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December 7, 2006

Ex Parte

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *XM Radio Inc. Request for Special Temporary Authority to Operate SDARS Terrestrial Repeaters for 30 Day – File No. SAT-STA-20061002-00114*

Dear Ms. Dortch:

Last week, in its opposition to the above-noted STA request ("STA Request"), the WCS Coalition tried to use this limited proceeding to circumvent the Satellite Digital Audio Radio Service ("SDARS") terrestrial repeater rulemaking – seeking results here that it has been unable to obtain there. The Commission should not countenance this attempt to abuse the regulatory process.

The WCS Coalition agenda is clear. It has long argued in the SDARS rulemaking that all terrestrial repeaters should operate below 2 kW equivalent isotropically radiated power ("EIRP").[1] Having failed to achieve that goal through the rulemaking process, the WCS Coalition now attempts artificially to manufacture its desired result here. Specifically, the WCS Coalition asks the Commission to deny the STA Request and instead to "require XM to immediately reduce the power level" of *all* its variant repeaters "to no more than

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[1] *See, e.g., WCS Coalition Ex Parte Letter*, IB Docket No. 95-91 (filed Oct. 4, 2001). The WCS Coalition, in its filings here and elsewhere, glosses over the difference between the SDARS operators and the WCS licensees when discussing power levels. The SDARS operators have always made clear, and the Commission has always understood, that they measure the power of their repeaters in terms of *average* EIRP – and that is how the repeaters were authorized. *See, e.g., Request for Further Comment on Selected Issues Regarding SDARS Terrestrial Repeater Networks*, IB Docket No. 95-91, Comments of XM Radio Inc. at 9-10 n.30 (filed Dec. 14, 2001) (endorsing definitions based on average EIRP); *XM Radio Inc. Request for Special Temporary Authority*, File No. SAT-STA-20061002-00114, Exhibit A (filed Oct. 2, 2006) ("XM 30-Day STA Request") (identifying average power for each repeater). The WCS Coalition, without noting what it is doing, always refers to *peak* EIRP. Needless to say, the two measures are not the same.

2,000 Watts peak EIRP,"[2] regardless of whether the variation has any relation to repeater power. In other words, the WCS Coalition wants each of XM's 349 variant repeaters to operate below 2 kW, even though, *if the STA Request is granted, only **18** repeaters would be operating over 2 kW that were not originally authorized at that power level* – and even though *XM has not used authorizations for 357 repeaters operating over 2 kW.*

In other words, if an antenna is 12 feet too high, the WCS Coalition would have XM turn the power down. If an antenna is 3 feet too low, the WCS Coalition would have XM turn the power down. If a repeater is 100 yards too far north, the WCS Coalition would have XM turn the power down. If a repeater is 150 yards too far south, the WCS Coalition would have XM turn the power down. If a repeater uses a sector antenna rather than an omni-directional antenna, thus reducing the area that the emissions affect, the WCS Coalition would have XM turn the power down. The WCS Coalition's position is every bit as absurd as it sounds – and this attempt to import its rulemaking agenda into this proceeding is a clear abuse of the regulatory process.

As XM has explained in detail,[3] the only question before the Commission in this proceeding is whether "there are extraordinary circumstances requiring temporary operations in the public interest," and whether "delay in the institution of such temporary operations would seriously prejudice the public interest."[4] XM has demonstrated the presence of such circumstances and has detailed the harm to the public interest that would follow from a denial of the STA Request.[5] Specifically, XM has shown that:

- XM's "as-built" network has never caused interference to a WCS licensee, and the STA Request requires XM to eliminate any interference with a properly authorized facility that results from the operation of an XM repeater.

- The requested STA will allow XM to operate a network that is smaller, less powerful, and less likely to cause interference than the network that XM is *now* authorized to deploy.

- Failure to grant the STA Request would, as explained by three major automobile manufacturers, degrade satellite radio services for hundreds of thousands of consumers, causing needless public harm.[6]

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2 *WCS Coalition Ex Parte Letter* at 7, File No. SAT-STA-20061002-00114 (filed Nov. 30, 2006) ("WCS Coalition Ex Parte") (emphasis added).

3 *See, XM Ex Parte Memorandum in Support of STA Request* at 4–8, File No. SAT-STA-20061002-00114 (filed Nov. 21, 2006) ("XM Memorandum").

4 47 U.S.C. § 309(f); 47 C.F.R. § 25.120(b)(1).

5 *See generally* XM Memorandum; XM Radio 30-Day STA Request at 4 & Exhibit A; *XM Ex Parte Letter*, File No. SAT-STA-20061002-00114 (filed Nov. 3, 2006).

6 *See* Letter from GM, Toyota, and Honda, File No. SAT-STA-20061002-00114 (filed Dec. 5, 2006).

- 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.

Tellingly, the WCS Coalition completely ignored the key considerations behind the Commission's STA evaluation process in this proceeding: interference to other licensees and harm to the public interest.

First, the WCS Coalition does not – indeed cannot – rebut the reality that XM's as-built network has produced no interference with WCS operators. In fact, the WCS Coalition concedes that XM's variant repeaters "are not located in close proximity to *any* [WCS] operating facility."[7]

Second, the WCS Coalition simply ignores that XM is authorized to build 118 high-power repeaters, but built only 32; and that XM is authorized to build 599 medium power repeaters, but built only 328.

Third, the WCS Coalition disregards XM's showing of the harm that an STA denial would produce.[8] It blindly asserts that XM "will be able to provide terrestrial service ... by using repeaters operating at no more than 2,000 Watts peak EIRP"[9] – completely overlooking XM's demonstration to the contrary, as well as the Commission's prior findings that authorized XM to construct and operate 717 repeaters over 2,000 Watts.[10] Turning down all of its repeaters to 2 kW EIRP would significantly degrade XM's service across its *entire* network.

The WCS Coalition ignores these inconvenient considerations because, as noted, its goal has nothing to do with the merits of this proceeding. Indeed, the WCS Coalition attempts to shift the focus away from the merits of the STA Request by wrongly accusing XM of playing "a shell game with the facts."[11] As the Commission staff knows, XM has provided detailed information to the Commission and has hidden no pertinent fact. In its STA Request filed on October 2, 2006, XM identified the market, antenna type (including number of sectors on an antenna), EIRP, antenna beamwidth, orientation, geographic coordinates, and antenna height of each of the 799 repeaters that it operates

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7 WCS Coalition Ex Parte at 7 (emphasis added).

8 *See* XM Memorandum at 14–22 and Exhibits (detailing the service disruption that will occur in four representative markets if variant repeaters cease operation).

9 WCS Coalition Ex Parte at 8.

10 *See* XM Memorandum at 11.

11 WCS Coalition Ex Parte at 3.

and, further, identified every variation.[12] Further, in the filing to which the WCS Coalition was supposedly responding, XM provided a detailed market-specific analysis of the extant repeater variations for certain representative markets, the effects of such variations, and the remedial measures that XM has taken in those markets. As XM stated in its memorandum, it is currently gathering the information to provide a similar analysis for each of its remaining markets.

In addition, the WCS Coalition turns the governing law on its head in an attempt to impugn XM's legal analysis which demonstrates that Commission precedent supports grant of XM's STA. The WCS Coalition argues that XM "mis-states the law" by relying on decisions involving licensees that did not operate outside the scope of their existing authorizations before requesting an STA.[13] But whether XM exceeded the scope of its authority has nothing to do with the Commission's review of this STA request, in which the only issues are whether extraordinary circumstances warrant temporary operations in the public interest and whether delaying an authorization would seriously prejudice the public interest.[14] And the case cited by the WCS Coalition, the Commission's 1998 *Comsat Corporation Order*, proves the point. In *Comsat*, the Commission rejected an STA request explaining that a competitor's illegal conduct "is not a justification for grant of special temporary authority," while observing that the Commission employs unrelated procedural mechanisms to address past conduct.[15] Simply put, *Comsat* stands for the proposition that the Commission responds to unauthorized conduct separately from its treatment of an STA request, and that the former has no bearing on the latter.

Indeed, nothing in any of the decisions cited in XM's memorandum suggests that the Commission would have reached a different result had the licensees in those cases operated with variances prior to applying for their STAs. The reasoning and flexibility that the Commission adopted in each of those decisions applies with full force in this context.[16] And, as in each of the cited decisions, only one question is on the table in this proceeding: Does XM's as-built network satisfy the standard for an STA? The WCS

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[12] *See* XM 30-Day STA Request at 4 & Exhibit A. XM also provided the antenna specification sheets for each of the antenna types listed. *Id.* at 4 & Exhibit B. It also noted its view that any repeater within five seconds of its identified location is not at variance with its authorization, and cited the relevant authority for that conclusion.

[13] *See* WCS Coalition Ex Parte at 2, 4-6.

[14] *See* 47 U.S.C. § 309(f); 47 C.F.R. § 25.120(b)(1).

[15] *See Comsat Corporation*, Order, 13 FCC Rcd. 319, 323-324 (¶ 9) (1998).

[16] In the midst of its attempt to distinguish the cases on which XM relies, the WCS Coalition chides XM for suggesting that the Commission's flexible approach to satellite authorizations should extend to XM's network of terrestrial repeaters. *See* WCS Coalition Ex Parte at 5-6 n.19. As XM explained, the Commission explicitly treats XM's repeater network as part of its satellite system. *See 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, 16783 (¶ 7) (2001).

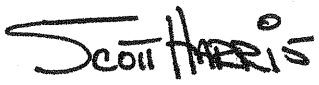
Coalition has not even addressed that central inquiry, thereby conceding that the answer is yes.

Finally, the WCS Coalition again mangles the law when urging the Commission to issue a public notice related to XM's STA request and to accept public comment.[17] In fact, XM and the WCS Coalition are already debating the STA Request quite publicly. Indeed, the WCS Coalition has already publicly commented – on two separate occasions – on the STA Request.[18] All the same, the WCS Coalition's inaccurate articulation and application of the law require comment. First, the WCS Coalition argues that Section 25.120(b) of the Commission's rules requires a public notice and an opportunity for public comment. But on its face, that rule section says that an application for a 30-day STA does *not* require public notice or comment.[19]

Even faced with clear regulatory language to the contrary, the WCS Coalition continues to argue (without support) that a public proceeding is warranted because XM "trivialized" its network variances and "mis-stated" the law.[20] These allegations are utterly baseless. As explained above, XM has hardly minimized its variances; to the contrary, it has voluntarily disclosed each and every variance and unilaterally brought many of its repeaters into compliance with the original authorizations. Moreover, XM has described the law exactly as the Commission applies it in the STA context. It is the WCS Coalition that has mischaracterized the governing law in an effort to promote its own policy agenda.

In sum, notwithstanding the WCS Coalition's bluster and its inappropriate attempt to affect a separate docket, this proceeding should focus on only one question: is an STA justified in this circumstance? The answer is clear. No one would be harmed by the grant of the STA and failing to do so would harm consumers in every affected area, and thereby disserve the public interest.

Respectfully submitted,



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17 *See* WCS Coalition Ex Parte at 1-2.

18 *See* WCS Coalition Ex Parte; *WCS Coalition Ex Parte Letter*, File No. SAT-STA-20061002-00114 (filed Oct. 10, 2006).

19 *See* 47 C.F.R. § 25.120(b)(4) ("The 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.").

20 WCS Coalition Ex Parte at 2.