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WRITTEN EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band - WT Docket No. 07-293; Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band - IB Docket No. 95-91, GEN Docket No. 90-357, RM-8610

Dear Ms. Dortch:

On December 11, 2008, NextWave Wireless Inc. ("NextWave") filed an *ex parte* notice in the above-captioned proceeding encouraging the Commission to quickly modify the WCS rules to reduce the interference protections for satellite radio, claiming "[f]urther delay in adopting appropriate rules may jeopardize WCS wireless broadband equipment development, network design, and service deployment and contribute to the need for another extension of the WCS substantial service deadline."¹

Sirius XM Radio, Inc. ("Sirius XM") urges the Commission to dismiss this self-serving assertion, which ignores the need for caution before modifying rules that would significantly impact the ability of satellite radio subscribers to continue receiving service free from harmful interference. The Commission should instead use this opportunity to remind NextWave and all similarly situated WCS licensees of their obligation to put their spectrum to use and to finally construct facilities that serve the public – eleven years of

¹ Letter from Jennifer M. McCarthy, Vice President, Regulatory Affairs, NextWave Wireless Inc. to Marlene H. Dortch, Secretary, FCC (filed Dec. 11, 2008).

warehousing spectrum is enough. Any suggestion that the Commission's deliberations in this proceeding are responsible for the failure of WCS licensees to construct facilities is disingenuous and inconsistent with reality. It also ignores previous statements made by WCS licensees to the Commission, disregards the Commission's previous findings, and discounts the existence of technology that would enable WCS licensees to meet their existing buildout requirements.

NextWave has made no secret that it does not intend to deploy facilities or provide *any* WCS service. All of NextWave's U.S. spectrum assets are very publicly available for sale,² and, as a spectrum arbitrager, NextWave's interest in this proceeding is only to use the regulatory process to maximize the value of its assets for that sale. The Commission should not condone NextWave's misusing the regulatory process to increase the market value of its WCS licenses, under the guise of allowing new services that NextWave itself has no interest in providing.

NextWave's latest filing is also inconsistent with statements previously made by WCS licensees themselves. In 2006, when WCS licensees first asked the Commission to extend their initial construction period, they assured the Commission that changes to the WCS technical rules were *not* necessary for them to meet extended buildout requirements, which is precisely the opposite of what NextWave now claims. Specifically, in support of its request for a previous extension of the substantial service construction deadline, the WCS Coalition said:

“[T]he WCS Coalition has *not* suggested that relief from the restrictive WCS spectral mask is necessary to permit deployments to move forward in accordance with their proposed extended construction schedule, making the WCS spectral mask issue of no relevance here.”³

² See e.g., NextWave Wireless Retains Deutsche Bank and UBS to Explore the Sale of Its Wireless Spectrum Holdings in the U.S., Press Release, at <http://media.nextwave.com/phoenix.zhtml?c=215860&p=irol-newsArticle&ID=1134249> (Apr. 23, 2008); NextWave Wireless to Sell a Portion of Its AWS Spectrum for \$150 Million, Press Release, at <http://media.nextwave.com/phoenix.zhtml?c=215860&p=irol-newsArticle&ID=1178717> (July 24, 2008).

³ See Reply Comments of the WCS Coalition, WT Dkt. No. 06-102, 12 (filed June 23, 2006)(emphasis in original).

The WCS Coalition – of which NextWave is a member – again stressed this point in 2007, when it first proposed rule changes to facilitate wide-area mobile services in the WCS band:

“[R]elief from the restrictive OOB limits currently imposed on WCS is not essential for licensees to meet their revised deadline for providing substantial service.”⁴

The Commission ultimately extended the buildout requirements as the WCS Coalition requested, but expressly refused to grant an open-ended extension until the satellite radio rulemaking was finished, stating:

“[W]e reject the WCS Coalition’s argument that the timing of relief should be based on the resolution of the pending SDARS rulemaking proceeding. We believe a lack of certainty regarding the construction deadline could act as a disincentive for WCS licensees to expeditiously develop technological solutions for the band and construct systems. This would undermine one of the purposes of the construction requirement – to prevent spectrum warehousing.”⁵

The Commission went on to confirm that WCS licensees must meet their construction deadlines regardless of any rule changes, because “WCS operating rules are established.”⁶ The Commission should hold the WCS licensees to their earlier commitment, and to the Commission’s own conclusion quoted above, requiring WCS licensees to construct their stations with or without the proposed rule changes they seek in this proceeding.

⁴ Letter from Paul J. Sinderbrand, Counsel to the WCS Coalition to Marlene H. Dortch, Secretary, Federal Communications Commission, IB Docket No. 95-91, (filed July 9, 2007).

⁵ *Consolidated Request of the WCS Coalition for Limited Waiver of Construction Deadline for 132 WCS Licenses*, Order, 21 FCC Rcd 14134, ¶ 14 (WTB 2006), citing 47 U.S.C. §§ 309(j)(3), 309(j)(4)(b) and *WCS Report and Order*, 12 FCC Rcd at 10848 ¶114.

⁶ *Id.*

Nothing prevents NextWave from meeting its construction obligations and providing service under the existing WCS technical rules. Other WCS licensees – including Horizon Wi-Com and Comcast – have already done so.⁷ AT&T is currently using its WCS licenses to offer fixed wireless broadband Internet access in eight markets in the United States, using WiMax technology.⁸

There is also demand for other services that WCS licensees could deploy under the current rules. For example, Commissioners and the wireless industry have recently recognized the need for additional spectrum to provide backhaul services for their wireless networks, particularly in rural areas.⁹ The WCS spectrum is well-suited for such point-to-point and point-to-multipoint fixed use under the existing rules, and this deployment would meet the licensees' substantial service requirements while providing

⁷ Comcast and Horizon Wi-Com have both filed substantial service showings for several markets. *See e.g.* ULS Application No. 0003107370 (construction notification filed by Comcast WCS ME16, Inc.); ULS Application No. 0003014435 (construction notification filed by Horizon Wi-Com LLC). *See* “WiMax Networks Go Live in Nine Northeast Cities,” *Information Week* (Jun. 13, 2007), *at* <http://www.informationweek.com/story/showArticle.jhtml?articleID=199903928> (last visited December 18, 2008).

⁸ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Twelfth Report, 23 FCC Rcd 2241 ¶ 26 (2008) (noting that AT&T is using its WCS spectrum to provide service in eight U.S. markets). *See* Press Release, AT&T Announces Availability of Fixed Wireless High Speed Internet Access in Pahrump (Nov. 16, 2006), *available at* <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=23161> (last visited December 18, 2008).

⁹ *See* Separate Statement of Commissioner Robert M. McDowell, ET Dkt. Nos. 04-186 and 02-380 (issued Nov. 4, 2008) (praising the Commission for opening “a notice of inquiry to commence an examination of possible other limited uses of [TV] white spaces, such as point-to-point backhaul in rural areas as a substitute for special access”); Statement of Commissioner Deborah Taylor Tate, ET Dkt. Nos. 04-186 and 02-380 (issued Nov. 4, 2008) (expressing disappointment “that [the TV white spaces order] does not take more specific steps to address higher-power fixed operations in rural areas, which could have been used to provide much needed backhaul, a key component of broadband service in rural communities.”); Letter from Joseph M. Sandri, Senior Vice President, FiberTower Corp, et al. to Marlene H. Dortch, Secretary, FCC, Dkt. Nos. 04-186 and 02-380, at 4 (filed Sept. 15, 2008) (letter from FiberTower Corp., Rural Telecommunications Group, Inc., Sprint Nextel Corp., and CompTel noting the “critical need for low-cost wireless backhaul in rural America”); Letter from Lawrence R. Krevor, Vice President, Government Affairs-Spectrum, Sprint Nextel Corp., and Thomas Sugrue, Vice President, Government Affairs, T-Mobile USA, Inc. to Marlene H. Dortch, Secretary, FCC, Dkt. Nos. 04-186 and 02-380, at 2 (filed Jan. 3, 2008) (encouraging the Commission to adopt rules for fixed backhaul services in the TV white space).

much-needed capacity. Instead of complaining that the current rules are a hindrance to construction, NextWave and other licensees should be seeking ways to use their WCS spectrum in a manner consistent with their fundamental responsibilities as FCC licensees.

As other WCS licensees have demonstrated, NextWave can construct its system in compliance with its license and the Commission's current rules. The WCS industry's effort to change established rules provides no basis for NextWave or any WCS licensee to avoid responsibility for their failure to build out facilities over the last 11 years, especially in light of the Commission's warning only two years ago that basing the WCS construction deadline on completing this rulemaking "could act as a disincentive for WCS licensees to expeditiously develop technological solutions for the band and construct systems."¹⁰ For these reasons, the Commission should disregard NextWave's plea for regulatory relief in order to satisfy the service requirements in its WCS licenses.

Sincerely,

/s/ James S. Blitz

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¹⁰ See Note 4, *supra*.