

January 6, 2012

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)* – WRITTEN EX PARTE PRESENTATION

Dear Ms. Dortch:

I am writing on behalf of the WCS Coalition to address the recent mischaracterization by Sirius XM Radio Inc. (“Sirius XM”) of Section 27.72 of the Commission’s Rules and to oppose Sirius XM’s untimely and unwarranted call for the Commission to reconsider the reach of that section.¹

The scope of Section 27.72 of the Commission’s Rules is clearly set forth on its face: “[t]his section requires WCS licensees in the 2305-2320 MHz and 2345-2360 MHz bands to share information regarding the location and operation of *base stations* with Satellite Digital Audio Radio Service (SDARS) licensees in the 2320-2345 MHz band.”² Pursuant to Section 27.4 of the Commission’s Rules, a “base station” is defined as “[a] land station in the land mobile service,” a “land station” is defined as “[a] station in the *mobile service* not intended to be used while in motion,” and the “land mobile service” is defined as “[a] *mobile service* between base stations and land mobile stations, or between land mobile stations.”³

To date, we understand that no 2.3 GHz Wireless Communications Service (“WCS”) licensee is providing a mobile service, and thus no WCS licensee is operating a base station. That is hardly surprising. The record developed during the reconsideration phase of this proceeding demonstrates that unless and until the Commission amends several of the Part 27 rules adopted by the *Report and*

¹ See Letter from James S. Blitz, Vice President, Regulatory Counsel, Sirius XM Radio Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 07-293 (filed Dec. 16, 2011) [“Sirius XM Letter”].

² 47 C.F.R. § 27.72 (emphasis added).

³ 47 C.F.R. § 27.4 (emphasis added). In contrast, a “fixed station” is defined as “[a] station in the fixed service” and the “fixed service” is defined as “[a] radio communication service between specified fixed points.” *Id.* As will be discussed below, that the Commission has adopted for all Part 27 services separate definitions for “base station” and “fixed station” is significant, for the definitions are inconsistent with Sirius XM’s assertion that “base station” includes “fixed station.”

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Order and Second Report and Order in WT Docket No. 07-293 and IB Docket No. 95-91⁴ and rejects calls by Sirius XM for even further restrictions on WCS, the 2.3 GHz band is unlikely to become home to mobile services.⁵ Given this state of affairs, Sirius XM should not be surprised that no WCS licensee has yet shared technical data pursuant to Section 27.72.

In furtherance of its recent campaign to hamstring the offering of even fixed services in the 2.3 GHz band, Sirius XM now calls on the Commission to ignore the definition of “base station” in Section 27.4 and “clarify” that the term “base station” in Section 27.72 extends not just to land stations in the mobile service, but also to fixed stations.⁶ That request should be denied. There is no ambiguity here that requires a clarification – as noted above, Sections 27.4 and 27.72 clearly establish that the notice requirement applies only to mobile offerings.

Moreover, Sirius XM’s call for expanding the definition of “base station” to encompass fixed services cannot be squared with other Part 27 provisions. When the Commission desires a Part 27 licensee to share with others information regarding both fixed and base stations, the applicable Part 27 rule has said just that. For example:

- Section 27.50(b)(8) of the Rules mandates that “[l]icensees authorized to transmit in the 746–757 MHz, 758–763 MHz, 776–787 MHz, and 788–793 MHz bands and intending to operate a *base or fixed station* at a power level permitted under the provisions of

⁴ 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”].

⁵ See, e.g., Petition of the WCS Coalition for Partial Reconsideration, WT Docket No. 07-293, at 14 (filed Sept. 1, 2010) [“WCS Coalition Petition for Reconsideration”]; Petition of AT&T Inc. for Partial Reconsideration, WT Docket No. 07-293, at 14-16 (filed Sept. 1, 2010); 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); Opposition of AT&T Inc. to Petition for Partial Reconsideration and Clarification of Sirius XM Radio Inc.; Reply of AT&T Inc. to Oppositions of Sirius XM Radio Inc., Aerospace and Flight Test Radio Coordinating Council, and the Boeing Company to the Petition for Partial Reconsideration, WT Docket No. 07-293, at 3-4 (filed Nov. 1, 2010); Letter from Paul J. Sinderbrand, Counsel to the WCS Coalition, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 07-293, at 1-2 (dated Dec. 1, 2011); Letter from Paul J. Sinderbrand, Counsel to the WCS Coalition, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 07-293, at 1-2 (dated Aug 1, 2011); Letter from Paul J. Sinderbrand, Counsel to the WCS Coalition, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 07-293, at 2 (dated July 21, 2011); Letter from Paul J. Sinderbrand, Counsel to the WCS Coalition, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 07-293, at 2-3 (dated June 27, 2011); Letter from Paul J. Sinderbrand, Counsel to the WCS Coalition, to Ruth Milkman, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, WT Docket No. 07-293, at 1-2 (dated May 31, 2011). See also Letter from Jennifer M. McCarthy, Vice President, Regulatory Affairs, NextWave Wireless Inc., to Marlene Dortch, Secretary, Federal Communications Commission, WT Docket No. 07-293, at 2 (dated Oct. 13, 2011); Letter from Jennifer M. McCarthy, Vice President, Regulatory Affairs, NextWave Wireless Inc., to Marlene Dortch, Secretary, Federal Communications Commission, WT Docket No. 07-293, at 2 (dated Sept. 22, 2011); Letter from Jennifer M. McCarthy, Vice President, Regulatory Affairs, NextWave Wireless Inc., to Marlene Dortch, Secretary, Federal Communications Commission, WT Docket No. 07-293, at 2 (dated Aug. 3, 2011).

⁶ Sirius XM Letter at 4.

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paragraph (b)(6) of this section must provide advanced notice of such operation to the Commission and to licensees authorized in their area of operation. Licensees who must be notified are all licensees authorized to operate in the 763–775 MHz and 793–805 MHz bands under part 90 of this chapter within 75 km of the *base or fixed station* and all regional planning committees, as identified in § 90.527 of this chapter, with jurisdiction within 75 km of the *base or fixed station*. Notifications must provide the location and operating parameters of the *base or fixed station*, including the station's ERP, antenna coordinates, antenna height above ground, and vertical antenna pattern, and such notifications must be provided at least 90 days prior to the commencement of station operation.” (emphasis added)

- 27.50(c)(8) of the Rules similarly mandates with respect to the 698-746 MHz band that “[l]icensees intending to operate a *base or fixed station* at a power level permitted under the provisions of paragraph (c)(6) of this section must provide advanced notice of such operation to the Commission and to licensees authorized in their area of operation. Licensees who must be notified are all licensees authorized under this part to operate on an adjacent spectrum block within 75 km of the *base or fixed station*. Notifications must provide the location and operating parameters of the *base or fixed station*, including the station's ERP, antenna coordinates, antenna height above ground, and vertical antenna pattern, and such notifications must be provided at least 90 days prior to the commencement of station operation.” (emphasis added).
- Section 27.70(a) mandates that “[p]ublic safety licensees authorized to operate in the 763–775 MHz and 793–805 MHz bands may notify any licensee authorized to operate in the 746–757, 758–763, 776–787, or 788–793 MHz bands that they wish to receive prior notification of the activation or modification of the licensee’s *base or fixed stations* in their area. Thereafter, the 746–757, 758–763, 776–787, or 788–793 MHz band licensee must provide the following information to the public safety licensee at least 10 business days before a new *base or fixed station* is activated or an existing *base or fixed station* is modified: (1) Location; (2) Effective radiated power; (3) Antenna height; and (4) Channels available for use.” (emphasis added).

In addition to these Part 27 advance notice requirements, when the Commission requires a Part 27 licensee to engage in prior frequency coordination before deploying a fixed or base station, the applicable rule specifically says as much.⁷ The fact that the Commission has crafted numerous Part 27

⁷ Section 27.50(b)(7) requires that certain 700 MHz licensees seeking to operate a high powered rural “fixed or base station” engage in prior coordination with certain other licensees. Section 27.50(c)(5) mandates that licensees in the 698–746 MHz band seeking to operate a high powered rural “fixed or base station” must engage in prior coordination with certain other licensees. Section 27.50(d)(3) provides that an AWS-1 licensee operating a high-powered “base or fixed station” must coordinate in advance with satellite entities in the 2025–2110 MHz band. Section 27.50(d)(3) also provides that each AWS-1 high powered “base or fixed station” must coordinate with all other Broadband Radio Service and AWS-1 licensees within 75 miles of the “base or fixed station.” Finally, Section 27.1131 mandates that all AWS licensees, prior to

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rules to require advance notice or prior coordination of any base or fixed station, while Section 27.72 only applies to a “base station,” speaks volumes. Had the Commission intended for Section 27.72 to apply to fixed and base stations, it presumably would have said so, just as it has done elsewhere in Part 27.⁸

Moreover, the text of the *WCS/SDARS Order* adopting Section 27.72 belies any suggestion that the Commission intended the phrase “base station” to incorporate fixed and base stations. The phrase “base and fixed stations” appears twenty-five separate times within the *WCS/SDARS Order*, making clear that the Commission viewed fixed stations and base stations as two separate categories of facilities. Yet, in stark contrast to these references, the text of Section 27.72, the discussion of the notification requirement at Paragraphs 150-153 of the *WCS/SDARS Order* and the discussion of the notification requirement in Paragraph 35 of the Final Regulatory Flexibility Analysis annexed to the *WCS/SDARS Order* reference only base stations. One can only conclude that in adopting the *WCS/SDARS Order*, the Commission understood that fixed stations and base stations are different, and knew how to use the phrase “base and fixed stations” when it wanted to reference both types of facilities.

As a matter of procedure, any effort by Sirius XM to seek modification of the definition of “base station” set forth in Section 27.72 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 its “Petition for

initiating operations from any “base or fixed station,” must coordinate certain Part 101 fixed-point-to-point microwave licensees operating in the 2110–2155 MHz band.

⁸ Sirius XM mischaracterizes the WCS Coalition’s 2008 Comments in this proceeding as supporting its interpretation that “base station” as defined in Section 27.72 includes fixed stations. See Sirius XM Letter, at 4. In fact, the WCS Coalition’s filing demonstrates the exact opposite. In that filing, the WCS Coalition proposed that the Commission adopt a common 2,000 watt average EIRP limit for both WCS and SDARS. See Comments of the WCS Coalition, WT Docket No. 07-293, at 23 (filed Feb. 14, 2008). Because the WCS Coalition contemplated that this requirement would apply to both fixed and base stations, the WCS Coalition specifically stated “[t]o eliminate any ambiguity, the WCS Coalition envisions that point-to-point link transmitters would be treated as base stations for purposes of its proposal, and suggests that whatever rules the Commission adopts to govern the 2305-2320/2345-2360 MHz band make clear that a point-to-point transmitter will be treated as a WCS base station.” *Id.* at 23 n.45. Clearly, the WCS Coalition understood that the definition of “base station” in Section 27.4 was not sufficiently broad to include fixed stations and that the Commission would have to provide clarity if it intended fixed and base stations to have the same maximum power level. Indeed, the Commission did exactly that – Section 27.50(a)(1) expressly provides for a 2,000 watt average EIRP limit “[f]or base and fixed stations transmitting in the 2305-2315 MHz band or the 2350-2365 MHz band.” 47 C.F.R. § 27.50(a)(1).

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 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 raise concerns regarding the failure to apply the notification requirements of newly-adopted Section 27.72 to fixed services prior to the 30 day deadline (*e.g.*, by September 1, 2010), it cannot now seek reconsideration. Sirius XM has not attempted to demonstrate, and cannot demonstrate, extraordinary circumstances justifying its failure to raise any objection to Section 27.72 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).

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Partial Reconsideration and Clarification” of the *WCS/SDARS Order* did Sirius XM suggest, much less demonstrate, that the public interest would somehow be advanced by subjecting new or modified WCS fixed facilities to advance notification requirements.¹⁰ Since Sirius XM failed to seek inclusion of fixed stations within the scope of Section 27.72 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. Styling its latest request as one for “clarification” does not change the applicable deadline.¹¹

In addition, and ultimately more importantly, the Commission’s decision to limit the scope of Section 27.72 solely to mobile services serves the public interest and is the only conclusion that can be reached based on the record in this proceeding.¹² Sirius XM’s request for reconsideration must be read against the backdrop of the rules that had governed WCS for the thirteen years prior to the *WCS/SDARS Order* – rules that SDARS has said protected its subscribers from interference. When WCS and SDARS were simultaneously created by the Commission and the predecessors of Sirius XM acquired their spectrum, it was projected that WCS fixed offerings would include a variety of ubiquitous consumer services, including high-speed wireless Internet access, return links for interactive cable and broadcasting services, and the provision of wireless local loop services.¹³ The rules adopted at that time allowed far greater power levels from consumer devices than are currently permitted, and imposed no advance notice or coordination obligation on WCS licensees. Yet, WCS fixed operations under those rules proved to posed no threat to SDARS. To the contrary, a variety of fixed WCS deployments were made over the years, and not one complaint of interference has come from a Sirius XM subscriber.¹⁴ Indeed, prior to the adoption of the current rules, SDARS represented to the Commission that “[b]oth satellite radio licensees designed, built and deployed their systems to withstand interference that could be anticipated from Part 27-compliant systems”¹⁵ and that the Commission’s initial WCS rules “allow fixed broadband deployment in WCS spectrum *and fully*

¹⁰ Petition of Sirius XM Radio Inc. for Partial Reconsideration and Clarification, WT Docket No. 07-293 (filed Sept. 1, 2010).

¹¹ See Association of College and University Telecommunications Administrators, American Council on Education, and National Association of College and University Business Officers, *Memorandum Opinion and Order*, 8 FCC Rcd 1781 (1993).

¹² Sirius XM ignores the Commission’s express language when Sirius XM claims the one-time notice obligation imposed on WCS licensees by Paragraph 327 of the *WCS/SDARS Order* is broader than Section 27.72. See Sirius XM Letter at 3. Paragraph 327 provides, in pertinent part, that WCS licensees and lessees must provide Sirius XM with “an inventory of their deployed infrastructure *consistent with . . . new Section 27.72(b).*” *WCS/SDARS Order*, 25 FCC Rcd at 11830 (emphasis added). Since Section 27.72 only requires the provision of notice regarding base stations used in mobile services, the Commission presumably intended to limit the inventory to base stations used in mobile services.

¹³ See *WCS/SDARS Order*, 25 FCC Rcd at 11716, *citing* Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service, GN Docket No. 96-228, *Report and Order*, 12 FCC Rcd 10785, 10798 (1997).

¹⁴ See *WCS/SDARS Order*, 25 FCC Rcd at 11768. Indeed, the Commission recognized that “the SDARS licensees note that current fixed WCS deployments pose no or little interference concerns to SDARS operations.” *Id.* at 11769 (citation omitted).

¹⁵ Comments of Sirius Satellite Radio Inc., WT Docket No. 07-293, at 17 (filed Feb 14, 2008).

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*protect satellite radio consumers.*¹⁶ As a result of this interference-free track record, there was no basis in the record for the *WCS/SDARS Order* to impose a new notification requirement on WCS licenses deploying or modifying fixed facilities, and Sirius XM can hardly be surprised that the Commission refrained from adopting such a requirement.

In short, while the WCS Coalition has raised its own concerns on reconsideration regarding the notice obligations imposed with respect to mobile offerings,¹⁷ the Commission got it right when it preserved the *status quo* and refrained from burdening WCS licensees with advance notice obligations on fixed offerings that pose no threat of interference to Sirius XM subscribers. Sections 27.4 and 27.72 are clear, unambiguous, based on sound policy, and should not be disturbed as proposed, albeit in untimely fashion, by Sirius XM.

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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¹⁶ Letter from Robert L. Pettit, Counsel to Sirius XM Radio, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 07-293, Attachment at 26 (filed Aug. 11, 2009) (emphasis added).

¹⁷ See WCS Coalition Petition for Reconsideration at 18-21.