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March 14, 2002

Ex Parte Communication

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20445

Re: IB Docket No. 95-91

Dear Mr. Caton:

On March 7, 2002, XM Satellite Radio responded to our *ex parte* letter of March 4 which raised concerns about a patent recently obtained by XM that would permit it to offer locally oriented programming. Letter from Lon C. Levin to William F. Caton, IB Docket No. 95-91, March 7, 2002. On March 8, the WCS Coalition also submitted an *ex parte* letter concerning the XM patent. Letter from Douglas I. Brandon, *et al.*, to William F. Caton, IB Docket No. 95-91, March 8, 2002. We respond to both letters.

In NAB's March 4 letter, we suggested that the local programming insertion technology described in the patent might explain the large growth in the number of terrestrial repeaters XM planned to build, despite the Commission's clear direction that repeaters would be authorized for SDARS licensees only to fill in gaps in signal coverage. The WCS Coalition letter points out that XM "has placed large numbers of repeaters along interstate highways that generally have unobstructed paths to satellites." *Id.* at 2. Under the pretext of filling in gaps, it may be that XM is constructing a repeater network that, using its patented technology, would effectively transform its system from a direct satellite audio broadcasting service to a primarily terrestrial service fed from satellites. As the WCS Coalition suggests, the Commission should require XM to demonstrate that its repeaters are only placed in locations where there are gaps in satellite coverage.

XM stated in its letter that "[w]e have not changed our plans or position." Since XM applied for the patent in 1999, that statement may well be true as far as it goes, but may not indicate whether XM has for some time contemplated using terrestrial repeaters to provide different programs to customers in different areas.

XM also repeated its willingness to accept a condition on its repeater licenses that would “limit transmissions from repeaters to only that programming that is transmitted by an authorized DARS satellite.” If the XM patent were implemented, however, all of the programming that would be distributed by the repeaters would have originated on the satellite, so the condition XM proffers would be technically satisfied, but the Commission’s intent – that SDARS licensees only offer national programming – would have been evaded.

As the court of appeals has stated, “the Commission is not expected to ‘play procedural games with those who come before it in order to ascertain the truth.’” *RKO General, Inc. v. FCC*, 670 F.2d 215, 229 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982)(quoting FCC Brief). Licensees “have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate.” *Id.* at 232. XM should not only demonstrate that it has or will build repeaters only where transmission conditions impede reception from satellites, it should also provide answers to the following questions:

- Do XM’s deployed *repeaters* have the capability of transmitting the type of geographic identification described in the XM patent?
 - If so, do these repeaters presently transmit such information?
 - If not, does XM have any plans to make such transmissions possible in the future?
- Do the XM *receivers* now available to consumers have the capability of selecting data for play or display based on geographic information transmitted by repeaters?
 - If not, is XM aware of any plans to add that capability to future models?

The Commission should not grant permanent licenses for the SDARS repeaters, or extend the current STAs, until it is satisfied that it has full and complete information concerning the XM and Sirius networks of repeaters. When it adopts final repeater rules, the Commission should make clear that, regardless of the specific technology employed, the use of the SDARS networks to deliver programming to consumers in one market that is different from that delivered to consumers in another market is prohibited.

To that end, NAB requests that the following condition be included in any permanent repeater license granted to XM or Sirius:

“SDARS terrestrial repeaters may not originate any programming, are restricted to the simultaneous retransmission of the complete programming and only that programming transmitted by the satellite directly to the SDARS subscribers’ receivers, and may not be used in any

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manner to facilitate the provision of locally differentiated services by SDARS licensees.”

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jack N. Goodman". The signature is fluid and cursive, with the first name "Jack" being the most prominent.

Jack N. Goodman

cc: The Honorable Michael Powell
The Honorable Kathleen Q. Abernathy
The Honorable Michael J. Copps
The Honorable Kevin Martin
Donald Abelson, Chief, International Bureau
Roy Stewart, Chief, Mass Media Bureau
Kenneth Ferree, Chief, Cable Services Bureau