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

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In re )  
SATELLITE CD RADIO, INC. )  
Requests for Section 319(d) Waiver )

File Nos. 8-DSS-MISC-91(2)  
47-DSS-MISC-93

SEP 20 1995

To: The Commission

APPLICATION FOR REVIEW

Cracker Barrel Old Country Store, Inc. ("Cracker Barrel"), by its attorneys and pursuant to Section 1.115 of the Rules of the Federal Communications Commission (the "Commission"), hereby submits this Application for Review of the September 5, 1995 Order ("Order") issued in this proceeding by the Commission's International Bureau (the "Bureau") in which the Bureau waives Section 319(d) of the Communications Act, 47 U.S.C. § 319(d). The waiver allows Satellite CD Radio ("CD Radio") to begin construction of \$10 million in satellite apparatus before the resolution of the Commission's Notice of Proposed Rulemaking ("NPRM") on satellite-delivered Digital Audio Radio Service ("Policy Proceeding").

Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, FCC 95-229, IB Docket No. 95-91, GEN Docket No. 90-357, RM No. 8610, PP-24, PP-86, PP-87 (released June 15, 1995).

Cracker Barrel is a retail and restaurant chain with 225 stores along our nation's interstate highway system. Cracker Barrel, which is based in Lebanon, Tennessee, is one of the fastest growing companies in its field; it had revenues in fiscal year 1994-95 of approximately \$783 million. With its expertise in identifying and meeting the needs of the traveling public, Cracker Barrel is interested in constructing and operating a DARS satellite to provide important, specialized entertainment and information services to automobile travelers.

Cracker Barrel is a potential competing applicant in the DARS proceeding. In response to the NPRM, Cracker Barrel is filing comments today in which it urges the Commission to accept additional applications. If the Commission opens the field to other applicants, Cracker Barrel intends to file a DARS application.

**I. THE ORDER SHOULD BE REVERSED OR MODIFIED TO PRESERVE THE COMMISSION'S OPTIONS IN THE DARS RULEMAKING**

This Application for Review seeks Commission review of the Bureau's decision to waive Section 319(d) at CD Radio's request. The Order raises the important issue of whether the Bureau properly permitted the applicant to begin construction of a DARS satellite system before it receives a license when the Commission is just now considering rules and policies that will establish the DARS service, the technical parameters to govern satellite operations and whether CD Radio's application is mutually exclusive with other current or additional

applications that might be accepted by the Commission. The Order creates a risk of significant harm to the public interest because it may have the unintended effect of prejudicing the outcome of matters of crucial public interest in the Policy Proceeding.

In the Policy Proceeding, the Commission is at this moment considering issues directly related to CD Radio's proposals that will bear on the opportunity for other, competing DARS applicants to participate in this important new service. The waiver request was granted less than two weeks before initial comments are due in the Policy Proceeding after action on the waiver request was deferred by the Bureau for more than four years. The Order does not explain why the Bureau could not wait just a few months more until the Commission concludes the Policy Proceeding and decides issues directly related to the waiver request. <sup>1/</sup>

The Order raises four serious concerns. First, it creates the appearance of Commission acceptance of CD Radio's proposed transmission technology when the matter of transmission standards and their effect on efficient usage of the limited available bandwidth is at issue in the Policy Proceeding. CD Radio apparently proposes to use Time Division Multiplex ("TDM"), which may not

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<sup>1/</sup> In remarks at the National Association of Broadcasters' convention on September 8, 1995, FCC Chairman Hundt stated that, while he had not prejudged the issue, he thought that the Commission should probably reopen the DARS spectrum to new license applicants. Naturally, we agree that additional applicants should have the opportunity to participate in DARS, but we are concerned that, by allowing CD Radio to prematurely begin construction, the Commission may severely limit its options, should it choose to open up the field to new entrants.

be the most spectrum efficient transmission technology. Second, CD Radio has every incentive to favor and promote the use of technology that limits, rather than expands the number of licensees that can be accommodated in the DARS band. With the waiver grant, and \$10 million to spend, CD Radio could readily seed the industry, including both satellite equipment and receiver manufacturers with construction and development contracts based on TDM. Those interested parties then have their own incentive to influence the record in the Policy Proceeding in favor of CD Radio's efforts to promote its technology and prevent re-opening of the applications cut-off period. Third, the Order appears to eliminate the possibility of sharing of individual space stations by multiple licensees, a decision that further reduces the opportunity for additional licensees.

Finally, the Order apparently resolves the issue in the Policy Proceeding as to whether the existing applications are mutually exclusive. Cracker Barrel is aware of no other situation in which a Section 319(d) waiver was issued to one of a group of potentially mutually exclusive applicants, while the Commission was simultaneously considering whether the applications will be considered mutually exclusive. In the Policy Proceeding, the Commission is also addressing procedures for choosing among mutually exclusive applicants. The Bureau should not effectively prejudge the outcome of the Policy Proceeding by issuing an Order that seems to ignore the issue of mutual exclusivity pending in the Policy Proceeding.

Cracker Barrel recognizes that the Commission routinely grants requests for waivers of Section 319(d) under normal circumstances. However, this is not a typical situation. The Bureau has allowed an applicant to begin construction of a satellite system while the Commission is in the process of defining the service, setting its technical parameters, determining whether the current applications, including CD Radio's, are mutually exclusive and considering whether to open the field to additional, possibly mutually exclusive, applications. Perhaps most telling, the Bureau itself feels compelled to argue that its Order does not "prejudge" the ongoing Policy Proceeding "in any way." <sup>2/</sup>

The Commission observed in the Policy Proceeding that DARS promises an "increased choice of over-the-air audio programming" to all listeners, along with specialty programming targeted to "underserved and unserved" citizens. <sup>3/</sup> The public stands to benefit greatly from satellite-delivered DARS and will do so as long as competition and innovation are not stifled. The Bureau's Order threatens to narrow, rather than expand, the possibility of competition among DARS providers, by condoning the use of CD Radio's transmission technology.

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<sup>2/</sup> Order, DA 95-1908 at ¶¶ 1, 11. The Bureau notes in the Order that before the text was even issued a prospective investor called the Bureau to clarify whether grant of the waiver implied any predisposition to approaches espoused by CD Radio. CD Radio's request is too closely related to important issues in the Policy Proceeding to justify grant of the waiver.

<sup>3/</sup> Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services, FCC 95-17, GEN Docket No. 90-357, 10 FCC Rcd 2310, 2311 at ¶ 22 (1995).

There is no conceivable public benefit arising from grant of CD Radio's Section 319(d) waiver request now that could outweigh the significant risk of harm to the public interest. <sup>4/</sup> The Bureau's grant of the waiver request should be reversed by the Commission. Alternatively, the waiver should be modified to limit expenditures to those portions of the proposed satellite system not related to a specific transmission technology.

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<sup>4/</sup> See WAIT Radio v. FCC, 459 F.2d 1203, 1209 (D.C. Cir.), cert. denied, 409 U.S. 1027 (1972) (noting, in the context of conditional waivers, that an agency can take into account that a grant "would generate a vested interest in fact that undercuts flexibility" and supporting the Commission's view that curtailment of future flexibility justifies denying such a waiver request "unless there is a concomitant showing that the waiver is in the public interest.")

## II. CONCLUSION

For the foregoing reasons, the Commission should reverse or modify as indicated herein the International Bureau's September 5, 1995 Order.

Respectfully submitted,

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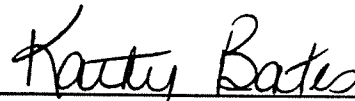
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Dated: September 15, 1995

**CERTIFICATE OF SERVICE**

I, Kathy Bates, a legal secretary with the law firm of Hogan & Hartson L.L.P., hereby certify that on this 15th day of September, 1995, a copy of the foregoing Application for Review of Cracker Barrel Old Country Store, Inc. was mailed by U.S. first class mail, postage prepaid, to the parties listed on the attached service list.



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Kathy Bates

Dated: September 15, 1995



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