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December 10, 2008

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

Re: Ex Parte Submission
IB Docket No. 95-91
WT Docket No. 07-293

Dear Ms. Dortch,

Sirius XM Radio Inc. ("Sirius XM")[1] hereby submits these further comments in the above-captioned proceedings.

When the Commission allocated spectrum for the use of Satellite Digital Audio Radio Services ("satellite radio") in 1997, it carved out, under direction from Congress, half of the 50 MHz of spectrum originally allocated to satellite radio (some on each side) for Wireless Communications Services ("WCS"). In order to "protect prospective [satellite radio] licensees from interference from WCS operations,"[2] the Commission imposed a strict out-of-band emissions ("OOBE") limitation on WCS providers that rendered "mobile operation in the WCS

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[1] On July 25, 2008, the Commission granted applications to allow the acquisition of XM Satellite Radio Holdings Inc. ("XM") by Sirius Satellite Radio Inc. ("Sirius") *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348, FCC 08-178 (rel. Aug. 5, 2008). The transaction was consummated on July 28, 2008, and the surviving parent company changed its name to Sirius XM Radio Inc. For convenience, references to activities previously conducted independently by either Sirius or XM are credited to the new company, Sirius XM.

[2] *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, Report and Order, 12 FCC Rcd 10785, 10787 (¶ 3) (1997) ("*WCS Report and Order*").

spectrum technologically infeasible."[3] The Commission concluded that this limitation was "necessary to ensure the viability" of satellite radio.[4]

The need to protect satellite radio is even more important now than it was in 1997. Since that time—and in specific reliance on the OOBE limitations that the FCC in 1997 determined were necessary to protect satellite radio—Sirius XM has designed and built a popular audio entertainment and information service that currently serves more than 19 million subscribers. In doing so, Sirius XM has spent billions of dollars to acquire its spectrum at auction,[5] to design and deploy satellite and terrestrial repeater networks, and to design satellite radio receivers. Likewise, consumers have spent billions of dollars to purchase their satellite radio receivers and the automobiles that include those receivers. Understandably, these networks and receivers have all been designed around the OOBE protections adopted by the FCC in 1997.

The 30 MHz of WCS spectrum was auctioned in April 1997 for less than $14 million, and since that time the spectrum has largely remained fallow—the subject of various buildout extensions.[6] However, in July 2007, WCS interests, having acquired their spectrum under a technically restrictive set of rules, requested that the Commission wholly reverse those rules. In essence, WCS interests now ask the Commission to overrule the protections that the Commission decided in 1997 were necessary to protect satellite radio consumers[7] in order to allow the wholesale deployment of mobile devices in all parts of the WCS spectrum. The effect of this change would be to create substantial interference with the transmission and reception of satellite radio. Sirius XM has previously submitted lengthy and detailed technical analyses demonstrating that this dramatic reversal would cause harmful interference to satellite radio consumers. Sirius XM takes this opportunity to provide an analysis of the legal consequences of modifying the WCS rules to allow for mobile operations.

As detailed below, wholesale adoption of the WCS proposal would violate statutory and case law in four principal areas: First, relaxing OOBE limits through the present rulemaking proceeding would violate Section 316 of the Communications Act. Agency action to allow

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[3] *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, Memorandum Opinion and Order, 12 FCC Rcd 3977, 3978 (¶ 3) (1997) ("*WCS MO&O*"); *WCS Report & Order*, 12 FCC Rcd at 10787 (¶ 3); *see also WCS MO&O*, 12 FCC Rcd at 3991-92 (¶¶ 25, 27).

[4] *WCS MO&O*, 12 FCC Rcd at 3991 (¶ 25). As the Commission determined, "if Satellite [radio] in this spectrum is subject to excessive interference, the service will not be successful and the American public will not benefit from the service." *Id.* (¶ 27).

[5] Sirius XM spent more than $178 million to acquire the 25 MHz satellite radio band.

[6] Some fixed broadband deployments have been made in the WCS bands.

[7] In engineering terms the WCS proposal would be accomplished by reducing the OOBE mask from 110 + 10 log P to 55 + 10 log P. Because these limits are logarithmic expressions, this does not merely represent a reduction by half in the OOBE limitations but a more than 300,000-fold reduction in the protection now afforded to satellite radio consumers.

additional interference to satellite radio would effect a modification to Sirius XM's licenses, which, under Section 316, can be accomplished lawfully *only* through an adjudicatory proceeding specified in the Communications Act and cannot be accomplished in a rulemaking proceeding. Second, the proposed modification would violate the Administrative Procedure Act ("APA") as an unjustified departure from previous FCC precedent, a decision unsupported by record evidence, and an action taken without considering reasonable alternatives. Third, allowing harmful interference to Sirius XM would violate statutory, constitutional, and contractual rights. Fourth, modifying the WCS rules to allow mobile operations in the WCS band would increase the value of that spectrum to such a degree as to necessitate reauction to avoid a windfall to WCS operators at the expense of the public.

I. Adoption of the WCS Proposal in this Proceeding Would Illegally Modify Sirius XM's Licenses.

The additional interference occasioned by adopting the WCS proposal would constitute a modification of Sirius XM's license in violation of the procedures set out in Section 316 of the Communications Act.[8] In short, the Commission may not legally modify Sirius XM's license through rulemaking but must comply with Section 316's procedural requirements and protections.

A. The WCS Proposal Would Effect a Modification of Sirius XM's Licenses Within the Meaning of Section 316.

The Supreme Court has long held that any action by the Commission that allows additional interference to a licensee constitutes a modification of license under Section 316.[9] In *FCC v. National Broadcasting Corp*., the Court held that the agency had improperly modified a license by adopting a rule change that allowed for increased interference to the licensee.[10] The court reasoned that "[t]o alter the rules so as to deprive [a licensee] of what had been assigned to it, and to grant an application which would create interference on the channel given it, was in fact and in substance to modify [the licensee's] license."[11]

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[8] 47 U.S.C. § 316.

[9] *See FCC v. National Broadcasting Co.*, 319 U.S. 239 (1943) (holding that a licensee could intervene in a proceeding on whether to grant another application that would change the relevant service rules and lead to interference with the licensee's use of its assigned spectrum).

[10] *See id.* at 240-46.

[11] *Id.* at 245.

Federal courts have repeatedly reaffirmed this holding.[12] In doing so, courts have emphasized that modifications may occur under Section 316 regardless of whether the actual terms of the affected license are changed,[13] how the agency characterizes its action,[14] or who requests the alteration.[15] Courts have consistently held that "a license is 'modified' within the meaning of [Section 316] whenever the Commission permits additional interference on the licensee's channel."[16] Therefore, as the D.C. Circuit has held, a "claim, alleging that [an action by the FCC] may create objectionable interference, raises a legally cognizable issue under Section 316."[17]

Here, the WCS operators' proposal to reverse the Commission's 1997 OOBE protections[18] would cause significant additional interference to Sirius XM's satellite radio operations.[19] This increase in harmful interference formed the basis for the Commission's 1997

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[12] *See, e.g.*, *AMSC Subsidiary Corp. v. FCC*, 216 F.3d 1154, 1158-59 (D.C. Cir. 2000); *Western Broadcasting Co. v. FCC*, 674 F.2d 44, 49-55 (D.C. Cir. 1982) ("It has long been established that [§ 316] covers indirect . . . modifications, [which] include factual circumstances where it is alleged that a new grant may create objectionable electrical interference to an existing licensee and the existing licensee is protected by Commission policy or regulation from such interference."); *WBEN, Inc. v. United States*, 396 F.2d 601, 617-20 (2d Cir. 1968).

[13] *See AMSC Subsidiary Corp.*, 216 F.3d at 1158-59 ("Although the Commission did not, of course, literally change the terms of AMSC's license, we regard 'a license [as] modified for purposes of Section 316 when an unconditional right conferred by the license is substantially affected.'" (quoting *P&R Temmer v. FCC*, 743 F.2d 918, 927-28 (D.C. Cir. 1984)).

[14] *P&R Temmer*, 743 F.2d at 927 ("[A] court considering the applicability of Section 316 must look beyond the form of the license document and beyond the language employed by the FCC to describe its action.").

[15] *Community Television, Inc. v. FCC*, 216 F.3d 1133, 1140 (D.C. Cir. 2000) ("The Commission has power under Section 316(a) . . . to modify a license without an application for the modification having been made by the licensee" (citing *Peoples Broadcasting Co. v. United States*, 209 F.2d 286, 287 (D.C. Cir. 1953)).

[16] *WBEN, Inc.*, 396 F.2d at 619.

[17] *Western Broadcasting Co.*, 674 F.2d at 50.

[18] *See Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band; Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, WT Docket No. 07-293, IB Docket No. 95-91, GEN Docket No. 90-357, RM No. 8610, Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, FCC 07-215, at ¶ 24 (rel. Dec. 18, 2007) ("*WCS NPRM*").

[19] *See, e.g.*, Further Comments of Sirius XM Radio Inc. at 4-9, WT Docket No. 07-293 (filed Sept. 8, 2008).

OOBE limitations,[20] has been demonstrated by record evidence in this proceeding,[21] and has been acknowledged in this proceeding by WCS interests.[22] Adopting the WCS proposal would thus constitute a modification of Sirius XM's licenses within the meaning of Section 316. The procedural requirements of Section 316 therefore apply to any rule change pursuant to the WCS proposal. The Commission must comply with those requirements before any such rule change can take effect.

B. <u>The Commission Must Follow the Adjudicatory Procedures Outlined in Section 316 for Any Alteration of the Sirius XM License To Be Valid.</u>

Section 316 prescribes an adjudicatory procedure that must be followed whenever the FCC seeks to modify a license.[23] If the Commission seeks to do so in this instance, it must follow the procedures outlined in the statute;[24] it may not legally do so in a rulemaking proceeding.[25]

In Section 316, Congress imposed strict procedural protections with which the FCC must comply. Specifically, Section 316 states that no modification "shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall be given reasonable opportunity, of at least thirty days, to

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[20] *See WCS MO&O*, 12 FCC Rcd at 3978 (¶ 3); *WCS Report & Order*, 12 FCC Rcd at 10787 (¶ 3), 10854-55 (¶¶ 136, 138).

[21] *See, e.g., id.*

[22] *See* Comments of the WCS Coalition, at 15 & Attachment B at 6 (filed Feb. 14, 2008) (providing a probability assessment of interference to satellite radio, which asserts that "the OOBE from a WCS device operating with a 55+10 log (P) emissions mask in the SDARS band will have less than a 1 dB impact on the SDARS receiver noise floor"). Even if this were accurate—the actual impact on satellite radio will be much greater—the WCS Coalition concedes that, for at least 6% of the time, the proposed emissions mask *will* interfere with satellite radio transmissions.

[23] *See* 47 U.S.C. § 316(a)(1).

[24] *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1319 (D.C. Cir. 1995) ("Obviously, the FCC cannot, merely by invoking its rulemaking authority, avoid the adjudicatory procedures required for granting and modifying *individual* licenses.").

[25] *Id.* This rule is not inconsistent with the general principle in *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202-04 (1956), that a hearing requirement does not withdraw the Commission's "rulemaking authority necessary for the orderly conduct of its business." The proposal here affects the rights of a single licensee, not a class of licensees. And the affected licenses were duly acquired at auction, creating a contractual relationship, *see infra* Part III.C.

protest such proposed order of modification."[26] Courts have readily overturned attempts by the agency to effect modifications without following the prescribed procedures.[27]

Although the Commission may engage in rulemaking proceedings to promulgate rules of general applicability that affect a class of licensees,[28] courts have made clear that when an individual licensee's interests are at stake, only a Section 316 adjudication will suffice.[29] For example, in *California Citizens Band Ass'n v. United States*, the Ninth Circuit held that Section 316's "primary function is to protect the individual licensee from a modification order of the Commission and is concerned with the conduct and other facts peculiar to an individual licensee."[30] Thus, the rulemaking proceeding in that case did not violate Section 316's requirements because it involved "the promulgation of standards of general applicability" to an entire class of licensees.[31] The Second Circuit has explained further that although rulemaking may be appropriate where "a new policy is based upon the general characteristics of an industry," adjudicatory proceedings "serve an important function when the agency bases its decision on the peculiar situation of individual parties who know more than anyone else."[32]

The FCC has made this same distinction in recent decisions promulgating general rules that affect classes of licensees. For example, when the Commission declined to grant Globalstar's request for a hearing under Section 316 in affirming its *Big LEO Spectrum Sharing Order*, the agency explained that the proceeding was "general in nature" and that "Globalstar never had a right of exclusive access to the spectrum."[33] Although the Commission has asserted

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[26] 47 U.S.C. § 316(a).

[27] *See, e.g.*, *Western Broadcasting Co.*, 674 F.2d at 49-55; *FCC v. National Broadcasting Co.*, 319 U.S. at 240-46.

[28] *See, e.g.*, *California Citizens Band Ass'n v. United States*, 375 F.2d 43, 50-52 (9th Cir. 1967).

[29] *E.g.*, *Committee for Effective Cellular Rules*, 53 F.3d at 1319 ("Obviously, the FCC cannot, merely by invoking its rulemaking authority, avoid the adjudicatory procedures required for granting and modifying *individual* licenses.").

[30] 375 F.2d at 52.

[31] *Id.* at 50-52; *see also Washington Utils. & Transport. Comm'n v. FCC*, 513 F.2d 1142, 1160 (9th Cir. 1975) (holding that the Commission properly used a rulemaking proceeding instead of a procedure under Section 316 where the issue met the following standards: "It affected large numbers of individual situations, it involved determination of a general policy applicable equally to all in the affected class, case-by-case adjudication would require repetitious determination of precisely the same issue, it concerned future events, and it required a broad judgment, legislative in nature, rather than resolution of a particular dispute of fact.")

[32] *WBEN, Inc.*, 396 F.2d at 618.

[33] *Spectrum and Service Rules for Ancillary Terrestrial Components in the 1.6/2.4 GHz Big LEO Bands; Review of the Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems in the 1.6/2.4 GHz Bands*, IB Docket No. 07-253, RM-11339,

that rulemaking proceedings may be adequate in such situations "even if the Commission action will affect a relatively narrow universe of licenses,"[34] the key term in its statement is "universe of licenses." In other words, even the FCC has not argued that a modification of an individual licensee's spectrum rights can avoid Section 316 requirements for an adjudicatory procedure.[35]

The adjudicatory process is well-suited for determining the specific rights put at issue in this proceeding by the WCS proposal. Given the complexity of the technical interference issues involved, a full adjudicatory hearing would give the Commission the best opportunity to come to a reasoned and sound decision.[36] As the D.C. Circuit has stated, "this case highlights rather well the reasons why a hearing should [be] held: the contesting parties have relied on factual assertions that are flatly contradictory; there are difficult and confusing technical issues to be resolved; [and] there is a serious dispute over the proper methodology to be used in measuring

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IB Docket No. 02-364, Second Order on Reconsideration, Second Report and Order, and Notice of Proposed Rulemaking, 22 FCC Rcd 19733, 19743-44 (¶¶ 21-25) (rel. Nov. 9, 2007).

[34] *Amendment of the Commission's Rules Regarding Maritime Automatic Identification Systems; Petition for Rule Making Filed by National Telecommunications and Information Administration; Emergency Petition for Declaratory Ruling Filed by MariTEL; Amendment of the Commission's Rules Concerning Maritime Communications*, WT Docket No. 04-344, RM-10821, PR Docket No. 92-257, Report and Order and Further Notice of Proposed Rule Making and Fourth Memorandum Opinion and Order, 21 FCC Rcd 8892, 8920-23 (¶¶ 40-43) (rel. July 24, 2006) ("*MariTEL Order*").

[35] In the *MariTEL Order*, *supra*, the Commission cited only to *Transcontinent Television Corp. v. FCC*, 308 F.2d 339, 342-44 (D.C. Cir. 1962), for the assertion that "courts have ruled that the Section 316 hearing requirement can be met in a notice-and-comment rulemaking proceeding." However the court in *Transcontinent Television* held that Section 316 did not apply in that case because the challenged action (deletion of a channel at the end of a license term) did not constitute a "modification" under Section 316. In fact, the Second Circuit later expounded on the case, explaining that "[a]s the issue involved a *particular* situation [i.e. 'whether *one* VHF television station . . . should be deprived of its channel'] the Court, in dicta, properly stated that the rulemaking proceeding would not have been sufficient if [the channel's] present license had been modified." *WBEN, Inc.*, 396 F.2d at 619 (emphasis added).

[36] Such a hearing would also allow the Commission to address additional relevant issues not fully considered in the present proceeding. For example, Sirius XM notes that the proposal, which facilitates mobile *WCS* devices, also would effectively limit development of handheld *satellite radio* devices. Throughout this phase of these proceedings, Sirius XM has based its analysis of the compatibility of mobile WCS devices and Sirius XM receivers on vehicular uses. In other words, Sirius XM has performed analyses that assess the impact on satellite radio reception when the interfering WCS device is 3 meters away from the victim satellite radio receiver. This scenario is far from worst-case however, as it ignores the likelihood that hand-held satellite radio receivers would come within 1 or 2 meters of an interfering WCS mobile transmitter. Mobile WCS transmitters will thus have a far greater impact on portable, non-vehicular satellite radio receivers, including in-home units. In short, Sirius XM would be restricted from the full use of its assigned spectrum.

interference."[37] If the Commission decides to consider the WCS proposal further, it must comply with Section 316's procedural requirements.

II. Adoption of the WCS Proposal Would Violate the APA.

Under the APA, a reviewing court must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[38] Adoption of the WCS Coalition's proposal to relax the OOBE limits would run afoul of the APA for several independent reasons. First, the proposal to modify the OOBE limits would fail APA review because it would be a dramatic and unexplained departure from previous FCC policy that strict OOBE limitations, which would preclude mobile operations in the WCS band, are necessary to "protect prospective [satellite radio] licensees from interference from WCS operations" and to "ensure the viability" of satellite radio.[39] Second, the record of this proceeding contains no evidence that warrants relaxation of the OOBE rules because WCS interests have yet to provide the Commission with any verifiable and replicable testing data to demonstrate that mobile WCS operations will not cause harmful interference to satellite radio.[40] Third, it would be arbitrary and capricious for the Commission to adopt any relaxation of the OOBE limits without considering the reasonable alternatives proposed by Sirius XM to allow WCS licensees to make better use of their spectrum while, at the same time, protecting satellite radio licensees from the harmful interference that will result under the present proposal.[41] The Commission simply cannot adopt the proposed relaxation of the OOBE limits without violating the APA.

III. Adoption of the WCS Proposal Would Violate Statutory, Constitutional, and Contractual Rights.

If the WCS proposal is adopted, the resulting interference caused by mobile WCS operations will effectively remove the ability of Sirius XM to fully utilize its licensed spectrum in violation of Sirius XM's statutory, constitutional, and existing contract rights.

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37 *Western Broadcasting Co.*, 674 F.2d at 52.

38 5 U.S.C. § 706(2)(A).

39 *WCS Report and Order*, 12 FCC Rcd at 10787 (¶ 3).

40 *See, e.g., Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency.").

41 *See, e.g., Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 761 (6th Cir. 1995) ("The FCC is required to give an explanation when it declines to adopt less restrictive measures in promulgating its rules."); *see also* Comments of Sirius Satellite Radio Inc. at 25-35, WT Docket No. 07-293 (filed Feb. 14, 2008); Comments of XM Radio Inc. at 34-35, WT Docket No. 07-293 (filed Feb. 14, 2008).

A. **Adoption of the WCS Proposal Would Effectuate an Impermissible Retroactive Change to Satellite Radio Licenses.**

The WCS proposal to reverse the OOBE limits would effect an impermissibly retroactive change to Sirius XM's existing satellite radio licenses. The Commission simply "cannot, in fairness, radically change the terms of an auction after the fact."[42] But this is precisely what the Commission would be doing if it were to reverse the OOBE limits in the manner proposed.

The APA limits "rules" to agency prescriptions of "future effect"[43] and prohibits retroactive rules.[44] An agency rule may be unlawfully retroactive in two respects: it may be "primarily retroactive" or "secondarily retroactive."[45] Primarily retroactive rulemaking is per se invalid. As the Supreme Court has noted, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."[46] Secondary retroactivity "occurs if an agency's rule affects a regulated entity's investment made in reliance on the regulatory status quo before the rule's promulgation."[47] "Retroactivity of this sort makes worthless substantial past investment incurred in reliance upon the prior rule."[48] The

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[42] *U.S. AirWaves, Inc. v. FCC*, 232 F.3d 227, 235 (D.C. Cir. 2000).

[43] 5 U.S.C. § 551(4).

[44] *See, e.g.*, *DIRECTV v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997) (holding that "primarily retroactive" rules are per se unlawful under the APA); *Chadmoore Commc'ns, Inc. v. FCC*, 113 F.3d 235, 240 (D.C. Cir. 1997) ("[A] legislative rule may only be applied prospectively."); *see also Bowen v. Georgetown Univ. Hosp.*, 448 U.S. 204, 216 (1988) (Scalia, J., concurring) (stating that the APA "does not permit retroactive application" of agency rules).

[45] *See, e.g.*, *DIRECTV*, 110 F.3d at 825-26; *see also, e.g.*, *Bergerco Canada v. U.S. Treasury Dep't*, 129 F.3d 189, 192 (D.C. Cir. 1997) ("[T]here are two retroactivity limits in the APA: The first is a categorical limit, requiring express congressional authority and applying only in the domain of agency rules. The second limit is more elastic, governing all agency decisionmaking and involving the sort of balancing of competing values, both legal and economic, that often features in 'arbitrary or capricious' analysis and that has historically governed retroactivity considerations in the agency context.").

[46] *Bowen*, 448 U.S. at 265 (citation omitted); *see also Bergerco*, 129 F.3d at 193 ("retroactivity law is concerned with the protection of reasonable reliance."); *Brimstone R. & Canal Co. v. United States*, 276 U.S. 104, 122 (1928) ("The power to require readjustments for the past is drastic").

[47] *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006). "This sort of retroactivity—characteristic of a rule having exclusively 'future effect' but affecting the desirability of past transactions—has become known as 'secondary retroactivity.' *Celtronix*, 272 F.3d at 589 (citing *Bowen*, 488 U.S. at 219-20 (Scalia, J., concurring)).

[48] *Bergerco*, 129 F.3d at 192-93 (quotation marks omitted).

Commission must clear a substantial hurdle when it attempts to adopt secondarily retroactive rules.[49]

The proposed OOBE limits, by creating harmful interference to satellite radio service, would effectively alter the bounds of Sirius XM's licenses in violation of the APA. Bidders for satellite radio licenses relied on the reasonable expectation that they would receive what they bid on—spectrum suitable for the provision of wireless services in the *entirety* of the band. Moreover, bidders relied on the Commission's rules protecting satellite radio spectrum from interference from mobile WCS operations. Thus, the WCS proposal to increase interference to satellite radio would "'impair rights [the] party possessed when . . . [it] acted,'"[50] and "'alter the past legal consequences of past actions.'"[51] This squarely fits within the definition of retroactive rulemaking.[52]

B. <u>Adoption of the WCS Proposal Would Likely Result in a Fifth Amendment Taking Without Compensation.</u>

The interference resulting from the WCS proposal to relax OOBE also likely constitutes a taking in violation of the Fifth Amendment.[53] Government regulation that burdens property in a manner that, among other things, unfairly interferes with the owner's "investment-backed expectations" constitutes a regulatory taking.[54] The Supreme Court's regulatory takings inquiry focuses on the character of the government action, the economic impact of the government action, and reasonable investment-backed expectations.[55]

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[49] *See, e.g. U.S. AirWaves*, 232 F.3d at 235; *Celtronix*, 272 F.3d at 589-90.

[50] *DIRECTV*, 110 F.3d at 825 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)).

[51] *Mobile Relay*, 457 F.3d at 11 (quoting *Bowen*, 488 U.S. at 219 (Scalia, J., concurring)); *accord Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 586 (D.C. Cir. 2001); *Bergerco*, 129 F.3d at 193; *Chadmoore*, 113 F.3d at 241.

[52] *See, e.g.*, *Celtronix*, 272 F.3d at 590 (determining that, in the context of a spectrum auction, a retroactive rule change was not arbitrary and capricious because bidders would not have altered their bidding strategy in light of the newly imposed rules).

[53] The FCC's proposal to modify the OOBE limits may also constitute a "per se" taking in violation of the Fifth Amendment. A "per se" taking results in a "permanent physical occupation" or denies the owner of all economically beneficial use of property. *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 426 (1982). The interference resulting from WCS wireless mobile service could becomes so severe as to constitute a "per se" taking if the interference renders adjacent satellite radio spectrum useless.

[54] *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

[55] *Id.*

First, as Sirius XM has repeatedly shown in this proceeding, the WCS proposal will cause additional harmful interference to satellite radio services operating in adjacent spectrum. WCS interests have been unable to show the absence of interference and, in fact, have acknowledged that additional interference will occur. Moreover, the Commission's current OOBE restrictions are based on the FCC's determination in 1997 that mobile WCS operations will cause harmful interference to satellite radio.

Second, the economic impact on Sirius XM may be substantial. Sirius XM paid more than $178 million for satellite radio licenses.[56] In addition, Sirius XM has invested billions of dollars in establishing a nationwide radio network.[57] If the Commission adopts the WCS proposal, the resulting interference will diminish these investments.

Third, this impact would disrupt Sirius XM's reasonable, investment-backed expectations. Sirius XM paid millions of dollars at auction with the expectation that its satellite radio licenses would be free from harmful interference from WCS. If the FCC adopts the WCS proposal, the resulting interference will frustrate those expectations and interfere with the licensees' substantial investments in the provision of satellite radio.

Accordingly, the Commission's proposal to relax the OOBE limits, which will result in harmful interference that significantly disrupts Sirius XM's economic investments, would likely constitute a taking in violation of the Fifth Amendment.

C. Adoption of the WCS Proposal Would Violate Sirius XM's Existing Contractual Relationship with the FCC for Satellite Radio Licenses.

To the extent the plan adopted allows harmful interference to satellite radio licensees, the Commission will violate the contractual relationship established when it granted the satellite radio licenses to Sirius and XM. As both the FCC and the courts have made clear, an agency spectrum auction makes the government a party to a contract, with all the obligations that entails. That contractual relationship includes an implied covenant of good faith and fair dealing, which the Commission would breach by adopting rules in this proceeding that impair the value of Sirius XM's licenses and impede its ability to use the licensed spectrum to provide satellite radio services to its customers.

Spectrum auctions, no less than other types of auctions, create binding contracts between the Government and the winning bidder.[58] Indeed, a spectrum auction creates "a binding mutual

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[56] *Notice*, 22 FCC Rcd at 22125 n.15 (¶ 7).

[57] *Sirius-XM Merger Order*, 23 FCC Rcd 12348 (¶ 50 n.162).

[58] *In re NextWave Personal Commc'ns, Inc.*, 200 F.3d 43, 60 (2d Cir. 1999) ("the close of the auction – traditionally the drop of the hammer – signals acceptance of an offer and forms an enforceable contract").

obligation between the Commission and the winning bidder as of the close of the auction."[59] "The announcement of the winning bidder in an auction conducted by the Commission [is] like the acceptance of high bids in auctions in other settings,"[60] and "federal government auctions are viewed under the same rules pertaining to the formation of contracts generally."[61] The Commission has further stated that its licenses create "spectrum usage rights" that are "defined within the terms, conditions, and period of the license at the *time of issuance*."[62] Indeed, Commission policy strongly disfavors interference with existing licenses.[63] Licensees "must have certain rights and responsibilities that define and ensure their economic interests," among these "the right to be protected from interference to the extent provided in the Commission's rules."[64] In the *NextWave* case, the Second Circuit accepted the Commission's argument that a spectrum auction results in an enforceable contract.[65] Consistent with these precedents, the

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[59] *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, Second Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 6571, 6581 n.66 (¶ 17) (1999).

[60] *BDPCS, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 17590, 17599-17600 (¶ 16) (2000).

[61] *Id.* at 17599-17600 n.63 (¶ 16) (quoting *Commodities Recovery Corp. v. United States*, 34 Fed. Cl. 282, 289 (1995)).

[62] *Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, 15 FCC Rcd 24178, 24187 (¶ 22) (2000) ("*Spectrum Policy Statement*") (emphasis added).

[63] *See, e.g.*, *In the Matter of Township of Cinnaminson, New Jersey*, Order, 22 FCC Rcd 4583 (2007) (considering possible interference with spectrum users as a factor when denying license application and related waiver request); *In the Matter of City of Richmond, Virginia*, Order, 21 FCC Rcd 14,384 (2006) (same); *Advanced Wireless Spectrum (AWS-1 Auction)*, Small Entity Compliance Guide, 21 FCC Rcd 9098, 9102 (2006) (explaining that the Commission requires that licenses not interfere with incumbent licenses); *Office of Engineering and Technology Seeks Additional Comment on Petitions for Reconsideration for Unlicensed National Information Infrastructure Devices*, Public Notice, 21 FCC Rcd 4339, 4340 (describing Commission's efforts to minimize interference with existing radiofrequency operations).

[64] *Spectrum Policy Statement*, 15 FCC Rcd at 24186 (¶ 20).

[65] *NextWave*, 200 F.3d at 61-62 (noting that "the obligations NextWave seeks to avoid arose no later than the announcement of the winning bid, . . . [t]he FCC was bound, and so was NextWave"). Moreover, courts in *United States v.* Winstar, 518 U.S. 839 (1996), and *Centex Corp. v. United States*, 395 F.3d 1283 (Fed. Cir. 2005), emphasized that the duty of good faith and fair dealing protects against meddling with the reasonable expectations of a party regarding the fruits of a contract, particularly if the other party contributed to those expectations. *See Winstar*, 518 U.S. at 855 (stating that it was "not obvious that regulators would accept purchase accounting in determining compliance with regulatory criteria, and it was clearly prudent to get agreement on the matter"); *Centex*, 395 F.3d at 1288 (noting that the request for bids and the agreement between the S&Ls and the FSLIB indicated that the FSLIB understood and contributed to the S&Ls expectation that they would be able to take advantage of certain tax benefits and that the expectation "was not unilateral"). This includes expectations with respect to both a licensee's current and future use of the spectrum.

satellite radio auction generated binding contracts between the Commission and the winning bidders.

For the FCC to allow harmful interference to reduce the value of the licenses acquired by Sirius XM would result in a breach of the contract established at auction. As noted above, Sirius XM paid millions of dollars for the right to use satellite radio spectrum based on auction terms that promised bidders that the spectrum could be used for satellite radio service and free from interference.[66] This promise was reinforced by the Commission's imposition of strict OOBE limits for adjacent WCS licensees—specifically in order to protect satellite radio from interference. However, adoption of the WCS proposal would subject the satellite radio spectrum to harmful interference and therefore render it far less usable for satellite radio services. This would necessarily result in a breach of the FCC's contract with Sirius XM.

IV. A Rule Change Accommodating Mobile Services in the WCS Band Would Require a Reauction of that Spectrum.

The WCS operators' proposal to allow widespread mobile services in their band would bestow on them fundamentally greater rights than they now hold, triggering a necessary reauction of the WCS spectrum. As noted above, when the Commission allocated WCS spectrum, it imposed strict OOBE limits on WCS operations.[67] The Commission made clear that these limits most likely would "make mobile operations in the WCS spectrum technologically infeasible."[68] As a result, the auction of that spectrum yielded less than $14 million for the U.S. Treasury—with some of the licenses selling for only $1 each.[69] Since then, WCS licensees have provided only fixed services and largely have not built out at all.[70]

WCS interests now seek a government-sponsored windfall. By adding the ability to deploy mobile devices, at the expense of satellite radio services, they seek to transform their licenses into something vastly more valuable. The net effect of this proposal would be to

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66 *WCS Report and Order*, 12 FCC Rcd at 10787 (¶¶ 3, 25); *see also WCS MO&O*, 12 FCC Rcd at 3978, 3992 (¶¶ 3, 25).

67 *See WCS Report and Order*, 12 FCC Rcd at 10787, 10848-57 (¶¶ 3, 123-144) (requiring that all out-of-band emissions from WCS mobile transmitters be attenuated below p by at least 110+10 log (p) dBW within the SDARS band).

68 *Id.* at 10787 (¶ 3); *WCS MO&O*, 12 FCC Rcd at 3978 (¶ 3)..

69 *See, e.g.*, Press Release, *WCS Auction Closes, Winning Bidders in the Auction of 128 Wireless Communications Service Licenses*, Public Notice, 12 FCC Rcd 21653 (1997) (noting that Auction 14, the WCS auction, "rais[ed] a net total of $13,638,940 for the U.S. Treasury").

70 *See, e.g.*, *Consolidated Request for the WCS Coalition for Limited Waiver of Construction Deadline for 132 WCS Licenses*, Order, 21 FCC Rcd 14134, 14139-40 (¶¶ 10-12) (WTB 2006);

dramatically increase the market value of WCS licenses.[71] A rule change this significant requires a reauction of the spectrum because it otherwise "would provide [WCS licensees] with a substantial windfall."[72]

Reauctions in such circumstances are hardly unknown. For instance, when the Commission revised its rules to allow broadband use of the 800 MHz commercial Air-Ground Radiotelephone Service band, it reauctioned the spectrum previously auctioned for narrowband use.[73] The FCC explained that reauction was necessary where the modification otherwise "would confer fundamentally greater rights . . . than is available to [the incumbent licensee] under its existing license and the current . . . rules."[74] The Commission concluded that, in this type of situation, "permitting competing applications for licenses . . . would better serve the public interest."[75]

Likewise here, a rule modification to accommodate mobile services in the WCS band would be "so different in kind" and "so large in scope and scale as to warrant competitive bidding."[76] Without question, the proposed rule modification would significantly increase the commercial value of the spectrum, likely an order of magnitude above the proceeds of the original auction. Moreover, in giving WCS operators "a substantial windfall," the FCC would at

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[71] For instance, if a rule change permits WCS mobile operations, the impending sale of WCS spectrum by NextWave would produce far greater proceeds than it would under the current rules.

[72] *E.g.*, *Amendment of Part 22 of the Commission's Rules To Benefit the Consumers of Air-Ground Telecommunications Services*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4402, 4438 (¶ 74) (2005) ("*Airfone Report and Order*"). To highlight the potential windfall to WCS licensees, one could use the spectrum valuations derived in the 2006 auctions for AWS-1 licenses. In that auction, licenses for 90 MHz of spectrum raised approximately 13.7billion in net bids thus establishing a $0.51 MHz/POP value for that spectrum. Applying that value to the 30 MHz of WCS spectrum yields a nationwide spectrum value of approximately $4.6 billion. Again, initial auctions for WCS licenses raised less than $14 million in net bids.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 1962, 2070 (¶ 225) (2003). When the Commission allowed MSS providers to integrate ancillary terrestrial components (ATCs) into their networks, the Commission stressed that it ultimately deemed reauction for ATC use unnecessary because "MSS operators [would] not be allowed to use ATC authority for more than *ancillary* service." *Id.* at 2070 (¶ 224) (emphasis added). Specifically, the Commission imposed "stringent requirements . . . to ensure that any terrestrial components [would be] ancillary to the principal MSS authority . . . previously granted," and concluded that the modification would not require reauction "given the strict limitations we are placing on ATC authority." *Id.* at 2070-71 (¶¶ 225-226).

the same time deny the U.S. public the fair proceeds reflecting the true value of the spectrum under the modified rules.[77] Doing so would also deny other potential mobile services providers a fair opportunity to bid on valuable spectrum on an equal basis with the incumbent licensees. If the Commission, therefore, decides to accommodate mobile services in the band, the spectrum must be reauctioned to "better serve the public interest."[78]

V. Conclusion

For the foregoing reasons, Sirius XM urges the Commission to reject the WCS proposal to overrule the OOBE limits adopted by the FCC in 1997 in order to allow for mobile services in the WCS band.

Respectfully submitted,

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cc: The Honorable Kevin J. Martin
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The Honorable Jonathan S. Adelstein
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[77] *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, 2349, 2355 (¶¶ 1, 37-40) (1994) (stating that "competitive bidding will promote the objectives described in Section 309(j)(3) [of the Communications Act], . . . [including] recovery for the public of a portion of the value of the public spectrum made available for commercial use and avoidance of unjust enrichment").

[78] *Airfone Report and Order*, 20 FCC Rcd at 4438 (¶ 74).