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December 23, 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") hereby submits this ex parte response to a letter submitted on behalf of the WCS Coalition,[1] replying to Sirius XM's further comments[2] regarding certain legal issues relating to the WCS proposal to reduce out-of-band emissions ("OOBE") limitations. In that letter, the WCS Coalition attempts to counter Sirius XM's showing that adopting the proposal to reduce limitations on out-of-band emissions ("OOBE") would effect an illegal modification of Sirius XM's licenses. None of the WCS Coalition's arguments withstands scrutiny.

First, the WCS Coalition wrests the caselaw to argue that its proposal would not modify Sirius XM's licenses within the meaning of Section 316 of the Communications Act.[3] Specifically, WCS mischaracterizes and misapplies the D.C. Circuit's decision in *AMSC Subsidiary Corp. v. FCC*.[4] There, the court held that a license for mobile satellite services was not modified by an FCC order permitting earth stations to use a foreign satellite on a non-

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[1] Letter from Paul J. Sinderbrand, Counsel to the WCS Coalition, WT Docket No. 07-293, IB Docket No. 95-91 (filed Dec. 11, 2008) (the "WCS Ex Parte").

[2] Letter from James S. Blitz, Sirius XM Radio Inc., WT Docket No. 07-293, IB Docket No. 95-91 (filed Dec. 10, 2008) (the "Sirius XM Ex Parte").

[3] *See* 47 U.S.C. § 316 (2000).

[4] 216 F.3d 1154, 1158-60 (D.C. Cir. 2000).

interference basis in the same band. The court rejected AMSC's claim that the order modified its license by weakening its negotiating position in international coordination proceedings, where the license was "expressly conditioned upon the international coordination process" and where the FCC convincingly showed its order would not increase the likelihood of interference.[5] However, the FCC placed no analogous condition on Sirius XM's licenses; Sirius XM is not required by the terms of its licenses to coordinate mobile use with WCS licensees. Just the opposite is true: Sirius XM's licenses were granted by Commission decisions that clearly contemplated no mobile operations by WCS licensees.

Moreover, WCS tries to turn *AMSC* on its head by citing it for the proposition that an increased likelihood of interference is not a modification. What the court actually said is that no modification had taken place in *AMSC* because there was no increase in interference. Here, however, Sirius XM has demonstrated a significant increase in interference that would result from the proposed rule changes.[6] The Commission determined in 1997 that mobile operations in WCS would cause interference to satellite radio consumers.[7] WCS interests have admitted that mobile use would increase interference to satellite radio consumers and have even suggested the use of repeaters specifically to overcome that interference.[8] The holding in *AMSC* therefore supports the proposition that where, as here, a proposed use of spectrum would increase interference, the change would constitute a license modification.[9]

Second, the WCS Coalition argues that, even if its proposal would effect a modification, the FCC need not follow Section 316 procedures. The WCS Ex Parte repeats Sirius XM's citations to cases affirming an agency's ability to adopt rules of general applicability through rulemaking that affect a class of licensees, but that modifications affecting an individual licensee are subject to Section 316 procedural requirements.[10] Astonishingly, however, the WCS Coalition argues that the FCC can avoid the Section 316 procedural requirements when

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[5] *Id.* at 1159 (explaining that "AMSC's license does not guarantee success in [the international coordination] negotiations; it merely provides the opportunity to participate, which is unaffected by the Order").

[6] *See, e.g.*, Letter from James S. Blitz, Sirius XM Radio Inc., at 4-15 & Exhibits A, B (filed Sep. 8, 2008).

[7] *See 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 R&O*"); *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, Memorandum Opinion and Order, 12 FCC Rcd 3977, 3991 (¶¶ 25, 27) (1997) ("*WCS MO&O*").

[8] *See* Letter from Jennifer M. McCarthy, Vice President, Regulatory Affairs, NextWave Wireless Inc., at 3 (filed November 17, 2008).

[9] The WCS Coalition further mischaracterizes *AMSC* by quoting it out of context in claiming that "an increased likelihood of interference is too speculative to constitute a modification of its license cognizable under § 316." WCS Ex Parte at 2 (quoting *AMSC*, 216 F.3d at 1160). The quote in context states that "*in these circumstances AMSC's claim of* an increased likelihood of interference is too speculative . . . ." *AMSC*, 216 F.3d 1154, 1158-60. Those "circumstances" included the FCC's showing that there was no increased likelihood of interference. *See id.* at 1159.

[10] *See, e.g.*, *California Citizens Band Ass'n v. FCC*, 375 F.3d 43 (9th Cir. 1967).

modifying the rights of a single licensee, so long as the purpose of the modification relates to other entities or the individual licensee can be characterized as a single-member "class."

This argument would render Section 316 meaningless. Under the WCS Coalition's interpretation, the FCC could simply avoid Section 316 altogether by defining a "class" narrow enough to include only the target licensee. This is clearly not what Congress had in mind in enacting Section 316, and the Coalition's slippery interpretation to the contrary should therefore be rejected.

Third, the WCS Coalition disputes Sirius XM's argument that adopting the WCS proposal would violate the APA.[11] However, the WCS Coalition's bald assertion that the record supports its proposals does not make it so. Sirius XM has repeatedly demonstrated the infirmities in the Coalition's position.[12] While the WCS Ex Parte makes much of the fact that Sirius XM has stated "the record is sufficiently complete" to move forward in this proceeding,[13] each of the statements it cites confirms that the record is sufficiently complete to adopt *Sirius XM's* proposals,[14] not those of the WCS Coalition. The Coalition's argument that its proposal does not represent a dramatic, unexplained departure from previous FCC policy is pure fantasy. In fact, the Coalition's proposal represents a complete reversal of the Commission's technical decision in 1997 that mobile devices could not be allowed in the WCS band without harmful interference to satellite radio consumers. [15]

Finally, the WCS Ex Parte makes the laughable argument that if accommodating mobile WCS devices would violate the Fifth Amendment and auction-related rights of Sirius XM, then allowing terrestrial satellite radio repeaters would violate those same rights of WCS licensees. This argument is nonsensical because the Commission's initial decision establishing the satellite radio service and the rules to effectuate that decision *specifically anticipated the deployment of*

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[11] *See* 5 U.S.C. § 706(2)(A).

[12] *See* Comments of Sirius Satellite Radio Inc., at 20-22 & Exhibits A, C (filed Feb. 14, 2008); Comments of XM Radio Inc., at 29-32 & Exhibits A, C (filed Feb. 14, 2008); Reply Comments of Sirius Satellite Radio Inc., at 11-29 & Technical Appendix, Exhibits B-D (filed Mar. 17, 2008); Reply Comments of XM Radio Inc., at 16-25 & Technical Appendix, Exhibits B, C (filed Mar. 17, 2008); Letter from James S. Blitz, Sirius XM Radio Inc., at 4-15 & Exhibits A, B (filed Sep. 8, 2008); Letter from Robert L. Pettit, Counsel to Sirius XM Radio Inc. (filed Nov. 6, 2008); Letter from Terrence R. Smith and James S. Blitz, Sirius XM Radio Inc. (filed Nov. 13, 2008); Letter from Robert L. Pettit, Counsel to Sirius XM Radio Inc. (filed Dec. 2, 2008).

[13] *See* WCS Ex Parte at 3.

[14] *See* Letter from Patrick L. Donnelly and James S. Blitz, IB Docket No. 95-91, et al., Attachment at 24 (filed May 14, 2008); Letter from Patrick L. Donnelly and James S. Blitz, IB Docket No. 95-91, et al., Attachment at 24 (filed May 9, 2008); Letter from Patrick L. Donnelly and James S. Blitz, IB Docket No. 95-91, et al, Attachment at 24 (filed April 25, 2008).

[15] *See, e.g.*, *WCS MO&O*, 12 FCC Rcd at 3978 (¶ 3); *WCS R&O*, 12 FCC Rcd at 10787 (¶ 3).

terrestrial repeaters[16] while its decision initially establishing the WCS service *specifically anticipated that mobile WCS operations would not be feasible*.[17] Even the initial WCS auction winners – as well as each subsequent generation of WCS licensees – could not have had a reasonable expectation, let alone an enforceable right, that WCS facilities would ever be deployed with the absence of satellite radio terrestrial repeaters. By contrast, the initial WCS licensees were fully aware that the use of mobile transmitters in their band was technologically infeasible.

Sirius XM repeats that adopting the WCS proposal to relax OOBE limitations in this proceeding would illegally modify its licenses and would otherwise violate its contractual and statutory rights as explained in the December 10 Ex Parte. The WCS Coalition has failed to raise any arguments that effectively rebut Sirius XM's position.

Respectfully submitted,

/s/ James S. Blitz
James S. Blitz
Vice President, Regulatory Counsel
Sirius XM Radio, Inc.

cc: The Honorable Kevin J. Martin
The Honorable Michael J. Copps
The Honorable Jonathan S. Adelstein
The Honorable Robert M. McDowell
The Honorable Deborah Taylor Tate
Matthew Berry
Julius Knapp
Charles Mathias
Rick Chessen
Bruce Gottlieb
Renee Crittendon
Angela Giancarlo
Jim Schlichting
Helen Domenici
Joel Taubenblatt
Roger Noel
Thomas Derenge

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[16] *See 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, 5812 (¶ 142) (1997).

[17] *See WCS MO&O*, 12 FCC Rcd at 3978 (¶ 3); *WCS R&O*, 12 FCC Rcd at10787 (¶ 3).