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January 24, 2002

BY ELECTRONIC DELIVERY

Managing Director
Attn: FOIA Officer
Federal Communications Commission
445 Twelfth Street, S.W., Room 1-A835
Washington, DC 20554

Re: ***Freedom of Information Act Request***
Establishment of Rules and Policies for the Satellite Digital Audio Radio Service in the 2310-2360 MHz Band, IB Docket No. 95-91
XM Radio Request for STA, File No. SAT-STA-20010712-00063

Dear Sir:

AT&T Wireless Services, Inc. ("AWS") hereby requests disclosure of the information related to low power terrestrial repeaters filed by XM Radio Inc.[1] pursuant to the Freedom of Information Act ("FOIA")[2] and Section 0.461 of the Commission's Rules.[3] XM has requested confidential treatment of this information pursuant to Section 0.459 of the Commission's rules,[4] but has failed to make the showing necessary to justify confidential treatment. In fact, there is no basis upon which such a showing can be made. The Commission should deny XM's request and make this information freely available for public inspection.

Background

AWS holds licenses in the 2.3 GHz band for the Wireless Communications Service ("WCS"). XM has been licensed to provide satellite Digital Audio Radio Service

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1 *See* Letter from Bruce D. Jacobs to Magalie Roman Salas (dated Nov. 13, 2001)("XM Request").

2 5 U.S.C. § 552.

3 47 C.F.R. § 0.461.

4 *Id.* at § 0.459.

("SDARS") in a contiguous portion of the 2.3 GHz band. Although the Commission adopted SDARS service rules in 1997, it left open the issue of whether and how to authorize terrestrial repeaters that could be used to retransmit the SDARS signal to provide gap-filling coverage where the satellite transmission could be blocked.[5] That proceeding remains open, primarily because AWS and other WCS licensees and equipment manufacturers have raised significant concerns about the potential for blanketing interference that could arise from the use of such repeaters.

In July 2001, XM applied for special temporary authorization ("STA") to operate its nationwide experimental repeater network on a commercial basis, pending adoption of final rules. The International Bureau granted an STA, with conditions to protect against blanketing interference, on September 17, 2001.[6] As part of its application, XM provided – without a request for confidentiality -- the location and operational parameters of all terrestrial repeaters operating at more than 2 kW EIRP ("high power repeaters"). XM did not, however, provide similar information for its repeaters operating at 2 kW EIRP or less ("standard power repeaters").

By letter dated November 1, 2001, the International Bureau requested that XM submit information on the location and operational parameters of its standard power repeaters. On November 13, 2001, XM filed a responsive letter but requested that the information be given confidential treatment pursuant to Section 0.459. XM asserts that the information is "privileged" because, although the STA order required XM to disclose this information to WCS licensees upon request, a footnote therein contemplated that XM might seek a reasonable non-disclosure agreement.[7] The only alleged competitive harm from disclosure that XM could articulate was its concern that "this information [on standard power repeaters] could be used to unnecessarily complicate their deployment and operation."[8]

Discussion

Although the main purpose of FOIA is full disclosure of and public access to documents,[9] the statutory requirements are tempered by a few limited exceptions. Once

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5 *See Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd. 5754, 5810-12 (1997).

6 *XM Radio Inc.*, DA 01-2172 (Int'l Bur., rel. Sept. 17, 2001).

7 *Id.* at ¶ 14 and n.30.

8 XM Request at p. 3.

9 *See Center for Auto Safety v. NHTSA*, 244 F.3d 144, 147 (D.C. Cir. 2001).

such exception, commonly known as Exemption 4, exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[10] As the party requesting confidential treatment, XM must demonstrate by a preponderance of the evidence that each and every element necessary to justify such treatment is satisfied in this case.[11] XM's perfunctory filing patently fails to meet this burden, and in fact should be deemed to be the kind of "casual request" that the Commission will not consider.[12]

XM's sole claim that the subject information is "privileged" rests upon a footnote in the International Bureau's order granting the STA which contemplates that XM may provide this information to WCS licensees subject to a reasonable protective order. This claim rests upon an erroneous understanding of the term "privileged." For purposes of FOIA, the word "privileged" refers only to privileges created by the Constitution, statute, or common law.[13] Dicta in the Bureau's STA order does not fall within any of those categories,[14] and XM does not cite any other alleged basis for privilege in its request for confidentiality. Accordingly, its claim of privilege must fail.

To the extent XM is claiming that the standard repeater information is confidential rather than privileged, its claim must also fail. Information will only be deemed "confidential" within the meaning of FOIA if its disclosure will be likely to either (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information is obtained.[15] XM has made no claim that disclosure would impair the government's ability to obtain information in the future. And the only potential harm that it has identified is its concern that disclosure could somehow be used "to unnecessarily complicate" deployment and operation of standard power repeaters. XM does not,

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10 5 U.S.C. § 552(b)(4). Section 0.459 of the Commission's rules implements this exemption.

11 47 C.F.R. § 0.459(d)(2).

12 *Id.* at § 0.459(c).

13 *See Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 400 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985).

14 Moreover, the Bureau's footnote was not part of a decision construing the disclosure requirements of FOIA. And in any event, agencies cannot alter the dictates of FOIA by their own express or implied promises of confidentiality. *See Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1287 (D.C. Cir. 1983).

15 *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1972).

however, explain *how* the information could be used in this way or who would have the desire and ability to do so.

This is plainly insufficient to justify confidentiality. "To prove substantial competitive harm, the party seeking to prevent disclosure ***must show by specific factual and evidentiary material*** . . . that substantial competitive injury would likely result from disclosure."[16] Conclusory and generalized allegations are not sufficient to meet this burden; instead, a request must detail the extent, nature, and likely impact of the substantial competitive harm that would occur as a result of disclosure.[17] XM's vague, one-sentence assertion does not say anything about how the alleged competitive harm would be suffered, nor does it discuss in any way the extent, nature, and likely impact of the alleged competitive harm. XM has therefore failed to prove by a preponderance of the evidence this essential basis for its confidentiality request.

Moreover, it is clear that XM would not be able to meet this burden even if it attempted to do so. XM has already provided exactly the same type of location and operational information with respect to its 778 high power repeaters – without any claim of competitive harm or request for confidentiality. XM does not explain why disclosure of standard power repeater information would result in any more competitive injury than disclosure of high power repeater information, nor does it claim that the disclosure of information on high power repeaters has, in fact, caused any such injury. Accordingly, this case is very similar to *Liberty Cable Company*, in which the Commission denied confidential treatment of information relating to certain operational fixed microwave service ("OFS") applications.[18] In denying Liberty's request, the Commission stated:

> [G]iven the fact that [Liberty] has previously disclosed, without objection, the same type of information (*i.e.*, receive site addresses, service commencement dates, and number of subscribers) regarding 15 OFS applications, we are unconvinced that disclosure of the same type of data for the four remaining applications will cause it substantial injury.[19]

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16 *Sharyland Water Supply Corp.*, 755 F.2d at 399 (emphasis added).

17 *See, e.g., Ameritech Corp.*, 13 FCC Rcd. 20349 at ¶ 4 (CCB 1998); *Marcus Cable Assocs., L.P. v. Texas Util. Elec. Co.*, 12 FCC Rcd. 10362 at ¶ 35 (CSB 1997); Letter from Amy J. Zoslov to Timothy E. Welch, 14 FCC Rcd. 3016 (WTB 1999).

18 *Liberty Cable Co.*, 11 FCC Rcd. 2475 (1996), *aff'd sub nom. Bartholdi Cable Co. v. FCC*, 114 F.3d 274 (D.C. Cir. 1997).

19 *Id.* at ¶ 8.

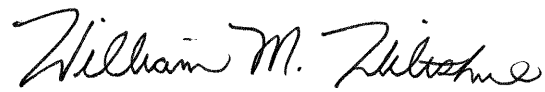
XM should fare no better here, given its prior voluntary public disclosure of terrestrial repeater information and the lack of any resulting competitive harm.

AWS is not a competitor of XM. It seeks the operational characteristics of standard power repeaters in order to provide the Commission with a full and accurate analysis of the interference environment that the deployment of terrestrial repeaters will create for WCS licensees, as well as the capability of SDARS licensees to achieve their gap-filling mission without deploying high power repeaters. Unless all interested parties in the SDARS repeater proceeding are allowed to review and analyze this data, the Commission will have to make its decision based on incomplete and perhaps misleading information. Thus, the confidential treatment would undermine the public interest in this case.[20]

Conclusion

XM has failed to demonstrate by a preponderance of the evidence that the information it has submitted on standard power repeaters should be withheld from public scrutiny. Accordingly, AWS requests that the Commission deny XM's request for confidentiality and make this information feely available for public inspection.

Sincerely,



William M. Wiltshire
Counsel for AT&T Wireless Services, Inc.

cc: Donald Abelson
Rocky Patterson
Stephen Duall
Bruce D. Jacobs (counsel for XM Radio)

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[20] AWS is prepared to pay a maximum search fee of $100.