

May 9, 2011

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); and Application of Sirius XM Radio Inc. for Special Temporary Authority (File No. SAT-STA-20110128-00018): WRITTEN EX PARTE PRESENTATION*

Dear Ms. Dortch:

I am writing on behalf of the WCS Coalition to address a mischaracterization by Sirius XM Radio Inc. ("Sirius XM") of the WCS Coalition's position on an issue pending before the Commission on reconsideration of the *Report and Order and Second Report and Order* in WT Docket No. 07-293 and IB Docket No. 95-91.¹ Specifically, in seeking the above-referenced special temporary authority ("STA"), Sirius XM represented to the International Bureau that it and the WCS Coalition had agreed to a compromise that would redefine the phrase "potentially affected WCS licensees" in Section 25.263(b)(1) of the Commission's Rules.² In fact, as Sirius XM was well-aware at the time, the WCS Coalition is on record as opposing any modification to Section 25.263(b)(1)³ and has agreed only to revising the definitions of that phrase in Sections 25.202(h)(4) and 25.214(d)(3).

¹ See Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band, *Report and Order and Second Report and Order*, 25 FCC Rcd 11710 (2010) ["WCS/SDARS Order"].

² See Letter from James S. Blitz, Vice President, Regulatory Counsel, Sirius XM Radio Inc., SAT-STA-20110128-00018 at 2 (filed Jan. 28., 2011) ("For the limited purposes of the instant STA, Sirius XM will provide notice of new construction under this STA to any 'potentially affected WCS licensees' as currently defined in 47 C.F.R § 25.263(b), without reference to the compromise definition of that term as recently proposed in reconsideration pleadings."). As authority for its claim that there has been a "compromise", Sirius XM cited to the WCS Coalition's October 18, 2010 "Opposition of the WCS Coalition to Petition of Sirius XM Radio Inc. for Partial Reconsideration and Clarification." See *id.* at n.7. As discussed in detail below, that pleading made clear that the WCS Coalition was only agreeing to modifications of Sections 25.202(h)(4) and 25.214(d)(3), and Sirius XM subsequently acknowledged that the WCS Coalition had not agreed to any modification of Section 25.263(b)(1).

³ Section 25.144(e)(3) of the Rules provides that "[a]fter May 20, 2010, SDARS licensees shall, before deploying any new, or modifying any existing, terrestrial repeater, notify potentially affected WCS licensees pursuant to the procedure set forth

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Newly-adopted Section 25.202(h)(1) and (2) set forth out-of-band emission (“OOBE”) limits applicable to Sirius XM’s terrestrial repeaters. Recognizing in the *WCS/SDARS Order* that the repeaters Sirius XM constructed pursuant to STA do not necessarily comport with these OOBE limits, the Commission adopted Section 25.202(h)(3) to establish a mechanism for bringing Sirius XM’s non-compliant repeaters into conformity with the rules. That Section provides that Sirius XM must bring a repeater into compliance with the new rule within 180 days of receiving written notice from a “potentially affected WCS licensee” that proposes to commence commercial service within the next 365 days. The definition of “potentially affected WCS licensee” for purposes of Section 25.202(h) is set forth in Section 25.202(h)(4). For present purposes, suffice it to say that any WCS licensee proposing to commence commercial service anywhere in the Major Economic Area (for purposes of WCS A and B Block licensees) or Regional Economic Area Grouping (for purposes of WCS C Block licensees) could force Sirius XM to modify a repeater in its licensed area, even if the proposed WCS service is so far removed from the repeater that interference is not threatened.

Newly-adopted Section 25.214(d) sets forth a similar regulatory approach to bringing any Sirius XM repeater that is operating in excess of 12 kilowatts average EIRP into compliance with the new rule limiting repeater power to that level. Section 25.214(d)(2) requires Sirius XM to reduce the power of any repeater within 180 days of notice from a “potentially affected WCS licensee” that proposes to commence commercial service within the next 365 days, while Section 25.214(d)(3) defines “potentially affected WCS licensee” in the same manner as Section 25.202(h)(4).

In its “Petition for Partial Reconsideration and Clarification” of the *WCS/SDARS Order*, Sirius XM complained that “[u]nder this rule, WCS licensees operating hundreds, even thousands of miles from the terrestrial repeater are considered ‘potentially affected’ such that they could require modification of Sirius XM’s network when no interference could conceivably occur.”⁴ Sirius XM thus urged the Commission to only allow those WCS licensees proposing to deploy within five kilometers of a repeater to invoke Sections 25.202(h)(3) and 25.214(d)(2).⁵

In the spirit of compromise that has marked its efforts throughout this proceeding, the WCS Coalition response agreed with Sirius XM, at least in part. While taking issue with Sirius XM’s oft-discredited claim that high-powered terrestrial repeaters only pose a threat to WCS facilities within five kilometers, the WCS Coalition offered the following compromise:

in § 25.263.” 47 C.F.R. § 25.144(e)(3). The definition of “potentially affected WCS licensees” for purposes of Section 25.263 is set forth in Section subsection (b)(1). *See id.* at § 25.263(b)(1). To avoid any future confusion on the part of Sirius XM, the WCS Coalition not only opposes any change to the definition of “potentially affected WCS licensee” in Section 25.263(b)(1), but it opposes any change to Section 25.144(e)(3).

⁴ Petition of Sirius XM Radio Inc. for Partial Reconsideration and Clarification, WT Docket No. 07-293 and IB Docket No. 95-91, at 22 (filed Sept. 1, 2010) (citation omitted) [“Sirius XM Petition”].

⁵ *See id.*

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[T]he WCS Coalition recognizes that for purposes of Sections 25.202(h)(3) and 25.214(d), **and for purposes of those sections only**, the definition of “potentially affected WCS licensee” may be excessive in some extreme cases. Therefore, the WCS Coalition would not object to modification of those sections to eliminate references to MEAs and REAGs, and simply provide that upon notice from any WCS licensee preparing to deploy a fixed or base station within 25 kilometers of a non-compliant repeater, Sirius XM must bring that repeater into compliance with the new power and OOB limits within 180 days.⁶

To avoid any confusion, the WCS Coalition emphasized that its compromise was limited in scope to Sections 25.202(h)(4) and 25.214(d)(3), and that the Commission should not disturb the definition set forth in Section 25.263(b)(1) – which serves the entirely unrelated purpose of requiring Sirius XM to keep WCS licensees advised of the location and operating parameters of its repeaters to facilitate coordination. Specifically, the WCS Coalition noted that:

[W]hile Sirius XM objects to the definition of “potentially affected WCS licensee” as it relates the process for bringing SDARS repeaters into compliance with the Part 25 power and OOB limits under these two rules, it does not seek reconsideration of that definition, as set forth in Section 25.263(b), for purposes of Section 25.144(e)(3), which requires advance notice before any new or modified repeaters are deployed. Thus, regardless of how the Commission resolves the Sirius XM Petition, it should not modify Section 25.263(b).⁷

This distinction was not lost on Sirius XM. Indeed, in its subsequent reply to the WCS Coalition, Sirius XM clearly and unambiguously acknowledged that the WCS Coalition objected to modification of Sections 25.144(e)(3) and 25.263(b).⁸ Given the clarity with which the WCS Coalition expressed its position, and Sirius XM’s stated understanding of that position, Sirius XM’s recent misrepresentation to the Commission of the state of the record is inexplicable.

At this juncture, the WCS Coalition must make two points. First, as a matter of procedure, any effort by Sirius XM to seek modification of the definition of “potentially affected WCS licensees” set forth in Section 25.263(b)(1) is untimely under Section 405 of the Communications Act of 1934, as amended, and Section 1.429(d) of the Commission’s Rules.⁹ At no point in the Sirius XM Petition did

⁶ Opposition of the WCS Coalition to Petition of Sirius XM Radio Inc. for Partial Reconsideration and Clarification, WT Docket No. 07-293 and IB Docket No. 95-91, at 24 (filed Oct. 18, 2011) (emphasis added) [“WCS Coalition Opposition”].

⁷ *Id.* at 22 n.77.

⁸ See Reply of Sirius XM Radio Inc. to Oppositions of the WCS Coalition and AT&T Inc., WT Docket No. 07-293 and IB Docket No. 95-91, at 9 (filed Nov. 2, 2010) (“Sirius XM disagrees with the WCS Coalition’s assertion that the FCC should not modify the ‘potentially affected licensees’ definition with respect to the notification requirement of Sections 25.144(e)(3) and 25.263(b).”).

⁹ Section 405 of the Communications Act of 1934, as amended, specifies in part that any “petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order . . . complained of.” Similarly, Section 1.429(d) of the Commission’s Rules specifies in part that a “petition for reconsideration and any supplement thereto

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Sirius XM suggest, much less demonstrate, that the public interest is somehow disserved by having Sirius XM provide notice of any new or modified terrestrial repeater to each WCS licensee with a geographic license overlapping the repeater location. To the contrary, the only references in the Sirius XM Petition to the notice requirements of Section 25.263 are in connection with Sirius XM's request that repeaters operating below 2 watts be exempt from the notice requirement.¹⁰ Since Sirius XM failed to seek any change in Section 25.263(b)(1) by the September 1, 2010 deadline for seeking reconsideration of the *WCS/SDARS Order*, any subsequent effort to do so must be dismissed as untimely.¹¹

Second, Sirius XM's proposed modification of Section 25.263(b)(1) would undermine the ability of WCS licensees to meet their obligations under Section 27.72(a) to "select base station sites and frequencies, to the extent practicable, to minimize the possibility of harmful interference to operations in the SDARS 2320–2345 MHz band"¹² and under Section 27.72(e) to "cooperate in good faith in the selection and use of new station sites and new frequencies to reduce interference and make the most effective use of the authorized facilities."¹³ As currently crafted, Section 25.263(b)(1) assures that every WCS licensee will at all times have a current record of the location and technical operation parameters of all Sirius XM repeaters in its authorized service area. Thus, under the current rule, as the WCS licensee designs and deploys its network, it will do so with full knowledge of the terrestrial repeater environment. By contrast, if Sirius XM has its way and it is only required to provide information concerning a new or modified repeater to WCS licensees that already have deployed in the vicinity of that repeater, a WCS licensee seeking to expand into an area it does not already serve will be "flying blind" – Sirius XM will have had no obligation to keep it advised of repeaters added or modified following the one-time inventory disclosure mandated by Paragraph 278 of the *WCS/SDARS*

shall be filed within 30 days from the date of public notice of such action, as that date is defined in § 1.4(b)." Because Sirius XM did not seek reconsideration of newly-adopted Section 25.263(b)(1) prior to the 30 day deadline (*e.g.*, by September 1, 2010), it cannot subsequently seek to have the definition of "potentially affected WCS licensee" contained therein changed. Sirius XM has not attempted to demonstrate, and cannot demonstrate, extraordinary circumstances justifying its failure to raise any objection to Section 25.263(b)(1) on time, and thus proposed modifications to that Section cannot be entertained. *See, e.g., Virgin Islands Tel. Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993); *Reuters Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986).

¹⁰ *See* Sirius XM Petition at 24-25. In response, the WCS Coalition indicated that it "has no objection to modifying Section 25.263 as proposed, *provided that the Commission makes a parallel modification to Section 27.72(b) and (c) to exempt WCS mobile base stations operating at less than 2 watts EIRP.*" WCS Coalition Opposition at 24 (emphasis in original).

¹¹ In addition, it is worth noting that under Section 1.429(c) of the Commission's Rules, a petition for reconsideration must "state with particularity the respects in which petitioner believes the action taken should be changed." Sirius XM specifically urged that the Commission "[u]nder Section 25.214 of the Rules, , [*sic*] replace the overly broad 'REAG' and 'MSA' [*sic* 'MEA'] based definition of 'potentially affected' WCS licensees with a more narrowly tailored coordination distance of 5km." Sirius XM Petition at 4. To the extent Sirius XM is now alleging that it also meant to seek reconsideration of Section 25.263(b)(1), its petition clearly failed to comport with the specificity requirement of Section 1.429(c).

¹² 47 C.F.R. § 27.72(a).

¹³ *Id.* at § 27.72(e).

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Order.¹⁴ The net result will be even more troubling delays in deploying WCS than we anticipate under the current, unnecessarily burdensome coordination process.¹⁵

I hope this avoids any misconception of the WCS Coalition's position regarding Section 25.263(b)(1) that Sirius XM may have caused. Should you have any questions regarding that position, please contact the undersigned.

Pursuant to Sections 1.1206(b)(1) and 1.49(f) of the Commission's Rules, this letter is being filed electronically with the Commission via the Electronic Comment Filing System.

Respectfully submitted,

/s/ Paul J. Sinderbrand

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cc: Ruth Milkman
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¹⁴ See *WCS/SDARS Order*, 25 FCC Rcd at 11815. The WCS Coalition reiterates its concern that the *WCS/SDARS Order* lacks an ordering clause requiring Sirius XM to comport with Paragraph 278, and urges the Commission to address this oversight on reconsideration. See Petition of the WCS Coalition for Partial Reconsideration, WT Docket No. 07-293 and IB Docket No. 95-91, at 22-23 n.48 (filed Sept. 1, 2010) ["WCS Coalition Petition"].

¹⁵ See WCS Coalition Petition at 18-21 (proposing elimination of the five day advance notice requirement for WCS base station modifications that are unlikely to impact reception of Sirius XM's service) and 22-24 (proposing modification of Section 27.72(e) to eliminate unnecessarily burdensome obligations that were unfairly imposed on WCS licensees, but not Sirius XM).