

SIRIUS SATELLITE RADIO INC. XM RADIO INC.

March 13, 2002

Via Electronic Filing

Ms. Jane E. Mago
General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: *Ex Parte* Presentation
IB Docket No. 95-91**

Dear Ms. Mago:

Sirius Satellite Radio Inc. (“Sirius”) and XM Radio Inc. (“XM Radio”) have urged the Commission to apply the interference protection standard recently adopted in its Lower 700 MHz proceeding to resolution of the dispute regarding Satellite Digital Audio Radio Service (“SDARS”) terrestrial repeaters, in particular to the claims of adjacent-channel Wireless Communications Service (“WCS”) licensees that SDARS repeaters will interfere with their operations. *See Report and Order*, GN Docket No. 01-74 (Jan. 18, 2002) (“*Lower 700 MHz Decision*”); Letter from XM Radio and Sirius to Mr. William F. Caton, FCC, IB Docket No. 95-91 (Feb. 21, 2002). Indeed, our view is that the Commission is legally required to apply the Lower 700 MHz standard to its analysis of the interference potential in this case. The Commission made findings in the Lower 700 MHz proceeding that are directly relevant here and fully consistent with and supported by the record in this proceeding. To deviate from those findings and conclusions in this case without a rational basis (and we see none in the record) would be arbitrary and capricious.

In the Lower 700 MHz decision, released just two months ago, the Commission firmly rejected the notion that “parity” in power levels is required between adjacent-band broadcast and lower power non-broadcast, fixed and mobile operations. *Lower 700 MHz Decision* at paras. 104-105. Instead, the Commission decided that high-power broadcast operations (at power levels up to more than twice those being discussed in this case) are appropriate and will not prevent lower power Part 27 fixed and mobile operations, including use of consumer equipment. *Id.* In the decision, the Commission established the fundamental principle that a power flux density (“pfd”) of 3000 microwatts per square meter anywhere at ground level within 1 km of an adjacent-channel broadcast transmitter is a “reasonable standard for non-interference” for the protection of all lower power Part 27 fixed and mobile licensees in the Lower 700 MHz band. *Id.* at para. 103. The Commission further provided that compliance with the pfd limit should be calculated based on the Hata propagation model. *Id.* at Appendix D.

There is no basis for the Commission to deviate from this precedent in any manner in authorizing SDARS terrestrial repeaters in the 2.3 GHz band. Lower 700 MHz licensees, just like WCS licensees in the 2.3 GHz band, are authorized under Part 27 of the Commission's rules to make flexible use of their authorized spectrum for both fixed and mobile services. Broadcast operations in the lower 700 MHz band, just like SDARS providers in the 2.3 GHz band, will operate facilities at power levels that exceed those of the fixed and mobile operators in the band.¹ The interference concerns of lower power Part 27 licensees in the lower 700 MHz band are identical to those of Part 27 licensees in the 2.3 GHz band. Thus, the FCC's conclusion that higher power broadcast operations and lower power Part 27 fixed and mobile operations in adjacent bands in the Lower 700 MHz band can coexist applies equally to the instant proceeding.

We have heard arguments that the focus of the staff's analysis in the 700 MHz proceeding involved the deployment of different kinds of adjacent channel facilities than those deployed or anticipated to be deployed by the SDARS and WCS licensees. Any such differences are not legally relevant, however. As an initial matter, the Commission's findings are stated clearly and broadly, to apply to a wide variety of facilities deployments. This is consistent with the rules that were adopted, which in no way restrict the deployment of facilities to those that may have been the focus of the staff's analysis. Finally, however, and of greatest importance, the record in the SDARS proceeding provides ample, unrebutted evidence supporting the broad conclusion of the 700 MHz proceeding, that Part 27 licensees can easily and inexpensively design systems and equipment that can operate without interference in an environment in which the adjacent-channel operators limit their power flux density to 3000 microwatts per square meter.

The Administrative Procedure Act states that an agency's actions, findings or conclusions may be set aside by a court if they are found to be, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Court of Appeals for the D.C. Circuit has consistently reminded the Commission "of the importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment."² As the Supreme Court has held, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"³ Furthermore, it is a well-established doctrine that when the Commission seeks to

¹ The only difference between the two proceedings is that the SDARS licensees have agreed to cap power at 40 kW EIRP whereas broadcast operations in the lower 700 MHz band are authorized at up to 50 kW ERP, which equates to 82 kW EIRP.

² *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965) (FCC must "do more than enumerate factual differences, if any, between appellant and the other cases; it must explain the relevance of those differences to the purposes of the Federal Communications Act").

³ *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (quoting *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168 (1962)); see also *MCI Telecomm. Corp. v. FCC*, 10 F.3d 842, 846 (D.C. Cir. 1993).

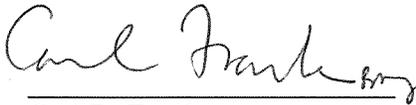
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change an existing rule, policy, or precedent it must “supply a reasoned analysis indicating that prior policies are being *deliberately changed and not casually ignored.*”⁴

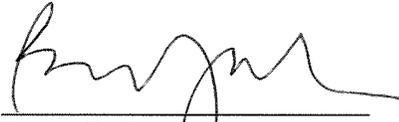
If the Commission were to depart from its findings in the Lower 700 MHz proceeding, it must have a rational basis for doing so and must explain its reasoning. Given the identical nature of the interference issues in the instant case and those raised in the Lower 700 MHz proceeding, it would be irrational for the Commission to develop a different set of interference rules in the 2.3 GHz band two months later.⁵

Please direct any questions regarding this matter to the undersigned.

Very truly yours,



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⁴ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (emphasis added), *cert. denied*, 403 US 923 (1971).

⁵ *Time Warner Entertainment v. FCC*, 240 F.3d 1126, 1128 (D.C. Cir. 2001).