

MAR 18 1991

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
Federal Communications Commission
Office of the Secretary

In re)
)
SATELLITE CD RADIO, INC.)
)
For Conditional Authority to)
Construct, Launch and Operate a)
Space Station in the Satellite)
Sound Broadcasting Service)

File Nos. 8-DSS-MISC-91(2)
49/50-DSS-P/LA-90
58/59-DSS-AMEND-90

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MAR 20 1991

NATIONAL ASSOCIATION OF BROADCASTERS
PETITION TO DENY
Satellite Radio Branch

The National Association of Broadcasters ("NAB"),¹ pursuant to § 309(d)(1) of the Communications Act of 1934, as amended, and § 73.3584(a) of the Commission's rules, hereby petitions the Commission to deny the above referenced request of Satellite CD Radio, Inc. ("Satellite CD") for conditional authority to begin construction of a satellite system. In support hereof, NAB respectfully states as follows:

I. PRELIMINARY MATTERS

A. Standing

NAB is a voluntary nonprofit incorporated association of radio and television broadcast stations and networks. NAB member radio stations are licensed to serve communities in virtually all areas of the United States. Satellite

¹/ NAB is a nonprofit, incorporated association of radio and television broadcast stations and networks. NAB serves and represents America's radio and television stations and all the major networks.

CD's proposed private satellite sound broadcasting system will compete directly with NAB member stations for listening audience. Because the stations' revenues depend on the size of their listening audience, the loss of listening audience to Satellite CD will adversely affect the stations economically.^{2/} Thus, all such stations would have standing in this proceeding as individual parties in interest,^{3/} and NAB has standing as their trade association representative.^{4/}

B. Summary of NAB's Comments Addressing Satellite CD Petition and Application and the Notice of Inquiry.

In June 1990 Satellite CD Radio, Inc. submitted a Petition for Rule Making ("Petition") that sought to allocate spectrum for a hybrid space satellite and terrestrially-delivered digital audio broadcasting service.^{5/} The National

^{2/} "Since advertiser support is dependent upon the local station's programs being received by the public, the loss of any substantial number of viewers may cause a diversion of revenue from the local station with possible serious affect [sic] on the station" Rust Craft Broadcasting Co., 36 FCC 1556, 1561, 2 RR 2d 908, 915 (1964).

^{3/} FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940).

^{4/} National Motor Freight Association, Inc. v. U.S., 372 U.S. 246 (1963) (association of motor carriers has standing to challenge agency order that will aggrieve individual members of the association); Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 343 (1977) (association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue their own right); United Telephone Co. of Ohio, 26 FCC 2d 417, 418, 20 RR 2d 602, 604 (1970) (association of common carriers has standing to file petition to deny where two of its members are in direct economic competition with applicant).

^{5/} See Public Notice, "Office of the Secretary: Petitions for Rule Making Filed," June 18, 1990; see also FCC July 9, 1990 Public Notice "Office of the Secretary: Petition for Rule Making Filed," acknowledging Satellite CD's filing of a June 22, 1990 supplement to request for rule making.

Association of Broadcasters that summer filed comments in response to the Satellite CD petition for rulemaking, asking that the FCC dismiss or simply defer consideration of the petition as premature and as infirm, as to both policy and technical matters.^{6/} Satellite CD filed an application to construct, launch and operate a DAB service.^{7/} NAB filed comments opposing the application, which addressed virtually the identical substantive issues in the petition. NAB has also filed comments in response to the FCC's Notice of Inquiry with regard to a Digital Audio Broadcasting ("DAB") service, there opposing the provision of a satellite delivered DAB service. Copies of the earlier NAB pleadings are attached hereto as Appendix I, and their contents and arguments are incorporated herein by reference. Most recently, Satellite CD filed a Request for Conditional authority to begin construction of a satellite DAB system. We strongly urge, for the reasons stated below, that the request be denied.

II. IT IS PREMATURE AND PREJUDICIAL IN THE EXTREME TO GRANT THIS REQUEST BEFORE PRELIMINARY ESSENTIAL QUESTIONS REGARDING DAB HAVE BEEN RESOLVED

Satellite CD requests authority to begin construction of its proposed DAB satellite system, with that authority to be conditioned on Satellite CD's "assumption of the entire risk that permanent authorization either may not be granted or be granted with technical or regulatory parameters different from

^{6/} See Comments of NAB (RM-7400), filed Aug. 20, 1990.

^{7/} See comments filed by NAB in Gen. File No. 49/50-DSS-P/LA-90, filed Nov. 30, 1990.

those proposed in its application." NAB maintains, however, that the risk here of early authorization is not just Satellite CD's risk. The risk is, rather, to the listening public, to other applicants for DAB service, to other parties in interest, to sound FCC processes and decision-making and ultimately, of course, to the public interest. For, here, to authorize early construction of a hundreds-of-millions of dollars system where the basic, preliminary questions of "if, where and how" have not yet been answered would seem to be pure folly.

A. It is Premature To Grant This Request Before On-going Proceedings Have Answered Critical Questions, Including Whether There Should Be a Satellite DAB Service.

While the real risk in granting this "early construction" request belong to the Commission and to the public interest, the "real" facts here are: 1) the Commission has as of yet made no decisions about the nature or shape of a DAB service, including the decision basic to Satellite CD's entire service, i.e. whether it is in the public interest to here authorize a satellite DAB service, 2) there are not as of yet any proposed rules for a DAB service, with the Commission's proceedings still at the Inquiry stage, and 3) there are still outstanding proceedings and undecided positions concerning the United States' preferred positions on DAB issues to be presented internationally at WARC '92.

The Commission has received comments in response to its Notice of Inquiry concerning DAB, but it has not made even the most basic decisions about a DAB service for the United States and has not yet considered, in proposed

rules, what form that service might take, what parties might be eligible to participate, whether the service should be limited to a terrestrial one, as NAB urges, how much spectrum should be devoted to such a service, where that spectrum should be, or a host of other issues basic to a DAB service. It could not be more premature for a construction permit, conditional or otherwise, to be issued.

Satellite CD cites as precedent for its request the issuance of conditional construction permits in the Direct Broadcast Satellite ("DBS") service. The issuance of conditional permits there is not at all relevant to the situation with Satellite CD. There, the Commission had proposed, albeit interim, rules to give shape and direction to the new service. Before the conditional permits were issued, the Commission had adopted interim rules for DBS and, therefore, knew what it intended and what it wanted for this fledgling service.^{8/} Here, it knows none of that. It has proposed nothing. Satellite CD would have the Commission, essentially, grant it a waiver of licensing rules and technical requirements that are not yet set -- nor even proposed.

The Commission is in no position to grant the request here made. The course for DAB is not yet steady or sure enough for grants of construction authority -- grants that well may prejudice the issues awaiting decision and direction.

^{8/} See, Memorandum Opinion and Order, In re Application of Satellite Television Corporation for authority to Construct an Experimental Direct Broadcast Satellite System, File No. DBS-81-01, 91 FCC 2d 953 (1982).

B. Critical Issues Determining the Future of DAB in the United States, including Those of "If, Where and How", May Be Prejudiced By a Grant of the Request.

Should Satellite CD be permitted to begin construction of its proposed DAB satellite system, even at its own peril, the Commission will be unlikely later to ignore that grant in making the yet undecided but critical issues as to the future and shape of DAB in the United States.

Even, and most particularly, the basic issue of whether DAB in the United States should be a satellite service (or, as NAB maintains, whether DAB should be the long-needed "upgrading" of the U.S. terrestrial radio service, with available spectrum going to serve this "need") would be prejudiced by early construction of even the beginning stages of a satellite system. Critical rulemaking and decision making simply could not be made on a "clean slate".

Spectrum issues, similarly, would be prejudiced, once a satellite provider had begun to expend millions of dollars for a system designed for a particular spectrum location and premised on a minimum amount of spectrum space.

Other applicants, currently awaiting the outcome of the inquiry and the to-come rulemaking on DAB, would be prejudiced as to a grant, should spectrum be limited to that expected by Satellite CD. They would most certainly be denied the "leg-up" given Satellite CD.

Even the FCC's and the United States' positions for the upcoming WARC '92 international sessions allocating spectrum would be prejudiced and influenced by the presence of a conditional grant of authority to construct a

satellite DAB system. Such a grant puts the Commission behind a decision to authorize satellite DAB and to authorize it at a particular spectrum location. U.S. preparations for WARC are currently pending and those decisions, as well as those for U.S. implementation, should be given the room to be formulated, adjusted and advocated without the albatross of a premature, unripe grant affecting those positions.

To assert that a conditional grant to begin to construct a proposed system will likely prejudice critical decision making is only common sense. No decisions as to a U.S. DAB service have yet been made. No proposals have been proffered by the Commission. That much is clear. And, to expect prejudice of those decisions by an early grant is obvious and to be expected. As was said in a Commission case many years ago:

"Ordinary human experience tells us that these factors have a force which cannot always be set aside by the triers no matter how sincere their effort or intent. The Commission realistically concedes that if the grant is ultimately made to appellant rather than to intervenor, 2 1/2 or 3 years hence, the latter's market to dispose of its large temporary investment in a going television station is one man, *i.e.*, the successful applicant. In that eventuality the losing party faces the problem of salvaging whatever he can on a distress market. To argue, as appellant does, that this may weigh in the balance of an otherwise close question is not a challenge to the good faith or integrity of the triers; it is a recognition that they are mortal men."^{9/}

^{9/} Community Broadcasting Co. v. FCC, 274 F.2d 753, 761 (1960).

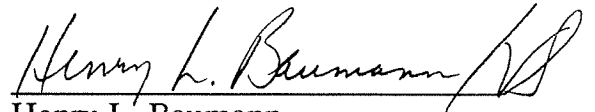
Once a grant is made, even conditionally, the Commission would be unlikely to decide issues contrary to Satellite CD's position. And it would be unlikely as well to later "pull the plug" on that particular applicant. To proceed with such a grant would be patently unfair to all involved, to both parties and to principles like the "public interest".

IV. CONCLUSION

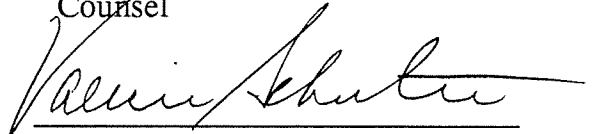
For the reasons stated herein and in NAB's comments in preceding inquiries, NAB urges the Commission to deny the above-captioned Satellite CD request. To grant the request is against the public interest and undermines the ability to develop the best digital audio system possible.

Respectfully submitted,

NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430



Henry L. Baumann
Exec. Vice President & General
Counsel



Valerie Schulte
Sr. Associate General Counsel

Amy Brett
Legal Intern

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APPENDIX I