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

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In the Matter of)	
)	
Applications for Transfer of Control of)	WTB Docket No. 05-256
Licensee WCS Wireless License Subsidiary,)	File No. 0002240823
LLC from WCS Wireless, Inc. to)	
XM Satellite Radio Holdings Inc.)	

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AUG 29 2005

Federal Communications Commission
Office of Secretary

**CONSOLIDATED REPLY OF SIRIUS SATELLITE RADIO INC.
TO OPPOSITIONS OF XM SATELLITE RADIO HOLDINGS INC. AND
WCS LICENSE SUBSIDIARY, LLC TO PETITIONS TO DENY**

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Sirius Satellite Radio Inc. (“Sirius”), pursuant to Section 309(d) of the Communications Act of 1934, as amended, and Section 1.939 of the rules of the Federal Communications Commission (“FCC” or “Commission”),¹ hereby replies to the oppositions of XM Satellite Radio Holdings Inc. (“Transferee” or “XM”) and WCS Wireless License Subsidiary, Inc. (“Licensee” or “WCS License Sub”) to Sirius’ petition to deny the above-referenced application for transfer of control of WCS License Sub from WCS Wireless Inc. (“Transferor” or “WCS Wireless”) to XM.²

I. INTRODUCTION AND SUMMARY

The Applicants’ oppositions confirm that the Commission should deny the transfer. The Applicants concede that the post-transfer entity plans to collocate WCS transmitters with XM’s terrestrial repeaters. As Sirius has demonstrated, this collocation would deliver interfering signals that would incapacitate Sirius receivers in the near vicinity of XM’s numerous collocated

¹ 47 U.S.C. § 309(d); 47 C.F.R. § 1.939.

² XM and WCS License Sub are collectively referred to herein as “Applicants.”

sites. Moreover, were the transfer approved, it would permanently derail the terrestrial repeater negotiations by creating a situation where XM would have the incentive and ability to favor its combined business while simultaneously disadvantaging Sirius' satellite digital audio radio ("satellite DARS") operations. In addition, contrary to the Applicants' claims, Sirius has demonstrated that it is a party in interest and therefore has standing in this proceeding. To prevent the public interest harms that Sirius has identified from occurring, the Commission should deny the transfer application. As a minimum, prior to approving any transfer, the FCC should remedy the interference issues Sirius has raised and finalize its pending terrestrial repeater rules.

II. THE APPLICANTS HAVE FAILED TO COUNTER SIRIUS' SHOWING OF INTERMODULATION INTERFERENCE

In its petition and attached technical appendix, Sirius established that "collocation of XM's A, B or D-block WCS transmitters and satellite DARS terrestrial repeaters will result in third-order intermodulation products that will deliver interfering signals to Sirius receivers."³ Sirius further detailed that "[s]uch an interfering signal level will incapacitate Sirius receivers in the near vicinity of XM's numerous terrestrial repeater sites."⁴ This type of intermodulation interference was central to the Commission's recent proceedings on interference to public safety networks in the 800 MHz band.⁵

³ Petition to Deny of Sirius Satellite Radio Inc. and Request for Removal from Streamlined Processing, WTB Docket No. 05-256, File No. 0002240823, at 4 (Aug. 3, 2005) ("Sirius Petition").

⁴ Sirius Petition at 4.

⁵ See, e.g., *Improving Public Safety Communications in the 800 MHz Band*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14,969, 15,022-23 (¶ 89) ("800 MHz Order") ("The predominant types of interference encountered by public safety and other 800 MHz non-cellular systems are intermodulation interference and OOBE interference."); see also *id.* at 15,021-045 (¶¶ 88-141) (discussing

Neither XM nor WCS License Sub dispute Sirius' showing of intermodulation and overload interference.⁶ Instead, the Applicants observe that the collocation of WCS transmitters and XM's repeaters "could occur regardless of whether the proposed transaction is approved or consummated."⁷ But they fail to point to a single instance of such collocation having already occurred.⁸ Nor do they bother rebutting the increased incentives to collocate following a transfer of control, as opposed to some hypothetical business arrangement – indeed, XM concedes that collocation pursuant to a hypothetical "joint venture" would occur "probably in a less

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interference abatement).

⁶ Indeed, XM concedes intermodulation and overload interference, but offers the cold comfort that "the interference impact of WCS deployments should be manageable." *Consolidated Opposition of XM Satellite Radio Holdings Inc. to Petitions to Deny*, WT Docket No. 05-256, ULS File No. 0002240823, at 10 (Aug. 17, 2005) ("XM Opposition").

⁷ *Opposition to Petitions to Deny of WCS Wireless License Subsidiary, LLC*, File No. 0002240823, at 8 (Aug. 17, 2005) ("WCS Opposition"); *see also* XM Opposition at 8 (arguing that "WCS Wireless, instead of transferring control to XM, could have entered into a joint venture with XM and deployed its own WCS facilities (albeit probably in a less expeditious fashion), operating in the same WCS spectrum blocks where XM would operate and collocating some or all of them with XM SDARS repeaters").

WCS License Sub also claims that "[t]he use of free space loss to characterize the urban areas where XM and Sirius currently operate is an erroneous assumption." WCS Opposition at 9. This argument, however, misconstrues Sirius' technical showing and thus misses the mark. In its petition, Sirius demonstrated that the effect of intermodulation interference varies depending on terrain and population density by examining *both* free space propagation *and* a mixed, urban clutter model. *See* Sirius Petition, Technical Appendix at 4 & Slides 5-6. Thereafter, it applied both approaches to the Philadelphia market. *See id.*, Technical Appendix at 4 & Slides 7-10. In each case, the increase in interfering "null" areas was significant. *See id.*, Technical Appendix at 4 & Slides 5-10.

⁸ The fact that some collocation might occur absent the proposed transfer of control is not grounds to deny Sirius standing, as XM suggests in passing. *See* XM Opposition at 7 n.21. Plainly, the interference issues Sirius raises are exacerbated by the proposed transaction, and thus "can be traced to the challenged action." *Warren Ache, Application for Review and Request for Reinstatement of Conditional License*, Memorandum Opinion and Order, 9 FCC Rcd 2464, 2467 (¶ 7). And such interference "would be prevented or redressed by the relief requested." *Id.* Thus, Sirius has satisfied the "causal link" element of standing. *See also infra* Section IV (addressing Applicants' other standing arguments).

expeditious fashion” than under the proposed transfer of control.⁹ And WCS License Sub affirmatively touts that the merger would make the collocation “process more efficient.”¹⁰ In any event, such speculation is irrelevant¹¹ and does nothing to remedy the imminent harmful intermodulation interference.

Moreover, the Applicants’ argument overlooks the fact that the best and most efficient time to resolve interference concerns is *prior* to actual interference and infrastructure deployment. For this reason, the Commission routinely requires applicants to “ensure that potential issues of interference are resolved before deployment.”¹² Here, because WCS licensees need not individually license each transmitter, this forum is the *only* opportunity for prior and appropriate FCC oversight.

The Applicants’ contention also ignores their obligation under the Commission’s “last-in-fixes-it” policy, under which “the ‘newcomer’ is responsible, financially and otherwise, for taking whatever steps may be necessary to eliminate objectionable interference.”¹³ Indeed, the

⁹ XM Opposition at 8.

¹⁰ WCS Opposition at ii.

¹¹ Cf. 47 U.S.C. § 310(d) (“in acting [on a transfer application] the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee”).

¹² *Amendment of the Commission's Rules to Establish New Personal Communications Services*, 9 FCC Rcd 4957, 5030 (¶ 187) (1994); see also *Regulation of Domestic Receive-only Satellite Earth Stations*, First Report and Order, 74 F.C.C.2d 205, 208 (¶ 8) (1979) (“Frequency coordination is an analytical process designed to resolve potential interference problems and must be performed prior to the filing of an application for construction permit and license.”).

¹³ *Sudbrink Broad. of Ga., Inc.*, Memorandum Opinion and Order, 65 F.C.C.2d 691, 692 (¶ 5) (1977); see also *Broad. Corp. of Ga. (WVEU-TV)*, Memorandum Opinion and Order, 96 F.C.C.2d 901, 908 (¶ 17) (1984) (“*WVEU III*”); *Athens Broad. Co.*, Memorandum Opinion and Order, 68 F.C.C.2d 920, 920-01 (¶ 2) (1978).

“last in” licensee must bear all of the costs associated with remedying the interference it causes,¹⁴ even if those costs are substantial and “greatly in excess of that which [the licensee] anticipated.”¹⁵ Furthermore, these financial and other obligations exist, even if the newcomer licensee is operating within its authorized parameters.¹⁶

Accordingly, the Bureau should deny the application unless the Commission first remedies any risk of harmful interference to Sirius’ satellite DARS operations – and the potential interruption of service to millions in the listening audience.

III. XM’S CLAIM THAT THE APPROVAL OF THE TRANSFER APPLICATION WOULD “ENSURE A FAIR, EQUITABLE, AND EXPEDITIOUS RESOLUTION” OF THE TERRESTRIAL REPEATER NEGOTIATIONS DEFIES COMMON SENSE

The Sirius petition warned that the proposed transfer would accelerate the need to address and resolve issues relating to interference between WCS and satellite DARS still outstanding in IB Docket No. 95-91.¹⁷ Sirius has been working closely with XM for the past two years on

¹⁴ *Broad. Corp. of Ga. (WVEU(TV))*, Memorandum Opinion and Order, 92 F.C.C.2d 910, 912 (¶ 7) (1982) (“Although the land mobile radio licensees are expected to cooperate with [the interfering party] by offering suggestions to resolve the problem and by implementing a solution to it reasonable in both cost and configuration . . . , there is no doubt that the financial responsibility for eliminating the objectionable interference falls upon the ‘newcomer.’” (footnote omitted)).

¹⁵ *Id.*; see also *Jack Straw Mem’l Found.*, Memorandum Opinion and Order, 37 F.C.C.2d 544, 546-47 (¶ 7) (1972) (requiring an FM radio station to eliminate any harmful interference to land mobile and maritime mobile licensees).

¹⁶ See *Application of WKLX, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 225, 226 (¶ 10) (1991) (stating that WKLX would be obligated to rectify interference even though “the transmitted signals fully comply with all of our emission standards and requirements”); *WVEU III*, 96 F.C.C.2d at 902, 910 (¶¶ 2,21) (requiring the newcomer licensee to “reimburse [affected] land mobile radio licensees for their expenses in modifying their facilities to new frequencies” even though it was operating at only “6% of full power” permitted under its license).

¹⁷ See Sirius Petition at 6 (noting intermodulation and harmful blanketing interference issues); *Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Report and Order Memorandum Opinion and Order and Further Notice of

analyses, tests, and the development of filters to demonstrate that satellite DARS terrestrial repeaters will not significantly interfere with WCS receivers. The continuation of this joint Sirius-XM effort is particularly vital because the issue of WCS transmitters interfering with satellite DARS receivers has not yet been addressed.¹⁸ Were the transfer approved, however, XM would be on both “sides” of the negotiating table, undermining the parties’ confidence in good faith negotiations and frustrating further progress.¹⁹ Thus, Sirius requested in its petition that the Wireless Bureau hold XM’s transfer application in abeyance until the negotiations conclude or the Commission enacts final repeater rules that protect Sirius’ satellite DARS operations.²⁰

XM offers nothing meaningful in response. It states only that “[a]s a licensee of both WCS and SDARS spectrum, XM will be uniquely interested in ensuring a fair, equitable, and expeditious resolution of the repeater negotiations.”²¹ This incredible claim defies common sense. XM can be expected rationally to take whatever actions will maximize its profits. Given that it would be on both sides of the negotiating table while debating interference protection with a competitor, XM would have the incentive and ability to take whatever position favored its combined business and, at the same time, disadvantaged Sirius’ satellite DARS operations. Plainly, this dynamic would make good faith negotiations impossible. It would also put an end

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Proposed Rulemaking, 12 FCC Rcd 5754 (1997).

¹⁸ Sirius Petition at 6.

¹⁹ *Id.* at 7; see also Petition to Deny of Wireless Communications Association International, Inc., File No. 0002240823 (Aug. 3, 2005).

²⁰ Sirius Petition at 7.

²¹ XM Opposition at 19.

to Sirius' and XM's collaborative filter development efforts and truncate negotiations before the critical issue of WCS interference into satellite DARS is even addressed. Accordingly, the Bureau should hold the proposed license transfer in abeyance until the terrestrial repeater rules are finalized.²²

IV. SIRIUS HAS STANDING

A. Sirius Demonstrated That It Is a "Party in Interest"

WCS License Sub claims that Sirius "does not allege any concrete reason why the Application should be denied,"²³ and therefore lacks standing. This argument has no basis in law or fact. Potential interference is the preeminent basis for Section 309 standing.²⁴ And the Sirius petition *specifically* set forth the grounds for denying the transfer of control. Sirius, for example, detailed how the "collocation of XM's A, B or D-block WCS transmitters and satellite DARS terrestrial repeaters *will result* in third-order intermodulation products that *will deliver interfering*

²² Indeed, the full Commission, not the Bureau, must resolve the new and novel questions of law and policy that are raised by the terrestrial repeater negotiations and related rulemaking. See Petition to Deny of the National Association of Broadcasters, File No. 0002240823, at 11-14 (Aug. 3, 2003) ("NAB Petition"). The same is true for the interference issues raised in Sirius' petition.

²³ WCS Opposition at 7.

²⁴ See, e.g., *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1,000, 1,001 (D.C. Cir. 1966) (recognizing "electrical interference" as one of the "established categories" for party in interest standing under Section 309(d)); *WKKQ, Inc.*, Memorandum Opinion and Order, 51 Rad. Reg. 2d (P&F) 635, 636 n.2 (1982) ("The showing of possible interference gives Metromedia standing as a party in interest within the meaning of Section 309(d) of the Communications Act of 1934, as amended."); *Dennis F. Doeslitzsch*, Memorandum Opinion and Order, 44 Rad. Reg. 2d (P&F) 1241, 1242 (¶ 2) (1978) ("Since a grant of Doeslitzsch's application may create objectionable interference to co-channel AM Station KCMO, Meredith has standing as a party in interest within the meaning of Section 309(d) of the Communications Act of 1934, as amended."); *Columbia Montour B/Casting Co.*, Memorandum Opinion and Order, 44 Rad. Reg. 2d (P&F) 372, 373 (¶ 2) (1978) ("Where a grant may create objectionable interference to an existing licensee, the licensee has standing as a party in interest to prove interference would actually occur.").

signals to Sirius receivers,”²⁵ and explained that “[s]uch an interfering signal level *will incapacitate* Sirius receivers in the near vicinity of XM’s numerous terrestrial repeater sites.”²⁶ Similarly, Sirius explicitly highlighted the obvious and undeniable fact that approval of the transfer would untenably “place XM on both the ‘WCS’ and ‘satellite DARS’ sides” of the WCS-satellite DARS interference negotiations.²⁷

WCS License Sub’s specificity argument turns entirely on Sirius’ use of the phrase “may cause harmful interference.”²⁸ Sirius’ use of the word “may” signifies only XM’s failure to address “its planned WCS deployment, including the number of transmitter sites by radio frequency, approximate geographical location, EIRP (or maximum on the ground power flux densities) and modulation.”²⁹ In other words, Sirius’ sole alleged uncertainty stems from the Applicants’ unknown collocated transmitter deployment,³⁰ information that XM has declined to disclose.³¹ The Applicants cannot evade substantial and material technical issues merely by being non-responsive. Rather, prior to addressing the transfer, the Commission should insist the

²⁵ Sirius Petition at 4 (emphasis added); *see also id.* at 4-5. The engineering basis for Sirius’ interference allegations are specifically set forth in the technical appendix attached to its petition. *See id.*, Technical Appendix.

²⁶ Sirius Petition at 4 (emphasis added).

²⁷ *Id.* at 7; *see also id.* at 5-8.

²⁸ *Id.* at 1, 4. In particular, WCS License Sub claims that Sirius’ “assertions that there ‘may’ be interference are not sufficient to comply with the specificity demands of Section 309.” WCS Opposition at 7 (citing Sirius Petition at 1, 4).

²⁹ Sirius Petition at 8; *see also id.* (asking the FCC to “require XM to put on the record basic technical information with respect to its planned implementation of WCS frequencies so that the Commission and interested parties can more accurately evaluate potential harmful interference”).

³⁰ *Id.* at 4, 8.

³¹ *See* XM Opposition at 19 (arguing that there is “no basis for requiring XM to disclose information regarding its WCS deployment”).

Applicants promptly provide their proposed WCS build-out on the record.³²

B. Sirius' Affidavit and Pleading Complies with Section 309

WCS License Sub halfheartedly seeks to dismiss Sirius' claims because its petition allegedly contained "no Section 309 affidavit."³³ XM makes a similar argument, albeit in a footnote.³⁴ These attempts to create a procedural infirmity with Sirius' petition are entirely without merit.

The Sirius petition contained the signed statement of Terrence Smith, Sirius' Senior Vice President, Engineering. Mr. Smith's statement attested that the engineering and technical information submitted – supporting Sirius' allegation of harmful interference – were "complete and accurate." In other words, the Smith statement covers the technical facts, claims and conclusions at issue in this proceeding, thus satisfying the statute.³⁵

Moreover, as the Bureau is aware, no affidavit is needed for allegations of fact "of which official notice may be taken."³⁶ All of the "facts" in the Sirius petition and the attached technical

³² *Sirius Petition at 8.* In this regard, Sirius agrees with the National Association of Broadcasters that the Applicants "have failed to satisfy their burden of showing that the proposed transaction would serve the public interest, convenience and necessity" and should be required "to provide substantially more information" on the public interest issues raised by their application, including their proposed WCS build-out. NAB Petition at 6. In any event, the Applicants admit they intend to collocate WCS transmitters and satellite DARS repeaters, *see* XM Opposition at 8 (collocation would take place "probably in a less expeditious fashion" without a transfer of control to XM); WCS Opposition at ii (collocation "process more efficient" with the merger), which confirms the substance and gravity of Sirius' interference allegations.

³³ WCS Opposition at 6 (claiming that Sirius' petition to deny must be dismissed because "[t]here is no Section 309 affidavit").

³⁴ XM Opposition at 18 n.47 (arguing that "the Sirius and WCA Petitions should be denied because they failed to include an affidavit supporting their allegations of fact").

³⁵ 47 U.S.C. § 309(d)(1) (requiring petitions be "supported by affidavit of a person or persons with personal knowledge thereof").

³⁶ *Id.*; *see also* 47 C.F.R. § 1.939(d) (same); *Application of Mobex Network Services, LLC*

appendix qualify for official notice and need not be re-verified by affidavit. For example, the petition's "Introduction and Background"³⁷ cites only the Communications Act, the Commission's rules, its orders, and this proceeding.³⁸ The remainder of the Sirius petition addresses the relationship of satellite DARS and WCS spectrum – based on agency rules, orders,³⁹ and other public records⁴⁰ – and the existence and effect of intermodulation interference,⁴¹ concepts both covered in the Smith statement and at the heart of, and thus well documented in, the FCC's recent 800 MHz proceedings.⁴² Tellingly, Applicants never even attempt to specify any "fact" not covered by official notice. Accordingly, their Section 309 objection should be rejected.

In any event and out of an abundance of caution, attached are affidavits of Terrence

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for Modification of the Licenses for Automated Maritime Telecomms., Order, 18 FCC Rcd 12,305, 12,307 n.16 (2003) ("No affidavit is needed in this case . . . because all of the operative facts . . . are of the type of which we can take official notice" (citing 47 C.F.R. § 1.939(d))).

³⁷ See Sirius Petition at 2-4.

³⁸ See *McClatchy Newspapers, Inc.*, Memorandum Opinion and Order, 61 F.C.C.2d 279, 280 (¶ 4) (1976) ("[T]he [Section 309(d)(1)] affidavit requirement of the Communications Act is not applicable to factual matter of which official notice may be taken. The Department's allegations are based on Commission records and generally accepted trade publications, and hence the absence of supporting affidavits by the Department is not a procedural defect." (citation omitted)).

³⁹ See Sirius Petition at 5-7. The "facts" underlying the terrestrial repeater rulemaking are fully set forth in the proposals and record of that proceeding.

⁴⁰ See 5 U.S.C. § 552(f)(2); *Fort Myers Broad. Co.*, Letter Ruling, 19 FCC Rcd 19,556, 19,560 (2004) (Commission may take official notice of "Commission records and precedent").

⁴¹ See Sirius Petition at 4-5; *id.*, Technical Appendix.

⁴² See *800 MHz Order*, 19 FCC Rcd at 15,021-045 (¶¶ 88-141). In fact, the equation Sirius used to calculate the relevant intermodulation frequency components, see Sirius Petition, Technical Appendix at 3, is expressly set forth in the *800 MHz Order*, see *800 MHz Order*, 19 FCC Rcd at 15,023 n. 276.

Smith and Patrick Donnelly, Executive Vice President, General Counsel, and Secretary of Sirius.

These statements cure any alleged defect in Sirius' petition.⁴³

V. CONCLUSION

For the foregoing reasons and those set forth in Sirius' petition to deny, Sirius urges the Wireless Bureau to deny the application until XM remedies any risk of harmful interference to Sirius' customers and the Commission concludes the terrestrial repeater rulemaking.

Respectfully submitted,

SIRIUS SATELLITE RADIO INC.

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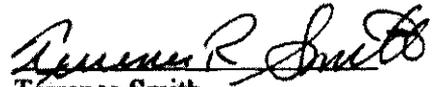
⁴³ See, e.g., *KQED, Inc.*, Memorandum Opinion and Order, 88 F.C.C.2d 1159, 1166 (¶ 15) (1982) (“[E]ven though the licensee is correct that no affidavits were initially submitted by the other petitioners to show standing, they later presented affidavits in their reply to the opposition and thereby corrected their initial pleading. The affidavits establish the other petitioners' standing and we will accept these late-filed affidavits *nunc pro tunc* in the exercise of our discretion.”); *Malrite of N.Y., Inc.*, Memorandum Opinion and Order, 71 F.C.C.2d 241, 242 (¶ 3) (1979) (“[A] late filed affidavit is not necessarily fatal to a petition. In the exercise of our discretion, we can accept the affidavit *nunc pro tunc*. Because we can find no intent on the part of petitioner to abuse the Commission's processes, we elect to accept the affidavit.” (citations omitted)).

DECLARATION

I, Terrence Smith, hereby declare under penalty of perjury that the following is true and correct:

- (1) I am the Senior Vice President, Engineering, at Sirius Satellite Radio Inc.
- (2) I have read the foregoing Consolidated Reply of Sirius Satellite Radio Inc. to Oppositions of XM Satellite Radio Holdings Inc. and WCS License Subsidiary, LLC to Petitions to Deny dated August 29, 2005, as well as the Petition to Deny and Request For Removal From Streamlined Processing and the accompanying Technical Appendix of Sirius Satellite Radio Inc. dated August 3, 2005.
- (3) I have personal knowledge of the technical facts stated in these documents that are related to interference.
- (4) The facts over which I have personal knowledge are true and correct.

Executed this 29th day of August 2005.


Terrence Smith
Senior Vice President, Engineering
Sirius Satellite Radio Inc.

DECLARATION

I, Patrick Donnelly, hereby declare under penalty of perjury that the following is true and correct:

- (1) I am the Executive Vice President, General Counsel, and Secretary of Sirius Satellite Radio Inc.
- (2) I have read the foregoing Consolidated Reply of Sirius Satellite Radio Inc. to *Oppositions of XM Satellite Radio Holdings Inc. and WCS License Subsidiary, LLC* to Petitions to Deny dated August 29, 2005, as well as the Petition to Deny and Request For Removal From Streamlined Processing dated August 3, 2005.
- (3) I have personal knowledge of the facts stated in these documents, other than the technical facts related to interference.
- (4) The facts over which I have personal knowledge are true and correct.

Executed this 29th day of August 2005.


Patrick Donnelly
Executive Vice President,
General Counsel, and Secretary
Sirius Satellite Radio Inc.

Certificate of Service

I, Barbara Lampich, do hereby certify that on this 29th day of August, 2005, the foregoing "Consolidated Reply of Sirius Satellite Radio Inc. to Oppositions of XM Satellite Radio Holdings Inc. and WCS License Subsidiary, LLC to Petitions to Deny" was served on the following persons via first class mail, postage prepaid:

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