

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of:	)	
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	)	
Federal Communications Commission	)	WT Docket No. 07-293
Requests Comment on Revision of	)	
Performance Requirements for 2.3 GHz	)	
Wireless Communications Services	)	
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	)	

**REPLY COMMENTS OF SIRIUS XM RADIO INC.**

Sirius XM Radio Inc. (“Sirius XM”) submits these replies to comments filed in response to the Commission’s Public Notice seeking input on the revision of performance requirements for the 2.3 GHz Wireless Communications Service (WCS) band.<sup>1</sup> Sirius XM herein responds to comments submitted by the WCS Coalition and WCS licensees expressing their reluctance to comply with the Commission’s performance requirements and build out the WCS band.

The comments submitted by the WCS Coalition perpetuate the myth that WCS licensees have been unable to meet the Commission-mandated performance requirements because of “regulatory uncertainty.”<sup>2</sup> As Sirius XM discussed in its initial comments, this claim is spurious. The regulatory uncertainty impacting both satellite radio and WCS exists solely because the WCS licensees have tried to change their own services’ rules to

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<sup>1</sup> Public Notice, *Federal Communications Commission Requests Comment on Revision of Performance Requirements for 2.3 GHz Wireless Communications Service*, FCC 10-46, WT Docket No. 07-293 (rel. March 29, 2010) (“WCS Performance Public Notice”).

<sup>2</sup> Comments of the WCS Coalition, WT Docket No. 07-293 (filed Apr. 21, 2010) (“WCS Coalition Comments”) at i, 1, 5-7, 10. To emphasize this point, the WCS Coalition Comments use the word “uncertainty” fifteen times.

fundamentally alter the nature of operations permitted over WCS spectrum. Having created their own regulatory uncertainty, WCS licensees have the temerity to rely on that uncertainty for their failure to provide service over their spectrum. To the extent they allege the “uncertainty” is due to the lack of final rules for Sirius XM’s terrestrial repeaters, the claim is absurd on its face because that network extends over a miniscule portion of the U.S. – serving approximately 1 percent of the continental land area – and operates on a secondary basis to WCS.<sup>3</sup> Under the current STA regime for operating terrestrial repeaters, any interference caused to WCS service would need to be immediately resolved in favor of WCS.

Sirius XM understands regulatory uncertainties. Operating under similar uncertainties and no formal repeater rules since its inception, Sirius XM has nonetheless spent more than \$10 billion to build out its spectrum, developing a thriving business serving millions of customers. Sirius XM continues to invest in its network and add subscribers even as the Commission considers the adoption of revised WCS service rules that would threaten its operations commercially.<sup>4</sup> By contrast, during the same time period, the WCS industry has built a handful of sites, has requested multiple extensions

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<sup>3</sup> XM Radio Inc., Application for Special Temporary Authority to Operate Satellite Digital Audio Radio Service Complementary Terrestrial Repeaters, Order and Authorization, 16 FCC Rcd 16781, 16786, ¶ 14 (2001) (requiring XM to immediately reduce power levels or if necessary cease operations of any repeater that causes interference to a WCS station upon written notification by a WCS licensee). With the likely adoption of Part 25 blanket licensing proposals as recommended by the FCC staff, satellite radio terrestrial repeaters will no longer operate pursuant to special temporary authorizations and will not be secondary to WCS operations. Commission Staff Requests that Interested Parties Supplement the Record on Draft Interference Rules for Wireless Communications Service and Satellite Digital Audio Radio Service, Public Notice, WT Docket No. 07-293, IB Docket No. 95-91, GEN Docket No. 90-357, RM No. 8610 (rel. Apr. 2, 2010) (“Staff Public Notice”).

<sup>4</sup> Staff Public Notice.

of buildout requirements, and now tells the Commission it will need four years to construct its system even after all regulatory uncertainty is removed.<sup>5</sup>

The claims of the WCS Coalition are further damaged by evidence in the record that some WCS licensees did construct in timely fashion.<sup>6</sup> Those WCS licensees who constructed were not subject to any less uncertainty than the WCS licensees who did not. In fact, if the WCS arguments were valid, Horizon Wi-Com would have been among the WCS licensees least likely to construct because Horizon's WCS licenses are in major markets such as Boston, New York and Philadelphia that are served by Sirius XM terrestrial repeaters. Sirius XM further notes that in the three years that Horizon has provided WCS service in these markets, Sirius XM has not received a single complaint of interference to WCS.

The other WCS licenses should have learned from the experience of those licensees who constructed and concluded that services permitted under the terms of the initial WCS licenses are fully compatible with satellite radio operations in the adjacent band, including services provided both by satellite and terrestrial means. But in reality,

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<sup>5</sup> See Comments of Horizon Wi-Com, LLC, WT Docket No. 07-293 at 2 (filed Apr. 21, 2010) ("Horizon Comments"); See e.g. ULS File No. 0003855241 (filed June 1, 2009), attached Request for Extension of Deadline for Establishing Compliance With Section 27.14 Substantial Service Requirement at 1 ("NW Spectrum Co. understands that other WCS licensees, including CELLUTEC., WaveTel NC License Corporation, and NTELOS, Inc. are filing similar requests at this time"); WCS Coalition Comments at i, 13 (requesting performance requirements providing at least four years before the interim benchmark is measured).

<sup>6</sup> Horizon Comments; Comments of Stratos Offshore Services Company, WT Docket No. 07-293 (filed Apr. 21, 2010) ("Stratos Comments"); Reply Comments of Green Flag Wireless, LLC, CWC License Holding, Inc. and James McCotter, WT Docket No. 07-293 at 2 (filed May 3, 2010) (stating AT&T has not sought an extension and is filing build-out notifications indicating it has constructed and is operating over a hundred point to point links in cities across the United States); Amy Schatz, *Satellite Radio Resists FCC Airwave Proposal*, Wall St. J., May 3, 2010 (stating AT&T currently uses the WCS spectrum for fixed point to point backhaul).

the limited amount of WCS construction is more likely due to regulatory *certainty* – most WCS licensees were certain that they did not wish to build fixed networks authorized by their licenses and instead gambled that a regulatory change would provide them with greater flexibility. Given the meager amounts paid for WCS licenses at auction, the risk was well worth the reward.

The Commission should not encourage such actions but should instead give close scrutiny to the pending requests for extension of the WCS substantial service requirements. Where licensees have failed to make any good faith effort to comply with current performance requirements – which the Commission has already extended once – the Commission should not hesitate to cancel licenses and reactivate the facilities to entities that will demonstrate a commitment to construct and serve the public.

Despite the characterization of the WCS Coalition and Stratos Offshore Services, the Public Notice’s penalty for failure to meet performance requirements is fair.<sup>7</sup> The current performance requirements include attainable benchmarks and safe harbors for WCS licensees who are unable to meet the requirements.<sup>8</sup> But the rules unequivocally state that “[f]ailure by any licensee to meet this requirement will result in forfeiture of the license...”<sup>9</sup> Nothing in the rule should have led WCS licensees to believe that they would be able to retain their licenses if they failed to meet the benchmarks. The

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<sup>7</sup> WCS Performance Public Notice at 3 (“If the Commission determines that a licensee has not met the applicable performance benchmarks for a license area, the license will be deemed to have terminated automatically...”).

<sup>8</sup> See 47 C.F.R. Section 27.14(a).

<sup>9</sup> 47 C.F.R. Section 27.14(a).

commenters' mischaracterization of a requirement as a "death penalty"<sup>10</sup> illustrates just how strongly the WCS licensees do not wish to comply with any performance requirements and what little intention they have of promptly building out. WCS licensees must be held accountable for their failure to meet the mandated requirements. If the WCS licensees fail to use their spectrum as the Commission requires, then the public interest compels the Commission to terminate those licenses and reactivate them.

Nonetheless, as Sirius XM said in its initial comments on the WCS Performance Public Notice,<sup>11</sup> the Commission should not encourage the uncoordinated deployment of WCS facilities simply to meet the construction deadlines. Any deployment of mobile WCS facilities must be coordinated to mitigate interference to adjacent radio services, including satellite radio.

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<sup>10</sup> WCS Coalition Comments at ii, 13, 19. Stratos Comments at 2; Reply Comments of the WCS Coalition, WT Docket No. 07-293 at i, 10-11 (filed Apr. 29, 2010).

<sup>11</sup> See Comments of Sirius XM, WT Docket No. 07-293 (filed Apr. 21, 2010) at 6-7.

## CONCLUSION

In view of the foregoing, the Commission should ignore excuses that regulatory uncertainty has made WCS deployment infeasible. WCS licensees have chosen to warehouse their spectrum instead of developing it to the benefit of consumers. The Commission should encourage deployment of WCS systems by enacting and enforcing strict performance requirements.

Respectfully Submitted,

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