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## **FCC Resolves One Long-Standing 2.3 GHz Controversy, Promptly Creates New One**

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By a Report and Order released May 20, 2010, the FCC brought to an end years of bickering between the Wireless Communications Service (WCS) industry and the Satellite Digital Audio Radio Service (SDARS) industry regarding the extent to which they can interfere with each other. The WCS has been largely unused since it was auctioned off in 1997, while the SDARS licensees (now consolidated into a single entity, Sirius XM Radio) have used their spectrum to provide a terrestrial-based complement to satellite transmissions. The two services, like neighbors whose houses are too close, have been squabbling for the better part of a decade about how their respective, immediately adjacent operations can co-exist so as to minimize cross-interference between them.

After having tried to resolve the dispute by many meetings, tests and technical submissions over the years, the Commission finally gave up on a negotiated solution and laid down the law as it saw it. The FCC adopted power levels for both services that it felt would minimize interference potential, depending on whether mobile or fixed usage was involved, with tighter restrictions for WCS licensees in the bands closest to the SDARS band. It also protected Aeronautical Mobile Telemetry sites (used to gather data in flight testing of planes and missiles) by requiring coordination of usage within 45 kilometers (or line of sight) from the AMT site to a WCS base station. While no one is likely to be happy with the Commission's resolution, it at least has the virtue of bringing the technical dispute to a close. Licensees and manufacturers alike can finally proceed with certainty as to what the governing technical rules are.

Unfortunately, the FCC at the same time created a significant new problem for WCS licensees. Shortly before it was scheduled to act on the technical issues, the FCC hastily issued a public notice requesting comment on proposed "performance requirements" for WCS. The Commission suggested, without any prior input from the industry, that the current 10-years-to- provide-service-to-20%-of-your-population standard was too lax. Since virtually no licensees in the service had met even this very forgiving standard, it is unclear why the FCC thought that a new, tougher standard was appropriate. In any case,

the FCC proposed performance requirements that are likely the most onerous ever imposed on any service: 40% of the population had to be covered within 30 months and 75% with 60 months – or else. (For point-to-point links, service to at least 15 links per million of population would be required in 30 months, 30 links in 60 months.) The “or else” was the regulatory equivalent of the death penalty: loss of your entire license regardless of how much had been built out and how many customers you have.

This last-minute proposal raised predictable, unanimous and, in the view of some observers, justifiable howls of protest. The Commission had never before imposed such harsh performance requirements on any class of common carrier service, and the feasibility of completing a nationwide build-out of this service in the time allowed was extremely doubtful.

The FCC responded by relenting slightly from its originally proposed deadlines. It extended the build out periods to 42 months and 72 months, respectively, and dropped its proposal to require specific build-out levels in sub-areas of the geographic licenses. It retained, however, the death penalty for failure to meet the liberalized benchmarks, a threat that must be of concern to licensees as they contemplate provision of service to wide geographic areas.

For incumbent licensees, the situation is even more problematic since most of them are subject to challenges to their renewal applications. The controversy surrounding those applications is likely to drag on for several more years since the Commission’s actions in that regard are of doubtful legality. (*See* article by Alan Campbell on page 1.) [Full disclosure: the author represents applicants who are challenging the incumbents.] So at the same time that these licensees must be constructing extensive networks, they have no assurance whatsoever that their licenses will be renewed. Petitions for reconsideration of this part of the order are expected from all concerned.