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ORIGINAL

December 13, 2006

FILED/ACCEPTED

DEC 13 2006

Federal Communications Commission
Office of the Secretary

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

Re: *Request Of XM Radio Inc. For Special Temporary Authorization Regarding Digital Audio Radio Service Terrestrial Repeaters* – File No. SAT-STA-20061002-00114
WRITTEN EX PARTE PRESENTATION

Dear Ms. Dortch:

I am writing on behalf of the WCS Coalition in response to the December 7, 2006 letter filing in this proceeding by XM Radio Inc. ("XM").[1] Once again, XM's rhetoric in support of its unlawful operation of terrestrial Digital Audio Radio Service ("DARS") repeaters is impossible to square with either the law or the facts before the Commission.[2] And, making matters worse, XM's latest filing suggests that more DARS terrestrial repeater facilities may have been operated

[1] *See* Letter from Scott Blake Harris, Counsel to XM Radio Inc., to Marlene Dortch, Secretary, FCC, File No. SAT-STA-20061002-00114 (filed Dec. 7, 2006)["XM Ex Parte"].

[2] For example, it is XM that "mangles the law" when it asserts that the Commission has authority to grant the instant special temporary authorization ("STA") without placing it on public notice and allowing interested members of the public an opportunity to comment. *Id.* at 5. While XM quotes language from Section 25.120(b)(4) of the Commission's Rules to support its assertion that no public notice is necessary here, it fails to quote *all* the relevant language. According to XM, Section 25.120(b)(4) merely provides that "[t]he Commission may grant a temporary authorization for a period not to exceed 30 days, if the STA request has not been placed on public notice." *Id.* The rule actually provides that "[t]he Commission may grant a temporary authorization for a period not to exceed 30 days, if the STA request has not been placed on public notice, *and an application for regular authority is not contemplated.*" 47 C.F.R. § 25.120(b)(4)(emphasis added to illustrate language missing from XM quotation). As the WCS Coalition pointed out in its November 30 filing, XM has urged the Commission to "grandfather" from its final DARS repeater rules all repeaters constructed by Sirius Satellite Radio Inc. ("Sirius") and XM pursuant to STAs, thus providing them with regular authority. *See* Letter from Carl R. Frank to Marlene H. Dortch, Secretary, FCC, IB Docket No. 95-91 (filed Aug. 14, 2006); Letter from Paul J. Sinderbrand, Counsel to WCS Coalition, to John Giusti, Acting Chief, International Bureau, FCC, SAT-STA-20061107-00133 (filed Nov. 22, 2006). Significantly, XM never denies that it contemplates regular authority to operate these repeaters, and thus on its face Section 25.120(b)(4) cannot justify action on the instant request absent public notice and an opportunity to comment.

by XM at unauthorized power levels than was initially believed. Thus, the WCS Coalition reiterates its call for the Commission to deny XM's request for a 30-day STA that would legitimize XM's unlawful conduct.

Perhaps recognizing that its illegal construction and operation of unauthorized DARS terrestrial repeater facilities is indefensible,[3] XM has the audacity to suggest that the WCS Coalition is somehow abusing the Commission's processes when it calls for the Commission to reject XM's request for a 30-day STA that would bless XM's unlawful facilities.[4] XM's motivation is transparent -- it seeks to divert attention from its own misconduct by going on the offensive. In doing so, however, XM distorts the status of IB Docket No. 95-91 when it asserts that the WCS Coalition there has "failed" to limit the maximum effective isotropic radiated power ("EIRP") of DARS terrestrial repeaters to 2,000 watts peak EIRP.[5] To the contrary, a fair assessment of the record in IB Docket No. 95-91 is that XM has failed to convince the Commission that XM should be permitted to construct DARS terrestrial repeaters at whatever higher power levels XM desires, without regard to the consequences for Wireless Communications Service ("WCS"). Of course, no decision has been rendered by the Commission in IB Docket No. 95-91. However, that the International Bureau has conditioned all of XM's STAs on providing WCS with absolute interference protection, and explicitly warned XM that any facilities built pursuant to its STAs would have to be modified to comply with the future rules governing DARS terrestrial repeaters, certainly suggests that the staff finds substantial merit in the WCS position.[6]

More importantly for present purposes, the WCS Coalition is not asking the Commission here to "circumvent" the IB Docket No. 95-91 rulemaking proceeding. To the contrary, the WCS Coalition has consistently urged the Commission to resolve expeditiously the issues before it in that proceeding. Until the Commission does resolve those issues, however, XM's construction and operation of terrestrial repeaters pursuant to an STA must be governed by the applicable Commission rules. And therein lies the fundamental problem with XM's instant

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[3] Although XM denies that it has trivialized the extent of its misconduct (*see* XM Ex Parte at 5), the facts speak otherwise. Even in its latest filing, XM focuses on situations where antennas have been mounted at relatively small deviations from its STAs. *See id.* at 2. However, XM does not deny the WCS Coalition's demonstration that XM had been operating at least 221 terrestrial repeaters at power levels in excess of that authorized by its present authorizations, that XM has been operating approximately 142 separate repeaters that were constructed at locations that differ by at least five seconds from that authorized by the FCC, and that XM has been operating 19 repeaters that were not authorized at all. *See* Letter from Paul J. Sinderbrand, Counsel to WCS Coalition, to Marlene H. Dortch, Secretary, FCC, File No. SAT-STA-20061002-00114 (filed Nov. 30, 2006)["WCS Coalition Opposition"].

[4] *See* XM Ex Parte at 1.

[5] *Id.*

[6] *See XM Radio Inc.*, Order and Authorization, 16 FCC Rcd 16781, 16787 (IB 2001) ["*XM 2001 STA Grant*"]; *Sirius Satellite Radio, Inc.*, Order and Authorization, 16 FCC Rcd 16773, 16777 (IB 2001), *modified on recon.* Order, 16 FCC Rcd 18481 (IB 2001); *XM Radio Inc,* Order and Authorization, 19 FCC Rcd 18140, 18143 (IB 2004).

request for a new STA – *XM has failed to demonstrate that there are extraordinary circumstances present (as required by Section 25.120(b) of the Commission's Rules) that would warrant grant of the requested STA, because XM has failed to establish that it cannot provide service in compliance with its existing STAs.*[7]

If, as XM posits, there are repeaters that are constructed with their antennas 12 feet too high, or with their antennas 3 feet too low, the WCS Coalition has no objection to XM modifying those facilities to comport with its current STAs.[8] Where XM has utilized unauthorized antennas, the WCS Coalition has no objection to replacement of those antennas with the proper antennas.[9] And if, as XM suggests, some repeaters have been constructed at just 50 or 100 feet from the authorized site, the WCS Coalition has no objection to relocation to the authorized site. *But XM appears to have rejected those simple fixes*, and thus the WCS Coalition's most recent filing focused on XM's other alternative – coming into compliance with the existing STAs by relying on the blanket authorization for repeaters operating at no greater than 2,000 Watts peak EIRP. Again, to be clear, the WCS Coalition's position is that XM has failed to justify the instant STA request, and thus should be required to provide terrestrial service only in accordance with its existing STAs. Moreover, the WCS community is prepared to consider consenting on a case-by-case basis to specific proposals by XM for modifications to authorized repeaters if XM can demonstrate that a specific variation from the existing STA presents a "win-win" solution that benefits not just XM, but also advances the ability of WCS licensees to provide wireless broadband service. But, that requires a case-by-case analysis, and not the sort of blanket endorsement of all of the unlawful facilities that XM has sought from the Commission.

As such, the Commission is not limited to the Hobson's Choice XM presents. XM would have the Commission believe that there are only two options here – either accept the "as built" network or suffer interference from the full authorized network.[10] XM's *in terrorem* claim that failure to grant the instant STA request will result in construction of the full authorized network is belied by XM's earlier admission that "[t]he largest single reason for variance is the

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[7] *See* WCS Coalition Opposition at 8.

[8] While XM implies that variations in antenna height are of no moment, low-mounted DARS terrestrial repeater antennas can unreasonably increase the interference suffered by WCS receivers in close proximity to the repeater, while high-mounted DARS terrestrial repeater antennas can unreasonably increase the distance at which interference may occur. Thus, depending upon EIRP and other factors, antenna height is very relevant to coexistence between WCS and DARS terrestrial repeaters.

[9] Of course, if XM does modify its unlawful facilities to comport with the terms of its existing STAs, those facilities must still be subject to all of the conditions imposed on its STAs, including the conditions that XM cure any interference to current or future WCS operations, and that it modify those facilities as required by the Commission when final rules are adopted to govern WCS/DARS coexistence.

[10] *See, e.g.,* XM Ex Parte at 3 ("Failure to grant the STA Request in its entirety could require XM to rebuild its network to conform to the detailed characteristics of the existing STAs – thereby creating a larger, more powerful network with greater interference potential.").

determination that many authorized repeaters could simply be eliminated based in part on greater than anticipated satellite signal availability."[11] In other words, denial of the instant STA request is not going to result in the increased interference that XM suggests for the simple reason that XM is not going to construct the high-power repeaters that it concedes it does not need. If the Commission denies the instant request and forces XM to comport with the existing STAs, the result will be a middle ground – a network that is less powerful than originally authorized, but that complies with Section 301 of the Communications Act of 1934, as amended, and the Commission's rules.

For similar reasons, the Commission should not countenance recent efforts by XM to exaggerate the impact that denial of the instant STA request will have on service to the public. XM presents the Commission with analyses based on a complete shut-down of all non-compliant facilities, and not surprisingly concludes that "[t]urning off the variant repeaters would adversely affect service for consumers."[12] But that is besides the point – the WCS Coalition is not asking XM to turn off all of the unlawful repeaters. Rather, the WCS Coalition is asking the Commission to require XM to modify its unlawful facilities to bring them into compliance with its STAs. Given that XM has blanket authority to construct and operate repeaters operating at no more than 2,000 Watts peak EIRP, it is evident that XM lawfully can provide service to all of the areas it illegally served. This is readily demonstrated by reference to the Providence market, where XM is providing service through a single repeater constructed at an unauthorized location. It is inconceivable that XM could not provide equivalent coverage through construction of one or more repeaters that either operate at no more than 2,000 Watts peak EIRP or conform to the parameters of one or more of the six higher-power repeaters authorized by the Commission.

Nor should the Commission accept XM's clearly erroneous assertion that it "has hidden no pertinent fact" from the Commission.[13] Indeed, although buried in a footnote, XM concedes that it still has not identified those repeaters that have been constructed at locations that were not authorized, but are within five seconds of an authorized location.[14] XM provides no response to the WCS Coalition's objection to XM's failure to fully identify those repeaters, other than to assert that in the instant STA request XM "cited the relevant authority" for the proposition that

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[11] *See* Request Of XM Radio Inc. For Special Temporary Authority to Operate Satellite Digital Audio Radio Service Terrestrial Repeaters, File No. SAT-STA-20061002-00114, at 3 (filed Oct. 2, 2006).

[12] Supplement No. 1 to XM Radio Inc.'s Memorandum in Support of STA Request, SAT-STA-20061002-00114, at 3 (filed Dec. 12, 2006)(discussing 7 unlawful Nashville repeaters). *See also id.* at 5 (discussing 18 unlawful Atlanta repeaters); *id.* at 6 (discussing 35 unlawful repeaters in New York City); *id.* at 9 (discussing 39 unlawful repeaters in Los Angeles); Ex Parte Memorandum of XM Radio Inc. In Support of STA Request, SAT-STA-20061002-00114, at 15 (filed Nov. 22, 2006)(discussing 13 unlawful repeaters in Boston); *id.* at 18 (discussing 5 illegal repeaters in Buffalo); *id.* at 20 (discussing illegal repeaters in Detroit); *id.* at 21 (discussing single repeater in Providence).

[13] XM Ex Parte at 3.

[14] *See id.* at 4 n.12.

XM is free to relocated its repeaters by five seconds without prior Commission approval.[15] Yet *the STA request included no discussion whatsoever purporting to provide authority for XM's unlawful construction of these repeaters*. That is hardly surprising, since there is absolutely no Commission rule or policy allowing holders of site-specific STAs to locate facilities as much as five seconds from the authorized location.

Also buried in a footnote is a cleverly worded statement by XM that implies that XM has been operating as if the power levels authorized by its STAs were to be measured by average EIRP, rather than peak EIRP. Although XM has once again phrased its admission in a manner that obscures the full implications, the WCS Coalition cannot help but suspect that XM has been operating far more repeaters at unauthorized power levels than previously believed.

For XM to even suggest that in granting XM its initial STA the Commission intended to grant a blanket license for repeater operations at or below 2,000 Watts *average* EIRP is revisionist history in the extreme. It was patently evident from the facts and circumstances leading up to the grant of XM's initial STA that the Commission contemplated the measurement of EIRP levels for DARS repeaters in exactly the same manner as the rules provided for WCS, and that means using the *peak* level.

As is the case today, during the period in 2001 when XM was seeking its initial STA, the Commission's rules limited WCS licensees to a maximum of 2,000 Watts peak EIRP.[16] And, as is the case today, the WCS community and others were then urging the Commission in IB Docket No. 95-91 to limit DARS terrestrial repeaters to no greater power than is permitted for WCS base stations.[17] Indeed, XM itself proposed rules just prior to the filing of its initial STA

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[15] *Id.*

[16] *See* 47 C.F.R. § 27.50 (2001). It was not until years later that proposals were floated suggesting that WCS power levels be expressed in terms of average EIRP, rather than peak EIRP.

[17] *See, e.g.* Letter from William Wiltshire, Counsel to AT&T Wireless Services, to Magalie Roman Salas, Secretary, FCC, IB Docket No. 95-91, at 2 (filed Feb. 20, 2001)("ATTWS submits that the Commission should not grant the unprecedented blanket license for high power repeaters that the SDARS licensees have requested; rather, *it should adopt a blanket authorization for standard power transmitters -- operating under the same maximum power levels applicable to WCS – with a notice requirement.* Any high power repeaters should be coordinated with all affected WCS licensees on a site-by-site basis before licensing. Such a regime will achieve an appropriate balance by protecting the integrity of the WCS licenses while still affording the SDARS licensees substantial flexibility in deploying their repeater networks.")(emphasis added); Letter from William Wiltshire, Counsel to AT&T Wireless Services, to Magalie Roman Salas, Secretary, FCC, IB Docket No. 95-91, at 8 (filed April 30, 2001)("the rule would limit SDARS repeaters to peak EIRP levels of no more than 400 W/MHz, evenly distributed across the band, for a total of 2 kW per 5 MHz of repeater spectrum. This would place SDARS repeaters on a par with the EIRP limitations placed on WCS operators and allow them to operate, as XM admits, 'as a power level that is completely standard in this part of the spectrum.'") *citing* Letter from Bruce D. Jacobs, Counsel to XM Radio Inc., to Magalie Roman Salas, Secretary, FCC, IB Docket No. 95-91, at 2 (filed April 25, 2001) ["XM April 25, 2001 Ex Parte"]; Letter from Paul J. Sinderbrand, Counsel to Wireless Communications Ass'n Int'l, Inc., to Magalie Roman Salas, Secretary, FCC, IB Docket No. 95-91, at 1-2 (filed Jan. 25, 2001); Letter from Paul J. Sinderbrand, Counsel to

request which would have afforded blanket licensing for repeaters operating below 2,000 Watts EIRP, suggesting that such licensing should be non-controversial because they will operate "at a power level [that] is completely standard in this part of the spectrum."[18] This statement by XM only makes sense if XM intended for its proposal to be based on 2,000 Watts *peak* EIRP, since that is and remains the restriction imposed on the WCS licensees in this part of the spectrum.

When XM sought its initial STA, many WCS interests objected and called upon the Commission to restrict XM's repeaters to the same EIRP limit imposed on WCS base stations (*i.e.*, 2,000 Watts *peak* EIRP).[19] Others criticized XM for failing to identify the specific repeaters that would operate below that power level.[20] In responding to that criticism, XM justified its action by citing to comments filed by WCS licensees in IB Docket No. 95-91 and in response to its STA request that proposed limiting DARS repeaters to the same EIRP limit imposed on WCS (*i.e.* 2,000 Watts *peak* EIRP).[21] Moreover, in a filing designed to deflect arguments that over-powered DARS repeaters would interfere with WCS operations, XM specifically referred on multiple occasions to the measurement of DARS terrestrial repeater EIRP utilizing peak measurements.[22] Indeed, XM has failed to identify a single filing made by it

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Wireless Communications Ass'n Int'l, Inc., to Magalie Roman Salas, Secretary, FCC, IB Docket No. 95-91, at 2 (filed Dec. 15, 2000).

[18] *See* XM April 25, 2001 Ex Parte at 2.

[19] *See* Opposition of WorldCom, Inc. to STA Request, SAT-STA-20010712-00063, at 2 (filed Aug. 21, 2001)(supporting grant of STA limited to same power levels as imposed on WCS).

[20] *See* Comments of AT&T Wireless Services, SAT-STA-20010712-00063, at 11 (filed Aug. 21, 2001); Application of AT&T Wireless Services for Review, SAT-STA-20010712-00063, at 2-5 (filed Oct. 17, 2001). It is worth noting that the environment surrounding the request for terrestrial repeaters by Sirius, the other DARS licensee, was indistinguishable. Sirius also sought a blanket authorization for repeaters that would operate below 2,000 Watts EIRP, and when that proposal was criticized, Sirius responded by citing to proposals by WCS licensees that would subject DARS terrestrial repeaters to the same power limit as is imposed on WCS (*i.e.*, a 2,000 Watt *peak* EIRP limit). *See* Reply Comments of Sirius Satellite Radio Inc., SAT-STA-20010724-00064, at 6 n.11 (filed Aug. 31, 2001); Opposition of Sirius Satellite Radio Inc. to AT&T Wireless Services, Inc. Application for Review, SAT-STA-20010724-00064, at 11 n.35 (filed Nov. 1, 2001).

[21] *See* Comments of XM Radio Inc., IB Docket No. 95-91, at 14-15 (filed Dec. 14, 2001) *citing, e.g.,* Opposition of WorldCom, Inc. to STA Request, SAT-STA-20010712-00063, at 2 (filed Aug. 21, 2001)(supporting grant of STA limited to same power levels as imposed on WCS). *See also* Opposition of XM Radio to Application for Review, SAT-STA-20010712-00063, at 4 n.8 (filed Nov. 1, 2001).

[22] *See* Letter from Bruce D. Jacobs, Counsel to XM Radio Inc., to Magalie Roman Salas, Secretary, FCC, SAT-STA-20010712-00063, Attachment at 8 (filed Aug. 29, 2001)(referencing *peak* DARS EIRP level in table explaining link budget used by XM in interference analysis); *id.* at 12 (referencing *peak* DARS EIRP); *id.* at 15 (comparing sizes of "exclusion zones" for various antenna models when DARS repeater is limited to 2,000 Watts peak EIRP and other peak EIRP levels).

prior to the grant of its initial STA that suggests its proposed STA power levels were to be restricted using an average reading.[23]

In addition, the language of the initial STA granted to XM itself underscores that the International Bureau intended to limit the blanket terrestrial repeater authorization to the same power level imposed on WCS licensees (*i.e.* 2,000 Watts *peak* EIRP). In explaining its rationale for permitting blanket licensing of low-power repeaters, the Bureau noted that "the focus of the party's technical interference objections has been on repeaters operating above 2 kW EIRP."[24] As discussed above, that focus was on repeaters operating above the 2,000 Watts *peak* EIRP limit imposed on WCS. Thus, the only reasonable conclusion is that the Bureau intended to provide for blanket licensing of facilities operating at or below 2,000 Watts *peak* EIRP and to restrict the operating parameters of more powerful repeaters to those identified in the site-specific applications.

As such, XM could not have reasonably believed it was authorized to operate repeaters pursuant to its blanket authority of up to 2,000 Watts average EIRP and that the site-specific power levels were to be read as average EIRP levels. To the contrary, it is only reasonable to conclude that this is a newly-created interpretation designed by XM to reduce the number of terrestrial repeaters that have been operating in violation of Section 301 of the Communications Act and the Commission's rules. Before the Commission takes any further action regarding the instant STA, it should require XM to identify the maximum peak power level at which each of its facilities have been operated and are today operating.

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[23] Although XM cites to two filings that do reference average EIRP, both were made after its initial STA was granted. *See* XM Ex Parte at 1 n.1. One of those documents is, at best, ambiguous since, although it does reference average in a footnote, the body is replete with references to peak EIRP. *See* Comments of XM Radio Inc., IB Docket No. 95-91, at 11 (filed December 14, 2001)(comparing sizes of "exclusion zones" for various antenna models when DARS repeater is limited to 2,000 Watts peak EIRP and other peak EIRP levels); *id.* at 13 (proposing that "[b]elow 2320 MHz and above 2332.5 MHz, the *peak* equivalent isotropically radiated power (P_{eirp}) from any SDARS repeater operating within its assigned frequency band between 2320 and 2332.5MHz shall be attenuated by a factor (P_e) at least equal to 75 + 10 log (P_{eirp}) db")(emphasis added); *id.* at 14 (proposing that "[b]elow 2332.5 MHz and above 2345 MHz, the *peak* equivalent isotropically radiated power (Peirp) from any SDARS repeater operating within its assigned frequency band between 2332.5 and 2345MHz shall be attenuated by a factor (Pe) at least equal to 75 + 10 log (Peirp) db.")(emphasis added). The other filing by XM was made in connection with the instant STA request and, in retrospect, appears to have been an attempt to sneak the issue past the Commission without scrutiny.

[24] *See XM 2001 STA Grant*, 16 FCC Rcd at 16784.

Should you have any questions regarding this submission, please contact the undersigned.

Respectfully submitted,

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