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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)
)
WCS WIRELESS LICENSE SUBSIDIARY, LLC)
)
Application for Transfer of Control from WCS)
Wireless, Inc. to XM Satellite Radio Holdings Inc.)
)

Wireless Telecommunications Bureau
File No. 0002240823

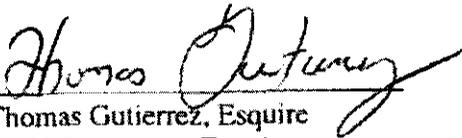
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OPPOSITION TO PETITIONS TO DENY

Respectfully Submitted,

WCS WIRELESS LICENSE SUBSIDIARY, LLC


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August 17, 2005

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SUMMARY

Three parties have challenged the Application. None has any standing to petition and, most certainly, none has presented any reason that the Application should be denied.

The most fundamental problem with the Petitioners' arguments is that there is no cause-effect relationship between the concerns that Petitioners raise and the merger at issue. That is to say, the interference and programming issues that are raised are equally applicable regardless of whether the merger is consummated. The WCS Wireless and XM facilities could be collocated without any merger, and whatever programming is permitted over WCS spectrum could be provided through coordination arrangements rather than a merger. The merger simply makes the process more efficient, and is thus in the public interest.

The interference and trafficking matters presented are non-issues. Nothing about the merger, or the contemplated use of the spectrum, will increase the likelihood of interference. Similarly both the auctioned nature of the spectrum at issue and the considerable efforts that WCS Wireless has devoted to its development belie any potential trafficking issue.

In view of the above, the Commission should deny the Petitions and promptly grant the Application.

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OPPOSITION TO PETITIONS TO DENY

WCS Wireless License Subsidiary, LLC (“WCS Wireless”), by counsel and pursuant to 47 C.F.R. §§ 1.45 and 1.939, hereby submits its opposition to the three petitions to deny (“Petitions”) submitted against the captioned applications (the “Application”).¹ For the reasons set forth below, WCS Wireless urges the Commission to dismiss the Petitions and grant the Application.

I. OVERVIEW

Collectively, the Petitioners complain about all that they can. They take issue with the Commission’s rules governing the spectrum at issue;² they berate WCS Wireless;³ they protest

¹ Petitions to deny the Application were filed by: (a) the Wireless Communications Association (“WCA”, and the “WCA Petition”); (b) the National Association of Broadcasters (“NAB” and the “NAB Petition”) and (c) Sirius Satellite Radio Inc. (“Sirius” and the “Sirius Petition”). Each of the Petitioners is referred to herein as a “Petitioner” and collectively they are the “Petitioners”

² Sirius Petition, at 4-5.

³ NAB Petition, at 6-8.

that XM will compete with them;⁴ and they argue about the FCC's process for acting upon applications of this nature.⁵ There is, however, one issue which they have not raised, and could not legitimately raise: that the transfer itself would cause any of them harm!

This is because there is no cause-effect relationship between the proposed transfer and the claimed parade of horrors. Simply put, the professed possibility of interference about which WCA and Sirius complain is wholly unrelated to the proposed merger. If any interference were to occur (and it will not), it could happen regardless of whether XM holds the licenses or WCS Wireless does. The same applies to the competitive threat that NAB so fears. If it is possible to provide services that NAB brings to issue over WCS spectrum, WCS could provide those in the absence of any merger, possibly coordinating with a strategic partner, including XM, but not in a manner that would require Commission approval. And if the services about which NAB is so concerned cannot be provided over WCS spectrum, the contemplated merger does not change that.

The merger will simply permit the spectrum to be used more efficiently to provide services that are already available. As such, it will serve the public interest.

Because there is no cause-effect relationship, Petitioners have no standing. Equally important they present no substantive reason to deny the Application. As such, the Petitions should be denied and the Application granted promptly.

⁴ NAB Petition, at 16-18.

⁵ NAB Petition at 6-13; Sirius Petition, at 9.

II. ARGUMENT

A. The WCA Petition

WCA challenges the Application only:

“to the extent that it [the Application] proposes ... the assignment of the WCS Wireless pending Amended Request for Waiver of Section 27.50(a) (the “Waiver”) to XM without affording the public the notice and opportunity to comment afforded by Sections 1927(h) and 1.933(b) of the Commission’s Rules.”

WCA Petition, at 1. According to the WCA, the rationale for the Waiver, i.e., to provide efficient datacasting, is no longer applicable in view of the contemplated merger. *Id.*, at 2. As demonstrated below, the WCA Petition is procedurally and substantively flawed.

1. WCA Has No Standing.

a) The WCA Petition is Not Supported by Any Affidavit.

There are several problems with the WCA Petition. First, it violates Section 309(d)(1) of the Act⁶ and Section 1.939(d) of the Commission’s rules in that it is not accompanied by an affidavit supporting “specific allegations of fact sufficient to make a prima facie showing that the petitioner is a party in interest and that a grant of the application would be inconsistent with the public interest convenience and necessity.” As this requirement is absolute and is included in the Act itself, this is not one that can be taken lightly or waived by the Commission. For this reason alone, the WCA Petition must be dismissed.

⁶ The Telecommunications Act of 1934, as amended.

b) *WCA Fails to Show Injury From the Challenged Action.*

One reason that WCA should not have claimed under penalty of perjury that it has standing is because it has none! As explained above, nothing could be done after grant of the merger Application that could not be done in its absence (other than effectuation of the merger which, in and of itself, has no negative impact on WCA or its unnamed members.) As such, WCA has utterly failed to establish standing. It has not shown any “personal injury” that is “fairly traceable to the challenged action”, and there is no “substantial likelihood that the relief requested will redress the injury claimed.” *MCI Communications Corp., Transferor, and Southern Pacific Telecommunications Company, Transferee.* 12 FCC Rcd 7790, 97 (1997). Similarly, grant of the Application would not cause it “direct injury”;⁷ there is no “causal link” between application grant and any injury;⁸ and no injury is “likely” rather than merely “speculative”.⁹ Both the Supreme Court and the D.C. Circuit have properly explained these to be the “irreducible constitutional minimums” to establish standing.¹⁰ Without them, there is no standing.

The second prong of the required (but here missing) sworn statement is equally important. It requires a genuine showing that there is a basis in fact for the statements included in the pleading. Here there is none. Despite WCA’s assumptions to the contrary, there has been

⁷ *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972); *Minnesota PCS*, 17 FCC Rcd 126, 128 (CWD 2002.)

⁸ *Americatel Corporation*, 9 FCC Rcd 3993, 3995 (1994.)

⁹ *Alaska Native Wireless, Order*, 18 FCC Rcd 11640, 11644 (2003.)

¹⁰ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *High Plains Wireless, L.P. v. FCC*, 276 F. 3d 599, 605 (D.C. Cir. 2002)(citing *U.S. Airwaves, Inc. v. FCC*, 232 F. 3d 227, 232-32)(D.C. Cir. 2000).

no change in the WCS Wireless business plan for one-way datacasting service, and there remains a need to make WCS spectrum economically suitable for investment. See the Declaration of Scott Donohue provided herewith.

c) *The Commission Should Not Treat the WCA Petition as Informal Comments.*

WCS Wireless is cognizant that, in order to minimize controversy, the Commission sometimes views defective petitions (such as these) as informal comments that can be presented pursuant to 47 C.F.R. § 1.41. There are several reasons why that policy should not apply in this instance. First, as formal processes exist here and Section 1.41 applies only in their absence, that provision is not here applicable. Second, the submissions at issue are so very much devoid of merit that Petitioners should not be “rewarded” by effectively obtaining the delay that they seek. Third, under such circumstances, if the Commission were to here reward WCA, it would be more difficult for the Commission to enforce its rules in future proceedings. See *Melody Music, Inc. v. FCC*, 345 F.2nd 730 (D.C. Cir. 1965). Lastly, unless the Commission enforces its standing rules (and the Act’s requirements), WCA could conceivably pursue this matter in the courts. This would have the effect of continuing this stalemate for years. Thus, at a minimum, there needs to be a determination that WCA has no standing, regardless of whether its issues are addressed.

2. **There is no Merit to the WCA Argument.**

When one turns to the “substance” of the WCA pleading, it fares no better. The merger will not harm WCA (or any of the Petitioners), or undermine the public interest. As demonstrated above, there is no causal relationship between the merger here at issue and any possible harm to WCA (or anyone else) that would result from grant of the Application. In other words, because there is no causal relationship between the merger and the alleged harm that

WCA professes to be concerned about, WCA has failed to present any reason why the Application should not be granted. In fact, because the merger will permit the same services that are now possible to be provided more efficiently, grant of the Application will serve the public interest.

The cry that there may have been a procedural glitch in the public notice associated with the Application is a desperate effort by WCA to create an issue. It is particularly lacking given WCA's critical failings discussed above. The public was given notice of the Waiver at least twice: first in the Public Notice announcing the filing of the Waiver¹¹, then in the transfer Application Public Notice.¹² Anyone with interest in the Waiver would have learned of the contemplated merger – as did WCA. Anyone who had an interest in, and read, the Application would have seen reference to the Waiver, and the Application request bypasses any need for duplicative public notices. Lastly, the Commission has traditionally provided an exception to its major amendment rules whenever there is a complete merger of interest, rather than an assignment of only certain of a licensee's license assets. (See former 47 C.F.R. § 22.23(g).) There is no reason that the exception should not be applied in this instance.

B. The Sirius Petition

1. Sirius Has No Standing.

The Sirius Petition suffers many of the same fatal procedural defects as the WCA Petition. There is no Section 309 affidavit. As such, it must be dismissed for the same reasons

¹¹ Public Notice, DA 05-1662 (June 15, 2005).

¹² Report No. 2209, File Nos. 0002240823, et al, rel. July 20, 2005.

as the WCA Petition. (See discussion in Section IIA above.) But the Sirius Petition has another fatal flaw: It does not even allege any concrete reason why the Application should be denied. Its assertions that there “may” be interference are not sufficient to comply with the specificity demands of Section 309. Sirius Petition, at 1 and 4. The courts have spoken on this matter clearly. Allegations must include specific evidentiary facts, not “ultimate, conclusory facts or mere general allegations”.¹³ As a result, the claimed injury is far too speculative to support standing.¹⁴

2. **Sirius Has Presented No Reason That The Application Should Not Be Granted.**

Substantively, the Sirius Petition also fails due to the lack of any causal relationship between the merger and the claimed harm. Instead of providing any genuine reason why the Application should not be granted, Sirius attempts to direct the Commission regarding rulemaking matters. Sirius first urges the Commission to complete another rulemaking proceeding prior to acting on the subject application. Sirius Petition, at 5-7. It then effectively attempts to have the Commission revise, after the fact, its eligibility rules for WCS licensees so that no SDARS licensee could now also be a WCS licensee. Sirius Petition, at 7. Yet, as the spectrum here at issue was, by Sirius’ own admission “created in a manner to protect satellite DARS” (Sirius Petition, at 2), there is no need for the relief Sirius seeks. That is to say, existing rules already provide the protection that Sirius claims to want.

¹³ *United States v. FCC*, 652 F. 2nd 72, 89 (D.C. Cir. 1980)(*en banc*) (quoting *Columbus Broadcasting Coalition v. FCC*, 505 F. 2nd 320, 323-324 (D.C. Cr. 1974.)

¹⁴ *Cuero Broadcasting, Inc.*, 22 FCC 2nd 441 (1970.)

The Application proposes no change in the service rules involving WCS spectrum, and Sirius does not claim otherwise. Rather, according to Sirius, the interference that “may” result from the merger stems solely from “the collocation of XM’s A, B or D-Block WCS transmitters and satellite DARS terrestrial repeaters...” Id, at 4. The argument suffers from two critical failures. First, the argument is flawed because it is based solely on the expectation that, barring the merger, WCS would never operate its facilities at a location where a SDARS repeater also operates. The collocation challenge that Sirius points to is a fact of modern communications life. It is virtually everywhere;¹⁵ it is environmentally sensitive;¹⁶ and it is a general approach that the Commission has repeatedly endorsed and encouraged.¹⁷ Equally important, it could occur regardless of whether the proposed transaction is approved or consummated. WCS Wireless and XM could, and likely would, collocate facilities with or without a merger. Because many local communities object to the increasing number of towers constructed over the past 20 years, avoiding collocation would be impossible since WCS Wireless would need to embark on the extremely difficult task of building new towers across its service regions, instead of leasing existing facilities. Such collocation is a fundamental expectation and requirement for any communications service provider, and would best serve both WCS Wireless and the public interest.

¹⁵ See *Nationwide Programmatic Agreement for Collocation of Wireless Antennas*. (“Antenna Collocation Programmatic Agreement.”) 66 Fed. Reg. 17554 (April 2, 2001)

¹⁶ See e.g. 47 C.F.R. § 1.307(a)(4) (excepting collocations from certain required environmental showings.)

¹⁷ Antenna Collocation Programmatic Agreement.

The argument is also technically flawed in that the interference that Sirius claims “may” occur will not, in fact, occur over the large areas claimed. This is because the analysis used to determine the impacted area is faulty. The use of free space loss to characterize the urban areas where XM and Sirius currently operate repeaters is an erroneous assumption. The building density that necessitates the use of SDARS repeaters is also responsible for providing significant blockage to terrestrial transmitters.

Like collocation, intermodulation products are a fact of life in the modern communications world. Sirius’ analysis suggests that intermodulation products at a site where WCS collocates with a XM repeater will fall within the Sirius receive bandpass. Similar analysis also shows that if WCS collocates with a Sirius repeater, the intermodulation product will fall within the XM receive bandpass. In addition, certain combinations of WCS frequency usage produce intermodulation products that fall within the SDARS band or other WCS bands. A similar analysis in other bands would show that the same intermodulation products claimed in Sirius’ Petition exist in Cellular, PCS, BRS, and other services. In fact, they commonly exist within and between bands, yet they rarely cause actual interference. Sirius fails to differentiate between the existence of intermodulation products and harmful interference due to the existence of these products.

C. The NAB Petition

1. NAB Has No Standing

The NAB Petition is unabashed in its protectionist base. It too is procedurally flawed. Although NAB begins with the conclusory statement that “NAB is a party in interest in this proceeding” (NAB Petition, at 1), it never explains why this is the case. Nothing in the

Application requests special authority to use the spectrum at issue in any way not already permitted by the rules, or in any manner that WCS Wireless could not use it in the absence of a merger itself. Thus, there is no showing that NAB would be harmed by grant of the Application. To be clear, not only is there no harm, but in fact, there is not even a claimed harm that would result from the merger. The courts and the Commission have been clear that a “bare allegation”, unaccompanied by any “demonstration” of how grant of an application would “harm” a petitioner is not sufficient to demonstrate standing. *Gencom Inc. v. FCC*, 832 F 2nd 171 (D.C. Cir. 1987,) *Alaska Native Wireless*, 17 FCC Rcd 4231, 4235-36 (WTB 2003.) NAB effectively concedes the lack of a causal relationship point when it states that “if the WCS spectrum were used for SDARS service, the SDARS regulatory framework would apply, including the limitation that supporting terrestrial services be “complementary”. *Id.*, at 4, (quoting the Commission’s rulemaking in which the WCS service was established.¹⁸) This NAB concession erases any claim to standing (due to lack of causality and redressability.)

2. **There is No Reason that the Application Should Not Be Granted.**

Apparently not confident that its competition-limiting arguments would carry the day, NAB argued that there “appears” to have been trafficking. *Id.*, at 6. But NAB could find no support for that position in either fact or law. NAB is simply off-base on the law regarding trafficking. Although Section 1.948(i)(1) could extend to licenses that were awarded via auction,

¹⁸ *Report and Order, Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service*, 12 FCC Rcd 107895.

the Commission does not do so as a general rule. Moreover, the Commission has made clear that any consideration of trafficking in the auction context is discretionary,¹⁹ and that

“[w]e would expect that we would rarely need to exercise this discretionary authority to review assignments on transfers of authorizations that were assigned through auctions because the auction process, by requiring initial licensees to pay market value for their authorization, effectively safeguards against such speculation.”

Id. The Commission is on record that, in the auction context, the anti-trafficking rules intended to protect against unjust enrichment are designed only to guard against the “rapid sale of licenses acquired through the benefit of preferential policies.” *Cingular Wireless, LLC*. 19 FCC Rcd 2570 (2004). The Commission’s pronouncement is fully consistent with Section 309(j) of the Act, whereby the Commission was tasked with establishing unjust enrichment and anti-trafficking restrictions. Notably, the five year time frame within which unjust enrichment could apply to the licenses at issue expired long ago. Here, the licenses were auctioned eight (8) years ago and unjust enrichment is not a concern. 47 CFR § 1.2111. NAB has provided no reason why the Commission should deviate from its established position in this proceeding, and none exists.

From a factual perspective, NAB has also strayed far off course. To begin with, NAB is ill-informed when it asserts that “WCS Wireless does not appear to have engaged in any development of the licenses.” Id, at 7. Notably, NAB has failed even to argue any facts that would support a claim that WCS Wireless has “obtain[ed] an authorization for the principal purpose of speculation or profitable resale...” rather than the provision of service, as is required

¹⁹ Forbearance from applying provisions of the Telecommunications Act to Wireless Telecommunications Carriers,

by Section 1.948(i)(1) to support a claim of trafficking. This failing alone dooms the NAB charge. In any event, the reality is that WCS Wireless has done far more than any other WCS licensee to develop its WCS licenses. WCS Wireless has participated in multiple discussions with Wireless Telecommunication Bureau and the Office of Engineering and Technology staff regarding uses of the spectrum; it has applied for and received experimental authority to operate in its Dallas market; it has conducted that test satisfactorily; and it has reported all of the above to the Commission. See the Declaration of Scott Donohue for a further listing of WCS spectrum developmental actions.

The transaction here at issue is not the type against which trafficking regulations are designed to protect. In addition to the considerable time that has passed (eight years) since initial licensing, it must be appreciated that the transaction is not a simple assignment or sale. No money is changing hands. Current WCS investors are simply exchanging ownership in one company that controls WCS licenses for interest in another company that will own such spectrum (as well as other spectrum). In this context, this transaction is similar to the Sprint/Nextel merger that the Commission recently authorized, even though the party being acquired in that transaction had very recently received from the government a nationwide 10 MHz authorization at 1900 MHz.²⁰ Anti-trafficking concerns were not applicable there, and they are equally inapplicable here.

15 FCC Rcd 17414, 17429 (2000).

²⁰ Sprint/Nextel Merger Order, __ FCC Rcd __, FCC 05-148 (2005).

In view of the above, it is irresponsible and disingenuous for NAB to assert that WCS Wireless has done nothing to develop the spectrum at issue. It is equally inappropriate for NAB to suggest that there somehow is an obligation for WCS Wireless to do more.²¹ Nothing in the rules requires that. Moreover, as NAB knows well, WCS Wireless is on record as explaining that further development is pending an FCC decision on its Waiver. In this context, it is wholly disingenuous for NAB to oppose grant of the Waiver, on the one hand, (in the context of this proceeding) while, on the other hand, arguing that WCS is somehow deficient for not undertaking development for which a decision on the Waiver is a necessary prerequisite.

III. CONCLUSION

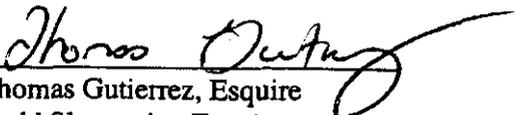
Grant of the Application will serve the public interest. None of the Petitioners have standing. Most certainly, they present no issues warranting delay or denial of the Application – and there are none. The absence of such issues is best illustrated by the fact that none of the injury claimed by Petitioners would be caused by the merger here at issue. The alleged problems almost certainly will not occur, but if they were to occur, they could do so regardless of whether the Application is granted. Collectively, these flaws cause the Petitions to be both substantively and procedurally defective.

²¹ The depth to which NAB has sunk in an unsuccessful effort to create an issue here is best demonstrated by its argument that a statement by one of WCS Wireless' investors that WCS Wireless was created to "acquire and hold" spectrum somehow evidences trafficking. See *Id.*, at 7.

WHEREFORE, WCS Wireless urges the Commission to act promptly to deny the Petitions and grant the Application.

Respectfully Submitted,

WCS WIRELESS LICENSE SUBSIDIARY, LLC


Thomas Gutierrez, Esquire
Todd Slamowitz, Esquire
Lukas, Nace, Gutierrez & Sachs Chartered
Its Attorneys

August 17, 2005

DECLARATION

I, Scott Donohue, under penalty of perjury, do hereby declare as follows:

- 1) I am the President of WCS Wireless License Subsidiary, LLC.
- 2) WCS Wireless License Subsidiary's parent company, WCS Wireless, LLC as been engaged in the development of datacasting business models, and their networks and related technologies, since October 2003; several of the principals of WCS Wireless, including myself, have been actively working on the development of datacasting as the highest and best use of WCS spectrum since 1998.
- 3) Among the WCS spectrum developmental efforts with which WCS Wireless has been involved are the following: (a) actively participating in SDARS/WCS coordination efforts (b) requesting, obtaining, implementing and reporting upon, experimental test in Dallas; (c) advocating improved power regulation for WCS spectrum; (d) transmitter and filler development; and (e) coordinating with FCC personnel regarding the above.
- 4) There has been no change in WCS Wireless' business plans for datacasting to date, and this specific use of WCS is the only approach that has attracted significant investment from external investment experts and a potential strategic partner. To date, WCS Wireless has raised tens of millions of dollars for the acquisition, development and deployment of WCS networks.
- 5) The facts set forth in the associated Opposition to Petitions to Deny are true and correct to the best of my knowledge, information, and belief.



Scott Donohue, President
WCS Wireless, LLC

August 17, 2005

CERTIFICATE OF SERVICE

I, David Crawford, do hereby certify that on this 17th day of August, 2005, I caused copies of the "*Opposition to Petitions to Deny*" to be served via the United States Postal Service upon the following:

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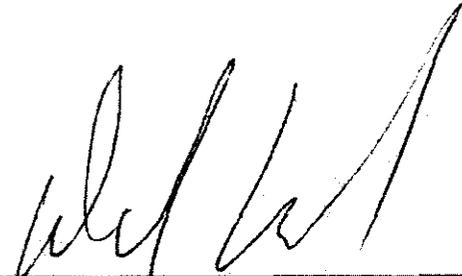
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