

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Review of Part 15 and Other Parts)	ET Docket 01-278
Of the Commission's Rules)	RM-9375
)	RM-10051
)	

**JOINT OPPOSITION OF SATELLITE INDUSTRY ASSOCIATION,
SPACENET INC., AND MICROSPACE COMMUNICATIONS
CORPORATION TO MOTION FOR STAY**

August 1, 2002

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SUMMARY

The Satellite Industry Association, Spacenet Inc., and Microspace Communications Corporation (collectively, the Parties”) hereby oppose the Motion for Stay filed by RADAR Members, in which RADAR requests a stay of the Commission’s First Report and Order, which limits the radio frequency emissions of radar detectors in the 11.7-12.2 GHz band. The record in this proceeding demonstrates that the extremely high levels of radar detector emissions in the 11.7-12.2 GHz band cause harmful interference into vital communications services provided by licensed satellite earth stations. The Commission has determined that, due to the severe nature of the interference, the only feasible solution is to require radar detectors to comply with emission limits before they are marketed. RADAR has missed its opportunity to oppose the request of the satellite industry for immediate relief. Furthermore, the arguments in RADAR’s Motion for Stay are without merit.

The Commission must not grant RADAR’s Motion for Stay because RADAR has failed to demonstrate that the circumstances warrant a stay of the Commission’s rules. First, RADAR is unlikely to succeed on the merits of its Petition for Partial Reconsideration: (1) because RADAR raises arguments that it could have raised during the comment period in this proceeding, and (2) because the Commission’s schedule for compliance is justified by the unprecedented nature of the radar detector interference into the 11.7-12.2 GHz band. Second, RADAR has not demonstrated that it will suffer irreparable injury resulting from the rules in the First Report and Order. Third, RADAR fails to show that the Parties and other satellite operators will not suffer harm if the stay is granted. Finally, RADAR does not demonstrate that a stay would serve the public interest. Therefore, the Motion for Stay must be denied.

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The Satellite Industry Association and its members (“SIA”),¹ Spacenet Inc. (“Spacenet”), and Microspace Communications Corporation (“Microspace”) (collectively, the “Parties”) hereby oppose the Motion for Stay filed by RADAR Members (“RADAR”),² in which RADAR requests a stay of the Commission’s Order limiting the radio frequency emissions of radar detectors in the 11.7-12.2 GHz band.³ For the reasons set forth below, the Motion for Stay utterly fails to satisfy the criteria necessary to merit the extraordinary relief requested by RADAR and, accordingly, the Motion for Stay must be denied.

¹ SIA’s Executive Members are: The Boeing Company; Globalstar, L.P.; Hughes Electronics Corp.; ICO Global Communications; Intelsat; Lockheed Martin Corp.; Loral Space & Communications Ltd.; Mobile Satellite Ventures; PanAmSat Corporation; SES Americom, Inc.; Teledesic Corporation; and TRW Inc. Inmarsat participates in SIA as a non-voting Associate Member.

² Motion for Stay of RADAR Members, ET Docket No. 01-278, RM-9375, RM-10051 (filed July 26, 2002) (the “Motion for Stay”).

³ *Review of Part 15 and Other Parts of the Commission’s Rules*, ET Docket 01-278, First Report and Order, FCC 02-211 (rel. July 19, 2002) (“*First Report and Order*”).

I. BACKGROUND

The Parties applaud the Commission's decision in the First Report and Order because the decision promises to prevent the disastrous alternative consequence of RADAR's proposal. The Commission correctly determined that the severity of the harm caused by radar detector interference into VSATs and other licensed services in the 11.7-12.2 GHz band warrants regulation of the offending devices. Additionally, the Commission correctly concluded that the prompt application of the radio frequency emission limits is critical to ensuring the uninterrupted use and operation of VSATs and other licensed applications in the 11.7-12.2 GHz band.

The record in this proceeding, including the Commission's independent testing, demonstrates that the high levels of radar detector emissions in the 11.7-12.2 GHz band cause harmful interference into vital communications services provided by licensed satellite earth stations. In many cases, these emissions are over 200 times greater than the Part 15 limit for spurious emissions above 960 MHz. The record is also replete with proposed remedies. All parties had a chance to brief the various proposed remedies and address any concerns they may have had. The proposals ranged from the request of the radar industry that they be allowed to come into compliance in June 2003,⁴ to the position of members of the satellite industry, who sought the immediate cessation of sale of non-compliant radar detectors, and a recall of those non-compliant radar detectors already on the market.⁵ Based on the facts in the record (including the fact that, as of a month and a half ago, 73% of manufactured devices were compliant), the Commission carefully balanced the competing needs of the parties. Ultimately, the Commission chose a middle ground: the requirements will become effective 30 days from the publication of the rules in the Federal Register for radar detectors being manufactured and imported, and 60

⁴ See RADAR Comments at 2.

⁵ See Spacenet/StarBand Comments at 8-15.

days after publication of the rules in the Federal Register for radar detectors being marketed.⁶

While older, non-compliant radar detectors were permitted to remain in the marketplace available for sale, the time in which they could be sold was shortened.

The Commission's decision was well reasoned: short of a recall, mandating that manufacturers substantially reduce the power that radar detectors emit is the only feasible way to enforce the Part 15 non-interference rules against radar detectors that cause harmful interference. The record in this proceeding unequivocally establishes that radar detectors operate far in excess of the Part 15 limits for transmitters and that the operation of radar detectors by end users cannot be effectively controlled. Moreover, the cause of increased incidents of radar detector interference in the 11.7-12.2 GHz band is a recent redesign of radar detectors intended to avoid detection by law enforcement. RADAR's request for a stay runs counter to the Commission's stated objective of reducing interference from radar detectors to satellite operations in the 11.7-12.2 GHz band on an urgent basis.

Throughout this proceeding, RADAR consistently denied that their products were the source of harmful interference and instead, blamed satellite earth station operators for alleged errors in the design and siting of their earth terminals.⁷ RADAR at long last has ceased denying that its products are the source of harmful interference. However, RADAR now asserts that its members have "voluntarily" been coming into compliance with the Part 15 limits on a protracted timeframe, and that its members will be harmed by the requirement that manufacturers and importers comply within 30 days of Federal Register publication of the rules and that retailers comply within 60 days of Federal Register publication. RADAR also quite incredibly claims

⁶ First Report and Order at ¶ 1.

⁷ See RADAR Comments at 4; RADAR Reply Comments at 4-7.

that the Commission's schedule for compliance "penalizes" its members for trying to solve the problem themselves.

RADAR had the opportunity to oppose the request of the satellite industry for immediate relief and to explain why it was not feasible for manufacturers to comply with that request. RADAR chose not to address the issues it now belatedly raises about the feasibility of coming into compliance with Part 15 on the Commission's schedule. Instead, RADAR made the strategic decision to argue that radar detectors were not the source of interference into satellite earth stations and to unfairly blame satellite earth station operators for making their antennas conducive to interference. RADAR cannot now file a petition for reconsideration in this proceeding solely to raise issues it failed to raise before. In any event, there is nothing in RADAR's filing which would justify a reversal of the Commission's First Report and Order.

II. A STAY OF THE COMMISSION'S RULES IS UNWARRANTED AND UNWISE

It is fundamental that a stay of the Commission's rules is an extraordinary remedy, which is only granted in special circumstances. The party seeking such a remedy must demonstrate to the Commission that: (1) it is likely to succeed on the merits of its position on appeal; (2) it would suffer irreparable injury absent a stay; (3) a stay would not substantially harm other interested parties; and (4) a stay would serve the public interest.⁸ The Commission requires that the party seeking a stay meet each of these four tests in order for the Commission to grant a stay.⁹ RADAR has totally failed to meet its burden on *any* of the four elements of the test describe above, and, therefore, the Commission must dismiss or deny the Motion for Stay.

⁸ *Access Charge Reform*, FCC 00-249, Order, 15 FCC Rcd 13191, 13192-93 (2000) ("Access Order"); *see Virginia Petroleum Jobbers Ass'n v FPC*, 259 F.2d 921 (D.C. Cir. 1958), as modified in *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc*, 559 F.2d 841, 843 (D.C. Cir. 1977).

⁹ *Id.*

A. RADAR is Unlikely to Succeed on the Merits¹⁰

1. RADAR missed its opportunity to present the arguments in its Petition for Reconsideration.

RADAR insists in its Motion for Stay that because the Notice of Proposed Rulemaking¹¹ in this proceeding did not propose specific rules or a specific implementation schedule, RADAR had no opportunity to provide factual input on the likely consequences of the schedule.¹² In fact, the Commission has already addressed this argument in the First Report and Order and has held that the Administrative Procedure Act does not require a notice of proposed rulemaking to propose specific regulations.¹³ The Commission determined that the large number of comments received from both the satellite industry and the radar detector industry show that the parties had adequate notice of potential rule changes, including a variety of alternative implementation schedules.¹⁴

The Commission's carefully rendered decision was based on comments, reply comments and *ex parte* submissions by numerous parties, including RADAR and its members. In its comments filed on February 12, 2002, RADAR members proposed a plan by which they would redesign their equipment so that their manufactured devices would comply by June 1, 2003 with the Class B limits in the 11.7-12.2 GHz band.¹⁵ In a subsequent *ex parte* letter, RADAR stated that manufacturers are already implementing these changes, and that

¹⁰ The Parties plan to file opposition(s) to RADAR's Petition for Partial Reconsideration filed on July 26, 2002, within fifteen days after notice of the Petition in the Federal Register, pursuant to rule §1.429(f).

¹¹ *Notice of Proposed Rule Making and Order* in ET Docket No. 01-278, 16 FCC Rcd 18205 (2001).

¹² Motion for Stay at 5.

¹³ First Report and Order at ¶ 19.

¹⁴ *Id.*

¹⁵ RADAR Comments at 2.

manufacturing compliance would be essentially complete by January 2003.¹⁶ As described above, RADAR made a strategic decision to blame satellite operators for the problem, rather than addressing the issue of an appropriate schedule to solve both the manufacture and retail distribution problems. Based on the RADAR's input, and balanced by the severe harm caused by radar detector interference into satellite operations, the Commission appropriately established the schedule set forth in the First Report and Order. Only now does RADAR address the issue of retail compliance; first proposing that the distribution pipeline be left to empty at its own speed, then proposing, in the alternative, a date for retail compliance of July 1, 2003. However, the issues were fully briefed and there is no reason that RADAR's current arguments could not have been made prior to the closing of this proceeding. The Commission has established, both in its rules and in decisions, that facts and events known to the parties during the proceeding cannot be raised later as the grounds for reconsideration.¹⁷ RADAR had ample time to present these arguments, failed to do so, and therefore, the Commission should not grant RADAR's Petition for Partial Reconsideration or its Motion for Stay.

2. The Commission's schedule for compliance is justified by the unprecedented nature of radar detector interference.

Even if RADAR had asserted in a timely manner the arguments it now raises regarding its ability to comply with the rules by July 2003, it would not have prevailed because these arguments have no merit. The Commission's motivation for implementing the effective dates for these rules is based on the unprecedented circumstances of the radar detector

¹⁶ RADAR *Ex Parte* Submission dated June 11, 2002.

¹⁷ See 47 C.F.R. § 1.429(b); see, e.g., *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, WT Docket No. 98-169, Third Order on Reconsideration of the Report and Order and Memorandum Opinion and Order, FCC 02-130 at ¶¶ 18-20 (rel. May 8, 2002); *Implementation of the AM Expanded Band Allotment Plan*, Memorandum Opinion and Order, 13 FCC Rcd 21872 at ¶ 7 (1998).

interference. The Commission's laboratory has found, and the Parties and other commenters have confirmed, that the emission levels from radar detectors are much greater than the levels Part 15 permits for some transmitters, and in many cases are over 200 times greater than the Part 15 limit for spurious emissions above 960 MHz.¹⁸ The Commission determined that identifying each individual source of interference from radar detectors is not practical for a satellite operator due to the transient nature of the device, and due to the fact that satellite operators are not in control of the interference source. The only feasible solution is to require radar detectors to comply with emission limits before they are marketed.¹⁹

The Commission appropriately took action to resolve the chronic problems caused by this class of devices. In its Motion for Stay, RADAR points to previous cases in which the Commission implemented new regulations within timeframes that were longer than in this instance.²⁰ However, in each individual case, the Commission must balance competing interests, including the public interest, and weigh the evidence and arguments submitted into the record. Requiring radar detector manufacturers to comply with good engineering practices within 30 days is reasonable given the extremely high levels of emissions and the high degree of harm resulting to licensed satellite operations.²¹

The relief requested by RADAR in its Motion for Stay would allow it to continue to flood the market with non-compliant devices through the December holiday season. This

¹⁸ See First Report and Order at ¶ 10 (citing 47 C.F.R. §§ 15.249, 15.109, 15.209).

¹⁹ First Report and Order at ¶ 11.

²⁰ Motion for Stay at 4.

²¹ RADAR, in its Petition for Partial Reconsideration, suggests that the Commission does not have the authority to address the imminent problem of radar devices in the distribution pipeline. See Petition for Partial Reconsideration at n. 26. This claim is ridiculous. The Commission regularly exercises this authority to adopt technical rules to prevent harm before it occurs, and the Communications Act of 1934 provides plenary authority to do so. See Spacenet Inc., StarBand Communications, Inc. *Ex Parte* Presentation at 2 (April 22, 2002). The Commission has wisely invoked that authority in this instance.

result is completely counter to the Commission's intent in the First Report and Order, which aims to minimize the number of offending devices entering the market. As discussed in detail below, RADAR's theory that a slower implementation schedule will actually reduce the number of non-complying units in service is preposterous. Based on statements made in *ex parte* filings, RADAR clearly prefers a slower implementation schedule so that RADAR members can empty their distribution pipelines.²² Granting the Motion for Stay would allow retailers to continue to sell non-compliant devices for an unreasonably long period, compounding the problems resulting from the continuing flood of non-compliant radar detectors into the market.

Finally, RADAR states its belief that "the Commission should grant a stay even if doubts remain as to RADAR's ultimate likelihood of success."²³ The Commission has held that it will *consider* granting a stay upon a demonstration that the Commission's action raises serious legal issues *if* the movant makes a particularly strong showing on the second, third and fourth prongs of the test. As demonstrated below, however, the Motion for Stay does not make a strong showing on these other three prongs of the test. In fact, RADAR utterly fails the test on each of those three prongs, as it does with respect to the first prong.

B. RADAR Has Not Demonstrated Irreparable Injury

RADAR claims that the rules in the First Report and Order will result in irreparable injury to RADAR members in the form of massive returns from retailers and distributors of both non-complying and certified products because stores will not take the trouble to tell them apart. RADAR insists that this action by retailers will cause the closure of manufacturers and even the industry as a whole. However, RADAR's claim is extremely

²² See RADAR *Ex Parte* Submission dated July 9, 2002; RADAR *Ex Parte* Submission dated July 11, 2002; Motion for Stay at 2.

²³ Motion for Stay at 6.

speculative. It can be argued with equal force that retailers and distributors will have tremendous economic incentives to ensure that they have certified products in stock for sale and delivery to customers, so that their businesses are unaffected. Moreover, there is absolutely no evidence that the compliance process would cause manufacturers and the industry to shut down, especially given RADAR's representation that, as of 45 days ago, 73% of products manufactured were already compliant with the emission limits just set by the Commission.

In fact, nothing in RADAR's Motion for Stay indicates that the Commission's schedule is infeasible. Even if many returns were to occur, this scenario would pose an inconvenience with some associated monetary costs – a far cry from irreparable harm.²⁴ Moreover, any costs arising out of compliance with the new rules can be attributable to the failure to design devices using good engineering practices to reduce emissions. RADAR's extremely speculative claim of possible *future* injury caused by complying with the new rules does not compare to the *actual and present* harm experienced by the satellite industry, which the Parties and other satellite operators have conclusively demonstrated in this proceeding.

The Commission indicated in the First Report and Order that it has considered the logistical problems for manufacturers in complying with the new rules on the 30/60 day timeframe.²⁵ However, the Commission has factored these burdens into the substance of the rules. For instance, the new rules permit radar detector manufacturers and importers to label the equipment carton rather than placing the label on the certified device itself for devices

²⁴ Courts have long held that economic loss, in and of itself, does not constitute irreparable harm unless it threatens the very existence of an ongoing business. See *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673 (D.C. Cir. 1985). Irreparable harm must be “certain and great; . . . actual and not theoretical.” *Telmex/Sprint Communications, LLC*, Order, 13 FCC Rcd 15678, 15680 (1998), citing, e.g., *Wisconsin Gas Co.* 758 F.2d at 674.

²⁵ First Report and Order at ¶ 17.

manufactured or imported within 180 days of the publication of the new rules in the Federal Register.²⁶

Given these protections, and given RADAR's representation that 73% of manufactured devices already were compliant as of a month and a half ago, RADAR's allegations regarding the effect of the rules on stockholders and communities of workers are simply too disingenuous to have any weight. Indeed, the impact on domestic manufacturing communities will be minimal because many of the radar detectors are made in Asia.²⁷

C. RADAR Fails to Consider the Harm to the Parties and Other Licensed Users of the 11.7-12.2 GHz Band

RADAR argues that its requested relief will not harm other interested parties because it says that a slower schedule will actually reduce the number of non-complying units in service.²⁸ RADAR's theory regarding the replacement of non-compliant units with upgraded compliant devices is highly doubtful. According to RADAR's latest figures, RADAR has indicated that 27% of newly manufactured radar detectors are not compliant with the new limits. RADAR fails to provide information about the percentage of current inventory already manufactured; therefore, non-compliant existing stock could be much higher than 27%.

Furthermore, RADAR fails to present any evidence that the devices being replaced are compliant units. Radar detectors emitting RF energy in the 11.7-12.2 GHz band have been recently manufactured. In fact, units tested by the Parties and by the FCC were recently manufactured and recently purchased devices that not only fail to comply with the Part 15 limits, but also are egregiously out of synch with the new emission standards. It is counterintuitive that the recently manufactured and recently purchased radar detectors are the

²⁶ *Id.*

²⁷ RADAR Petition for Partial Reconsideration at 7.

²⁸ Motion for Stay at 6.

devices being replaced by consumers. Rather, it is more likely that older devices, which are less likely to emit in the VSAT band, are the ones being replaced. Therefore, the longer the Commission's rule is delayed, the greater the chances that non-complying radar detectors will replace these older devices.

The Parties and other satellite operators have submitted into the record numerous documented instances of actual, debilitating interference. These companies and their customers will continue to suffer irreparable harm from devices that do not comply with the Part 15 emission limits. The Parties and their hundreds of thousands of customer VSATs would be significantly and unjustifiably harmed by the stay requested by RADAR because the longer non-complying units are allowed to flood the market, the greater the incidents of interference are likely to be and the greater the harmful impact on the satellite user community will be. RADAR completely fails to consider this harm and, therefore, the Commission should dismiss or deny the Motion for Stay.

D. Dismissal of RADAR's Motion for Stay Would Serve the Public Interest

The Commission concluded in the First Report and Order that “the public interest is best served by requiring that all radar detectors marketed within the United States meet the new emission limits quickly.”²⁹ The Commission recognized that VSATs are commonly used by a wide variety of small businesses, such as retail stores and gas stations.³⁰ As the Parties have shown, the disruptive effect of interference from radar detectors into VSATs hinders business significantly. In its Motion for Stay and in its Petition for Partial Reconsideration, RADAR attempts to appeal to our country's need for “all the economic activity it can muster, particularly

²⁹ First Report and Order at ¶ 15.

³⁰ First Report and Order at ¶ 10.

in the technology sector;³¹ however, RADAR simply ignores the actual, current harm suffered by the Parties, VSAT service providers, and the many users of VSAT services, resulting from the debilitating interference caused by radar detectors.

Moreover, the rules adopted by the Commission in the First Report and Order are an important part of the Commission's policy to protect licensed services. Short of the recall requested by the Parties, prompt implementation of the Commission's decision is the only way to prevent the market from being flooded with non-compliant devices. License holders have an expectation that their use of spectrum will be free from substantial disruptions. By adopting a near-term effective date for these rules, the Commission demonstrates its willingness to take steps to protect licensed users from interference caused by manufacturers who have chosen not to use best engineering practices in their product designs. The Commission is not, as RADAR suggests, "penalizing" the radar detector industry for attempting to fix problems on their own.

RADAR has not made the required showing under any of the four prongs of the test for the extraordinary relief that they seek. The Commission correctly and sufficiently justified the rules in the First Report and Order. Therefore, the Commission's denial of the Motion -- not the grant of the Motion -- will serve the public interest.

³¹ Petition for Partial Reconsideration at 12.

III. CONCLUSION

In sum, the Commission has fully assessed all the factors raised by the parties in the record and has made a decision that is legally correct, commercially fair and publicly responsive. For all of the foregoing reasons, the Satellite Industry Association and its members, Spacenet Inc. and Microspace Communications Corporation respectfully request that the Commission dismiss or deny the Motion for Stay of the RADAR and its members.

Respectfully submitted,

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August 1, 2002

CERTIFICATE OF SERVICE

I hereby certify that I have this first day of August, 2002, caused a true copy of the foregoing “Opposition of Satellite Industry Association to Motion for Stay” to be served by U.S. mail, on the following:

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