

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of)
)
XM Radio Inc.) File No. SAT-STA-20061013-00119
)
Request for Modification of SDARS Repeater)
Special Temporary Authority-180 Days)
)
To: Chief, International Bureau)

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Federal Communications Commission
Bureau / Office

PETITION TO DENY

The WCS Coalition, by its attorneys, pursuant to Section 25.154(a) of the Commission's Rules and in response to the International Bureau's August 6, 2008 *Public Notice*,¹ hereby petitions the International Bureau to deny the above-captioned request by XM Radio Inc. ("XM") for a modification to its existing special temporary authority ("2001 STA")² to the extent that the proposed modification would allow XM to operate any Digital Audio Radio Service ("DARS") terrestrial repeaters with an average equivalent isotropic radiated power ("EIRP") in excess of 2000 watts (the "STA Application"). As will be discussed below, XM has not satisfied the substantive standards set forth in Section 25.120(b)(1) for grant of a special temporary authorization ("STA"), as it has failed to establish that extraordinary circumstances preclude it from meeting its service needs while operating at or below 2000 average EIRP.³

The instant request was initially submitted by XM on October 13, 2006 in conjunction with XM's disclosure that it had constructed and operated hundreds of terrestrial repeaters with technical parameters at variance from those authorized by the Commission pursuant to the 2001

¹ See *Policy Branch Information*, Report No. SAT-00542, Public Notice (rel. Aug. 6, 2008).

² See *XM Radio Inc.*, Order and Authorization, 16 FCC Rcd 16781 (2001), *modified on recon.* Order, 16 FCC Rcd 18484 (2001) ["2001 Grant Order"].

³ See *2001 Grant Order*, 16 FCC Rcd at 16783.

STA (the “Non-Compliant Repeaters”). Although the request seeks authority to operate all of those repeaters as illegally constructed, in the August 5, 2008 Consent Decree between the Commission and XM (the “Consent Decree”),⁴ the Commission effectively rejected XM’s request with respect to 100 of those repeaters and directed XM within 60 days of the effective date of the Consent Decree to cease operating on 50 of the repeaters and to bring 50 additional repeaters into compliance with the 2001 STA before operating.⁵ Thus, as reflected by the August 6, 2008 *Public Notice*, the 221 repeaters identified in Attachment D are at issue here.⁶ The WCS Coalition does not object to the International Bureau granting the STA with respect to the 98 repeaters that will operate at less than 2000 watts average EIRP. However, the WCS Coalition does object to allowing the other 123 repeaters to operate at power level greater than 2000 watts average EIRP, as such repeaters pose a serious risk of future interference to WCS operations.

Section 25.120(b)(1) of the Commission’s Rules is clear: “the Commission may grant a temporary authorization *only* upon a finding that there are extraordinary circumstances requiring temporary operations in the public interest . . .”⁷ Here, however, XM has made no showing of “extraordinary circumstances” that require it to operate above 2000 watts average EIRP. To justify its request for authority to continue operating the illegally-constructed repeaters, XM merely claims that “all of these variances are in the public interest. First and foremost, they permit XM to provide valuable entertainment, information and emergency services to millions of

⁴ *XM Radio, Inc.*, Order 23 FCC Rcd 12327 (2008) [“Consent Decree”].

⁵ Neither the Consent Decree nor any document available to the WCS Coalition explains why the Commission has opened the door to consideration of the 221 modifications on Exhibit D, while rejecting modification of the other 100 repeaters.

⁶ *See* Consent Decree, 23 FCC Rcd at 12333.

⁷ 47 C.F.R. § 25.120(b)(1) (emphasis added).

American consumers with the high quality they expect.”⁸ However, XM provides the Commission with no explanation whatsoever (much less the requisite citation to extraordinary circumstances) as to why it cannot serve the areas at issue with one or more repeaters operating at no more than 2000 watts EIRP. This omission is startling given that the Commission has previously warned XM that “[a] request for special temporary authority must contain . . . all facts sufficient to justify the temporary authority sought and the public interest therein.”⁹ In light of XM’s total silence on the issue, and given that XM is operating numerous other repeaters at or below 2000 watts average EIRP, the Commission cannot reasonably conclude that there are extraordinary circumstances requiring XM to employ 123 high-power repeaters throughout the country.

XM’s failure to establish extraordinary circumstances requiring use of more than 2000 watts average EIRP is particularly telling when evaluated in the context of the ongoing debate in IB Docket No. 95-91 and WT Docket No. 07-293 over the rules that will govern WCS/DARS coexistence. As the Commission is aware, XM’s proposal in IB Docket No. 95-91 and WT Docket No. 07-293 to permit terrestrial repeaters to routinely operate at high power levels has been among the most contentious issues in the long-running debate between the Wireless Communications Service (“WCS”) and DARS communities.¹⁰ The record before the Commission establishes beyond peradventure that terrestrial repeaters operating above 2000 watts average EIRP will result in unduly large WCS “exclusion zones” – areas around a terrestrial repeater that WCS licensees cannot reasonably serve because of interference from the

⁸ See STA Application, at 1.

⁹ *XM Radio Inc., Sirius Satellite Radio Inc.*, Order and Authorization, 19 FCC Rcd 18140, 18142 (IB 2004) (citation omitted).

¹⁰ See Comments of XM Radio Inc., WT Docket No. 07-293 at 25-27 (filed Feb. 14, 2008) [“XM Comments”].

terrestrial repeater.¹¹ Not surprisingly, the Commission has acknowledged the potential for harmful interference from high-powered DARS terrestrial repeaters to WCS operations.¹² Thus, the WCS community has consistently called for permanent rules restricting DARS terrestrial repeaters to power levels of no more than 2000 watts average EIRP.¹³

Although XM here proposed that its STA be conditioned on non-interference to WCS,¹⁴ that protection offers WCS licensees scant comfort in light of XM's recent proposals in IB Docket No. 95-91 and WT Docket No. 07-293. In those dockets, XM is not only asking the

¹¹ See, e.g., Comments of WCS Coalition, WT Docket No. 07-293, at 33 (filed Feb. 14, 2008) ["WCS Coalition Comments"]. See also Letter from Karen L. Gulik, Counsel to AT&T Wireless Services, Inc., to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, FCC, IB Docket No. 95-91, at 1-7 (filed Aug. 9, 2001); Letter from Karen L. Gulik, Counsel to AT&T Wireless Services, Inc., to Magalie Roman Salas, Secretary, FCC, IB Docket No. 95-91, at 6 (filed Feb. 20, 2001); Letter from Karen L. Gulik, Counsel to AT&T Wireless Services, Inc., to Magalie Roman Salas, Secretary, FCC, IB Docket No. 95-91, at 2-12 (filed April 30, 2001); Comments of BellSouth Corporation, File Nos. SAT-STA-20010712-00063, SAT-STA-20010724-00064, at i-ii (filed Aug. 21, 2001); Letter from Karen B. Possner, BellSouth Corporation, to Magalie Roman Salas, Secretary, FCC, IB Docket No. 95-91 (filed May 18, 2001); Opposition of WorldCom, Inc., to STA Request, File Nos. SAT-STA-20010712-00063, SAT-STA-20010724-00064, at 1 (filed Aug. 21, 2001); Letter from Karen B. Possner, BellSouth Corporation, to Magalie Roman Salas, Secretary, FCC, IB Docket No. 95-91 (filed Aug. 28, 2001); Letter from Paul J. Sinderbrand, Counsel to the Wireless Communications Ass'n Int'l, Inc., to Magalie Roman Salas, Secretary, FCC, IB Docket No. 95-91 (filed Oct. 2, 2001); Letter from the WCS Coalition, to Magalie Roman Salas, Secretary, FCC, IB Docket No. 95-91 (filed Nov. 2, 2001); Comments of the WCS Coalition, IB Docket No. 95-91 (filed Dec. 14, 2001); Reply Comments of the WCS Coalition, IB Docket No. 95-91 (filed Dec. 21, 2001); Letter from the WCS Coalition, to William Caton, Acting Secretary, FCC, IB Docket No. 95-91 (filed Feb. 4, 2002); Letter from the WCS Coalition, to William Caton, Acting Secretary, FCC, IB Docket No. 95-91 (filed Feb. 19, 2002). Indeed, in granting XM its initial 2001 STA, the Commission acknowledged that there are areas around terrestrial repeaters where WCS equipment will be susceptible to interference and required XM to cure any interference from its terrestrial repeaters. See *2001 Grant Order*, 16 FCC Rcd at 16785.

¹² In granting and subsequently modifying XM's 2001 STA, the Commission has repeatedly emphasized both that XM terrestrial repeaters operating in excess of 2000 watts EIRP must avoid interference to WCS deployments and that, because the grant of the 2001 STA is without prejudice to the eventual outcome of the Commission's consideration of DARS terrestrial repeater rules in IB Docket No. 95-91 and WT Docket No. 07-293, construction of such high-power terrestrial repeaters pursuant to the 2001 STA is at XM's own risk. See *2001 Grant Order*, 16 FCC Rcd at 16787-88; *XM Radio Inc.*, Order and Authorization, 19 FCC Rcd 18140 (2004). The Commission believed that by conditioning XM's STAs in this manner, WCS licensees would not be jeopardized by permitting XM to construct and operate the high-power terrestrial repeaters it proposed.

¹³ See e.g., WCS Coalition Comments at 24.

¹⁴ See STA Application at 7.

Commission to “grandfather” all DARS terrestrial repeaters constructed pursuant to STAs, but it would have the Commission eliminate the unqualified obligation XM has pursuant to its STAs to protect WCS operations from interference – the obligation that has been an essential precondition to the Commission’s willingness to grant STAs in the first place.¹⁵ Given XM’s position calling for the “grandfathering” of terrestrial repeaters but elimination of the condition that protects WCS from interference from those repeaters and the rejection of the WCS Coalition’s position to permit grandfathering subject to non-interference, granting XM authority to operate even one, much more than a hundred repeaters at power levels above 2000 watts average EIRP can only exacerbate the present difficult situation. Absent any evidence that extraordinary circumstances preclude XM from serving the areas at issue here with repeaters operating at no more than 2000 watts average EIRP, there is no reason for the Commission to make a bad situation even worse.

While fortuitously XM’s illegal repeaters are not located in close proximity to any operating WCS facility, they are located in many areas where it is highly likely WCS will be deployed in the coming years. As the Commission is well-aware, the lack of final rules governing DARS terrestrial repeaters has forced WCS licensees to deploy systems at locations where there are no DARS terrestrial repeaters.¹⁶ However, if the WCS spectrum at 2.3 GHz is to achieve its potential as a viable, globally-harmonized home for broadband wireless services, ubiquitous coverage will be required, and that, in turn, will require the construction of WCS

¹⁵ See XM Comments at 25; Letter from Patrick L Donnelly and James S. Blitz to Marlene H. Dortch, Secretary, FCC, IB Docket No. 95-91 (filed Sept. 19, 2007); Letter from Bruce D. Jacobs, Counsel to XM Radio Inc., to Marlene H. Dortch, Secretary, FCC, IB Docket No. 95-91 (filed Jan. 5, 2007).

¹⁶ See Request of AT&T Inc., BellSouth Corporation, Comcast Corporation, NextWave Broadband Inc., NTELOS, Inc., Sprint Nextel Corporation, Verizon Laboratories Inc., and WaveTel NC License Corporation for Limited Extension of Deadline for Establishing Compliance with Section 27.14 Substantial Service, WT Docket No. 06-102, at 5-6 n.12 (filed March 22, 2006).

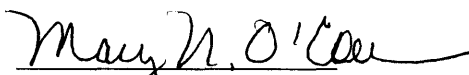
facilities in close proximity to DARS terrestrial repeaters. Thus, there is no doubt that if XM is permitted to operate above 2000 watts average EIRP, in time XM will cause unreasonable levels of harmful interference to WCS-based broadband offerings.

In short, rather than legitimize XM's illegal construction and operation of a high-power repeaters throughout the country, the Commission should advise XM that, if XM desires to provide terrestrial service in these cities, XM must utilize repeaters operating at no more than 2,000 watts average EIRP.

WHEREFORE, for the foregoing reasons, the Commission should deny XM's request for modification of its 2001 STA that would provide it authority to modify any repeater operating in excess of 2000 watts average EIRP.

Respectfully submitted,

THE WCS COALITION

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September 5, 2008

CERTIFICATE OF SERVICE

I, Karla E. Huffstickler, hereby certify that the foregoing Petition to Deny was served this 5th day of September, 2008 by depositing a true copy thereof with the United States Postal Service, first class postage prepaid, addressed to the following:

James S. Blitz
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Karla E. Huffstickler