

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

<p><i>In re</i></p> <p>Satellite CD Radio, Inc. Requests for Section 319(d) Waiver</p>	<p>File Nos. 8-DSS-MISC-91(2) +7-DSS-MISC-93</p>
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ORDER

Adopted: September 1, 1995

Released: September 5, 1995

BY THE CHIEF, INTERNATIONAL BUREAU:

1. In this Order, we grant Satellite CD Radio, Inc. ("CD Radio"), a waiver of Section 319(d) of the Communications Act, 47 U.S.C. § 319(d). This action will allow CD Radio, *solely at its own risk*, to begin construction of a satellite that could eventually bring the Digital Audio Radio Service ("DARS") to the public. This Order does not prejudice our ongoing DARS licensing proceedings in any way. Nor will any money spent pursuant to this waiver give CD Radio any equitable claim in future proceedings.

**Background**

2. On 31 January 1991, CD Radio filed a Request for Waiver of Section 319(d) of the Communications Act, to permit it to spend up to \$10 million over a period of ten months to commence construction of a proposed L-band satellite Digital Audio Radio Service (DARS) system. *See* File No. 8-DSS-MISC-90(2). This request was opposed.

3. Subsequently, WARC '92 allocated S-band spectrum (2310-2360 MHz) for satellite DARS in the U.S. Thereafter, CD Radio amended its application to propose operations in the S-band.<sup>1</sup> On May 18, 1993, CD Radio filed a second request for a waiver of Section 319(d) reflecting the change in proposed frequencies. This too was opposed.

<sup>1</sup> *See* File Nos. 49/50-DSS-P/LA-90; 58/59-DSS-AMEND-90; 8/9-DSS-AMEND-92; 12/13-DSS-AMEND-92; 44/45-DSS-AMEND-92; and 42-SAT-AMEND-95.

4. Since CD Radio filed its request, the Commission has taken two significant steps regarding satellite DARS in the U.S. In January 1995, the Commission adopted the WARC-92 allocation domestically and assigned S-band spectrum to satellite DARS on a primary basis.<sup>2</sup> In June 1995, the Commission adopted a *Notice of Proposed Rulemaking* for DARS.<sup>3</sup>

5. CD Radio asserts that granting a waiver will serve the public interest by allowing CD Radio to commence construction of its two-satellite DARS system, resulting in savings in construction time and costs. Specifically, it states that the expenditure of \$10 million will allow CD Radio to procure satellite components that must be ordered far in advance of any launch. This will permit overall satellite delivery time to be shortened. Further, CD Radio states that the savings realized by this waiver would enable it to offer DARS service expeditiously should the Commission ultimately grant its underlying applications, resulting in earlier DARS service and lower consumer prices. CD Radio states that it recognizes that grant of this waiver would be without prejudice to final Commission action on its underlying applications and that any expenditures made will be at its own risk.

6. National Association of Broadcasters (NAB), Joint Parties (licensees and permittees of radio stations throughout the United States), National Public Radio (NPR), and Noble Broadcast Group, Inc. (Noble) filed oppositions and petitions to deny CD Radio's May 1993 request. Digital Satellite Broadcasting Corporation (DSBC) filed a "Conditional Opposition." Primosphere Limited Partnership filed Conditional comments in support of grant. NAB also filed a reply after CD Radio responded to these pleadings.

7. In its opposition, NAB asserts that grant of the requested waiver would be prejudicial and would not serve the public interest since, at the time the request was filed, the Commission had not proposed DARS service rules. NAB argues that the Commission would be unlikely to decide issues contrary to CD Radio's position should a construction waiver be granted. In addition, NAB states that there are no defined public interest or policy issues requiring expeditious action. Finally, NAB states that grant of a waiver would prejudice other satellite DARS applicants because it is not clear that sufficient spectrum is available to accommodate all pending applications. The Joint Parties and Noble concur with NAB. Noble questions whether CD Radio is eligible for a Section 319(d) waiver, claiming its service is essentially a broadcast service and stating that construction permits for broadcast licenses cannot be waived. NPR states that the Commission should not take action without resolving the technical and policy issues which are involved in the provision of DARS service.

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<sup>2</sup> *Amendment of the Commission's Rules with Regard to the Establishment of New Digital Audio Radio Services*, 10 FCC Rcd 2310 (1995).

<sup>3</sup> *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2130-2360 MHz Frequency Band*, 60 FR 35166 (July 7, 1995) (DARS NPRM)

8. In contrast, Primosphere, a DARS applicant, states that it supports grant of the request and states that similar requests should be granted to all satellite DARS applicants should they choose to file them. DSBC, another applicant, stated that because CD Radio recently changed spacecraft vendors, its satellite design will necessarily change from that described in its application. DSBC argues that we should not grant a Section 319(d) waiver request until CD Radio amends its application to reflect design modifications.

9. In response to its opponents, CD Radio states that the requested waiver would not prejudice future Commission action. It acknowledges and accepts that any construction undertaken as a result of a waiver, would be at its own risk. In addition, CD Radio asserts that the savings associated with an early implementation would be passed on to the public. It also reiterates that it will offer subscription, not broadcast services. In response to DSBC, CD Radio asserts that it has not changed its proposal and that, in any event, its application will be subject to amendment after the Commission adopts final rules for the service. Further, it states the components it seeks to purchase are basic elements in any satellite and could be used in other spacecraft designs.

### Discussion

10. We hereby grant CD Radio's 1993 request.<sup>4</sup> It usually takes years to construct satellites. Allowing CD Radio to begin construction without a permit will help ensure that the public can benefit from satellite DARS as soon as possible -- in the event that the Commission eventually licenses CD Radio to provide this service. Given the amount of capital at stake, and the possibility that the Commission may *not* license CD Radio, this may be a risky proposition for CD Radio.<sup>5</sup> But if CD Radio wishes to commit funds to begin construction, we see no reason to prevent it from doing so.<sup>6</sup> We think this should be a business decision, not a government decision.

11. We do not accept the argument that granting a waiver will predispose us to award CD Radio a license. CD Radio does not now have a license. Whether or not it gets one will not be affected by the grant of this waiver. Our only hesitation is that others, not knowledgeable about regulatory matters, will be misled by our action. At least one potential investor has called the Bureau to see if a waiver had been granted, indicating his understanding that the grant of a waiver is tantamount to the grant of a license. We believe, however, that CD Radio will take due care to ensure that potential investors are not misled by

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<sup>4</sup> Because the May 1993 request reflects CD Radio's most recent proposal, we dismiss the earlier 1991 request as moot.

<sup>5</sup> We note that the DARS NPRM asks, for example, whether the processing round should be reopened. *See* DARS NPRM ¶¶ 33-40.

<sup>6</sup> *See* Streamlining the Commission's Rules and Regulations for Satellite Application and Licensing Procedures, FCC 95-285 (August 11, 1995) ¶¶ 7-8.

our action. We also emphasize that any expenditures made pursuant to this waiver prior to Commission action on the underlying application are *solely* at CD Radio's own risk. These expenditures may not be relied upon by CD Radio in any way during the rulemaking or subsequent licensing process, and shall not be the basis for any equitable claim to the Commission.

12. Accordingly, IT IS HEREBY ORDERED, pursuant to Section 0.261 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.261, and Section 319(d) of the Communications Act, 47 U.S.C. § 319(d), that the application in 47-DSS-MISC-93 is GRANTED, and Satellite CD Radio, Inc. is authorized to expend up to \$10 million to commence construction for its proposed DARS satellite system, **solely at its own risk.**

13. IT IS FURTHER ORDERED that the application in 8-DSS-MISC-91(2) is DISMISSED as moot.

14. IT IS FURTHER ORDERED that this Order be effective upon its adoption on September 1, 1995.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink that reads "Scott Harris". The signature is stylized, with a long horizontal stroke above the name.

Scott Blake Harris  
Bureau Chief