



1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

7925 JONES BRANCH DRIVE
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wileyrein.com

April 25, 2007

Robert L. Pettit
202.719.7019
rpettit@wileyrein.com

VIA ECFS AND HAND DELIVERY

Helen Domenici
Chief, International Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Fred Campbell
Chief, Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW
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 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:

On April 17, 2007, the WCS Coalition submitted a written ex parte communication¹ urging speedy resolution of discussions between satellite radio licensees in commercial operation and licensees in the Part 27 Wireless Communications Service, most of which have never been constructed. Sirius Satellite Radio Inc. (“Sirius”) submitted a set of Part 25 and 27 rule revisions last year,² XM Satellite Radio Inc. supported these rules,³ and the WCS Coalition filed a

¹ Letter from P. Sinderbrand, Counsel to WCS Coalition, to H. Domenici and F. Campbell, FCC, IB Docket No. 95-91, MB Docket No. 07-57, SAT-LOA-20060901-00096 (filed Apr. 17, 2007) (“WCS Coalition Ex Parte”).

² Sirius Satellite Radio Inc. Petition for Rulemaking and Comments, IB Docket No. 95-91, GEN Docket No. 90-357, RM No. 8610 (filed Oct. 17, 2006).

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useful response late last year.⁴ As Sirius has urged, the FCC should promptly seek comment on both documents and follow with a Report and Order as soon as possible.

However, the WCS Coalition *ex parte* gratuitously wandered into two unrelated topics. First, the WCS Coalition now questions Sirius' authority to offer video services over its satellite radio spectrum and requesting that the Commission preclude Sirius from offering ancillary video services. The Coalition speculates that Sirius' proposed backseat video offering could increase the risk of interference to WCS systems in the adjacent band (or that Sirius might demand additional protection from WCS emissions).⁵ Second, even though it failed to participate in the licensing proceeding, the WCS Coalition now suddenly argues that Sirius' recently granted application for its FM-5 satellite was defective and that the Commission should "rescind" that grant.⁶ For the reasons detailed herein, the FCC should promptly and unequivocally reject those aspects of the WCS Coalition's baseless arguments.

The relevant legal framework for ancillary offerings is both simple and straight-forward. As conceded by the WCS Coalition,⁷ the 1997 Satellite Radio Report and Order explicitly authorized satellite radio systems to provide "ancillary services."⁸ That Report and Order included a *non-exhaustive list* of transmissions classed as ancillary:

Examples of ancillary service envisioned for satellite DARS include

(Continued . . .)

³ Letter from B. Jacobs and D. Konczal, Counsel to XM Radio Inc., to M. Dortch, Secretary, FCC, IB Docket No. 95-91, GEN Docket No. 90-357, RM No. 8610 (Jan. 5, 2007).

⁴ Letter from P. Sinderbrand, Counsel to WCS Coalition, to M. Dortch, Secretary, FCC, IB Docket No. 95-91, GEN Docket No. 90-357, RM No. 8610 (filed Nov. 7, 2006).

⁵ *WCS Coalition Ex Parte* at 3.

⁶ *Id.* at 4 n.14

⁷ *See id.* at 2.

⁸ *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 (¶ 96) (1997) ("*Satellite DARS Order*").

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high speed broadcast data, location based geographic information, *electronic graphic/visual information*, voice mail and alpha-numeric messages.⁹

The Coalition provides neither logic nor law why “electronic graphic/visual information” fails to include video.¹⁰ Indeed, the WCS Coalition’s claim is flatly at odds with decades of FCC decisions favoring flexibility in the scope of permissible service offerings,¹¹ often to the benefit of Coalition member companies,¹² and certainly to the benefit of American consumers.

The principal limitation on ancillary satellite radio offerings is that they must not be inconsistent with the international allocation.¹³ The band is allocated internationally for “the broadcasting satellite service (sound) and complementary terrestrial sound broadcasting service on a primary basis” and “such use is limited to digital audio broadcasting.”¹⁴ Sirius’ backseat video offering easily meets that test. First, the back-seat video offering will operate in less than one-fifth of Sirius’ exclusively-licensed band—meaning that the principal use of the band is, and will remain, BSS (sound). Second, Sirius’ backseat video feed will operate under the same emission designators as the audio channels. Third, and following from the

⁹ *Id.*, 12 FCC Rcd at 5793, n.167 (emphasis added).

¹⁰ Plainly, the reference to “electronic graphic/visual information” classed the transmission of pictures as properly ancillary to satellite radio. Video is no more than the transmission of 30 pictures a second. *See* 47 C.F.R. § 2.1 (defining “television” as a “form of telecommunication for the transmission of transient images of fixed or moving objects”).

¹¹ Numerous Commission decisions are founded on the agency’s spectrum management policy of promoting “greater options and choices for consumers.” *Policy and Rules for the Direct Broadcast Satellite Service*, Report and Order, 17 FCC Rcd 11,331, 11,400 (¶ 148) (2002) (“*DBS Order*”). Indeed, the Commission has authorized DBS providers to offer ancillary services using their DBS allocation. *See, e.g., id.*, 17 FCC Rcd at 11,399-403 (¶¶ 145-155). Further, FM licensees may use in-band “subcarriers” for transmissions unrelated to broadcasting—indeed, even including acting as a common carrier. *See* 47 C.F.R. § 73.295.

¹² For example, the FCC allows CMRS providers to offer fixed services in addition to their primary mobile services. *See Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8965, 8977 (¶ 24) (1996).

¹³ *Satellite DARS Order*, 12 FCC Rcd at 5793 (¶ 96).

¹⁴ 47 C.F.R. § 2.106 note 5.393.

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previous point, the addition of video is unlikely to generate harmful interference—and the ITU Radio Regulations allow alternative uses so long as they do not generate harmful interference to conforming systems.¹⁵ Thus, because satellite radio will use most of the spectrum and the new video offering will not increase harmful interference to other properly authorized systems – including WCS networks operated in conformance with the allocation and Part 27 technical standards¹⁶ – Sirius’ backseat video is properly ancillary to satellite radio.

The WCS Coalition also alleges in a footnote¹⁷ that Sirius failed to comply with Section 25.144(a)(3)(iii) of the Commission’s rules and that therefore its recently granted application to launch and operate its FM-5 satellite¹⁸ should be rescinded. As an initial matter, the WCS Coalition’s rescission request is procedurally defective and should be dismissed because the WCS Coalition failed to participate in the original proceeding where the FCC considered Sirius’ application.¹⁹ Sirius’ application for its FM-5 satellite was put on public notice by the FCC in September 2006.²⁰ Comments and oppositions were due on October 16,

¹⁵ See ITU Rad. Reg. § 4.4 (“Administrations of the Member States shall not assign to a station any frequency in derogation of either the Table of Frequency Allocations in this Chapter or the other provisions of these Regulations, except on the express condition that such a station, when using such a frequency assignment, shall not cause harmful interference to, and shall not claim protection from harmful interference caused by, a station operating in accordance with the provisions of the Constitution, the Convention and these Regulations”).

¹⁶ To the extent the WCS Coalition’s concerns center on possible interference to future portable and mobile WCS user stations, the FCC explicitly warned potential WCS auction bidders that mobile WCS systems could claim only limited protection from adjacent satellite radio transmissions. See *Amendment of the Commission’s Rules To Establish Part 27, the Wireless Communications Service (“WCS”)*, Memorandum Opinion and Order, 12 FCC Rcd 3977, 3979 (¶ 5) (1997).

¹⁷ *WCS Coalition Ex Parte* at 4 n.14.

¹⁸ Policy Branch Info., Actions Taken, Public Notice, DA No. 06-1790, Rept. No. SAT-00438, File No. SAT-LOA-20060901-00096 (Apr. 20, 2007).

¹⁹ The WCS Coalition also failed to describe why it could not participate below, see 47 C.F.R. § 1.106 (requiring a petitioner seeking reconsideration of a prior FCC decision to “show good reason why it was not possible for him to participate in the earlier stages of the proceeding”), and no plausible excuse exists.

²⁰ *Policy Branch Info., Satellite Space Applications Accepted for Filing*, File No. SAT-LOA-20060901-00096, Public Notice, Rept. No. SAT-00386 (Sept. 15, 2006).



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2007.²¹ Neither the WCS Coalition nor any other entity filed comments opposing Sirius' FM-5 satellite application.

But even if the WCS Coalition's contentions were considered informally, the WCS Coalition's late-filed objection should be denied. Sirius' FM-5 application fully met the agency's rules. Section 25.144(a)(3)(iii) provides that "[i]f applicable, the applicant shall identify the compression rate it will use to transmit services that are ancillary to satellite DARS."²² As the WCS Coalition admits,²³ page 21 of the FM-5 application stated that "ancillary [channels] are either not compressed or compressed as appropriate" and that "[t]he compression will change over time with technology advancement."²⁴ In addition, Attachment A, paragraph A.7, page 9 of that application specifically mentions the provision of the television channels that the WCS Coalition now complains about.²⁵

The FM-5 spacecraft is still under construction. Compression technologies and higher-order modulation techniques are likely to advance substantially by the time Sirius' FM-5 is ready to be launched. Thus, pointless precision today would rapidly turn inaccurate and antiquated tomorrow. Sirius cannot be faulted for its inability to prognosticate the future.

* * *

Sirius fully agrees that the FCC must resolve final rules for satellite DARS terrestrial repeaters. Sirius and the WCS Coalition likely would disagree about the primary cause for that delay, but the reason is neither here nor there. The fact is that this proceeding has been ongoing for ten years, the Commission has yet to issue permanent rules for repeaters, and instead the licensing of terrestrial repeaters has been relegated to an awkward and time-consuming STA process. Although Sirius, like the WCS Coalition, is disappointed that these issues have remained pending for

²¹ See 47 C.F.R. § 25.154 (a)(2).

²² 47 C.F.R. § 25.144(a)(3)(iii).

²³ *WCS Coalition Ex Parte* at 4 n.14.

²⁴ Application of Sirius Satellite Radio Inc. for Authority to Launch and Operate SIRIUS FM-5, SAT-LOA-20060901-00096, at 21 (filed Sept. 1, 2006).

²⁵ *Id.* at Attachment A.

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almost ten years, it has hope that the Commission will act to resolve these issues.

In addition, the FCC's regulatory framework for satellite DARS providers' provision of ancillary services is clear. Under this framework, Sirius may provide video as an ancillary service.²⁶ Sirius also fully complied with the FCC's rules when it submitted its application for the FM-5 satellite.

For these reasons, the Commission should (1) seek comment on Sirius' Petition for Rulemaking and the WCS Coalition's response; (2) reject the WCS Coalition's suggestions about the appropriateness of ancillary video; and (3) dismiss the WCS Coalition's rescission of the FM-5 satellite license request as procedurally defective. Please contact the undersigned with any questions.

Sincerely,

/s/ Robert L. Pettit

Robert L. Pettit
Counsel to Sirius Satellite Radio Inc.

cc: Hon. Kevin J. Martin
Hon. Michael J. Copps
Hon. Jonathan S. Adelstein
Hon. Deborah Taylor Tate
Hon. Robert M. McDowell
Erika Olsen
Bruce Gottlieb
Barry Ohlson
Aaron Goldberger
Angela Giancarlo
Julius Knapp
Robert Nelson
Roderick Porter
Paul J. Sinderbrand, Counsel to the WCS Coalition

²⁶ From the start, Sirius kept the FCC fully informed, including a widely attended January 22, 2004 meeting with FCC staff (at the staff's request) to discuss its plans and the authority for 3-4 channels of backseat video ancillary to satellite radio.