

April 17, 2007

Helen Domenici  
Chief, International Bureau  
Federal Communications Commission  
Washington, DC 20554

Fred Campbell  
Chief, Wireless Telecommunications Bureau  
Federal Communications Commission  
Washington, DC 20554

Re: *Establishment of Rules and Policies for the Satellite Digital Audio Radio Service in the 2310-2360 MHz Band – IB Docket No. 95-91*  
*Applications of XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc. for Consent to Transfer of Control – MB Docket No. 07-57*  
*Application of Sirius Satellite Radio Inc. for Authority to Launch and Operate SIRIUS FM-5, a Geostationary Satellite, to Provide Satellite Digital Audio Radio Service –SAT-LOA-20060901-00096*  
*WRITTEN EX PARTE COMMUNICATION*

Dear Ms. Domenici and Mr. Campbell:

Recently, Sirius Satellite Radio Inc. (“Sirius”) announced that it has entered into an agreement with DaimlerChrysler AG’s Chrysler Group that calls for Sirius to commence the provision of video services over its Digital Audio Radio Service (“DARS”) spectrum later this year.<sup>1</sup> Specifically, Sirius has announced that it will begin the “Sirius Backseat TV” service, a service that initially will include three channels of children's programming from Nickelodeon, Disney Channel and Cartoon Network, but that, according to reports in the press, could be expanded in the future.<sup>2</sup> I am writing on behalf of the WCS Coalition to urge the Commission to

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<sup>1</sup> See, e.g., *Chrysler Minivans to Offer Satellite TV*, THE WALL STREET JOURNAL, at B3 (March 30, 2004); James Healy, *Chrysler, Sirius to Beam Kids’ TV Into ’08 Models*, USA TODAY, at 1B (March 30, 2007).

<sup>2</sup> *Id.* Indeed, a recent article in the *New York Times* suggests that Sirius may be planning a substantial increase in its video programming following its proposed merger with XM Radio Inc. (“XM”). See Austen, *Can Video Help Save the Satellite Radio Business*, THE NEW YORK TIMES, at C3 (Feb. 26, 2007). That speculation cannot be dismissed as far-fetched given that the Sirius/XM merger application specifically touts the availability of improved television

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prohibit Sirius from launching the Sirius Backseat TV service over its DARS spectrum until the Commission has implemented rules that will permit coexistence of the Wireless Communications Service (“WCS”) and DARS in the 2305-2360 MHz band.<sup>3</sup>

Sirius’ announcement begs a fundamental question – is Sirius even authorized to provide video programming of the sort it proposes on DARS spectrum? DARS is described in the Commission’s rules as “a radiocommunication service in which *audio* programming is digitally transmitted by one or more space stations,”<sup>4</sup> and under Footnote US327 of the Table of Allocations, use of the 2320-2335 MHz band “is limited to digital *audio* broadcasting.”<sup>5</sup> Although nowhere reflected in the Commission’s rules,<sup>6</sup> the Commission has indicated that it would permit DARS licensees to provide so-called “ancillary services,” so long as such use was not “inconsistent with the international allocation.”<sup>7</sup> At the time, the Commission explained that “[e]xamples of ancillary services envisioned for satellite DARS include high speed broadcast data, location based geographic information, electronic graphic/visual information, voice mail and alpha-numeric messages.”<sup>8</sup> Conspicuously missing from this list of ancillary services is the provision of multiple channels of video programming such as Sirius Backseat TV will offer. This lack of any explicit authority for Sirius to engage in the provision of video programming services has not escaped the notice of the Commission’s staff. To the contrary, trade press reports note that the Commission staff had sought information from Sirius to determine whether

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services as a benefit of the proposed merger. See Consolidated Application of XM Radio Inc. and Sirius Satellite Radio Inc. for Authority to Transfer Control, MB Docket No. 07-57, at 14 (filed March 20, 2007).

<sup>3</sup> The WCS Coalition is comprised of the licensees of virtually all of the WCS spectrum licensed by the Commission in the 2.3 GHz band. The members of the WCS Coalition have no current plans to provide cable television-like services into moving vehicles in competition with Sirius Backseat TV. As a practical matter, the WCS Coalition does not care one way or another what services Sirius offers, so long as those services do not threaten to increase interference to WCS or lead to demands by Sirius for increased protection against interference.

<sup>4</sup> 47 C.F.R. § 25.201 (emphasis added).

<sup>5</sup> The Commission has found that the international allocation at 2.3 GHz under which DARS is authorized “was limited to audio broadcasting by digital modulation.” *Amendment of the Commission’s Rules with Regard to the Establishment of New Digital Audio Radio Services*, Report and Order, 10 FCC Rcd 2310, 2310 (1995).

<sup>6</sup> The only reference in the Commission’s Rules to the provision of services other than audio services in the band is contained in Section 25.144(a)(3)(iii), which requires a DARS applicant to “[i]dentify the compression rate it will use to transmit services that are ancillary to satellite DARS.”

<sup>7</sup> *Establishment of 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 Proposed Rulemaking, 12 FCC Rcd 5754, 5793 (1997).

<sup>8</sup> *Id.* at 5792 n.167. This same list of possible ancillary services was identified by the Commission in the *Notice of Proposed Rulemaking* that led the Commission to permit ancillary services. See *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Notice of Proposed Rulemaking, 11 FCC Rcd 1, 26-27 (1995).

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Sirius' contemplated video services qualify as ancillary services.<sup>9</sup> However, to the best of the WCS Coalition's knowledge, Sirius has never responded to those inquiries and the Commission staff has never issued any ruling permitting Sirius to offer a video service such as Sirius Backseat TV.

Certainly, one element that must be considered in determining whether Sirius Backseat TV is "ancillary" is whether that service poses a risk of interference to WCS or requires greater protection than Sirius' primary audio service. The WCS Coalition is concerned that Sirius' introduction of Sirius Backseat TV could prejudice the Commission's efforts to adjust the DARS and WCS rules to promote the ability of WCS licensees to provide 802.16e WiMAX services while Sirius and XM provide DARS. If there is one thing on which Sirius and the WCS Coalition agree, it is that the DARS and WCS rules must be modified to provide for such coexistence.<sup>10</sup>

More specifically, the WCS community firmly believes that the out-of-band emission ("OOBE") limits set forth in Section 27.53(a) of the Commission's Rules are overly-protective of DARS, so much so that they unnecessarily frustrate the ability to WCS licensees to fully utilize their spectrum for WiMAX 802.16e technology.<sup>11</sup> The WCS Coalition is hardly alone in recognizing that the WCS OOBE limits are problematic. The Wireless Telecommunications

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<sup>9</sup> See Jeremy Pelofsky, *Sirius' Hopes on Video May Detour Through FCC*, REUTERS (Jan. 12, 2004)(quoting Commissioner staff member's statement that "The FCC has initiated discussions about whether Sirius' planned video programming is permitted under our current rules and their current authorization or whether it would require a formal request from Sirius and a regulatory decision from the commission.") available at [http://www.usatoday.com/tech/news/2004-01-13-sirius-video-holdup\\_x.htm](http://www.usatoday.com/tech/news/2004-01-13-sirius-video-holdup_x.htm); Jeremy Pelofsky, *Sirius Sees No Need to Okay On Video Service*, REUTERS (Jan. 14, 2004)("the Federal Communications Commission said on Monday it had initiated talks to learn more and determine if the licenses assigned to the company permitted such service or if the FCC needed to authorize it.") available at [http://www.usatoday.com/tech/news/techpolicy/2004-01-13-sirius-says-ok\\_x.htm](http://www.usatoday.com/tech/news/techpolicy/2004-01-13-sirius-says-ok_x.htm); Leslie Stimson, *XM, Sirius Expand Product Lines, Looking Beyond Boomboxes to In-Car Video, Wireless Distribution*, RWONLINE, (Feb. 11, 2004)(reporting that FCC spokesman "told Radio World the agency is trying to determine whether the video offering would qualify as an ancillary service, which would be consistent with the satcaster's spectrum authorization.") available at [http://www.rwonline.com/reference-room/special-report/02\\_rw\\_CES\\_satcaster\\_product\\_2.shtml](http://www.rwonline.com/reference-room/special-report/02_rw_CES_satcaster_product_2.shtml).

<sup>10</sup> See Petition of Sirius Satellite Radio Inc. for Rulemaking, and Comments, IB Docket No. 95-91 (filed Oct. 17, 2006); Letter from Paul J. Sinderbrand, Counsel to WCS Coalition, to Marlene H. Dortch, Secretary, Federal Communications Commission, IB Docket No. 95-91 (filed Nov. 7, 2006). To the extent the WCS Coalition has heretofore proposed rules and policies to govern the coexistence of WCS and DARS, those proposals have not contemplated DARS transmission of video programming such as Sirius Backseat TV. If the Commission permits DARS video as an ancillary service, it may add a level of complexity to any solution, and will certainly force the WCS Coalition to reconsider its earlier proposals.

<sup>11</sup> See Consolidated Request of AT&T Inc., BellSouth Corporation, Comcast Corporation, NextWave Broadband Inc., NTELOS, Inc., Sprint Nextel Corporation, Verizon Laboratories Inc., and WaveTel NC License Corporation For Limited Extension of Deadline for Establishing Compliance With Section 27.14 Substantial Service Requirement, WT Docket No. 06-102, at 4 n.9 (filed March 22, 2006).

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Bureau has found the restrictive OOB limits have impeded the development of WCS equipment,<sup>12</sup> while Sirius itself has acknowledged that those limits can be “overly strict.”<sup>13</sup> Based on its analysis to date, the WCS Coalition believes that the OOB limits set forth in Section 27.53(a) can be substantially loosened, without any material adverse effect on the ability of DARS consumers to enjoy the full range of services XM and Sirius currently provide. Such a loosening is essential if the entire WCS band is to be available for 802.16e WiMAX services.

At this juncture, however, there is insufficient information on the record to determine the impact that Sirius Backseat TV will have on the ability of WCS and DARS to coexist in the band. The WCS Coalition is unaware of any disclosure by Sirius of the specific technologies that will be employed to provide Sirius Backseat TV.<sup>14</sup> The WCS Coalition fears, however, that Sirius Backseat TV may be more prone to interference from WCS than Sirius’ current audio offerings. Before Sirius starts selling Sirius Backseat TV equipment to consumers (the receivers apparently will cost consumers in the neighborhood of \$500.00 each), the Commission must make certain that such equipment is no more prone to interference from WCS than the current Sirius audio receivers. Otherwise, Sirius will no doubt cite to consumer investment in Sirius Backseat TV technology in arguing against a loosening of the WCS OOB limits. The Commission should not let Sirius get the proverbial camel’s nose under the tent – until final rules are adopted to govern WCS and DARS coexistence, Sirius should be precluded from offering Sirius Backseat TV.

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<sup>12</sup> See *Consolidated Request of the WCS Coalition For Limited Waiver of Construction Deadline for 132 WCS Licenses*, Memorandum Opinion and Order, 21 FCC Rcd 14134, 14139-40 (WTB 2006).

<sup>13</sup> See Cavell, Mertz & Davis, Inc. Consulting Engineers and Sirius Satellite Radio Engineering, “White Paper, Interference to the SDARS Service from WCS Transmitters,” IB Docket No. 95-91, at 5 (March 28, 2006) *filed as an attachment to* Letter from Carl R. Frank, Counsel to Sirius Satellite Radio Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, IB Docket No. 95-91 (filed March 29, 2006).

<sup>14</sup> As noted above, Section 25.144(a)(3)(iii) requires a DARS licensee to “[i]dentify the compression rate it will use to transmit services that are ancillary to satellite DARS.” It does not appear that Sirius has ever specifically satisfied this requirement with respect to Sirius Backseat TV. Indeed, in its September 1, 2006 application for authority to add a geostationary satellite to its DARS constellation, Sirius advised the Commission that “music channels are compressed to approximately 50 kb/s and normal voice channels to approximately 20 kb/s.” Application of Sirius Satellite Radio for Authority to Launch and Operate SIRIUS FM-5, SAT-LOA-20060901-00096, at 21 (filed Sept. 1, 2006). However, with respect to ancillary services, Sirius’s filing fails to comply with Section 25.144(a)(3)(iii). Rather than “identify the compression rate it will use to transmit services that are ancillary to satellite DARS” as required by that Section, Sirius has sought to evade the question, stating that “ancillary [channels] are either not compressed or compressed as appropriate” and that “[t]he compression will change over time with technology advancement.” *Id.* The WCS Coalition is disappointed to learn that just yesterday the International Bureau granted Sirius authority to launch and operate this new satellite, and urges the Bureau to rescind that grant until Sirius provides a complete response that, among other things, discloses particulars with respect to the transmission of Sirius Backseat TV material.

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Should you have any questions regarding this submission, please contact the undersigned. Pursuant to Section 1.1206(b) of the Commission's Rules, a copy of this letter is being filed in the dockets referenced above utilizing the Electronic Comment Filing System.

Respectfully submitted,

*/s/ Paul J. Sinderbrand*

Paul J. Sinderbrand

Counsel to the WCS Coalition

cc: Hon. Kevin J. Martin  
Hon. Michael J. Copps  
Hon. Jonathan S. Adelstein  
Hon. Deborah Taylor Tate  
Hon. Robert M. McDowell  
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