

**Before the
Federal Communications Commission
WASHINGTON, D.C. 20554**

In the Matter of)	File No. EB-09-SE-127
)	
)	Acct. No. 201032100027
)	
Axxcelera Broadband Wireless, Inc.)	FRN No. 0009559089

ORDER

Adopted: April 23, 2010

Released: April 26, 2010

By the Chief, Spectrum Enforcement Division, Enforcement Bureau:

1. In this Order, we adopt the attached Consent Decree entered into between the Enforcement Bureau (“Bureau”) and Axxcelera Broadband Wireless, Inc. (“Axxcelera”). The Consent Decree terminates the Bureau’s investigation into Axxcelera’s possible violations of Section 302(b) the Communications Act of 1934, as amended,¹ and Sections 2.803(a)(1) and 15.407(h)(2) of the Commission’s Rules,² regarding the marketing of unlicensed National Information Infrastructure (“U-NII”) devices.

2. The Bureau and Axxcelera have negotiated the terms of the Consent Decree that resolve this matter. A copy of the Consent Decree is attached hereto and incorporated by reference.

3. After reviewing the terms of the Consent Decree and evaluating the facts before us, we find that the public interest would be served by adopting the Consent Decree that terminates the investigation.

4. In the absence of material new evidence relating to this matter, we conclude that our investigation raises no substantial or material questions of fact as to whether Axxcelera possesses the basic qualifications, including those related to character, to hold or obtain any Commission license or authorization.

5. Accordingly, **IT IS ORDERED** that, pursuant to Section 4(i) of the Act,³ and Sections 0.111 and 0.311 of the Rules,⁴ the Consent Decree attached to this Order **IS ADOPTED**.

6. **IT IS FURTHER ORDERED** that the above-captioned investigation **IS TERMINATED**.

¹ 47 U.S.C. § 302a(b).

² 47 C.F.R. §§ 2.803(a)(1) and 15.407(h)(2).

³ 47 U.S.C. § 154(i).

⁴ 47 C.F.R. §§ 0.111, 0.311.

7. **IT IS FURTHER ORDERED** that a copy of this Order and Consent Decree shall be sent by first class mail and certified mail, return receipt requested, to counsel for Axxcelera Broadband Wireless, Inc., Jack Richards, Keller and Heckman LLP, 1001 G Street, N.W., Suite 500 West, Washington, D.C. 20001.

FEDERAL COMMUNICATIONS COMMISSION

Kathryn S. Berthot
Chief, Spectrum Enforcement Division
Enforcement Bureau

In the Matter of)	File No. EB-09-SE-127
)	
)	Acct. No. 201032100027
)	
Axxcelera Broadband Wireless, Inc.)	FRN No. 0009559089

CONSENT DECREE

The Enforcement Bureau (“Bureau”) and Axxcelera Broadband Wireless, Inc. (“Axxcelera”), by their authorized representatives, hereby enter into this Consent Decree for the purpose of terminating the Bureau’s investigation of Axxcelera for possible violations of Section 302(b) of the Communications Act of 1934, as amended (“Act”),¹ and Sections 2.803(a)(1) and 15.407(h)(2) of the Commission’s Rules (“Rules”)² regarding the marketing of unlicensed National Information Infrastructure (“U-NII”) devices.

I. DEFINITIONS

1. For the purposes of this Consent Decree, the following definitions shall apply:
 - (a) “Act” means the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*
 - (b) “Adopting Order” means an Order of the Bureau adopting the terms of this Consent Decree without change, addition, deletion, or modification.
 - (c) “Axxcelera” means Axxcelera Broadband Wireless, Inc. and its subsidiaries and its predecessors-in-interest and successors-in-interest.
 - (d) “Bureau” means the Enforcement Bureau of the Federal Communications Commission.
 - (e) “Commission” and “FCC” mean the Federal Communications Commission and all of its bureaus and offices.
 - (f) “Compliance Plan” means the program described in this Consent Decree at paragraph 8.
 - (g) “Effective Date” means the date on which the Bureau releases the Adopting Order.
 - (h) “Investigation” means the investigation commenced by the Bureau’s July 30, 2009 letter of inquiry (“LOI”)³ to Axxcelera regarding possible violations of Section 302(b) of the Act and Sections 2.803(a)(1) and 15.407(h)(2) of the Rules.
 - (i) “Parties” means Axxcelera and the Bureau.

¹ 47 U.S.C. § 302a(b).

² 47 C.F.R. §§ 2.803(a)(1), 15.407(h)(2).

³ See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, to Christopher Moritz, Sr., Axxcelera Broadband Wireless, Inc. (July 30, 2009) (“LOI”).

- (j) “Rules” means the Commission’s regulations found in Title 47 of the Code of Federal Regulations.

II. BACKGROUND

2. Section 302(b) of the Act and Section 2.803(a)(1) of the Rules prohibit the marketing of radio frequency devices in the United States unless such devices comply with the applicable technical and administrative provisions of the Rules.⁴ Pursuant to Section 15.407(h)(2) of the Rules, U-NII devices operating in the 5.25-5.35 GHz and 5.47-5.725 GHz bands must employ a Dynamic Frequency Selection (“DFS”) radar detection mechanism.⁵

3. On July 30, 2009, the Bureau issued a LOI to Axxcelera.⁶ The LOI directed Axxcelera, among other things, to submit a sworn written response to a series of questions relating to its marketing of its ABMAX U-NII device. Axxcelera responded to the LOI on September 14, 2009.⁷

4. In its response, Axxcelera explained that it began marketing the ABMAX U-NII device (FCC ID: OJB-APDXYZ) upon receipt of the Commission’s grant of equipment authorization on November 6, 2008. Axxcelera reported that in May 2009, it became aware during a routine quality audit that some ABMAX units were showing degraded DFS performance. Axxcelera immediately stopped shipments. Axxcelera stated that it subsequently determined that the change in DFS performance was caused by variations in the production version of a subcontractor chip used in the radio receiver chain.

III. TERMS OF AGREEMENT

4. **Adopting Order.** The Parties agree that the provisions of this Consent Decree shall be subject to final approval by the Bureau by incorporation of such provisions by reference in the Adopting Order without change, addition, modification, or deletion.

5. **Jurisdiction.** Axxcelera agrees that the Bureau has jurisdiction over it and the matters contained in this Consent Decree and has the authority to enter into and adopt this Consent Decree.

6. **Effective Date; Violations.** The Parties agree that this Consent Decree shall become effective on the date on which the Bureau releases the Adopting Order. Upon release, the Adopting Order and this Consent Decree shall have the same force and effect as any other Order of the Bureau. Any violation of the Adopting Order or of the terms of this Consent Decree shall constitute a separate violation of a Bureau Order, entitling the Bureau to exercise any rights and remedies attendant to the enforcement of a Commission Order.

7. **Termination of Investigation.** In express reliance on the covenants and representations in this Consent Decree and to avoid further expenditure of public resources, the Bureau agrees to terminate its investigation. In consideration for the termination of said investigation, Axxcelera agrees to the terms, conditions, and procedures contained herein. The Bureau further agrees that in the absence of

⁴ 47 U.S.C. § 302a(b); 47 C.F.R. § 2.803(a)(1).

⁵ 47 C.F.R. § 15.407(h)(2).

⁶ See LOI.

⁷ See Letter from Jack Richards, Esq. and Greg Kunkle, Esq., Keller and Heckman, LLP to Thomas D. Fitz-Gibbon, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (September 14, 2009) (“LOI Response”).

new material evidence, the Bureau will not use the facts developed in this investigation through the Effective Date of the Consent Decree, or the existence of this Consent Decree, to institute, on its own motion, any new proceeding, formal or informal, or take any action on its own motion against Axxcelera concerning the matters that were the subject of the investigation. The Bureau also agrees that it will not use the facts developed in this investigation through the Effective Date of this Consent Decree, or the existence of this Consent Decree, to institute on its own motion any proceeding, formal or informal, or take any action on its own motion against Axxcelera with respect to Axxcelera's basic qualifications, including its character qualifications, to be a Commission licensee or to hold Commission authorizations.

8. **Compliance Plan.** For purposes of settling the matters set forth herein, Axxcelera agrees to maintain a Compliance Plan related to future compliance with the Act, the Commission's Rules and the Commission's Orders. The Compliance Plan will include, at a minimum, the following components:

- (a) **Compliance Officer.** Within 30 days of the Effective Date, Axxcelera will designate a Compliance Officer who will be responsible for administering the Compliance Plan.
- (b) **Remedial Measures.** Axxcelera has developed and distributed to its United States customers a firmware upgrade for its ABMAX U-NII device that resolves any degradation in the performance of the DFS radar detection mechanism in the units addressed in the LOI. In addition, Axxcelera asserts that it has contacted all of its clients and verified that the software was received and installed.
- (c) **Training.** Within 90 days of the Effective Date, and annually thereafter, Axxcelera will provide training concerning compliance with Parts 2 and 15 of the Rules to all of its officers and employees who are responsible for the marketing and distribution of radio frequency products imported, marketed, and sold by Axxcelera in the United States.
- (d) **Compliance Reports.** Axxcelera will file compliance reports with the Commission 90 days after the Effective Date, 12 months after the Effective Date, and 24 months after the Effective Date. Each report shall include a compliance certificate from the Compliance Officer stating that the Compliance Officer has personal knowledge that Axxcelera has established operating procedures intended to ensure compliance with this Consent Decree, together with an accompanying statement explaining the basis for the Compliance Officer's compliance certification. All compliance reports shall be submitted to Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W. Washington, D.C. 20554. All compliance reports shall also be submitted electronically to Holly.Berland@fcc.gov and Kathy.Berthot@fcc.gov.
- (e) **Termination Date.** Unless stated otherwise, the requirements of this Consent Decree will expire 24 months after the Effective Date.

9. **Voluntary Contribution.** Axxcelera agrees that it will make a voluntary contribution to the United States Treasury in the amount of five thousand dollars (\$5,000). The payment will be made within 30 days after the Effective Date of the Adopting Order. The payment must be made by check, wire transfer, credit card or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the Account Number and FRN Number referenced in the caption to the Adopting Order. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St.

Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Axxcelera will also send electronic notification on the date said payment is made to Holly.Berland@fcc.gov and Kathy.Berthot@fcc.gov.

10. **Waivers.** Axxcelera waives any and all rights it may have to seek administrative or judicial reconsideration, review, appeal or stay, or to otherwise challenge or contest the validity of this Consent Decree and the Adopting Order, provided the Bureau issues an Adopting Order adopting the Consent Decree without change, addition, modification, or deletion. Axxcelera shall retain the right to challenge Commission interpretation of the Consent Decree or any terms contained herein. If either Party (or the United States on behalf of the Commission) brings a judicial action to enforce the terms of the Adopting Order, neither Axxcelera nor the Commission shall contest the validity of the Consent Decree or the Adopting Order, and Axxcelera shall waive any statutory right to a trial *de novo*. Axxcelera hereby agrees to waive any claims it may otherwise have under the Equal Access to Justice Act, 5 U.S.C. § 504 and 47 C.F.R. § 1.1501 *et seq.*, relating to the matters addressed in this Consent Decree.

11. **Invalidity.** In the event that this Consent Decree is rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any manner in any legal proceeding.

12. **Subsequent Rule or Order.** The Parties agree that if any provision of the Consent Decree conflicts with any subsequent rule or Order adopted by the Commission (except an Order specifically intended to revise the terms of this Consent Decree to which Axxcelera does not expressly consent) that provision will be superseded by such Commission rule or Order.

13. **Successors and Assigns.** Axxcelera agrees that the provisions of this Consent Decree shall be binding on its successors, assigns, and transferees.

14. **Final Settlement.** The Parties agree and acknowledge that this Consent Decree shall constitute a final settlement between the Parties. The Parties further agree that this Consent Decree does not constitute either an adjudication on the merits or a factual or legal finding or determination regarding any compliance or noncompliance with the requirements of the Act or the Commission's Rules and Orders.

15. **Confidentiality.** By entering into this Consent Decree, Axxcelera neither waives nor alters its right to assert and seek protection from disclosure of any privileged or otherwise confidential and protected documents and information, or to seek appropriate safeguards of confidentiality for any competitively sensitive or proprietary information.⁸

16. **Modifications.** This Consent Decree cannot be modified without the advance written consent of both Parties.

17. **Paragraph Headings.** The headings of the Paragraphs in this Consent Decree are inserted for convenience only and are not intended to affect the meaning or interpretation of this Consent Decree.

⁸ To the extent that the Bureau receives a Freedom of Information Act request concerning this proceeding, the Bureau will follow the procedures set forth in Section 0.461 of the Rules, 47 C.F.R. § 0.461.

18. **Authorized Representative.** Each party represents and warrants to the other that it has full power and authority to enter into this Consent Decree.

19. **Counterparts.** This Consent Decree may be signed in any number of counterparts (including by facsimile), each of which, when executed and delivered, shall be an original, and all of which counterparts together shall constitute one and the same fully executed instrument.

Kathryn S. Berthot
Chief
Spectrum Enforcement Division
Enforcement Bureau

Date

Christopher Moritz
Senior Director System Engineering
Axxcelera Broadband Wireless, Inc.

Date