

Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Satellite CD Radio, Inc.

Request for a Declaratory Ruling for Further
Exemption Pursuant to 47 C.F.R. 25.116(c)(2).

File Nos. 49/50-DSS-P/L-90,
58/59-DSS-AMEND-90, 44/45-
DSS-AMEND-92.

DECLARATORY ORDER

Adopted: June 25, 1997

Released: June 26, 1997

By the Chief, International Bureau:

I. INTRODUCTION

1. By this Order we conditionally grant Satellite CD Radio, Inc.'s ("CD Radio") Request for Declaratory Ruling and exempt it from Section 25.116(c) of the Commission's rules ("the cut off rule") which requires the Commission to consider any major amendment that is filed after the applicable cut-off date to be considered a newly filed application.¹

¹ See 47 C.F.R. § 25.116(c).

II. DECLARATORY RULING

A. Background.

2. On April 2, 1997, CD Radio bid \$83,346,000 at auction for a Federal Communications Commission ("FCC") license to construct, launch and operate a satellite Digital Audio Radio Service ("DARS") system.² CD Radio subsequently made a post-auction down payment of \$13,669,200 to the U.S. Treasury, bringing its total down payment to \$16,669,200.³ The remainder of its winning bid will be due ten days after the issuance of a Commission order indicating that CD Radio is eligible to be a FCC licensee and that the Commission is ready to issue a license.⁴

3. On May 9, 1997, CD Radio filed a request for further exemption from Section 25.116(c) of the Commission's rules in order to permit CD Radio to engage in certain transactions designed to raise funds in the public capital markets for the development of its satellite DARS proposal.⁵ Specifically, CD Radio requests authority to make a public offering of up to 15 million shares of common stock in the applicant's parent company, CD Radio Inc.⁶ Additionally, CD Radio has issued 5,400,000 shares of 5% delayed convertible preferred stock, some of which may be converted into voting shares either directly or through

² See Public Notice, "FCC Announces Auction Winners for Digital Audio Radio Service," DA 97-656, Report No. AUC 97-05 (April 2, 1997).

³ *Id.* (instructing winning bidders to bring their down payments up to 20% of their winning bids by April 16, 1997); see also *Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, IB Docket No. 95-91, Gen Docket No. 90-357, ¶ 165 (March 3, 1997) ("*DARS Order*"); see also 47 C.F.R. § 25.404.

⁴ See April 2, 1997 Public Notice. The Public Notice also instructed winning bidders in the satellite DARS auction to amend their pending applications by May 16, 1997 in order to provide the additional information required by our rules.

⁵ CD Radio Petition at 1.

⁶ CD Radio Petition at 3.

one or more exchanges of securities.⁷ No comments or oppositions were filed in response to CD Radio's petition.

4. CD Radio states that the Commission previously granted a similar exemption to CD Radio, finding that it would serve in the public interest for CD Radio to issue additional shares to fund the prosecution of its satellite DARS application.⁸

5. CD Radio states that the circumstances prompting its request for further exemption are virtually identical to those that justified CD Radio's previous exemption.⁹ CD Radio contends that a further exemption from the cut-off rule is necessary because there is a possibility that at some time in the near future, the issuance of additional equity shares and/or the conversion of the preferred stock could result in a substantial change in beneficial ownership in the applicant's parent company by diluting the equity stake of the existing shareholders,¹⁰ thus necessitating CD Radio to amend its application under Section 25.116(c) of the rules. Therefore, CD Radio seeks a further exemption of the cut-off rule permitting it to amend its application to reflect a change in beneficial ownership without affecting its qualification as a satellite DARS licensee.¹¹

6. In support of its request, CD Radio indicates that it will place the voting equity shares issued in its parent company with a broad variety of parties, primarily institutional investors, which will result in a wide dispersal of the shares. CD Radio represents that its equity offerings will have no effect on the day-to-day management and business plan of CD Radio. Thus, according to CD Radio's representations, the same individuals who now control substantial blocks of equity in CD Radio and hold positions on the executive board and in senior management will retain their substantial equity stakes and decision-making executive positions.¹²

⁷ *Id.*

⁸ See *In the Matter of Request for Declaratory Ruling filed by Satellite CD Radio Inc.*, 9 FCC Rcd at 2569 Common Carrier Bureau (1994), where the Commission concluded that it would be in the public interest to permit a substantial change in beneficial ownership in CD Radio through the public offering of 4,500,000 shares of common stock.

⁹ CD Radio Petition at 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² CD Radio Petition at 3.

B. Discussion.

7. Section 25.116(c)(2) of the Commission's rules specifies, in pertinent part, that an amendment in a licensing application will be considered major if it specifies a substantial change in beneficial ownership or control of an applicant such that the change would require the filing of a prior assignment or transfer of control in the case of an authorized station. The rule further provides that any application will be considered to be a newly filed application if it is amended by a major amendment after a "cut-off" date applicable to the application.¹³ However, the Commission has authority to allow for exceptions in circumstances where the amendment reflects only a change in ownership or control found by the Commission to be in the public interest.¹⁴

8. As mentioned above, in June 1994, the Common Carrier Bureau granted CD Radio an exemption from Section 25.116(c) of the Commission's rules, which allowed it to issue additional equity. The Commission held that an exemption would serve the public interest by permitting CD Radio to continue to prosecute its pending satellite DARS application.¹⁵ In granting the exemption, the Bureau considered two factors: (1) whether the proposed transaction had a legitimate business purpose; and (2) whether the change in ownership was in the public interest.¹⁶

9. First, the Common Carrier Bureau concluded that the issuance of additional equity shares by CD Radio clearly had a legitimate business purpose, "to provide continuing financing to allow the company to pursue its application."¹⁷ In determining whether CD Radio had a legitimate business purpose, the Bureau noted that CD Radio's day-to-day

¹³ See 47 C.F.R. § 25.116.

¹⁴ See 47 C.F.R. § 25.116(c)(2).

¹⁵ CD Radio Petition at 4 (citing *In the Matter of Request for Declaratory Ruling filed by Satellite CD Radio Inc.*, 9 FCC Rcd at 2569 (1994)).

¹⁶ *Id.* at 2571 (citing *Airsignal International Inc.*, 81 FCC 2d 472 (1990), where the Commission applied a two-part test to determine if a waiver of the cut-off rules should be granted).

¹⁷ CD Radio Petition at 4 (citing *In the Matter of Request for Declaratory Ruling filed by Satellite CD Radio Inc.*, 9 FCC Rcd at 2569 (1994)).

management, operational team and service proposal would remain the same.¹⁸ Specifically, the Bureau determined that the current principals would remain in actual control of the applicant.¹⁹ Additionally, it found that CD Radio was not "trafficking in bare applications" or planning to sell control to third parties, but rather that the evidence indicated that it intended to use the offering to obtain funds from legitimate and traditional sources of capital in order to finance its business activities.²⁰

10. Second, in evaluating the prior grant of exemption, the Bureau found that any resulting change of beneficial ownership in CD Radio would further the public interest by permitting CD Radio to "strengthen its financial resources" and thus increase the likelihood that the satellite DARS service would promptly be made available to the public.²¹

11. The same factors are raised in the current petition. With respect to the first factor, CD Radio has a clearly defined business purpose in issuing additional voting equity shares to widely-dispersed parties through the public capital markets.²² According to CD Radio, additional capital is needed in order to continue its prosecution of its satellite DARS application.²³ To date, CD Radio has invested substantial resources, including time and financial commitments, to securing a DARS license and providing service. On April 2, 1997, CD Radio pledged at auction to pay \$83,346,000 for one of two FCC licenses to operate satellite DARS systems.²⁴ CD Radio then made a post auction down payment of \$13,669,200 to the U.S. Treasury, bringing its total down payment to \$16,669,200, twenty percent of its winning bid.

¹⁸ CD Radio Petition at 4.

¹⁹ *Id.* at 4.

²⁰ *Id.*

²¹ *Id.* at 5.

²² *Id.*

²³ *Id.* at 4-5.

²⁴ CD Radio Petition at 5. *See also* Public Notice, "FCC Announces Auction Winners for Digital Audio Radio Service," DA 97-656, Report No. AUC 97-05 (April 2, 1997).

12. Additionally, CD Radio has demonstrated its commitment to develop its DARS system and prevent unnecessary delays. In particular, it has begun constructing its space stations and executing agreements for associated hardware.²⁵ The Commission recognizes the substantial expense that is involved with the development of a new satellite communications facility.²⁶ Moreover, CD Radio has addressed the Commission's concern about applicants selling interests in bare licenses or applications. Indeed, there is no evidence that CD Radio plans to either engage in "trafficking in bare applications" or has undertaken a plan for "selling control to third parties."²⁷ Furthermore, CD Radio states that the management and operational team as well as its satellite DARS service proposal will remain the same.

13. As noted above, the Commission considers the public interest when determining whether to exempt an applicant from the "cut-off" rules. We believe that, in this instance, the public interest would be served by granting CD Radio's request. Grant of an exemption would allow CD Radio to obtain additional capital to finance the development of its DARS system, which would, in turn, help fulfill the Commission's objective of expediting DARS service to the public. In the *DARS Order* the Commission articulated numerous public interest benefits associated with providing DARS service.²⁸ In this instance, the record demonstrates that CD Radio is committed to providing such service. CD Radio plans to provide state-of-the-art service to consumers by the fall of 1999. Accordingly, we conclude that the public interest would be served by granting CD Radio a further exemption from the cut-off rule in order for it to raise sufficient capital to fund the development of its satellite DARS system.

²⁵ See News Release, "Digital Radio Satellite Under Construction," Loral Space & Communications Ltd., Newsbytes News Network (May 2, 1997). See also *In re Satellite CD Radio, Inc. Request for Section 319(d) Waiver*, 10 FCC Rcd. 10949, International Bureau (1995).

²⁶ See *In the Matter of Request for Declaratory Ruling filed by Satellite CD Radio Inc.*, 9 FCC Rcd at 2569 (1994).

²⁷ See *Airsignal International Inc.*, 81 FCC 2d 472 (1980). Concern about applicants selling interests in bare licenses or applications is a primary reason for cut-off dates and prohibitions of major amendments after those dates.

²⁸ See *DARS Order* at ¶¶ 10-17. The Commission specifically addressed the public interest benefits for satellite DARS: 1) can offer high quality radio signals to listeners who currently receive few terrestrial radio signals; 2) reduce the proportional discrepancy in the geographic distribution of radio service; 3) can provide new services that local radio inherently cannot provide; and 4) licensees will have incentive to diversify program formats and thereby provide niche programming.

III. CONCLUSION

13. In view of the foregoing, we find it in the public interest to conditionally grant CD Radio's request for further exemption in order to permit CD Radio to make a public offering of up to 15 million shares of common stock and complete the conversion of its delayed preferred shares into voting stock for the development of its DARS system.

IV. ORDERING CLAUSES

14. IT IS ORDERED, pursuant to Section 0.261 of the Commission's rules, 47 C.F.R. 0.261, that the request of CD Radio, Inc. for an exemption IS GRANTED.

15. IT IS FURTHER ORDERED that the issuance of up to 15 million shares of common stock in its parent corporation, along with conversion of up to 5,400,000 delayed preferred shares will not result in a determination that the application is newly filed pursuant to Section 25.116(c)(2) of the Commission's rules.

16. IT IS FURTHER ORDERED that this ruling is conditioned on the current stockholders and officers of the parent corporation continuing to exercise actual control over Satellite CD Radio, Inc.

FEDERAL COMMUNICATIONS COMMISSION



Peter F. Cowhey

Chief, International Bureau