

**Before the
Federal Communications Commission
Washington, D.C. 20554**

Application of)
)
SIRIUS XM RADIO INC.) File No. SAT-STA-20081027-00210
)
For Special Temporary Authority to Operate)
Twenty SDARS Terrestrial Repeaters in the)
Commonwealth of Puerto Rico)

To: The Secretary
For delivery to: The Chief, International Bureau

PETITION TO DENY

1. The Radio Broadcasters Association of Puerto Rico (the “Association”), by its counsel and pursuant to 47 C.F.R. § 25.154,¹ hereby submits this Petition to Deny (the “Petition”) the above-captioned application for Special Temporary Authority (“STA Application”) to permit Sirius XM Radio Inc. (“Sirius XM”) to operate twenty (20) Satellite Digital Audio Radio Service (“SDARS”) terrestrial repeaters in the Commonwealth of Puerto Rico. As demonstrated below, the basis for the STA Application is procedurally suspect, and its grant would be contrary to law and policy. Thus, the STA Application must be denied or, at minimum, stayed pending resolution of the concerns discussed herein.

2. The Association represents approximately 90% of the AM and FM broadcasters in the Commonwealth of Puerto Rico. Because the service proposed in the above-captioned application will be in direct competition for listeners with Puerto Rico radio broadcasters, the Association has standing to file this petition on behalf of its members. “It is well established

¹ This petition is timely filed pursuant to a *Request for Extension of Time* filed electronically via IBFS on May 28, 2009. Sirius XM Vice President and Regulatory Counsel, James S. Blitz, was notified by phone and email, and raised no objection to the extension request.

that a competitor of an applicant has party-in-interest status.” *Letter to Lawrence Bernstein, Esq.*, DA 09-1224, at 3 (rel. June 1, 2009), citing *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 476-477 (1940). However, a competitor is not required to demonstrate that it will suffer a direct injury, *Id.*, citing *Waterman Broadcasting Corporation of Florida, Letter*, 17 FCC Rcd 15742, 15744 n.2 (MB 2002), or otherwise allege a material change in competition resulting from the application. *Id.*, citing *American Mobilphone, Inc. and Ram Technologies, Inc.*, Order, 10 FCC Rcd 12297, 12298 (WTB 1995).

DISCUSSION

3. Sirius XM is an SDARS operator which does *not* provide, and has never provided, SDARS service to Puerto Rico. In the above-captioned application, Sirius XM seeks authority to establish a network of terrestrial repeaters in order to extend the coverage of its service to Puerto Rico. The Commission expressly declined to permit such use of terrestrial repeaters more than 10 years ago. *See Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 5754, 5811-12 (1997) (“*1997 Order and FNPRM*”). Instead, in 1997 the Commission invited comments – in a formal rulemaking context – on how it might permit the use of repeaters for limited “gap-filler” purposes (to serve, *e.g.*, “urban canyons” and similar difficult-to-reach areas) *within the SDARS operator’s authorized satellite coverage areas only*. *Id.* at 5811 and Appendix C. The possibility of allowing use of repeaters to serve areas *outside* of the SDARS service area was *not* among the alternatives described by the Commission.

4. Hundreds of comments were submitted in response to that invitation, but four years later the proceeding remained unresolved. At that point, the Commission invited more

comments relative to how best to limit use of terrestrial repeaters by SDARS operators. See *Public Notice, Request For Further Comment On Selected Issues Regarding The Authorization Of Satellite Digital Audio Radio Service Terrestrial Repeater Networks*, DA 01-2570 (2001). Hundreds more responsive comments were filed.

5. It is safe to say that the use of terrestrial repeaters by SDARS operators is a highly complex, highly controversial issue even if such use were to be restricted to previously authorized SDARS service areas. Today, more than a decade after the *1997 Order and FNPRM*, that issue *still* remains unresolved.

6. In 2007, the two original SDARS operators, Sirius and XM, proposed to merge into a single entity. Their application was generally silent about use of repeaters outside of the satellite service area of the proposed merged entity. The proposed merger itself was highly controversial, attracting thousands upon thousands of comments.

7. In June, 2008, more than a year after the merger proposal was originally submitted, the applicants filed an *ex parte* letter with the Commission in which they advanced certain “voluntary commitments”, one of which involved extension of service to Puerto Rico through terrestrial repeaters. Despite the fact that such service extension flew in the face of the Commission’s longstanding policy, and despite the fact that the Commission had *already* accumulated a very substantial record of public comment on the use of repeaters to in connection with SDARS service, the Commission did not expressly invite further comment on the “voluntary commitment”. Rather, barely more than a month later, the Commission granted the proposed merger and in so doing, *inter alia*, indicated summarily that SDARS service might be extended to Puerto Rico.

8. The above-captioned application has been filed in response to that indication. The Association submits that, before the application can be granted, the Commission must at long last review the record of public comment amassed over more than a decade and resolve, in a transparent manner, the longstanding questions surrounding SDARS use of terrestrial repeaters. With all due respect to the Commission, the summary acceptance of Sirius XM's *ex parte* "voluntary commitment" makes a mockery of any claim that the Commission offers the public an open and participatory deliberative process. That unfortunate departure from appropriate procedural standards can be corrected now only by giving full consideration to the important issues which are – and have for more than 10 years been – a matter of record before the Commission.

9. A combined satellite-terrestrial system for primary delivery of audio signals was *not* contemplated by the Commission when it established the SDARS service. Rather, SDARS was to be a nationwide, satellite-only system. *1997 Order and FNPRM* , at 5794 (requiring full CONUS service coverage); *Id.* at 5812 ("The Commission . . . must determine how to ensure any use of terrestrial repeaters is complementary to the DARS service and is only for retransmission of signals received from the satellite.").

10. The Commission acknowledged that some topographical features might impede satellite-delivered signals in some areas – "urban canyons" was a particular example. In some such limited situations, the Commission agreed that terrestrial repeaters could be used as "fill-in" signals. But it has always been a given that such "fill-in" service was to be just that – "fill-in", *i.e.*, service *not* intended to extend the authorized SDARS service area. *Id.* at 5811 (noting the Commission's own proposal to "prohibit the operation of terrestrial gap-fillers except in conjunction with an operating satellite DARS system to ensure its complementary

nature and so that there would be no transformation of satellite DARS into an independent terrestrial DARS network.”); *see also* 11 FCC Rcd 1 (1995).

11. The notion that Sirius XM might deploy a series of repeaters to provide service to Puerto Rico flies in the face of that given. Sirius XM does not provide SDARS service to Puerto Rico, so by definition any repeater-based distribution of its service there would extend its authorized service area and create “terrestrial DARS network.” Before the Commission performs that particular regulatory U-turn, it ought to consider the hundreds and thousands of comments it has already received on that subject.

12. The Association is particularly concerned about the effect that the introduction of terrestrially-based SDARS service may have on the delicate competitive ecology of the Puerto Rico radio market. Puerto Rico is, after all, an island – physically, culturally, economically. Introduction of a network of terrestrial repeaters providing programming from some remote source is akin to introducing into a previously sheltered ecosystem an invasive and predatory species with unknown and unpredictable behavioral patterns. The threat, of course, is that local Puerto Rico broadcasting will suffer and its ability to serve the Puerto Rican audience will be reduced in the face of that new and unpredictable competitive presence. And neither the Commission nor Sirius XM can legitimately deny that possibility, because such a terrestrial repeater network has never before existed. Indeed, the Commission has never even contemplated such a network. So the reality of that potential threat cannot be ignored.

13. The Commission has devoted considerable time and attention to fostering “localism” in broadcasting. *See, e.g., Report on Broadcast Localism and Notice of Proposed Rulemaking*, 07-218 (rel. Jan. 24, 2008). Granting the captioned application would represent the antithesis of that effort. SDARS service is everything that “localism” is not, because

SDARS service is designed to be delivered on a regional or nationwide basis, through satellites, with no capacity for truly “local” programming. But if the Commission were to sever that requisite tether to a satellite and instead permit the distribution of SDARS programming – *i.e.*, purely *non*-local programming – exclusively through conventional terrestrial means, the Commission would be encouraging precisely the kind of service against which the agency’s localism agenda has been directed.

14. It would, therefore, be the height of hypocrisy for the Commission to embrace the Sirius XM proposal. And that hypocrisy would be aggravated by the fact that this Commission, ostensibly committed to transparency² and public participation, would be ignoring a vast, *already accumulated*, record in order to grant Sirius XM extraordinary relief sought through an *ex parte* request slipped in under the radar at the tail end of a hotly contested matter, a request as to which the public was kept largely in the dark until, lo and behold, that request was miraculously granted in the fine print of a 100-page decision.

CONCLUSION

15. In view of the foregoing, the Association opposes the above-captioned application and submits that the application should be denied. In the alternative, before the Commission considers that application, the Commission should consider the record of comments relative to

² *See, e.g.*, Remarks of Acting Chairman Michael J. Copps, January 26, 2009 (“The first thing we need to do as an organization is to . . . enhance the level of transparency in our work, and bring to our daily decisions the kind of openness that gives true credibility to everything we do.”).

use, by SDARS operators, of terrestrial repeaters and, on the basis of that record, develop and announce rules and policies to be applied to all such proposals, including the above-captioned application.

Respectfully submitted,

RADIO BROADCASTERS ASSOCIATION
OF PUERTO RICO

/s/

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June 5, 2009

CERTIFICATE OF SERVICE

I, Marie Clark, a secretary in the law firm of Fletcher Heald & Hildreth, PLC, hereby certify that on June 5, 2009, I caused a copy of the foregoing "Petition to Deny" to be served via U.S. Mail, postage prepaid, upon the following:

James S. Blitz
Vice President, Regulatory Counsel
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/s/

Marie Clark