



Federal Communications Commission
Washington, DC 20554

International Bureau

December 11, 2001

Bruce Jacobs, Esq.
Shaw Pittman LLP
2300 N Street NW
Washington, DC 20037-1128

Re: XM Radio, Inc.
Request for Confidential Treatment
File No. SAT-STA-20010712-00063

Dear Mr. Jacobs:

This letter confirms today's telephone conversation in which you were informed of the denial of XM Radio, Inc.'s request for confidential treatment of certain information regarding XM Radio's use of low power terrestrial repeaters (LPRs) that was submitted to the International Bureau (Bureau) in the above referenced file.¹ For the reasons stated below, we find that XM Radio has not met its burden of demonstrating that the submitted information qualifies for confidential treatment. Accordingly, unless XM Radio files an application for review by the Commission of this denial on or before **December 18, 2001**, the submitted information will be made available for public inspection.

On September 17, 2001, the Bureau granted XM Radio special temporary authority (STA) to operate satellite digital audio radio service (SDARS) complementary terrestrial repeaters.² In the STA Order the Bureau directed XM Radio to provide the Commission, upon request, a list of the locations and technical specifications of terrestrial repeaters with an EIRP of 2 kW or less as of the date of the grant of the STA.³ On November 1, 2001, the Bureau requested XM Radio to submit the information specified in the STA Order.⁴ XM Radio complied with the request by letter dated November 13, 2001, and requested confidential treatment of its submitted information.⁵

¹ See 47 C.F.R. § 0.459(g) (requiring that Notice of denial and of the time for seeking review or a judicial stay will be given by telephone, with follow-up notice in writing).

² *XM Radio, Inc.*, Order and Authorization, DA 01-2172 (rel. September 17, 2001) (*XM Radio STA Order*), application for review pending.

³ *Id.* at para. 17.

⁴ Letter from Donald Abelson, Chief, International Bureau to XM Radio, Inc. (dated November 1, 2001). Specifically, the Bureau requested the following information regarding XM Radio's LPRs: 1) location – including geographic coordinates; 2) antenna type; 3) antenna orientation; 4) antenna radiation pattern vertical downtilt; 5) total EIRP; and 6) height above ground level.

⁵ Letter from Bruce Jacobs, Counsel, XM Radio, Inc. to Donald Abelson, Chief, International Bureau (dated November 13, 2001) (*XM Radio Confidentiality Request*).

XM Radio submitted its request for confidential treatment pursuant to Section 0.459 of the Commission's rules.⁶ The Bureau will grant a request for confidential treatment under Section 0.459 if the request presents, by a preponderance of the evidence, a case for non-disclosure consistent with the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000).⁷ The Commission's rules on confidential submissions are based on FOIA Exemption 4, which provides that that non-disclosure is justified for "trade secrets and commercial or financial information obtained from a person, and privileged or confidential."⁸ Commercial or financial information that is submitted on a mandatory basis is "confidential" under Exemption 4 of the FOIA if public disclosure is likely to cause substantial harm to the competitive position of the person from whom the information was obtained.⁹ Accordingly, the burden is on XM Radio to demonstrate, by the preponderance of the evidence, that public disclosure of its submitted material is likely to cause substantial harm to its competitive position.

XM Radio's request, as submitted, fails to meet this burden. The request supplies no factual basis to demonstrate the likelihood of substantial competitive harm to XM Radio by public disclosure of the submitted material. Rather, the request states only that XM Radio is "concerned" that disclosure of information about its LPRs "could be used to unnecessarily complicate their deployment and operation."¹⁰ Although an elaborate economic analysis is not necessary to establish the likelihood of substantial competitive injury, conclusory and generalized allegations cannot support requests for non-disclosure.¹¹ In this instance, the mere assertion – without any factual support – that public disclosure of the submitted information might "complicate" LPR deployment and operation is too generalized and conclusory to meet the burden of proof required of a request for confidential treatment. We also observe that the submitted information pertains only to LPRs that have already been deployed and were in operation at the time of the grant of the STA. The request does not explain how public disclosure of the submitted information would complicate the deployment or operation of LPRs that are, by terms of the STA Order, already deployed and operational.

The request also states that the Bureau has specifically recognized the confidential nature of the submitted information in its order granting XM Radio its STA.¹² This statement is incorrect. The STA Order notes that in disclosing information regarding LPRs to certain other affected licensees, it would be reasonable for XM Radio to enter into non-disclosure agreements with licensees seeking information on XM Radio's repeater locations.¹³ The STA Order did not decide whether the information to be made available to affected licensees was of a confidential nature under the FOIA, nor did it require the use of non-disclosure agreements in order to access

⁶ 47 C.F.R. § 0.459.

⁷ See 47 C.F.R. § 0.459(d)(2).

⁸ 47 U.S.C. § 552(b)(4).

⁹ *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) recon. in part, *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992).

¹⁰ *XM Radio Confidentiality Request* at 3.

¹¹ See, e.g., *Applications of AT&T Corp. and GE American Communications, Inc.*, 11 FCC Rcd 2425, 2426 (1996); *National Exchange Carrier Ass'n, Inc.*, 5 FCC Rcd 7184 (1990); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 680-81 (D.C. Cir. 1976).

¹² *XM Radio Confidentiality Request* at 2-3.

¹³ *XM Radio STA Order* at para. 14 n.30. See also *XM Radio, Inc.*, Order, DA 01-2384 (rel. October 15, 2001) at para. 4 n.9.

the information. The STA Order merely noted that the use of non-disclosure agreements would be permissible and reasonable, but did not conclude that non-disclosure to the public was mandatory. Accordingly, the STA Order cannot be used a basis to justify XM Radio's present request for confidentiality. Since the request offers no other facts or rationale to justify confidential treatment, it must be denied.

Under the Commission's rules, XM Radio may, within 5 working days, file an application for review by the Commission of this denial.¹⁴ For purposes of computing the deadline for filing an application for review by the Commission, the first day to be counted is the day after the date of oral notice.¹⁵ Because oral notice was provided by telephone on December 11, 2001, XM Radio must file an application for review by the Commission on or before **Tuesday, December 18, 2001**. The materials submitted to the Bureau on November 13, 2001, will continue to be accorded confidential treatment during this review period pursuant to the Commission's rules.¹⁶ If XM Radio does not file an application for review by the Commission on or before December 18, 2001, the submitted materials will be placed in the file of the above referenced proceeding for public inspection.

Please contact Stephen J. Duall, Attorney Advisor, Satellite and Radiocommunication Division, at (202) 418-1103 if you have any questions regarding this letter.

Sincerely,



Cassandra Thomas
Deputy Chief
Satellite and Radiocommunication Division

¹⁴ See 47 C.F.R. § 0.459(g).

¹⁵ See *id.*

¹⁶ See *id.*