



Jack N. Goodman

Senior Vice President & General Counsel
Legal & Regulatory Affairs
1771 N Street, NW • Washington, DC 20036-2891
(202) 429-5459 • Fax: (202) 775-3526
jgoodman@nab.org

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Ex Parte Communication

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20445

Re: IB Docket No. 95-91

Dear Ms. Dortch:

Nineteen months have passed since XM Radio Inc. ("XM") was issued a patent for a process specifically designed to use terrestrial repeaters to "provide geographically targeted broadcast data, such as weather, sports scores, advertisements and the like." U.S. Patent No. US 6,347,216 B1, p. 1. And for 19 months, XM has steadfastly refused to disclose to the Commission its plans for the use of this patent. *See* Letter from Jack Goodman to Marlene Dortch, IB Docket No. 95-91, Apr. 14, 2003; Letter from Jack Goodman to William F. Caton, IB Docket No. 95-91, March 8, 2002. And XM's concealment has extended as well to Members of Congress. *See* Letter from Congressmen Billy Tauzin and Gene Green To Chairman Powell, May 22, 2002; Letter from Congressmen Billy Tauzin and Gene Green To Chairman Powell, June 9, 2003.

In its June 23, 2003 letter, XM again evaded any disclosure. Instead, XM tersely claimed its new weather service for emergency management, aviation and marine users is permitted under its existing authorization. Letter from Lon C. Levin to Marlene H. Dortch, June 23, 2003 at 1. Despite its brevity, this response speaks volumes. Apparently, XM believes that so long as it transmits all data and programming through its satellites, it is then free to divide its signals into locally-differentiated services via its extensive repeater network, including the recently added 5,000 indoor-use microrepeaters. *See* Public Notice, Satellite Policy Branch Information, SAT-STA-20030409-0076 Grant of Authority, Aug. 29, 2003. The Commission should not be fooled by this sleight-of-hand. Indeed, NAB predicted that this would be XM's argument, noting that while the condition on XM's repeater authorizations might be technically satisfied, "the Commission's intent – that SDARS licensees offer only

national programming – would have been evaded.” Letter from Jack Goodman to William F. Caton, IB Docket No. 95-91, March 14, 2002, at 2.

Just as XM made repeated commitments not to use its repeaters to provide local programming, so too did the Commission make clear that it would authorize repeaters only to overcome “the effects of signal blockage and multipath interference.” *Digital Audio Radio Satellite Service*, 12 FCC Rcd 5754, 5811 (1997). Pending final service rules, the Commission conditioned the Special Temporary Authority (“STA”) granted XM to operate repeaters on their not being used to insert local programming. *Id.* Use of repeaters to provide instructions to receivers to select particular local content violates the STA. While XM has unwaveringly refused to disclose its plans or technology, its curt response to NAB’s latest complaint must be taken as an admission that XM is using its patented technology to distribute locally-differentiated programming.

The Commission must not allow XM to circumvent the principle on which it authorized satellite radio – to be a national radio service. The Commission should, once and for all, compel XM to fully and completely disclose all technical parameters of its patent, repeater and satellite network, and should bar XM from any scheme that would permit it to provide locally-differentiated services.

NAB understands that the Commission has delayed acting on these repeater issues while the SDARS licensees negotiate with licensees in the Wireless Communications Service and others concerning interference issues. We urge the Commission to separate these issues and proceed promptly to a final decision on SDARS repeater service rules. Otherwise, consumers may purchase SDARS service based on expectations of repeater-based services that will later prove unwarranted.

Respectfully submitted,



Jack N. Goodman

cc: The Honorable Michael K. Powell
The Honorable Kathleen Q. Abernathy
The Honorable Michael J. Copps
The Honorable Kevin J. Martin
The Honorable Jonathan S. Adelstein
Donald Abelson, Chief, International Bureau
Kenneth Ferree, Chief, Media Bureau
Lon C. Levin, Esquire