design. However, WCSR notes with dismay that the renegotiated manufacturing agreement does not include among its milestones any items related to interoperability with other systems. CD Radio should not commit to a particular receiver design before it complies with the

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<sup>11</sup> Andrea Adelson, *Satellite Companies Bet on Demand for Digital Radio*, N.Y. TIMES, December 28, 1998, at C-6 (emphasis added).

<sup>12</sup> See "CD Radio and Lucent Technologies Form Chip Pact," Press Release dated May 4, 1998, located at <http://www.cdradio.com/pr050498.html>.

<sup>13</sup> See Form 8-K filed with the Securities and Exchange Commission by CD Radio Inc., dated February 2, 1999 (located at [www.cdradio.com/form8-k.html](http://www.cdradio.com/form8-k.html)).

Commission's regulations (and its own certification) by developing truly interoperable equipment.

In an effort to live up to its commitment on interoperability, WCSR has attempted to engage CD Radio and XM Radio in negotiations. On November 23, 1998, WCSR sent a letter to CD Radio (and XM Radio) seeking to initiate interoperability discussions that would ensure that the consumer receiving equipment that is part of the WCSR system is interoperable with the CD Radio (and XM Radio) system, covering the entire SDARS band. One month later, WCSR's counsel sent a follow-up letter to counsel for CD Radio (and XM Radio). Regrettably, CD Radio has failed to respond to WCSR's repeated invitation, notwithstanding its stated support for interoperability. WCSR will not be able to fulfill its obligation if the other SDARS licensees do not live up to the condition stated in their licenses by agreeing to interoperability standards.

WCSR believes that the Commission's interoperability requirement is pro-competitive and pro-consumer, and serves the public interest in the manner outlined by CD Radio in its comments in the *SDARS Service Order* proceeding. While this requirement was intended to achieve laudable public policy goals, its wording was silent on the timetable under which SDARS operators must meet and confer to develop equipment capable of operating with all SDARS systems in the band. Without a timetable, it is difficult to enforce the interoperability requirement. By refusing to negotiate and stonewalling interoperability, an SDARS operator could attempt to proceed with the design and construction of its own system in the hope that its progress would later support a request for waiver of the requirement, all to the detriment of the public interest. From the statements made by CD Radio's Chairman

and the company's delay in seeking authority to modify its system as it has already contracted to do, such conduct would appear to be a real danger.

This proceeding affords the Commission an opportunity to address its interoperability requirement in more detail. First, the Commission should request information that would allow it to determine whether CD Radio has made any progress toward meeting its interoperability obligations.<sup>14</sup> CD Radio should be required to provide a list of dates on which it has met with any other interested party to design an interoperable SDARS receiver, the persons in attendance (including who each represented), and what, if any, progress was made. Second, any order authorizing the proposed modification should contain the following condition:

CD Radio shall initiate interoperability discussions with XM Radio and WCS Radio no later than one week from the release date of this Order, and shall agree with those parties on the design for a receiver capable of operating with the systems of XM Radio and WCS Radio within four months thereafter.

Such a condition would provide the timeframes needed to allow the parties and the Commission to monitor and enforce the interoperability requirement.

WCSR does not intend to allow parties that have apparently decided to ignore the Commission's interoperability rules to prevent WCSR from complying with that obligation. But it cannot achieve the Commission's goal without the Commission's help. The Commission must act while the window of opportunity is open or risk foregoing interoperability in the SDARS service.

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<sup>14</sup> The Commission may request such information pursuant to 47 C.F.R. § 25.111(a).

**B. *The Commission Must Consider the Implications of the Proposed Modification Under International Regulatory Principles.***

The Commission has submitted advanced notification materials to the International Telecommunication Union (“ITU”) related to the geostationary SDARS system that CD Radio is currently authorized to construct, launch, and operate. Under international regulatory procedures, such a submission gives CD Radio priority over later-filed systems seeking to coordinate their operations in the SDARS band. If the proposed modification is granted and CD Radio launches instead a non-geostationary SDARS system, it will lose its priority at the ITU. Moreover, under ITU Radio Regulation S22.10, a non-geostationary SDARS system is entitled to operate only on a secondary, non-interference basis with respect to other, geostationary SDARS systems.

[S]pace stations need not comply with [the stationkeeping requirements for geostationary systems] as long as the satellite network to which the space station belongs does not cause unacceptable interference to any other satellite network whose space station complies with the [geostationary stationkeeping] limits.<sup>15</sup>

Yet nowhere in its modification application does CD Radio acknowledge this international regulation or explain how it intends to operate its system in light of that provision.

It would be irresponsible of the Commission to allow CD Radio to modify its system without taking into account the consequences of such an action under the applicable ITU regulations. Unless and until CD Radio submits information on its plans for complying with or otherwise working around ITU Radio Regulation S22.10, the record in this proceeding does not contain sufficient information to support the

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<sup>15</sup> ITU Rad. Reg. S22.10.



requisite public interest finding. The Commission should not grant the pending application without a full explanation from CD Radio in this regard.

### **CONCLUSION**

The Commission has stated that its goal for SDARS "is to create as competitive a market structure as possible."<sup>16</sup> The interoperability requirement imposed upon all SDARS operators is a vital component of the Commission's strategy for achieving that goal, and should be treated accordingly. Instead, CD Radio has chosen to ignore WCSR's repeated efforts to set the interoperability process in motion. It has also failed to address the public interest implications of the demotion in international coordination priority that could result from the proposed modification.

For the foregoing reasons, WCS Radio, Inc. requests that the Commission request additional information from CD Radio and condition any approval of CD Radio's proposed modification in the manner set forth herein.

Respectfully submitted,

**WCS RADIO, INC.**

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Dated: February 8, 1999

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<sup>16</sup> DARS Service Order, 12 FCC Rcd. at 5786.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Comments of WCS Radio, Inc. were served by hand delivery this 8<sup>th</sup> day of February, 1999, upon:

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