

2007-model US automobiles will offer iPod integration.”⁹⁶ In fact, 60 million U.S. cars are projected to have factory-installed MP3 jacks by 2011.⁹⁷

5. Mobile Phones

Mobile phones represent another significant and expanding means of enjoying audio entertainment. Approximately 75 percent of all Americans currently own a mobile phone,⁹⁸ and the possibility of content delivery has not been lost on wireless carriers. Several carriers are offering their subscribers audio entertainment options today.⁹⁹ For example, Sprint currently offers subscribers over 50 channels of radio and streaming video that Sprint subscribers can access on their device for a monthly fee and offers music download capabilities for a one-time fee.¹⁰⁰ AT&T (formerly Cingular Wireless) provides numerous music-capable handsets and

⁹⁶ Press Release, Apple, *Apple Teams Up With Ford, General Motors & Mazda To Deliver Seamless iPod Integration*, Aug. 3, 2006, at <http://www.apple.com/pr/library/2006/aug/03ipod.html> (last visited Mar. 14, 2007).

⁹⁷ *Research Firm Sees 73 Million iPod-Equipped Cars Worldwide by 2011*, THE IPOD OBSERVER, Dec. 21, 2005, at <http://www.ipodobserver.com/story/24805> (last visited Mar. 13, 2007) (projecting that by 2011, 28 million American cars will feature built-in iPod interfaces, and 60 million will include auxiliary input jacks that will accommodate iPods as well as other types of MP3 players).

⁹⁸ Bridge Ratings, *Industry Study: In-Car Media Use*, Feb. 7, 2007, at http://www.bridgeratings.com/press_0207200-Media%20Incar.htm (last visited Mar. 17, 2007) (noting that approximately 75 percent of Americans owned a mobile phone in 2006). See also CTIA – The Wireless Association® Home Page, <http://www.ctia.org> (last visited Mar. 13, 2007) (estimating 233,336,423 current U.S. wireless subscribers). In terms of penetration, mobile phones are the third most popular electronic device, behind only televisions and radios.

⁹⁹ *A Pocket of Tunes*, NEWSWEEK, Feb. 5, 2007, at <http://www.msnbc.msn.com/id/16840023/wid/6448213/site/newsweek/> (last visited Mar. 17, 2007) (describing mobile music services provided or planned by Sprint, Verizon, and Cingular); see also *Verizon Wireless Introduces V Cast Music*, PRNEWswire, Jan. 5, 2006, at <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/01-05-2006/0004243500&EDATE=> (last visited Mar. 18, 2007) (describing Verizon’s V-Cast music service launched in January 2006, with one million songs available for download by mid-2006, and using the V-Cast network that covers more than 150 million Americans).

provides monthly subscription services that include streaming music, news, and sports, “making it possible for them to discover millions of new songs and take their favorites with them wherever they go.”¹⁰¹ Similarly, Verizon Wireless allows subscribers to wirelessly download over 1.5 million songs to their handsets via its V-Cast service.¹⁰² In addition, many non-carrier companies have deployed or plan to deploy similar radio and wireless download services.¹⁰³

Subscribers are taking advantage of these offerings in dramatically growing numbers. Today, approximately 23.5 million wireless subscribers own phones with integrated music players.¹⁰⁴ In addition, nearly 20 percent of the wireless phones purchased in the third quarter of

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¹⁰⁰ See Press Release, Sprint, *Sprint Turns Up the Music with Exclusive Streaming Radio and Video and Unique Song-Download Features*, Aug. 31, 2006, at http://www2.sprint.com/mr/news_dtl.do?id=13240 (last visited Mar. 18, 2007). AT&T, f/k/a Cingular, also allows subscribers to stream and download music and access a variety of music libraries using their wireless device. See AT&T Music Center, at http://www.cingular.com/learn/music-video/?_requestid=255939 (last visited Mar. 18, 2007).

¹⁰¹ Press Release, AT&T (f/k/a Cingular Wireless), *Cingular Wireless Customers Can Now Enjoy Music Content from Napster, Yahoo! Music, XM Satellite Radio and eMusic*, Nov. 2, 2006, at http://cingular.mediaroom.com/index.php?s=press_releases&item=1742 (last visited Mar. 18, 2007).

¹⁰² See Verizon Wireless Music Page, at http://getitnow.vzwshop.com/index.aspx?id=music_vcast (last visited Mar. 18, 2007).

¹⁰³ For example, Motorola has deployed an iRadio service that allows subscribers to access over 400 commercial-free radio stations over their iRadio enabled mobile phone. See Press Release, Motorola, Inc., *Motorola Rocks the House . . . and the Car . . . and the Mobile Phone . . . Rolls Out iRadio® Service*, Jan. 3, 2006, at http://www.motorola.com/mediacenter/news/detail.jsp?globalObjectId=6260_6215_23 (last visited Mar. 18, 2007).

¹⁰⁴ This is five times the number of Americans that owned such phones in 2005. Bridge Ratings, *Music on Cell Phones*, Jan. 25, 2007, at http://www.bridgeratings.com/press_01.25.2007-MusicCellphones.htm (last visited Mar. 13, 2007).

2006 were music-capable.¹⁰⁵ This demonstrated consumer interest in music-capable handsets likely will skyrocket in a matter of months when AT&T and Apple make the Apple iPhone available for sale.¹⁰⁶

Wireless carriers are rapidly accelerating their provision of music and other content-based services. Indeed, the nation's two largest cellular operators, AT&T and Verizon Wireless, have both announced their intentions to integrate Qualcomm's MediaFLO chipsets into their handsets and to market MediaFLO services, which provide a multi-channel video and audio subscription service in the 20 largest markets in the country (with subsequent expansion to smaller markets planned in coming years).¹⁰⁷ Wireless carriers have also invested billions of dollars to deploy their own advanced networks that allow for the provision of high-speed data services, such as music downloading and audio streaming. These next-generation systems offer unprecedented broadband coverage with enhanced data rates, reliability, and broadcast capabilities. In addition, wireless carriers recently invested almost \$14 billion in additional

¹⁰⁵ *Id.*

¹⁰⁶ See Press Release, Cingular, *Apple Chooses Cingular as Exclusive U.S. Carrier for Its Revolutionary iPhone*, Jan. 9, 2007, at http://cingular.mediaroom.com/index.php?s=press_releases&item=1813 (last visited Mar. 17, 2007). There is significant and ongoing convergence between satellite radio receivers, MP3 players, and mobile phones. The difference between mobile phones and portable music devices is blurring: a number of "music phones" have been released recently, including Apple's iPhone, Verizon/LG's Chocolate and many others. At the same time, satellite radio receivers have added MP3 playing capabilities, and mobile phones and MP3 players have started including AM/FM radios.

¹⁰⁷ For example, Qualcomm is investing \$800 million in building a network for MediaFLO, a broadband network offering mobile content via a wireless network that several wireless carriers plan to offer to their subscribers. Stephen Lawson, *Cingular signs on for Qualcomm mobile TV*, INFO WORLD, Feb. 13, 2007, at http://www.infoworld.com/article/07/02/13/HNcingularmobiletv_1.html (last visited Mar. 15, 2007).

spectrum that they can use to deploy such services.¹⁰⁸ Wireless carriers also spent more than \$234 million promoting music phones and music download services in 2006 alone.¹⁰⁹ Despite these substantial investments to date, wireless carriers and other entities will continue to invest in next-generation networks and spectrum so that they may provide consumers with even more advanced services.¹¹⁰ Such commitment both by service providers and equipment manufacturers underscores the vast potential for audio entertainment distribution via mobile phones.

6. CD Players

Compact discs have provided competition for satellite radio since the Commission first authorized this service. The Commission identified CD players as an analog to satellite radio

¹⁰⁸ In the FCC's recent Auction No. 66, entities invested almost \$14 billion in spectrum that can be used to provide Advanced Wireless Services ("AWS"). See *Auction of Advanced Wireless Services Closes, Winning Bidders Announced for Auction No. 66*, Public Notice, 21 FCC Rcd 10521 (2006). The FCC's upcoming 700 MHz auction is expected to draw just as much, if not more, interest from the wireless industry.

¹⁰⁹ Bridge Ratings, *Music on Cell Phones*, Jan. 25, 2007, at http://www.bridgeratings.com/press_01.25.2007-MusicCellphones.htm (last visited Mar. 13, 2007).

¹¹⁰ For example, Sprint Nextel announced in August 2006 plans to develop a fourth-generation nationwide mobile broadband network, which will use the WiMAX standard, and deploy it in some markets during 2007 with a national rollout in 2008. Press Release, Sprint Nextel Corp., *Sprint Nextel Announces 4G Wireless Broadband Initiative with Intel, Motorola, and Samsung*, Aug. 8, 2006, at http://www2.sprint.com/mr/news_dtl.do?id=12960 (last visited Mar. 18, 2007). A number of companies are developing inexpensive Internet radio receivers than can pick up the signal from WiFi networks. For example, Torian, an Australian company, is marketing a device called inFusion, which operates as an FM radio, MP3 player, and Internet radio in any WiFi hotspot. Matthew Ingram, *WiFi Radio Stations to Join Battle for Air Supremacy*, SESAC INDUSTRY NEWS, Dec. 14, 2006, at http://www.sesac.com/ind_news_detail.aspx?news_ID=26 (last visited Mar. 18, 2007). Clearwire Corp., which builds and operates wireless broadband networks using WiMAX, recently raised \$600 million with an initial public offering. Yung Kim, *UPDATE 2 - Clearwire IPO raises \$600 mln, top of range*, REUTERS, Mar. 7, 2007, at http://today.reuters.com/news/articleinvesting.aspx?view=CN&WTmodLOC=C3-News-4&symbol=INTC.O&storyID=2007-03-08T030708Z_01_N07317552_RTRIDST_0_CLEARWIRE-IPO-UPDATE-2.XML&type=qcna (last visited Mar. 18, 2007).

from the very beginning, comparing the services in an effort to determine the rate at which satellite radio would impact terrestrial radio listenership.¹¹¹ When satellite radio licenses were awarded in 1997, CD players were included in only 3.2 percent of new cars,¹¹² yet in 2006 the overwhelming preponderance of new cars included CD players as part of their factory-installed equipment. In 2005, sales of CDs were at \$11.2 billion, in contrast to \$770 million in sales for digital music downloads that same year.¹¹³ Moreover, users can record music on CDs, further broadening the range of potential consumer listening experiences. For example, a podcast subscriber can download a podcast and “burn” it onto a CD rather than transferring it to an MP3 player. And a CD owner can upload songs onto a personal computer for playback through a service such as iTunes or for transfer to an MP3 player. Thus, compact discs are another of the many audio entertainment options available to customers.

* * *

It is clear that all of the above providers view themselves as being in direct competition with each other. In public filings and statements, various members of the radio broadcasting industry have emphatically stated that they compete directly with satellite radio and other forms of audio entertainment—a view that is underscored by the fervent opposition they expressed toward the proposed transaction before the ink on the merger agreement was even dry.¹¹⁴ For

¹¹¹ *Satellite Radio Implementation Order*, 12 FCC Rcd at 5764 (¶ 20).

¹¹² *Id.*

¹¹³ Jupiter Research, *US Music Forecast, 2006 to 2011*, Jan. 4, 2007 (Executive Summary), at <http://www.jupiterresearch.com/bin/item.pl/events:jupitertel/jup/id=98643/> (last visited Mar. 13, 2007).

¹¹⁴ See Press Release, National Association of Broadcasters, *NAB Statement in Response to Proposed Sirius/XM Merger*, Feb. 19, 2007, at http://www.nab.org/AM/Template.cfm?Section=Press_Releases1&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=8258 (last visited Mar. 18, 2007).

example, as NAB has described, “local radio stations compete for listeners with other forms of audio delivery offering an almost unlimited array of content. iPods and other MP3 players, music [subscription] services, podcasting and the Internet streaming of U.S. and foreign radio stations literally provide content from around the world to listeners in each local radio market in America.”¹¹⁵ Clear Channel has noted that terrestrial radio faces competition from “[s]atellite radio . . . [and] portable audio devices, including MP3 players (such as iPods), subscription music services offered via cable television and direct broadcast satellite (‘DBS’), [and] Internet music services.”¹¹⁶ These and other parties have made similar representations in their certified securities filings.¹¹⁷ Such statements remove any doubt concerning the diversity and multiplicity of options available in the audio entertainment services market today.

¹¹⁵ NAB Comments, *2006 Quadrennial Regulatory Review*, at 26; see also Remarks of David Rehr, President and CEO, National Association of Broadcasters, *The Future of Broadcasting*, The National Press Club, Oct. 4, 2006, at http://www.nab.org/AM/Template.cfm?Section=News_room&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=6937 (last visited Mar. 15, 2007) (“[W]e must address new competitors. Who are the newer competitors? . . . On the radio side, we have satellite radio, Internet radio, iPods, other MP3 players, cell phones and others.”).

¹¹⁶ Clear Channel Comments, *2006 Quadrennial Regulatory Review*, at 13 (citation omitted).

¹¹⁷ See, e.g., Citadel Broadcasting Corp., 2006 Form 10-K Annual Report, at 26 (filed Mar. 16, 2007), at <http://www.sec.gov/Archives/edgar/data/1174527/000119312507056656/d10k.htm> (last visited Mar. 19, 2007) (“We operate in a highly competitive industry. Our radio stations compete for audiences, creative and performing talent, broadcast rights, market share and advertiser support with other radio stations and station groups, as well as with other media such as broadcast television, newspapers, magazines, cable television, satellite television, satellite radio, outdoor advertising, the Internet, hand held programmable devices, such as iPods and cellular phones, and direct mail.”); Cox Radio, Inc., 2006 Form 10-K Annual Report, at 16 (filed Mar. 13, 2007), at <http://www.sec.gov/Archives/edgar/data/1018522/000119312507053326/d10k.htm> (last visited Mar. 19, 2007) (“The radio broadcasting industry is a highly competitive business. Our radio stations compete against other radio stations and other media (including new technologies and services that are being developed or introduced) for audience share and advertising revenue. . . . New technologies (such as satellite-delivered and portable digital audio players and hand-held programmable devices including iPods and cellular telephones) allow listeners to avoid traditional commercial advertisements and offer superior sound quality as compared to terrestrial

B. A Satellite Radio Merger Would Not Harm Competition in the Audio Entertainment Market.

As the Commission has explained, a “merger can have an anticompetitive effect in a given market if it increases concentration in the market to such an extent that the exercise of market power becomes more likely and the ability of competitors to enter the market and constrain the exercise of market power is impeded by barriers to entry.”¹¹⁸ The proposed satellite merger presents neither of these prerequisites to competitive harm.¹¹⁹

1. A Combined Satellite Radio Provider Would Have No Market Power In Light of the Widespread Availability of Competitive Alternatives.

The possibility that a merger will produce anti-competitive effects is tied directly to the market power of the merged entity.¹²⁰ For several reasons, a combined satellite radio provider

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radio broadcasts.”); Cumulus Media Inc., 2006 Form 10-K Annual Report, at 9 (filed Mar. 19, 2007), at <http://www.sec.gov/Archives/edgar/data/1058623/000095014407002374/g06034e10vk.htm> (last visited Mar. 19, 2007) (“[T]he radio broadcasting industry is subject to competition from companies that use new media technologies that are being developed or have already been introduced, such as the Internet and the delivery of digital audio programming by cable television systems, by satellite radio carriers, and by terrestrial-based radio stations that broadcast digital audio signals. The FCC has authorized two companies to provide a digital audio programming service by satellite to nationwide audiences with a multi-channel, multi-format and with sound quality equivalent to that of compact discs.”).

¹¹⁸ *AT&T/BT Order*, 14 FCC Rcd at 19,157 (¶ 40).

¹¹⁹ The Commission should review the proposed transaction in light of this evidence of intense competition in the audio entertainment market, not in light of precedent from another context. Although some have suggested otherwise, the Commission’s review of the proposed merger of DIRECTV and EchoStar in 2002 provides no guidance to the analysis applicable here, as many facts about the services and the competitive landscape are different. For example, the marketplace for audio entertainment services today is far more competitive than the Commission determined the relevant video market to be in 2002, eliminating the concerns that the Commission noted in its other decision.

¹²⁰ See, e.g., *Verizon-MCI Order*, 20 FCC Rcd at 18,515 (¶ 159) (noting that a merger was “not likely to result in anticompetitive effects given the relatively low market shares of the Applicants” in the relevant market).

will be unable to exercise market power against consumers or other providers of audio entertainment services, let alone dominate the market. *First*, as discussed above, the two satellite radio providers currently have only a very small share of the audio entertainment market—combined, they account for just 3.4 percent of all radio listening.¹²¹ Even the combined company would serve only a fraction of the consumers who purchase or use audio entertainment services.

Second, the array of audio entertainment options currently available to consumers prevents the exercise of market power because, despite some differentiation, customers can easily substitute these options for satellite radio, and indeed many are potentially more appealing and less costly to consumers. For example, AM and FM radio, as well as HD Radio, currently offer much of the same content as satellite radio *for free* to all consumers (relying instead on advertising revenue). The ubiquitous nature of AM/FM radios, which are available in almost every car (including cars with satellite radios), in-home stereo system, and clock radio sold to consumers, provides consumers with broad exposure to the programming of AM and FM broadcasters.¹²² In addition, MP3 players and their rapid incorporation into mobile phones permit broader user selection of pre-mixed music and self-programmed content, and online

¹²¹ Phil Rosenthal, *Satellite deal foes don't hear message*, CHICAGO TRIBUNE, Feb. 28, 2007, at <http://www.chicagotribune.com/business/columnists/chi-0702280164feb28,0,1928140.column?coll=chi-navrailbusiness-nav> (last visited Mar. 17, 2007) (summarizing the results of a recent Arbitron study).

¹²² The strength of terrestrial radio was evident even as satellite radio was first being licensed. In 1995, Edward Fritts, then president of NAB, announced that many were predicting the “plethora of new technologies will be the death knell of local stations. My friends, the death knell for radio has sounded before [and] radio has refused to answer the call As we provide the public with relevant programming, I predict America’s love affair with radio will only be enhanced.” *DARS Grabs Attention of NAB Radio Show*, COMMUNICATIONS DAILY, Sept. 11, 1995, at 4. Given the current statistics regarding the number of listeners to local radio, Mr. Fritts’ predictions appear to continue to be accurate.

music subscription services and podcasting enable consumers to replicate most of the content and the user experience available through satellite radio. Further, Internet radio is capable of offering more variety and choice than any other option, including providing substantial control over content selection and information about artists. A number of free streaming music sites, such as Pandora and Last.fm, will customize the music delivered based on listeners' preferences, something not available over either terrestrial or satellite radio.¹²³

In fact, many of these providers already are expanding their capabilities so that their services more closely resemble the functionality provided by satellite radio. For example, terrestrial radio has adopted different formats while reducing commercials.¹²⁴ HD Radio provides higher-quality sound that is comparable to satellite radio, as well as expanded genres

¹²³ Kevin Schneider, *When Radio Doesn't Cut It, Turn to Last.fm*, THE MIRROR, Feb. 22, 2007, at <http://media.www.fairfieldmirror.com/media/storage/paper148/news/2007/02/22/Entertainment/When-Radio.Doesnt.Cut.It.Turn.To.Last.fm-2733792.shtml> (last visited Mar. 17, 2007).

¹²⁴ See, e.g., Kara Kridler, *Is the end drawing near for free radio?*, THE DAILY RECORD, Sept. 28, 2005, at http://www.findarticles.com/p/articles/mi_qn4183/is_20050928/ai_n15613982 (citing John MacKerron, associate professor of media and film at Towson University, "Terrestrial has already begun making some changes to compete with satellite Along with actually cutting back on commercials, radio stations have tried to create the illusion of reduced commercials by running more music back-to-back while airing longer commercial breaks."); *Revolutions in Radio*, ONLINE NEWSHOUR, May 4, 2005, at <http://www.pbs.org/newshour/media/radio/broadcast.html> (last visited Mar. 14, 2007) ("Radio executives have also moved to reduce the length and number of advertisements heard on the broadcast waves. Clear Channel launched a 'Less is More' campaign designed to reduce the total number of ad minutes per hour of airtime. They're also trying to teach advertisers how to make shorter, more entertaining commercial spots."); Todd Leopold, *New tricks for old broadcast medium*, CNN.COM, July 20, 2006, at <http://www.cnn.com/2006/SHOWBIZ/Music/07/20/radio/index.html> (last visited Mar. 17, 2007) ("The growing popularity of satellite has 'woken up the broadcast industry a little,' says Ron Dresner, a longtime radio professional Terrestrial radio is investing in new formats and new technology Radio companies are also sinking money into high-definition radio, internet streaming and podcasts.").

and music formats.¹²⁵ Internet radio offers a package of programming that is similar to—if not broader than—that available on satellite radio. New automobiles increasingly come with input jacks that can be used to connect MP3 players or factory-installed iPod integration kits, similar to satellite radio. Similarly, cars will soon be able to support Internet radio¹²⁶ and music over mobile phones.¹²⁷

Given the existing and emerging capabilities of other audio entertainment services, it is not surprising that consumers routinely avail themselves of multiple options. Many users of newer services, such as MP3 players and satellite radio, continue to rely on terrestrial radio to some extent.¹²⁸ One study noted that satellite radio actually has suffered some attrition,

¹²⁵ Press Release, HD Digital Radio Alliance, *The Digital Revolution Will Not Be Televised – It's On Your Radio*, Feb. 13, 2006, at http://www.hdradio.com/press_room.php?newscontent=21 (last visited Mar. 14, 2007) (citing Peter Ferrera, CEO of the HD Digital Radio Alliance, as saying, “HD digital radio is the hottest thing to happen to consumer entertainment since FM, and HDRadio.com has everything you need to create your digital radio lifestyle We think consumers are going to love having this information-rich, one-stop resource. This is all about quality and freedom for listeners. Quality of sound and freedom of choice. And on HD2 channels for the next 18 months to two years, freedom from commercials.”).

¹²⁶ For example, Avis Rent A Car System, LLC recently announced a new service that provides Avis renters with portable wireless Internet access that can be carried anywhere and will be available for a fee of \$10.95 per day. See Press Release, Avis Rent A Car System, LLC, *Rent from Avis and Get Your Own Mobile Wi-Fi Hot Spot*, Jan. 9, 2007, at http://www.avis.com/AvisWeb/JSP/global/en/aboutavis/press_room/2007-001.jsp (last visited Mar. 17, 2007).

¹²⁷ For example, as noted above, Motorola currently sells connection devices that allow subscribers to its iRadio service to connect their mobile phone to their car's stereo system. See Press Release, Motorola, Inc., *Motorola Rocks the House . . . and the Car . . . and the Mobile Phone . . . Rolls Out iRadio® Service*, Jan. 3, 2006, at http://www.motorola.com/mediacenter/news/detail.jsp?globalObjectId=6260_6215_23 (last visited Mar. 17, 2007) (“Motorola offers optional Bluetooth accessories to extend iRadio, including . . . a wireless car kit compatible with virtually all car stereos from major manufacturers such as Pioneer, Alpine, Sony and Kenwood.”).

¹²⁸ Phil Rosenthal, *Satellite deal foes don't hear message*, CHICAGO TRIBUNE, Feb. 28, 2007, at <http://www.chicagotribune.com/business/columnists/chi->

demonstrated by an average decline of 3.4 listening hours each week per subscriber from the first quarter of 2005 to the first quarter of 2006.¹²⁹

Finally, the conduct of XM and Sirius demonstrates that both already have been responsive to market forces. Both companies have priced or modified their services in order to make them more competitive with other forms of audio entertainment. In addition, both companies have expanded their channel selection over time, going from an original plan in 1997 to provide “20 or more channels” each to over 100 channels today,¹³⁰ and introducing local weather and traffic channels for major U.S. metropolitan centers in 2004. The emergence of Internet radio and MP3 players has forced the companies to make changes as well, such as by developing new features for their radios like recording and time-shifted listening, improving device performance, and permitting subscribers to listen through the Internet. Both XM and Sirius have introduced satellite radios with built-in MP3 players that allow users to store MP3s that they have purchased, as well as to listen to and record satellite radio. Sirius’ first MP3 receiver, the S50, was introduced in October 2005.¹³¹ During the past year, Sirius rolled out a new MP3 receiver, the Stiletto 100, which has more functionality than the S50.¹³² XM

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0702280164feb28,0,1928140.column?coll=chi-navrailbusiness-nav (last visited Mar. 17, 2007); *Study: iPod ownership reaches a new high*, MACDAILYNEWS, June 30, 2006, at <http://www.macdailynews.com/index.php/weblog/comments/10050/> (last visited Mar. 13, 2007).

¹²⁹ See *Podcasting, MP3 Players Stealing Radio’s Audience*, PODCASTING NEWS, Apr. 11, 2006, at http://www.podcastingnews.com/archives/2006/04/podcasting_mp3.html (last visited Mar. 13, 2007).

¹³⁰ *Satellite Radio Implementation Order*, 12 FCC Rcd at 5760 (¶ 12).

¹³¹ Press Release, Sirius Satellite Radio Inc., *SIRIUS Unveils Wearable Satellite Radio*, Aug. 25, 2005, at <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=171462> (last visited Mar. 14, 2007).

¹³² Press Release, Sirius Satellite Radio Inc., *SIRIUS Introduces the Stiletto 100, Its First*

introduced hand-held, recordable radio receivers—MyFi, Tao, and AirWare—in late 2004 and 2005,¹³³ and MP3 players/recordable radios—Helix, Inno, and NeXus—in 2006.¹³⁴

The nature of the audio entertainment marketplace—and in particular, satellite radio’s place in that market—make it extremely unlikely that a merger of the two satellite radio providers could or would have any anticompetitive effects, let alone dominate the market. A combined satellite radio provider would have to ensure that its service is competitive with the many alternatives to which consumers may readily turn. Thus, for example, the company will offer expanded programming options as well as other valuable services, as discussed above. In short, the combined company would work to *produce* benefits for consumers, not take them away, a result that is decidedly pro-competitive.

2. A Satellite Radio Merger Would Not Bar Entry By New Providers of Audio Entertainment Services.

Aside from this existing, vibrant competition, entry by new competitors and expansion of current services remains viable notwithstanding the proposed merger. As discussed above, new

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Live Portable Satellite Radio, Sept. 26, 2006, at <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=212194> (last visited Mar. 14, 2007).

¹³³ Press Release, XM Satellite Radio Holdings Inc., *XM Satellite Radio Holdings Inc. Announces Fourth Quarter and Full Year 2004 Results; XM Introduces First Portable, Wearable Satellite Radio*, Feb. 10, 2005, at http://xmradio.mediaroom.com/index.php?s=press_releases&item=829 (last visited Mar. 16, 2007) (noting the introduction of MyFi in December 2004 and Tao and Airware in 2005).

¹³⁴ Press Release, XM Satellite Radio Holdings Inc., *Samsung Introduces the First Complete Line of Portable XM Satellite Radios With MP3 Capability*, Jan. 4, 2006, at http://xmradio.mediaroom.com/index.php?s=press_releases&item=1136 (last visited Mar. 16, 2007); Press Release, XM Satellite Radio Holdings Inc., *XM Satellite Radio Holdings Inc. Announces First Quarter 2006 Results; XM Introduces Five New Radio Models in the Second Quarter, Including Portable XM/MP3 Players*, Apr. 27, 2006, at http://xmradio.mediaroom.com/index.php?s=press_releases&item=1307 (last visited Mar. 16, 2007).

wireless networks are already under construction, which will support mobile audio services over devices such as mobile phones and Internet radio over WiFi and WiMAX. In addition, there appears to be little limit to the growth of Internet radio and podcasting. The Slacker service described above, which uses both Internet and satellite technology, illustrates the way in which innovation is continually yielding new audio entertainment options.¹³⁵

In addition, other types of spectrum are available that are capable of supporting services comparable to satellite radio. Audio entertainment services similar to satellite can be deployed using the frequencies allocated to the Wireless Communications Service (“WCS”). This spectrum is immediately adjacent to the band in which satellite radio already operates—indeed, it originally had been identified for satellite radio but was reallocated to WCS pursuant to congressional mandate.¹³⁶ The Commission already has authorized satellite radio in this spectrum, having stated that WCS licensees were permitted “to provide a variety or combination of services,”¹³⁷ specifically including satellite radio.¹³⁸ 2 GHz or L-band spectrum currently allocated for Mobile Satellite Service (“MSS”) can also be used to provide audio entertainment services akin to satellite radio. At least one provider has advocated using the 2 GHz band to provide such services and sought permission to do so, although the Commission did not grant

¹³⁵ See *Introducing Slacker, a new kind of Satellite Radio company*, ORBITCAST, Mar. 14, 2007, at <http://www.orbitcast.com/archives/introducing-slacker-a-new-kind-of-satellite-radio-company.html> (last visited Mar. 17, 2007); see also J.D. Biersdorfer, *Now, a Radio Station for (Your Name Here)*, N.Y. TIMES, Mar. 15, 2007, at C8.

¹³⁶ See *Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (“WCS”)*, Report and Order, 12 FCC Rcd 10,785, 10,786-87 (¶¶ 1-3) (1997) (“WCS Order”); see also *Satellite Radio Implementation Order*, 12 FCC Rcd at 5756 (¶ 3).

¹³⁷ *WCS Order*, 12 FCC Rcd at 10,846 (¶ 119).

¹³⁸ *Id.*, 12 FCC Rcd at 10,798 (¶ 27); see also *id.*, 12 FCC Rcd at 10,808 (¶ 45) (noting that WCS “may have increased utility for satellite” radio).

that request.¹³⁹ Two companies are already planning to provide satellite-based services using the 2 GHz band, and are subject to binding milestones to do so (although neither has announced plans to provide audio entertainment services).¹⁴⁰ The Commission could authorize audio entertainment services using these spectrum alternatives without regard to a satellite radio merger.

Finally, a satellite radio merger will not affect competition at the programming level. There are many providers of programming and content that can easily reach listeners through a variety of means. As reflected in the very broad range of offerings in their respective channel line-ups, the Applicants are highly committed to providing a wide diversity of viewpoints to consumers; the merger will not change the combined company's strong incentives to continue this practice in the future. Programming and content providers could rely on other avenues to disseminate their content should the combined company adopt practices that would restrict the ability of programmers to reach satellite radio listeners. Indeed, by enabling the combined company to consolidate similar channels and thereby create capacity for new channels, the transaction eventually will open up additional opportunities for new content providers to reach listeners via satellite radio.¹⁴¹

¹³⁹ *Inmarsat Global Limited; Petition for Declaratory Ruling to Provide Mobile Satellite Service to the United States Using the 2 GHz and Extended Ku Bands*, Order, 20 FCC Rcd 19,409 (2005); *Use of Returned Spectrum in the 2 GHz Mobile Satellite Service Frequency Bands*, Order, 20 FCC Rcd 19,696, 19,722 n.171 (¶ 56 n.171) (2005).

¹⁴⁰ *TMI Communications and Company, Limited Partnership, and TerreStar Networks, Inc. Request to Assign Spectrum LOI Authorization*, Memorandum Opinion and Order, 19 FCC Rcd 12,603, 12,623 (¶ 59) (2004); *New ICO Satellite Services G.P., Application to Extend Milestones*, Memorandum Opinion and Order, 22 FCC Rcd 2229, 2235-36 (¶ 21) (2007).

¹⁴¹ *See supra* Section III.B.

V. THE TRANSACTION SATISFIES THE REQUIREMENTS OF THE COMMUNICATIONS ACT, ALL OTHER APPLICABLE STATUTES, AND THE COMMISSION'S RULES.

A. Sirius and XM Are Qualified to Control FCC Licenses.

Section 310(d) of the Communications Act requires the Commission to consider the qualifications of the proposed transferee as if it were applying for licenses directly under Section 308.¹⁴² Sirius' and XM's qualifications to hold and control FCC licenses are a matter of public record and have been reviewed and endorsed in prior proceedings. The Commission first granted Sirius and XM FCC satellite licenses in 1997.¹⁴³ In the ten years that followed, the Commission reaffirmed Sirius' qualifications to control this satellite license¹⁴⁴ and granted Sirius earth station, wireless, and special temporary authorizations for terrestrial repeaters.¹⁴⁵ The

¹⁴² 47 U.S.C. §§ 310(d), 308(b) (applications must set forth such facts as the Commission may require as to citizenship, character, and financial, technical and other qualifications); *see also Applications of AirTouch Commc'ns, Inc., Transferor, and Vodafone Group, PLC, Transferee, For Consent to Transfer of Control of Licenses and Authorizations*, Memorandum Opinion and Order, 14 FCC Rcd 9430, 9432-34 (¶¶ 5-9) (1999).

¹⁴³ *Sirius Authorization Order*, 13 FCC Rcd at 7971; *XM Authorization Order*, 13 FCC Rcd at 8829. Satellite CD Radio, Inc. is a wholly owned direct subsidiary of Sirius; American Mobile Radio Corp. is the former name of XM Radio Inc., which is a wholly owned subsidiary of XM.

¹⁴⁴ *Sirius Satellite Radio Inc., Application for Transfer of Control of Station Authorization*, Order, 18 FCC Rcd 215 (2003) ("2003 Sirius Transfer of Control Order").

¹⁴⁵ *See, e.g., Sirius Satellite Radio Inc., Application for Special Temporary Authority to Operate Satellite Digital Audio Radio Serv. Complementary Terrestrial Repeaters*, Order and Authorization, 16 FCC Rcd 16,773 (2001); *XM Radio Inc., Request for Special Temporary Authority to Operate Additional Satellite DARS Terrestrial Repeaters*, *Sirius Satellite Radio Inc., Request to Modify Special Temporary Authority To Operate Satellite DARS Terrestrial Repeaters*, Order and Authorization, 19 FCC Rcd 18,140 (2004); *Satellite Commc'ns Servs. Information re: Actions Taken*, Public Notice, Report No. SES-00853, File No. SES-LIC-20060721-01234 (Sept. 6, 2006); *Satellite Commc'ns Servs. Information, Re: Actions Taken*, Public Notice, Report No. SES-00861, File No. SES-LIC-20060818-01402 (Oct. 4, 2006).

Commission also reaffirmed XM's qualifications,¹⁴⁶ and granted it special temporary authority as well.¹⁴⁷

In addition, the combined company will benefit from a highly experienced management team from both companies.¹⁴⁸ Accordingly, Sirius and XM remain qualified to hold and control the licenses and authorizations involved in the proposed transaction.

B. No Commission Rule Bars the Transaction.

The Commission's published rules do not prohibit one satellite radio licensee from acquiring control of the other. The Commission noted in its 1997 order authorizing satellite radio as a service that satellite radio "licensees, like other satellite licensees, will be subject to rule 25.118."¹⁴⁹ That rule, now Section 25.119, implements the statutory requirement that the Commission grant transfer applications if doing so is in the public interest,¹⁵⁰ and sets forth the basic procedures for filing an application.¹⁵¹ Nowhere does that rule prohibit the ability of a satellite radio licensee to transfer or assign its license in any way. Indeed, the Commission's 1997 reference to this rule expressly recognizes that the agency's rules contemplate and permit

¹⁴⁶ *XM Radio Inc., Application for Minor Modification to Relocate Satellite Digital Audio Radio Service (SDARS) Satellite from 85° W to 115° W*, Order and Authorization, 20 FCC Rcd 1620 (2005) (affirming the legal and technical qualifications of XM Radio Inc.).

¹⁴⁷ *See, e.g., XM Terrestrial Repeater Authorization Order*, 16 FCC Rcd at 16,781; *XM Radio Inc., Request for Special Temporary Authority to Operate Additional Satellite Digital Audio Radio Service Terrestrial Repeaters*, Order and Authorization, 19 FCC Rcd 18,140 (2004).

¹⁴⁸ Mel Karmazin, currently Chief Executive Officer of Sirius, will become Chief Executive Officer of the combined company and Gary Parsons, currently Chairman of XM, will become Chairman of the combined company.

¹⁴⁹ *Satellite Radio Implementation Order*, 12 FCC Rcd at 5823 (¶ 170).

¹⁵⁰ 47 U.S.C. § 310(d).

¹⁵¹ 47 C.F.R. § 25.119.

the filing of this Application for the transfer of control of both satellite radio licensees to common ownership.

While the Commission stated in the same order that “one licensee will not be permitted to acquire control of the other remaining satellite DARS license,”¹⁵² this language was not codified in the Code of Federal Regulations and thus is not a binding FCC regulation.¹⁵³ To the contrary, it is merely a policy statement reflecting the Commission’s view, based on the evidence available in 1997, that two satellite radio licensees were needed to have enough competition in the audio entertainment market. That statement does not preclude today’s Commission, recognizing a radically altered competitive environment, from finding that the proposed transaction serves the public interest.¹⁵⁴

However, even if the Commission were inclined to treat this decade-old statement as an “uncodified” rule creating a limitation on a codified regulation, that treatment would not prohibit

¹⁵² *Satellite Radio Implementation Order*, 12 FCC Rcd at 5823 (¶ 170).

¹⁵³ See, e.g., *Wilderness Soc’y v. Norton*, 434 F.3d 584, 596 (D.C. Cir. 2006) (“The real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations, which the statute authorizes to contain only documents ‘having general applicability and legal effect,’ and which the governing regulations provide shall contain only ‘each Federal regulation of general applicability and current or future effect.’”); *Fla. Power & Light Co. v. EPA*, 145 F.3d 1414, 1418 (D.C. Cir. 1998) (holding that a statement published in the Federal Register, but not the C.F.R., was not a rule); *Am. Portland Cement Alliance v. EPA*, 101 F.3d 772, 776 (D.C. Cir. 1996). By contrast, when the Commission did discuss actual “rules” that it was adopting in the *Satellite Radio Implementation Order*, it attached specific text for such rules, which were then published in the Code of Federal Regulations. See *Satellite Radio Implementation Order*, 12 FCC Rcd at 5851 (App. A) (attaching proposed text of amendments to the Commission’s Part 25 rules).

¹⁵⁴ *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (citations omitted) (“By issuing a policy statement, an agency lets the public know its current enforcement or adjudicatory approach. The agency retains the discretion and the authority to change its position—even abruptly—in any specific case because a change in its policy does not affect the legal norm.”); *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940) (public interest standard of the Communications Act is “a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy”).

this transaction. It is settled law that the Commission may waive any of its rules on its own motion or upon request, if good cause is shown.¹⁵⁵ Moreover, agencies have discretion to decide significant issues through adjudication, rather than rulemaking, provided the decision (1) is a product of reasoned decision making, and (2) gives adequate notice to the parties subject to the decision.¹⁵⁶

Accordingly, to the extent necessary, the Applicants specifically request that the Commission waive, modify, or otherwise alter the subject statement from the 1997 licensing order to the extent necessary to permit this merger. The Commission is authorized to waive its rules when “[t]he underlying purpose of the rule(s) would not be served or would be frustrated, by application to the instant case, and [] a grant of the requested waiver would be in the public interest.”¹⁵⁷ In this case, waiver of the rule is appropriate because the preservation of two separate satellite radio licensees is no longer required to “help assure sufficient continuing competition,” which was the purpose of the original restriction.¹⁵⁸ As detailed above, the

¹⁵⁵ 47 C.F.R. §§ 1.3, 1.925(a). The Commission is required to give a “hard look” to meritorious waiver requests. *See, e.g., Delta Radio, Inc. v. FCC*, 387 F.3d 897, 900 (D.C. Cir. 2004).

¹⁵⁶ *See, e.g., SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947); *Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir. 1976) (noting that where parties have actual notice of a rule change and an opportunity to submit comments on it, requiring the FCC to “go through the motions of notice and comment rulemaking” would represent an “empty formality”). *See also* 47 C.F.R. § 1.412(a)(3) (providing that while notice “ordinarily” will be given by publication in the Federal Register, this is not necessary if “all persons subject to the proposed rules are named and have actual notice of the proposal as a matter of law”).

¹⁵⁷ 47 C.F.R. § 1.925(b)(3)(i); *see also, e.g., Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (stating that waiver is appropriate where rigid compliance with the rule is inconsistent with the public interest).

¹⁵⁸ *Satellite Radio Implementation Order*, 12 FCC Rcd at 5823 (¶ 170); *see also id.*, 12 FCC Rcd at 5786 (¶ 77) (describing the Commission’s goal to “create as competitive a market structure as possible”).

modern market for audio entertainment services in which satellite radio competes for listeners has significantly evolved in the past ten years and is now extremely competitive.¹⁵⁹ Such changed market conditions provide the “good cause” necessary to waive the rule and indicate that neither the underlying purpose of the “rule” nor the public interest is served by strict application.¹⁶⁰ Similarly, processing of this Application allows the FCC to collect “the relevant information [on competition faced by satellite radio] necessary [for] mature and fair consideration” of the requested rule modification and provides an open forum for all interested parties, including those “most immediately affected,” to be “accorded a full opportunity to be heard.”¹⁶¹

Accordingly, because the benefits outlined above indicate that the proposed transaction is in the public interest,¹⁶² the Commission should either waive or modify any uncodified rule in the context of its adjudication of the merger without commencing a separate rulemaking.¹⁶³ To

¹⁵⁹ See *supra* Section IV.

¹⁶⁰ See 47 C.F.R. § 1.925(b)(3) (“The Commission may grant a request for waiver if it is shown that: (i) The underlying purpose of the rule(s) would not be served or would be frustrated, by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative”). See also *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (providing that waiver is appropriate where rigid compliance with the rule is inconsistent with the public interest).

¹⁶¹ *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974). See also *Comsat Corp., Policies and Rules for Alternative Incentive Based Regulation of Comsat Corp.*, Report and Order, 14 FCC Rcd 3065, 3079 (¶ 38) (1999) (opting to proceed by adjudication instead of a rulemaking where “using the rulemaking process would be overly burdensome and unnecessary to assure adequate notice and comment” and where an adjudicatory proceeding “can offer adequate protection for the rights of interested parties”).

¹⁶² See *supra* Sections III and IV.

¹⁶³ See, e.g., *Bell Aerospace*, 416 U.S. at 295; *Chenery*, 332 U.S. at 203; *Chisholm*, 538 F.2d at 365.

ensure that adequate notice is provided, the Applicants hereby request that the Commission publish its request for comment on this Application in the Federal Register.

VI. FCC AUTHORIZATIONS AND PROCESSING

A. Request for Transfer of Authorizations

FCC applications for the transfer of control of the following authorizations are being filed simultaneously with respect to the proposed merger:

1. XM Satellite Radio Inc.'s space station authorizations, including special temporary authority grants and pending requests to operate terrestrial repeaters¹⁶⁴ (FCC Form 312)

S2118
S2119
S2616
S2617

2. XM Satellite Radio Inc.'s transmit/receive earth station authorizations (FCC Form 312)

E000158
E000724
E040204

3. XM Satellite Radio Inc.'s experimental license (FCC Form 703)

WB2XCA

4. Satellite CD Radio, Inc.'s space station authorization, including special temporary authority grants and pending requests to operate terrestrial repeaters (FCC Form 312)

S2105¹⁶⁵

¹⁶⁴ The FCC has previously approved the transfer of control of existing grants of, and requests for, special temporary authority as part of the transfer of control of the satellite license. *2003 Sirius Transfer of Control Order*, 18 FCC Rcd at 217 n.16 (¶ 7 n.16).

¹⁶⁵ As a result of Sirius' modification of its authority to launch and operate a NGSO system instead of two GSO satellites, the call sign S2106 is no longer operative. Therefore, the Applicants are not seeking authority to transfer control of this call sign. This approach is consistent the FCC's prior treatment of this license. *See Sirius Satellite Radio Inc., Application for Authorization to Transfer Control*, File No. SAT-T/C-20021122-00225, FCC Form 312,

5. Sirius Satellite Radio Inc.'s transmit/receive earth station authorizations (FCC Form 312)

E990291
E040363
E060276
E060277

6. Sirius Satellite Radio Inc.'s wireless license (FCC Form 603)

WPTX369

B. Request for Approval of Additional Authorizations

Both Sirius and XM have on file additional applications and pleadings and, following the filing of this Application, may file additional applications or petitions. Accordingly, the Applicants request that the Commission, in acting upon this Application, include authority for the transfer of control of (1) any license or authorization issued to XM or Sirius during the period prior to grant of the instant Application or during the period required for consummation following approval; and (2) any applications (including applications for STA), petitions or other filings that have been filed by XM or Sirius and are pending at the time of consummation of the proposed transfer of control.¹⁶⁶

(Continued . . .)

Schedule A (filed Nov. 22, 2002) (requesting transfer of call sign S2105); *Policy Branch Information, Satellite Space Station Applications Accepted for Filing*, Public Notice, Report No. SAT-00129 (Nov. 27, 2002) (accepting for filing Sirius' transfer of control application for call sign S2105); *2003 Sirius Transfer of Control Order*, 18 FCC Rcd at 217 n.16 (¶ 7 n.16) (granting Sirius' transfer of control application).

¹⁶⁶ Following the closing of the proposed transaction, Sirius and XM will supplement their pending applications as required under the Commission's rules, 47 C.F.R. § 1.65, to reflect the new ownership structure.

C. Request for Permit-But-Disclose Ex Parte Status

The Applicants request that this proceeding be designated “permit-but-disclose” under the Commission’s rules controlling *ex parte* presentations.¹⁶⁷ Designation as a “permit-but-disclose” proceeding under Section 1.1206 would serve the public interest by facilitating the development of a complete record upon which a well-reasoned decision can be made.

D. Section 304 Waiver

Pursuant to Section 304 of the Communications Act, the Applicants hereby waive any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States.¹⁶⁸

¹⁶⁷ 47 C.F.R. §§ 1.1200-1.1216.

¹⁶⁸ See 47 U.S.C. § 304.

VII. CONCLUSION

For the foregoing reasons, the Applicants request Commission approval of the transfer of control of the licenses and authorizations held by Sirius and XM.

Respectfully Submitted,

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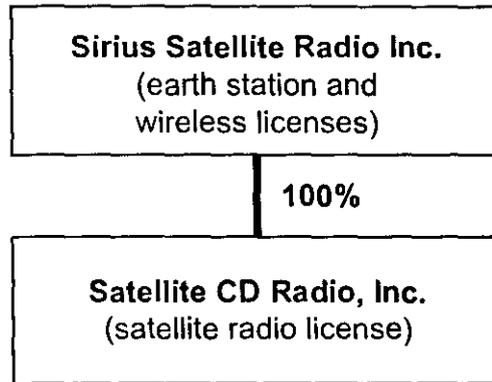
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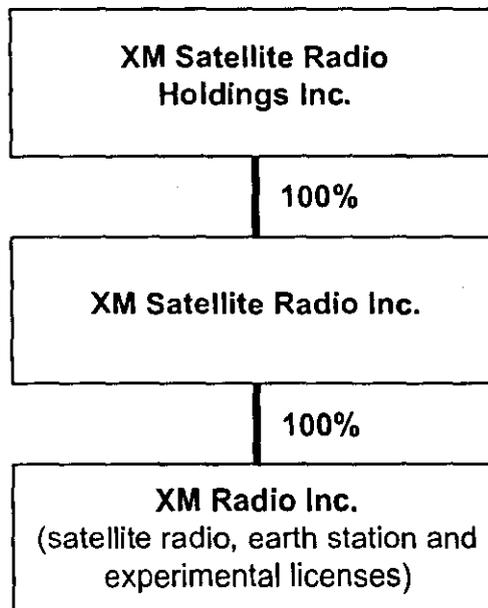
Attorneys for XM Satellite Radio Holdings Inc.

Attachment A¹

Sirius Current Corporate Structure

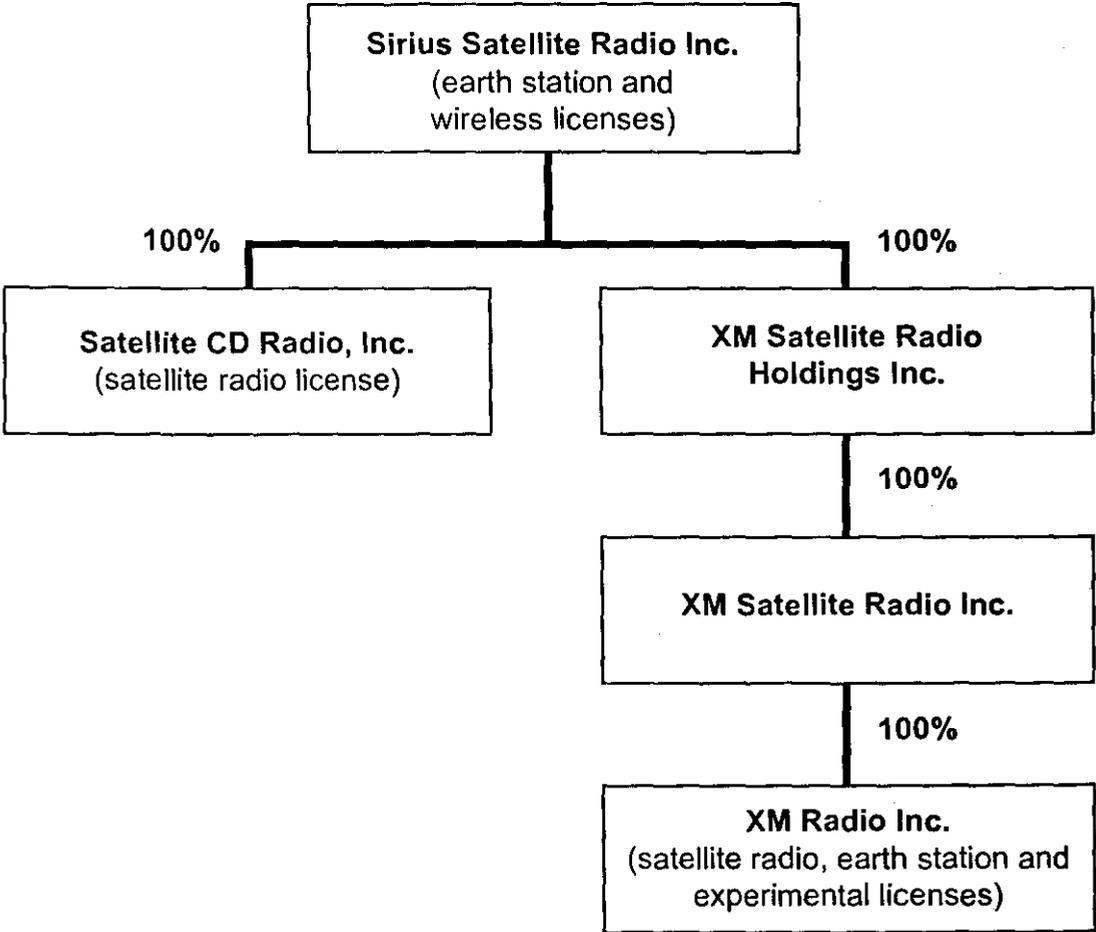


XM Current Corporate Structure



¹This Attachment A depicts the corporate structure for Sirius, XM and their U.S.-licensed subsidiaries. Sirius, XM and the combined company have (or will have) other subsidiaries not shown on this Attachment A.

Proposed Sirius-XM Corporate Structure



ATTACHMENT

CONTINGENT WAIVER REQUEST

See Section V.B. of the attached Consolidated Application for Authority to
Transfer Control of XM Radio Inc. and Sirius Satellite Radio Inc.