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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

OCT 2 1995

In the Matter of:

SATELLITE CD RADIO, INC.

Requests for Section 319(d) Waiver

Docket No. 8-DSS-Misc-91(2)
47-DSS-Misc-93

Opposition to Application for Review

Satellite CD Radio, Inc. (CD Radio), by its attorneys, hereby responds to the above-captioned application for review filed by Cracker Barrel Old Country Store, Inc. (Cracker).¹ Cracker makes the startling claim that a waiver permitting CD Radio to begin satellite construction² *at its own risk* should be reconsidered because it might prejudice ongoing proceedings. Cracker offers no support for this view. Rather, its filing is part of a campaign that seeks reversal of settled policies, and the Commission should promptly deny Cracker's request.

¹ Cracker Barrel Old Country Store Application for Review (filed Sept. 15, 1995).

² Satellite CD Radio, Inc., DA 95-1908 (Sept. 5, 1995) (*Waiver*).

Nearly five years ago, CD Radio filed a request to waive Section 319(d) of the Communications Act to permit spending on preliminary satellite construction.³ More than two years ago, CD Radio supplemented and updated its request.⁴ The application detailed the cost savings, and more rapid date-in-service, if CD Radio were permitted to begin satellite fabrication in advance of receiving a construction permit. The Bureau's approval one month ago finally will permit CD Radio, at its own risk, to compensate in part for the administrative delay in authorizing a new and valuable audio service to the American public.

Cracker, which asserts that it "intends" to file a satellite DARS application in the future,⁵ did not file in the satellite DARS cut-off held three years ago. It nowhere explains why it chose not to file at that time. But, Cracker now wishes to stop the wheels of progress while it prepares its own proposal for similar services. The Commission should not tolerate further delay to its satellite DARS process for at least four reasons.

First, Cracker claims that the grant of the waiver is inimical to its interests. It clearly is not. Indeed, Cracker's filing fundamentally misapprehends the nature of a Section 319(d) waiver. As CD Radio acknowledged in its application;⁶ as made abundantly clear in the *Waiver*; and as again acknowledged here, the Bureau's decision permits CD Radio to expend investor monies "*solely at its own risk.*"⁷ The Bureau made clear that its waiver did not and

³ Satellite CD Radio Request for Waiver of Section 319(d) (filed Jan 31, 1991).

⁴ Satellite CD Radio Request for Waiver of Section 319(d) (filed May 18, 1993).

⁵ Cracker at 2.

⁶ Request for Waiver at 1.

⁷ *Waiver*, ¶ 12 (emphasis in original).

would not prejudice future Commission action of any sort.⁸ That alone should dispose of Cracker's central contention.

Second, there is long precedent for the Bureau's approach. As Cracker itself acknowledges,⁹ the FCC routinely grants satellite applicants the right to begin construction in advance of authorization because of the long lead times involved. In the very first set of satellite applications, the Commission granted a Section 319(d) waiver¹⁰ months before it had established processing procedures for the new spacecraft.¹¹ Thereafter the Commission consistently held that the public interest is served by such waivers, because they enhance the "timely availability of service."¹² The instant waiver will serve the same ends, contrary to Cracker's claim.¹³ Indeed, the compelling public policy benefits of 319(d) waivers recently led to a Commission proposal to *eliminate* the necessity for construction permits altogether,¹⁴ which obviously would make Cracker's request moot.

Third, Cracker's filing mischaracterizes the precedent and the Bureau's order itself. For example, it claims that it is aware of "no other situation in which a Section 319(d) waiver

⁸ *Id.*, ¶ 10-11

⁹ Cracker at 5.

¹⁰ Western Union Telegraph Co., 24 Rad. Reg. 948 (1972).

¹¹ Domestic Satellite System Applications, 38 F.C.C.2d 40 (1972).

¹² Communications Satellite Corp., 42 F.C.C.2d 677, 681 (1973).

¹³ Cracker at 6 (arguing that there is "no conceivable public benefit" from granting a 319(d) waiver to CD Radio).

¹⁴ Streamlining the Commission's Rules and Regulations for Satellite Application and Licensing Procedure, FCC 95-285, ¶¶ 7-8 (Aug. 11, 1995).

was issued to one of a group of mutually exclusive applications, while the Commission was simultaneously considering whether the applications will be considered mutually exclusive.”¹⁵

In fact, a plethora of such cases exist:

- Earlier this year, the Bureau gave Hughes a Section 319(d) waiver to begin construction on its Galaxy IX satellite, saying “We have not yet determined whether we will be able to accommodate all qualified applicants filing in this processing round or whether the pending applications are mutually exclusive.”¹⁶
- Just one year ago, the Bureau granted three Big LEO applicants 319(d) waivers, despite continued uncertainty about mutual exclusivity: “If all cannot be accommodated, the Commission has said it will implement an auction to award licenses.”¹⁷
- More than a decade ago, the Common Carrier Bureau granted a Domsat applicant a 319(d) waiver a full year before the Commission’s *Two Degree Spacing* policy created enough slots to permit the grant of all then-pending applications.¹⁸

Similarly, Cracker seems to be unaware that the Commission has never confused the public interest in a 319(d) waiver with the pendency of the underlying application:

In the Satellite Business Systems case. . . we determined that the existence of significant policy questions in the underlying application

¹⁵ Cracker at 4.

¹⁶ Letter from Scott Blake Harris to Carl A. Brown at 1 (Mar. 9, 1995).

¹⁷ Letter from Scott Blake Harris to David Castiel at 2 (Oct. 20, 1994); Letter from Scott Blake Harris to Durrell Hillis at 2 (Oct. 20, 1994); Letter from Scott Blake Harris to Douglas Dwyre at 2 (Oct. 20, 1994).

¹⁸ Letter from James F. Keegan to William F. Fishman (July 15, 1982).

would not be considered during our evaluation of a Section 319(d) waiver request.¹⁹

The Bureau wisely adopted the same approach here, and Cracker presents no reason to change.

Cracker also wrongly contends that the waiver does not explain why the Bureau could not await conclusion of the rulemaking.²⁰ However, the waiver order correctly concludes: “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.”²¹ Cracker states that the waiver permits CD Radio to “seed” satellite equipment and receiver manufacturers.²² But, CD Radio has already legally spent millions developing a functioning satellite DARS receiver and the world’s smallest satellite dish for use with DARS prior to the Commission’s action, making the waiver irrelevant to Cracker’s complaint. Further, Cracker asserts that the *Waiver* “appears to eliminate the possibility of sharing of individual space stations by multiple licenses.”²³ Actually, the *Waiver* does nothing of the sort -- it does not even mention the issue.

¹⁹ RCA American Communications, Inc., 65 F.C.C.2d 351, 352 (1977), *citing* Satellite Business Systems, 61 F.C.C.2d 315 (1976).

²⁰ Cracker at 3.

²¹ *Waiver*, ¶ 10.

²² Cracker at 4.

²³ *Id.*

Finally, Cracker's overall strategy appears to assume that satellite processing is a zero sum game: grant of a waiver to CD Radio somehow will preclude Cracker's proposal. Nothing could be further from the truth. The issuance of a Section 319(d) waiver permitting CD Radio to expend monies at its own risk does not bind the Commission to any particular "transmission technology" as Cracker claims.²⁴ Therefore, there is no reason further to delay CD Radio beyond the five years that have already lapsed on behalf of an eleventh-hour applicant wannabee that has suffered no harm.

²⁴ *Id.* at 3. In any case, as CD Radio has previously explained, its planned satellite system is a "bent pipe" configuration capable of transmitting any modulation scheme CD Radio chooses.

For the foregoing reasons, the Commission should deny Cracker's application for review and affirm the Bureau's decision.

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Dated: October 2, 1995

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October, 1995, I caused copies of the foregoing "Opposition to Application for Review" to be mailed via first-class postage prepaid mail to the following:

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