



Wiley Rein & Fielding LLP

RECEIVED ORIGINAL

OCT 25 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARYCarl R. Frank
202.719.72691776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049Virginia Office
7925 JONES BRANCH DRIVE
SUITE 6200
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wrf.com

October 25, 2001

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554Re: *Ex Parte* Filing in IB Docket No. 95-51

95-91

Dear Ms Salas:

Sirius Satellite Radio Inc. ("Sirius"), by its attorneys, hereby opposes the three most recent in a series of *ex parte* filings by AT&T Wireless Services, Inc. ("AWS"), the Wireless Communications Service ("WCS") licensees, and the Wireless Communications Association International, Inc. ("WCA") regarding the establishment of rules for the operation of satellite digital audio radio service ("satellite DARS") terrestrial repeaters in the above-referenced docket. Specifically, for the reasons discussed below, Sirius requests that the Federal Communications Commission ("FCC" or "Commission") reject: (1) AWS' *ex parte* proposal filed on September 18, 2001, which seeks another further notice of proposed rulemaking ("FNPRM") in this docket and proposes revised terrestrial repeater rules;¹ (2) the WCA's October 2, 2001 request that the Commission impose on satellite DARS licensees the same restrictions applicable to WCS licensees in relation to MDS and ITFS operations;² and (3) the WCS licensees' October 4, 2001 sunset proposal for operation of Sirius' high power terrestrial repeaters.³

I. No Further FNPRM Is Legally Necessary; Further Delay Would Be Contrary to the Public Interest

The FCC should not issue another FNPRM in this docket. Contrary to the assertions of AWS and the WCS licensees, the 1995 Notice of Proposed Rulemaking ("NPRM") and 1997 FNPRM⁴ are legally adequate and a third NPRM is not needed to update the already voluminous record in the terrestrial repeaters docket.⁵

¹ See *Ex Parte Letter from William M. Wiltshire to Secretary, FCC* (filed Sept. 18, 2001) ("AWS filing").

² See *Ex Parte Letter from Paul J. Sinderbrand to Secretary, FCC* (filed Oct. 2, 2001) ("WCA filing").

³ *Ex Parte Letter from Douglas I. Brandon to Secretary, FCC* at 1 (filed Oct. 4, 2001) ("WCS filing").

⁴ *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 11 FCC Rcd 1 (1995) (Notice of Proposed Rulemaking) ("1995 NPRM"); *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd 5754 (1997) (Report and Order Memorandum Opinion and Order and Further Notice of Proposed Rulemaking) ("1997 FNPRM").

⁵ See AWS filing at 2; WCS filing at 3.

No. of Copies rec'd of 10
List ABCDE

Ms. Magalie Roman Salas

October 25, 2001

Page 2

Another FNPRM is not needed because the opportunities for comment already provided in this proceeding satisfy the legal notice requirement of the Administrative Procedure Act.⁶ Section 553(b) of the Administrative Procedure Act requires that a notice contain a “description of the subjects and issues involved.”⁷ The Seventh Circuit and the D.C. Circuit have clarified that adequate notice “apprise[s] interested parties of the issues to be addressed in the rule-making proceeding with sufficient clarity and specificity to allow them to participate in the rulemaking in a meaningful and informed manner.”⁸ In accordance with this standard, the FCC has provided adequate notice and numerous opportunities to comment. The Commission first requested comments on the use and licensing of terrestrial repeaters in the rulemaking for satellite DARS initiated in 1995.⁹ After receiving comments on the prospective satellite DARS licensees’ anticipated use of the repeaters, the Commission, in 1997, issued a FNPRM seeking further comments on whether a regulatory structure for mobile earth stations of other services should be adopted for satellite DARS.¹⁰ The FNPRM also sought comment on Sirius’ proposed rules for terrestrial repeaters and the repeaters’ potential impact on adjacent countries and the public.¹¹ The FCC also issued two subsequent public notices seeking additional comments—one in late 1997 and another in early 2000 following a request by the satellite DARS licensees to refresh the record.¹²

The FCC’s final rules will be a “logical outgrowth” of all of these opportunities to comment. The FNPRM outlined the very issues underlying AWS’ request.¹³ Indeed, AWS concedes that its proposed rules “capture most of the developments in this docket over the last four years and help define the interference environment for

⁶ See 5 U.S.C. 553 (2000).

⁷ 5 U.S.C. 553(b)(3).

⁸ *Am. Med. Ass’n v. United States*, 887 F.2d 760, 767 (7th Cir. 1989). See also *AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985); *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980) (final rule must be a “logical outgrowth” of the rule proposed), *cert. denied*, 453 U.S. 913 (1981).

⁹ See 1995 NPRM, 11 FCC Rcd 1.

¹⁰ See 1997 FNPRM, 12 FCC Rcd 5754.

¹¹ See *id.*

¹² See *Satellite Policy Branch Information: Applications Accepted for Filing*, Report No. SPB-112 (Dec. 23, 1997) (Public Notice) (establishing a reply comment deadline of January 9, 1998); *Satellite Policy Branch Information*, IB Docket No. 95-91, Gen. Docket No. 90-357 (Jan. 21, 2000) (Public Notice) (establishing a comment deadline of February 22, 2000 and a reply comment deadline of March 8, 2000).

¹³ 1997 FNPRM, 12 FCC Rcd at 5812.

Ms. Magalie Roman Salas

October 25, 2001

Page 3

all concerned parties.”¹⁴ Obviously, AWS cannot have it both ways: if its proposal flows directly from the FNPRM, so would any FCC rules resembling the Sirius/XM draft rules filed on September 26, 2001 (“Sirius/XM Rules”).¹⁵ Rather, the plea of AWS and WCS licensees for a further notice should be recognized for what it is: a delay tactic designed to prolong this process and cripple satellite DARS in its infancy.

In any event, the Commission would gain no new information from a third NPRM. Consistent with the FCC’s open-door policy for rulemaking proceedings, AWS, the WCA and numerous others have submitted dozens of *ex parte* filings addressing every conceivable issue.¹⁶ Four and one half years after the 1997 FNPRM, Sirius and XM—as well as the Commission’s staff—literally are drowning in process. Thus, there is no compelling policy reason to seek additional formal comments prior to the adoption of terrestrial repeater rules. Moreover, such additional procedure would be contrary to the public interest because it would further delay introduction of satellite DARS to the public.

Therefore, because further comments are not required as a matter of law and not supported by policy, Sirius respectfully requests that the FCC close this docket and swiftly adopt final rules.

II. The FCC Should Reject the WCS Licensees’ “Sunset” Proposal

The FCC should not adopt the WCS licensees’ proposed “sunset” on the operation of high power terrestrial repeaters. This “sunset” proposal would: (1) limit the use of terrestrial repeaters that operate above 2 kW Effective Isotropically Radiated Power (“EIRP”) to those identified in Sirius’ application for STA; (2) establish a deadline of December 31, 2006 for reduction in power of all terrestrial repeaters to 2kW EIRP; (3) require satellite DARS licensees to reduce power to “not more than 2kW EIRP within six months after the initial notice from the WCS licensee” if coordination of the higher power repeater is not obtained; and (4) require satellite DARS licensees to reduce power immediately upon written notification of interference to a WCS base station. Notably, in the few markets where WCS networks are already in operation, the proposed six-month transition period would begin running immediately upon adoption of final rules.

¹⁴ AWS filing at 2.

¹⁵ Put differently, AWS cannot argue both that the notice was not adequate for the discussion of these “important new issues” and also submit proposed rules for the resolution of these issues.

¹⁶ AWS itself admits that the Commission has already received numerous comments regarding coordination and interference issues related to the operation of terrestrial repeaters. See AWS filing at 2.

Ms. Magalie Roman Salas

October 25, 2001

Page 4

As Sirius often has explained, any reconfiguration of its terrestrial network would be time consuming, expensive, and invariably would imperil service to the public. Reconfiguration (for example to an all-2 kW system) could cost as much as \$100 million. Reconfiguration would also require Sirius to interrupt service to the public to re-time each repeater with nearby repeaters and cutover to the reconfigured network. And, as Sirius has long explained,¹⁷ a system of 2 kW satellite DARS repeaters will not decrease the potential for interference to WCS licensees.

In addition, the WCS licensees' proposal to limit terrestrial repeaters operated above 2kW EIRP to those identified in Sirius' STA would harm Sirius disproportionately merely because Sirius requested fewer repeaters in its STA than XM. By freezing deployment of terrestrial repeaters to those requested in the STA application, the WCS's sunset proposal would vitiate the ability of any satellite DARS provider to maintain competitive parity with the other licensee. Further, nowhere did the agency evidence any intent to use the temporary authority process to cap satellite DARS repeaters during the license period.¹⁸ To the contrary, the STA expressly does not "prejudice the outcome of the final rules."¹⁹ Finally, the agency cannot square such a cap with its long-standing preference to ensure that the public has a true choice in providers by ensuring competitive parity between licensees.

Even if, contrary to logic, the Commission decided to require Sirius and XM to reconfigure their repeater networks to include only 2kW terrestrial repeaters, the WCS proposal does not actually provide five years for this transition. While there are currently only two WCS commercial operations, WCS has asserted that many additional WCS base stations will be built in close proximity to satellite DARS terrestrial repeaters. The WCS licensees' proposed sunset rule would give WCS licensees a coordination veto over satellite DARS repeater operations. The practical result is that satellite DARS licensees would be compelled to reduce power to 2kW EIRP, within six months of notification from the WCS licensee that it is about to enter the market.²⁰ In practice, the WCS "five year" transition would likely be shortened to six months. Whatever the logic of a longer transition—which Sirius

¹⁷ See *Ex Parte Filing of Sirius Satellite Radio Inc. in IB Docket No. 95-91* (Feb. 5, 2001).

¹⁸ No such cap was proposed in the 1997 *FNPRM*.

¹⁹ *In the matter of Sirius Satellite Radio, Inc, Application for Special Temporary Authority to Operate Satellite Digital Audio Radio Service Complementary Terrestrial Repeaters*, File No. SAT-STA-20010724-00064, at ¶ 18 (Sept. 17, 2001) (Order and Authorization) ("Sirius STA").

²⁰ The WCS proposal also eliminates the six-month transition period in cases in which a repeater causes interference to a WCS network already in operation. Power must be immediately reduced on these repeaters. A sudden reduction in power of just one repeater would disrupt satellite DARS service to the area complemented by that repeater. See *WCS filing* at 2.

Ms. Magalie Roman Salas

October 25, 2001

Page 5

does not here concede—six months is simply not enough time to comply with the 2kW EIRP cap without reducing or interrupting of service to satellite DARS subscribers.

III. AWS's Proposed Rules Are Overly Complex and Would Unduly Burden the DARS Licensees and Commission Staff

AWS's most recent proposed rules would unduly restrict the ability of satellite DARS licensees to provide effective service, impose unnecessary burdens on Commission staff, and needlessly delay rollout of satellite DARS to the American radio listening public. In contrast, the Sirius/XM Rules would adequately protect the WCS and MDS/ITFS communities from harmful interference, permit prompt, roll-out of satellite DARS, and minimize the administrative burdens on Commission staff.

Out of Band Emission Limits. All parties agree that terrestrial repeaters should be subject to out-of-band emission limits. To this end, the Sirius/XM Rules provide that the DARS licensees must attenuate emissions outside the DARS bands in accordance with $75 + 10 \log(P)$, where P is measured in EIRP in watts. No further clarification of power calculation is warranted.

Power Limits. Sirius and XM won their spectrum rights at auction before the WCS spectrum was authorized. But even before that time, Sirius and XM had publicized plans to operate terrestrial repeaters at power levels up to 40 kW.²¹ More recently, the Sirius/XM Rules filed on September 26, 2001 agreed to reduce maximum repeater power to 18 kW, a decrease of more than 50 percent. Seemingly never satisfied, AWS now recommends that satellite DARS terrestrial repeaters be permitted to operate at no more than 400 W/MHz.

No reductions below 18 kW are warranted. Further power reductions would cripple satellite DARS reception in urban cores, and require expensive and time-consuming re-engineering (including interruptions in service necessary for network reconfiguration and re-timing). AWS's proposed 400 W/MHz cap would thus undermine the financial viability of satellite DARS service from its very inception—seemingly the intent of the WCS licensees. Indeed, because only a few

²¹ See *Application of Satellite CD Radio, Inc. for Authority to Construct, Launch and Operate a Space Station in the Satellite Sound Broadcasting Service at 103° West Longitude*, File Nos. 49-DDS-P/LA-90, 50-DDS-P/LA-90, at 21 (May 18, 1990) (seeking terrestrial repeaters power on the order of 500,000 watts); *Letter from Robert D. Briskman to Rosalee Chiara*, IB Docket No. 95-91, at 5 (filed Nov. 14, 1997) (seeking terrestrial repeater power of approximately 400,000 watts).

Ms. Magalie Roman Salas

October 25, 2001

Page 6

WCS licensees have recently begun transmitting in the WCS band²², the operation of medium power satellite DARS repeaters is not likely to cause significant “harmful” interference. The Commission should, therefore, authorize deployment of terrestrial repeaters up to 18 kW, as described in the Sirius/XM Rules.

Permissible Communications. Contrary to AWS’s proposal, the FCC should not restrict use of terrestrial repeaters to situations involving signal blockage. Such an approach is a gross oversimplification of the problems terrestrial repeaters are designed to solve. As the Commission well knows, delivering high quality audio from satellites to vehicles is an extraordinary technical challenge, and the satellite DARS systems are engineered to overcome numerous obstacles to service delivery, including multipath fading, shadowing, and blockage. Thus, the problem is not limited to signal blocking, as AWS would have the Commission believe. Therefore, the FCC should reaffirm that satellite DARS terrestrial repeaters may be employed in a variety of circumstances, not merely in instances of signal blockage.²³

Environmental Impact. Only those terrestrial repeaters with an EIRP exceeding 2000 W should be subject to the environmental assessments (“EAs”) requirement under Section 1.1307 of the Commission’s Rules. AWS proposes to require environmental assessments for satellite DARS terrestrial repeaters operating above 1640 W EIRP. However, subjecting terrestrial repeaters operating below 2000 W to environmental assessments would unduly burden the satellite DARS licensees. Environmental assessments can take many years and cost hundreds of thousands of dollars, which would further delay introduction of an important nascent service to the public. In addition, satellite DARS licensees will comply with ANSI standards, as implemented by the Commission, and, thus, ensure that the general public has no access to RF sources.

The Commission should also make clear that taking actions to bring an area into compliance with Section 1.1307 should be the shared responsibility of all licensees, not just the “last in time” licensee whose facilities cause emissions in a particular area to exceed applicable limits. Section 1.307(b)(3) already provides for such

²² See *Comments of AT&T Wireless Services, Inc. In the Matter of XM Radio, Inc. and Sirius Satellite Radio, Inc. Requests for Special Temporary Authority to Operate Terrestrial Repeaters in the Satellite Digital Audio Radio Service* at 1 (filed Aug. 21, 2001); *WorldCom, Inc. Opposition to STA Request, In the Matter of XM Radio, Inc. and Sirius Satellite Radio, Inc. Requests for Special Temporary Authority to Operate Terrestrial Repeaters in the Satellite Digital Audio Radio Service* at 1 (filed Aug. 21, 2001).

²³ The Sirius/XM proposed rules limited terrestrial repeaters to transmitting programming that is also transmitted by an authorized DARS satellite and in such a way that the DARS satellite signal and terrestrial repeater signal are received nearly simultaneously.

Ms. Magalie Roman Salas

October 25, 2001

Page 7

shared responsibility, and the Commission should resist any attempt to impose disproportionate liability on any one group of licensees.

Equipment Authorization. The FCC should not—as AWS proposes—subject DARS terrestrial repeaters to certification procedures, as outlined in 47 C.F.R. § 2.907. The primary purpose of the Commission’s equipment authorization procedures is to “promote efficient use of the radio spectrum” by establishing technical standards that reduce the risk of interference.²⁴ But, satellite DARS licensees already have *exclusive nationwide* use of their spectrum, purchased at auction for over \$170 million. Thus, there is no risk of co-channel interference requiring FCC equipment authorization.

Similarly, once the FCC adopts final out-of-band emission limits, there is no need to mandate a duplicative equipment approval regime. Sirius and XM already would be prohibited from exceeding the FCC-adopted limit, which the FCC could enforce in numerous ways including fines and license revocation.²⁵ Moreover, Sirius and XM already have every incentive to conform to out-of-band limits since any hypothetical repeater that exceeds the rule likely would also interfere with the immediately adjacent satellite DARS provider. Because equipment approval would require additional months after adoption of the final rules in this docket, the WCS licensees’ request appears designed merely to delay final authorization of satellite DARS repeaters.

Licenses. The Commission should not adopt AWS’ proposal to license terrestrial repeaters because a licensing requirement would add unnecessarily to the FCC’s administrative burdens. The satellite DARS spectrum rights include the right to deploy complementary services, including terrestrial repeaters, to ensure nationwide coverage. Because satellite DARS providers already have the right to deploy terrestrial repeaters, a licensing requirement is redundant.

Although satellite DARS providers have the right to deploy terrestrial repeaters, Sirius has been cooperating with the FCC and with WCS licensees to identify the locations of these repeaters, including those operating under 2 kW. In contrast, the WCS licensees have not started, and appear to have no intention of, notifying satellite DARS licensees of the locations of their sites operating below 2 kW nor of any sites after January 1, 2002.

²⁴ 47 C.F.R. § 2.901 (2000).

²⁵ 47 U.S.C. § 502 (1991) (fines); 47 U.S.C. § 312 (a) (1991) (license revocation).

Ms. Magalie Roman Salas

October 25, 2001

Page 8

IV. The WCA Proposal

The WCA, in its October 12, 2001 *ex parte* filing, proposes that the FCC regulate terrestrial repeaters in the same manner as WCS licensees to protect MDS and ITFS operations.²⁶ The WCA argues that there is “no material difference between the signal at a WCS station and a terrestrial DARS repeater” and that the repeaters pose the same risk of brute force interference as WCS stations.²⁷ This argument is seriously flawed.

The first problem with wholesale application of the WCS rules on satellite DARS is that the time period in which WCS licensees are liable for interference will soon end on February 20, 2002. In addition, the market is already dictating the conversion of MDS and ITFS operations from analog to digital, which makes those systems more robust and less vulnerable to possible interference. Second, the WCA and AWS proposals for unlimited liability would reward those licensees that have not designed sufficiently interference resistant systems, which they could have done given the information the DARS licensees have made available to them during the last decade. Finally, the expectation has already been established that WCS licensees are responsible for interference caused by their systems. In the cases in which both satellite DARS and WCS licensees cause interference, WCS licensees should be the first to respond. Accordingly, the FCC should reject the WCS proposal and refrain from imposing any short-lived obligation for satellite DARS licensees to protect legacy analog MDS and ITFS operations. Should the FCC, nevertheless, decide to adopt such a requirement, Sirius requests that the FCC adopt a rule whereby satellite DARS licensees would only be secondarily liable in instances where both satellite DARS and WCS licensees are responsible for interference with MDS and ITFS operations.

Conclusion

The satellite DARS licensees have worked diligently throughout this proceeding to address the concerns of other Commission licensees. The culmination of this hard work and compromise is evidenced by the September 26, 2001 Sirius/XM Rules.

²⁶ *WCA filing* at 1.

²⁷ *Id.* at 1-2 (emphasis in original).

Wiley Rein & Fielding LLP

Ms. Magalie Roman Salas
October 25, 2001
Page 9

Sirius respectfully requests that the FCC complete this rulemaking and issue final—and long-overdue—rules authorizing the operation of terrestrial repeaters based on the Sirius/XM Rules.

Sincerely,



Carl R. Frank
Jennifer D. Hindin
John F. Papandrea
Counsel to Sirius Satellite Radio Inc.

cc: Hon. Michael K. Powell
Hon. Kathleen Q. Abernathy
Hon. Michael J. Copps
Hon. Kevin J. Martin
Peter Tenhula
Bryan Tramont
Paul Margie
Monica Desai
Don Abelson
Bruce Franca
Keith Larsen
Tom Sugrue
Rosalee Chiara
David Furth
Julius Knapp
Chris Murphy
Ronald Netro
John J. O'Connor
Rockie Patterson
Ronald Repasi
Tom Stanley
Susan Steiman
Roy Stewart
Bruce Jacobs (counsel for XM)
Paul J. Sinderbrand (counsel for WCA)
William M. Wiltshire (counsel for AT&T Wireless Services)
Karen L. Gulick (counsel for AT&T Wireless Services)
Douglas Brandon (AT&T Wireless Services)
Karen B. Possner (BellSouth)
Michael K. Hamra (Metricom)
Donald C. Brittingham (Verizon Wireless)
Mary N. O'Connor (WorldCom)
Randall Schwartz (BeamReach Networks)