compelling programming for subscribers. Currently, Sirius operates three non-geostationary satellites and a network of complementary terrestrial repeaters[7] covering the contiguous United States.[8] Sirius controls and communicates with its satellites from its uplink facility in New Jersey and through its earth stations in Panama and Ecuador. Sirius continues to monitor its infrastructure, regularly evaluating and implementing improvements in technology. Sirius has entered into an agreement with Space Systems/Loral, Inc. to design and construct a new geostationary satellite that will complement its existing in-orbit satellites. When launched, the resulting constellation configuration is expected to provide enhanced coverage and performance.

2. XM Satellite Radio Holdings Inc.

XM, a publicly traded Delaware corporation, is an established provider of audio entertainment. In April 1997, XM was one of the winning bidders in the Commission's auction of 25 MHz of spectrum in the S-band allocated to satellite radio, in which XM committed and paid nearly $90 million to the U.S. Treasury.[9] The Commission awarded XM the license to provide satellite radio services in the 2332.5-2345 MHz band.[10] XM's wholly owned subsidiary XM Radio Inc., a Delaware corporation, now holds XM's satellite radio licenses (including related terrestrial repeater special temporary authorizations) as well as satellite, earth station, and experimental licenses issued by the Commission.

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[7] Sirius has deployed terrestrial repeaters in areas where its signal may be blocked such as urban centers with high concentrations of tall buildings and tunnels.

[8] Sirius also has a fourth spare satellite in ground storage that can be deployed in the event of a satellite failure.

[9] *Satellite Radio Auction Public Notice*, 12 FCC Rcd at 18,717.

[10] *See Am. Mobile Radio Corp., Application for Authority to Construct, Launch, and Operate Two Satellites in the Satellite Digital Audio Radio Service*, Order and Authorization, 13 FCC Rcd 8829, 8850 (¶ 51) (1997) ("*XM Authorization Order*").

XM initiated commercial operations in September 2001; as of December 31, 2006, it provided service to approximately 7.6 million subscribers. XM currently offers 170 channels of high-quality audio entertainment throughout the United States, including music channels devoted to a wide variety of genres, such as rock, country, jazz, gospel, classical, soul, hip-hop, bluegrass, folk, and reggae; sports programming that includes live, play-by-play broadcasts of Major League Baseball and National Hockey League games, as well as college games; children's channels; a variety of talk formats; news and religious programming; and 21 channels that transmit traffic, weather, and emergency (including Amber) alert information for many of the largest U.S. metropolitan areas. In addition, XM broadcasts emergency alerts, safety information, and Amber alerts on a 24-hour/7-days-a-week basis on a free-to-air channel (for which no subscription is required); it also participates in the national Emergency Alert System, providing Presidential Level alerts and certain state and local alerts; airs a Red Cross Radio channel when the country experiences disasters such as Hurricane Katrina; and provides real-time traffic and weather data to cars, planes, and boats equipped with XM receivers.[11] All of this content is up-linked from XM's facilities—primarily its headquarters in Washington, D.C.—to its satellites and then transmitted to its subscribers. XM also provides content to subscribers using streaming audio over the Internet, as well as to certain DIRECTV subscribers, Alltel and AT&T wireless subscribers, and AOL radio members.

XM has invested over five billion dollars to date, primarily to (1) develop and upgrade its network; (2) design chipsets and radios capable of receiving its service; (3) subsidize the cost of such chipsets and radios to encourage their distribution; (4) develop subscriber-based

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[11] *See, e.g.*, Richard L. Collins, *Flying With XM WX*, Mar. 2007, *at* http://www.flyingmag.com/article.asp?section_id=17&article_id=788&print_page=y (last visited Mar. 14, 2007).

management systems and other information technology; (5) market its brand; and (6) create compelling programming for subscribers. It currently operates four geostationary satellites that cover the forty-eight contiguous states and parts of Alaska, which broadcast from two orbital locations (85°W.L. and 115°W.L.). XM has also constructed terrestrial repeaters in markets where its signal may be blocked, such as by tall buildings and tunnels.[12] In addition, XM has deployed redundant uplink and control facilities, capable of encryption, and has made available small, inexpensive, lightweight radios to consumers.

B. The Proposed Transaction

On February 19, 2007, Sirius and XM entered into the Merger Agreement. Under the Merger Agreement, a wholly owned subsidiary of Sirius, Vernon Merger Corporation, will be merged with and into XM, with XM being the surviving entity of this subsidiary merger.

At the effective time of the merger (the "Effective Time"), by virtue of the merger and without any specific action on the part of any stockholder, each share of common stock of XM issued and outstanding immediately prior to the Effective Time will generally be converted into the right to receive 4.6 shares of common stock of Sirius. Each share of Series A Convertible Preferred Stock of XM issued and outstanding immediately prior to the Effective Time will be similarly converted at the Effective Time into the right to receive 4.6 shares of a newly designated series of preferred stock of Sirius having substantially the same powers, designations, preferences, rights and qualifications, limitations and restrictions as the stock so converted. XM will continue to hold the stock of its subsidiaries, and XM and its subsidiaries will continue to hold all of the FCC authorizations that they hold prior to the merger.

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[12] *See, e.g.*, *XM Radio, Inc., Application for Special Temporary Authority to Operate Satellite Digital Audio Radio Service Complementary Terrestrial Repeaters*, Order and Authorization, 16 FCC Rcd 16,781 (2001) ("*XM Terrestrial Repeater Authorization Order*").

At the Effective Time, the new Board of Directors will consist of:

- four members selected by Sirius, each of whom shall qualify as an independent director pursuant to the NASDAQ Marketplace Rules[13];
- four members selected by XM, each of whom shall qualify as an independent director pursuant to the NASDAQ Marketplace Rules;
- the Chief Executive Officer (Mel Karmazin);
- the Chairman of the Board of Directors (Gary Parsons); and
- two additional members, one of whom is expected to be a designee of General Motors and the other of whom is expected to be a designee of American Honda.

Attachment A shows the current corporate structures for XM and Sirius and the corporate structure of XM and Sirius at the Effective Time.

II. STANDARD OF REVIEW

Pursuant to Section 310(d) of the Communications Act, the Commission conducts a public interest analysis when reviewing applications for transfers of control of space station, earth station, experimental, and wireless authorizations.[14] The agency uses its expertise to "weigh the potential public interest harms against the potential public interest benefits to ensure that, on balance, the proposed transaction will serve the public interest, convenience, and necessity."[15] The public interest evaluation necessarily encompasses the "broad aims of the

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[13] *See* NASDAQ Marketplace Rules, § 4200(a)(15), *at* http://nasdaq.complinet.com/nasdaq/display/display_main.html?rbid=1705&element_id=1004 (last visited Mar. 14, 2007) (defining independent director as "a person other than an executive officer or employee of the company or any other individual having a relationship which, in the opinion of the issuer's board of directors, would interfere with the exercise of independent judgement [sic] in carrying out the responsibilities of a director").

[14] 47 U.S.C. § 310(d).

[15] *Lockheed Martin Corp., COMSAT Corp. and COMSAT Digital Teleport, Inc. Assignors and Intelsat, Ltd., Intelsat (Bermuda), Ltd, Intelsat LLC, and Intelsat USA License Corp., Assignees Application for Assignment of Earth Station and Wireless Licenses and Section 214 Authorizations and Petitions for Declaratory Ruling*, Order and Authorization, 17 FCC Rcd

Communications Act,"[16] which include, among other things, whether the transfer will affect the quality of communications services or foster technological development in communications.[17] As the Commission has found, "[e]fficiencies generated through a merger can mitigate competitive harms"—to the extent there would even be any—"if such efficiencies . . . result in lower prices, improved quality, enhanced service or new products" for consumers.[18]

(Continued . . .)
27,732, 27,739 (¶ 12) (2002); *see also Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Commc'ns Corp. (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc., Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8217 (¶ 23) (2006) ("*Adelphia Order*"); *Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee*, Memorandum Opinion and Order, 17 FCC Rcd 23,246, 23,255 (¶ 26) (2002) ("*AT&T-Comcast Order*").

16 *Adelphia Order*, 21 FCC Rcd at 8218 (¶ 24); *AT&T-Comcast Order*, 17 FCC Rcd at 23,255 (¶ 27); *Gen. Motors Corp. and Hughes Elecs. Corp., Transferors and The News Corp. Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, 483 (¶ 16) (2004) ("*GM-News Corp. Order*"); *Constellation, LLC, Carlyle PanAmSat I, LLC, Carlyle PanAmSat II, LLC, PEP PAS, LLC, and PEOP PAS, LLC, Transferors and Intelsat Holdings, Ltd., Transferee, Consolidated Application for Authority to Transfer Control of PanAmSat Licensee Corp. and PanAmSat H-2 Licensee Corp.*, Memorandum Opinion and Order, 21 FCC Rcd 7368, 7379 (¶ 18) (2006); *Verizon Commc'ns Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18,433, 18,443-444 (¶ 17) (2005) ("*Verizon-MCI Order*").

17 *See Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp. for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd 21,522, 21,544 (¶ 41) (2004) ("*Cingular-AT&T Wireless Order*"); *AT&T-Comcast Order*, 17 FCC Rcd at 23,255 (¶ 27); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, Memorandum Opinion and Order, 15 FCC Rcd 9816, 9821-22 (¶ 11) (2000) ("*AT&T-MediaOne Order*").

18 *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee for Consent to Transfer Control*, Memorandum Opinion and Order, 12 FCC Rcd 19,885, 20,063 (¶ 158) (1997) ("*Bell Atlantic-NYNEX Order*"). *See also Ameritech Corp., Transferor, and SBC Commc'ns, Inc., Transferee, For Consent to Transfer Control of Corps. Holding Comm'n Licenses and Lines Pursuant to Sections 214 and 310(d) of the Commc'ns Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Comm'ns Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14,712, 14,847 (¶¶ 319-20) (1999).

In assessing a proposed transaction, the FCC must consider technological and market trends, as well as the nature, complexity, and speed of change within the communications industry.[19] The Commission must also determine whether a proposed transaction complies with the relevant provisions of the Communications Act, other applicable statutes, and the Commission's rules,[20] and whether the proposed transferee is qualified to hold FCC licenses under the Act, relevant statutes, and rules.

The proposed transaction satisfies the standard—and will yield substantial public interest benefits without any potential harm to the public. Accordingly, the Commission should expeditiously grant the Application.

III. THE TRANSACTION WILL SERVE THE PUBLIC INTEREST BY ALLOWING THE COMBINED COMPANY TO OFFER LOWER PRICES AND INCREASED CHOICE.[21]

The merger of Sirius and XM will generate substantial, merger-specific,[22] public interest benefits. The synergies resulting from the merger will allow the combined company to provide consumers lower prices and more programming choices. Subscribers will be able to continue to use their existing radios and eventually purchase new radios capable of receiving all of the

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19 *See, e.g., Adelphia Order*, 21 FCC Rcd at 8218 (¶ 24); *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21,544 (¶ 41); *AT&T-Comcast Order*, 17 FCC Rcd at 23,255 (¶ 27); *AT&T-MediaOne Order*, 15 FCC Rcd at 9821-22 (¶ 11).

20 *See, e.g., Adelphia Order*, 21 FCC Rcd at 8217-8 (¶ 23); *AT&T-Comcast Order*, 17 FCC Rcd at 23,255 (¶ 26).

21 This section is responsive to Question A.21 on Schedule A of FCC Form 312.

22 *See, e.g., Adelphia Order*, 21 FCC Rcd at 8307-08 (¶ 244); *Applications of Midwest Wireless Holdings, L.L.C. and ALLTEL Commc'ns, Inc.*, Memorandum Opinion and Order, 21 FCC Rcd 11,526, 11,564 (¶ 105) (2006); *SBC Commc'ns Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18,290, 18,384 (¶ 182) (2005); *Verizon-MCI Order*, 20 FCC Rcd at 18,530 (¶ 193); *GM-News Corp. Order*, 19 FCC Rcd at 610-11 (¶ 317).

content of both services. These synergies and the resulting cost-savings will both benefit consumers and preserve the future viability of satellite radio.

A. A Combined Sirius-XM Will Offer Consumers More Choice at Lower Prices.

As a result of the merger, consumers will benefit from lower prices and greater program choice. The Commission has repeatedly acknowledged that lower prices and increased consumer choice are cognizable public interest benefits.[23] For example, the Commission has stated that it will consider whether a proposed transaction will enhance a combined company's "ability and incentive to compete and therefore result in lower prices, improved quality, enhanced service, or new products."[24]

The Applicants will provide customers with more choices at lower prices, more closely tailoring services to listener needs and desires. Today, Sirius and XM each provide consumers one service offering at one price—$12.95 per month. Consumers have only a limited ability to tailor their service, such as the ability to request that certain channels be blocked.[25] Consumers

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[23] *See, e.g., Adelphia Order*, 21 FCC Rcd at 8307 (¶ 243); *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 30,063 (¶ 158) ("Efficiencies generated through a merger can mitigate competitive harms if such efficiencies . . . result in lower prices, improved quality, enhanced service or new products"); *The Merger of MCI Commc'ns Corp. and British Telecomms. plc*, Memorandum Opinion and Order, 12 FCC Rcd 15,351, 15,430 (¶ 205) (1997) ("*BT/MCI Order*") (describing "lower prices, improved quality, enhanced service or new products" as examples of consumer benefits resulting from merger-specific efficiencies that are relevant to the public interest analysis).

[24] *Adelphia Order*, 21 FCC Rcd at 8307 (¶ 243); *see also GM-News Corp. Order*, 19 FCC Rcd at 610 (¶ 316); *AT&T Corp., British Telecomms., plc, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Ltd. Applications; For Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses in Connection With the Proposed Joint Venture Between AT&T Corp. and British Telecomms., plc*, Memorandum Opinion and Order, 14 FCC Rcd 19,140, 19,146-147 (¶ 14) (1999) ("*AT&T/BT Order*").

[25] These consumers, however, do not receive any rebate on their monthly subscription fee for the blocked channels. In addition, consumers may add additional radios to their service for a reduced price.

seeking programming from both Sirius and XM must subscribe to both services for a combined payment of $25.90 per month.

The proposed merger will generate significant synergies that will allow the combined company to offer consumers programming choices on a more à la carte basis at lower prices. Customers may, if they elect, continue to enjoy programming substantially similar to that which they currently receive after the merger at the existing monthly price of $12.95; the combined company will also offer consumers the options of receiving either fewer channels at a lower price or more channels, including the "best of both" networks, at a modest premium to the existing $12.95 per month price.

- Consumers who want fewer channels than currently offered will be able to select one or more packages of channels for less than $12.95 per month. These packages will include an attractive mix of music, news, informational, sports, children's, and religious programming.
- Consumers who want to continue to receive substantially the same channel lineup of either Sirius or XM may continue to do so at the same price—$12.95 per month.
- Sirius and XM customers also will be able to access popular, previously exclusive programming of the other provider for a modest premium over what they are paying now. Under this "best of" option, for example, current Sirius listeners could have access to Major League Baseball and Oprah. Likewise, current XM subscribers could have access to the National Football League and Martha Stewart. In effect, consumers might no longer have to choose between Oprah and Martha Stewart or between Major League Baseball and the National Football

League as the combined company will make certain "prime" programming available to subscribers on both networks.[26]

- When interoperable radios are commercially available, consumers who want to have access to the complete offerings of both companies will be able to do so on a single device for significantly less than the current price of $25.90.[27]
- Finally, while customers of both companies currently have the option of blocking adult programming, the combined company will provide customers a credit if they choose to do so.

B. The Combined Company Will Provide Consumers More Diverse Programming.

In the long-term, the combined company will provide consumers with an even more diverse selection of content.[28] Currently, both Sirius and XM provide a wide range of commercial-free music channels, exclusive and non-exclusive sports coverage, news, talk, traffic and weather, and entertainment programming. However, there is significant overlap and redundancy in the channel line-ups. For example, 12 identical channels are available on both

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[26] Final decisions to make currently exclusive programming available on both services will be subject to contractual negotiations with programming partners.

[27] In the near term, however, subscribers will have to own two legacy receivers (one XM receiver and one Sirius receiver) to receive the complete offerings of both services. This is due to the fact that the combined company must continue to operate both legacy systems. Neither system currently has enough capacity to offer both companies' full programming lineup. *See infra* Section III.C.

[28] *See 2002 Biennial Review—Review of the Comm'ns Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13,620, 13,631 (¶ 36) (2003) ("*2003 Media Ownership Order*") (noting importance of programming diversity as a Commission "policy goal").

Sirius and XM.[29] A further 75 channels overlap by genre—providing substantially similar programming (*e.g.*, both offer channels dedicated to music from the 1970s).[30]

Eventually, the combined company will be able to consolidate much redundant programming. The result ultimately will free capacity for even more diverse offerings that are not currently available on either company's system, including expanded non-English language programming, children's programming, and additional programming aimed at minority and other underserved populations.[31] Without this merger, however, an increase in programming diversity is unlikely, as both companies will be required to maintain overlapping, mainstream content in order to retain and attract customers.[32]

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[29] These are Radio Disney, FOX News, CNN, CNN Headline News, ABC News and Talk, CNN en Espanol, CNBC, Bloomberg Radio, BBC, ESPN Radio, ESPNEWS, and E! Entertainment Radio.

[30] *See 2003 Media Ownership Order*, 18 FCC Rcd at 13,739 (¶ 308) (noting that "duplication of programming . . . generally results in an inefficient use of the scarce radio spectrum and a lost opportunity to use that spectrum to serve" the public interest).

[31] *See* Statement of Representative Sheila Jackson-Lee, Hearing of the Antitrust Task Force Subcommittee of the House Judiciary Committee, *Competition and the Future of Digital Music*, Feb. 28, 2007, *at* 2007 WLNR 4055629 (advocating the need for increased diversity for various minority groups, including African Americans, Hispanics, Asians, and women); Statement of Representative Fred Upton, Hearing of the Telecommunications and the Internet Subcommittee of the House Energy and Commerce Committee, *Digital Future of the United States: Part II-The Future of Radio*, Mar. 7, 2007 (advocating the importance of increasing the availability of foreign language programming to consumers); William J. Drummond, *A merged satellite radio still isn't free*, SAN FRANCISCO CHRONICLE, Mar. 6, 2007, *at* http://www.freepress.net/news/21540 (last visited Mar. 14, 2007) (noting that satellite radio should strive for "programming to capture the imagination of its present listeners as did radio during its 'golden age'" and suggesting a channel for "original contemporary radio drama").

[32] This increased diversity may even stimulate more diverse programming on terrestrial radio. *See* James Surowiecki, *Satellite Sisters*, THE NEW YORKER, Mar. 19, 2007, *at* http://www.newyorker.com/talk/2007/03/19/070319ta_talk_surowiecki (last visited Mar. 17, 2007) ("Allowing Sirius and XM to merge . . . would significantly increase the competitive pressure on traditional radio stations, perhaps forcing them to abandon their cookie-cutter model. Paradoxically, by reducing choice you could stimulate diversity. Sometimes, it seems, you can have fewer competitors but more competition.").

This additional capacity also will allow the combined company to provide additional programming related to public safety and homeland security. Indeed, satellite communications have proven to be an essential component of disaster recovery efforts because of their survivability and availability when terrestrial-based communications systems are damaged or otherwise inoperable.[33] Both of the Applicants have demonstrated their commitment to homeland security and public safety issues,[34] and both companies transmit emergency alert information throughout the country. Indeed, during the Hurricane Katrina recovery effort, XM aired the "Red Cross Radio" channel, which provided up-to-date disaster relief information to volunteers and the public 24 hours a day, and Sirius equally devoted a channel to Katrina-related information. Sirius and XM also donated radios to the Red Cross.

C. The Merger Will Help Accelerate Deployment of Advanced Technology.

The combined company will be able to offer consumers access to advanced technology sooner than would otherwise occur. The efficiencies gained from the merger, including the marriage of the two engineering organizations, will ensure better results from each dollar invested in research and development. As a consequence, the combined company will be able to improve on products such as real-time traffic and rear-seat video.[35] In addition, the combined

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[33] *See* Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, *Report and Recommendations to the Federal Communications Commission*, June 12, 2006, at 10-11, *at* http://www.fcc.gov/eb/hkip/karrp.pdf.

[34] *See* Letter from Carl R. Frank, Counsel to Sirius Satellite Radio Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, EB Docket No. 04-296 (filed Aug. 23, 2006); Letter from David S. Konczal, Counsel to XM Satellite Radio Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, EB Docket No. 04-296, at Attachment (filed Sept. 12, 2006).

[35] As a result of the merger, consumers also will be able to choose between a wider range of low cost, easy-to-use, multi-functional devices because of efficiencies in chip set and radio design and procurement. *See, e.g.*, *GM-News Corp. Order*, 19 FCC Rcd at 610 (¶ 316) (noting that the FCC will consider development of "new products" in its public interest analysis).

company will be able to introduce new services, such as advanced data and telematics services; including enhanced traffic, weather, and infotainment offerings; more rapidly and with greater capabilities through a combined research and development effort. The common engineering standards and protocols which would come from a combined effort will accelerate the involvement of third party manufacturers and technology partners in developing and offering innovative devices and services. These benefits would not be possible absent the proposed transaction.

D. The Merged Company Will Be Capable of Commercializing Interoperable Receivers, Providing Greater Customer Choice and Convenience.

Today, XM and Sirius have approximately 20 million radios in the market, including millions built into vehicles manufactured by automakers. This merger will neither interrupt nor affect customers' use of these existing radios. After the merger, current subscribers may choose to continue to receive substantially similar service at the same price over their existing satellite radio. No customer will need to purchase a new radio in order to keep substantially similar service.

However, the merger will also foster the commercial introduction of interoperable satellite radios. In originally implementing rules for the satellite radio service, the Commission required the companies to develop designs for a radio capable of receiving the signal of either system.[36] In accordance with this requirement, Sirius and XM created a jointly funded engineering team that has developed a radio that is interoperable with each other's networks.[37]

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[36] *See* 47 C.F.R. § 25.144(a)(3)(ii). *See also 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, 5795-98 (¶¶ 102-07) (1997) ("*Satellite Radio Implementation Order*").

[37] *See* Letter from William Bailey, Senior Vice President, Regulatory and Government Affairs, XM Radio, Inc. and Patrick Donnelly, Executive Vice President and General Counsel,

These interoperable radios are currently larger, consume more power, and are more expensive and less feature rich than the current single-system radios. There is also little incentive for either company to subsidize the cost of interoperable radios, because of uncertainty whether the subsidy would be recouped since the buyer might not subscribe to that company's service. Because of these limitations, manufacturers have not expressed an interest in producing and distributing these radios, nor have any automobile manufacturers opted to include these radios in their vehicles.

As a practical matter, the merger will improve this situation. After the transaction is consummated, the marketplace itself will provide economic incentives to encourage further innovation and the subsidization and commercial distribution of interoperable radios. With appropriate subsidies to lower the costs, radio manufacturers would likely shift some amount of production, consistent with customer demand, to fabricating radios that tune to all channels of the combined service. Indeed, over the long run, such radios will enable the combined company to offer significantly enhanced content and services. Thus, the merger will enhance the availability and distribution of interoperable equipment allowing consumers to obtain all of the content available on both systems with a single consumer device.

(Continued . . .)
Sirius Satellite Radio Inc. to Thomas S. Tycz, Chief, International Bureau, Federal Communications Commission, IB Docket No. 95-91, at 1 (filed Mar. 14, 2005) (reconfirming compliance with 47 C.F.R. § 25.144(a)(3)(ii) and noting that "XM and Sirius have designed and licensed receiver systems that share a common head unit, antenna, and wiring harness"); Letter from Robert D. Briskman, Executive Vice President, Engineering, Sirius Satellite Radio Inc. and John R. Wormington, Senior Vice President, Engineering and Operations, XM Radio Inc. to Magalie Roman Salas, Secretary, Federal Communications Commission (filed Oct. 6, 2000).

E. The Merger Will Create Operational Efficiencies and Will Safeguard the Future of Satellite Radio.

The proposed merger will allow Sirius and XM to achieve large-scale operational efficiencies and will ensure that satellite radio continues to be a viable competitor in the market for audio entertainment services. In 2006, the two companies incurred total costs of approximately $3.4 billion, the vast majority of which was associated with the operation, depreciation, and management of the companies' infrastructure and cost of acquiring new subscribers. Efficiencies from the proposed merger can be identified in every cost category of the income statement. Importantly, operating expense savings can be passed on to subscribers in the form of lower subscription rates.

First, the merged company will be able to create its commercial-free music channels with the combined efforts of the respective programming staffs and eventually reduce duplicative programming expenses while continuing to offer subscribers a broad selection of music, talk, sports, and entertainment content that they have received in the past.

Second, the merged company will be able to reduce operational expenses for infrastructure used to broadcast and transmit satellite radio programming. Today, both Applicants maintain distinct broadcast operations infrastructure to facilitate the scheduling, storage, compression, transmission, and uplink of programming and content to the Applicants' satellites and terrestrial repeater networks.

Third, one of the largest expense items for each company is the ongoing marketing and subscriber acquisition costs associated with gaining new customers, growing the subscriber base, and increasing brand awareness. The merged company will enjoy the efficiencies of combined advertising and marketing campaigns as well as a unified set of product offerings with lower per unit manufacturing costs due to larger scale production that should ultimately result in lower

product prices for end consumers. In addition, the merged company will be able to focus marketing dollars not simply to drive brand awareness, but also to reduce consumer confusion over what satellite radio offers and to more effectively distinguish satellite radio from other competitive audio entertainment services.

Fourth, the Applicants will be able to accelerate innovation while reducing the cost of research and development efforts required to supply products and services in the retail and automotive distribution channels. The proposed merger will enhance innovation, and reduce the cost of duplicative research and development efforts that would otherwise be necessary to ensure the Applicants remain competitive in the market for audio entertainment services.

Finally, the Applicants will be able to achieve operating efficiencies by reducing duplicative General & Administrative expense.

Analysts predict that these and other combined synergies will save the merged company $200-400 million per year in the near term,[38] and several billion dollars over the long term.[39] As noted above, significant portions of these savings will be shared with customers immediately and in the long-term through lower prices and improved service offerings. In addition to eliminating duplicative operating expenses as outlined, the merger will also allow the Applicants to operate

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[38] *See Consolidation of SIRI and XM Announced*, UBS INVESTMENT RESEARCH, Feb. 20, 2007, at 2 (noting that savings opportunities "could represent approximately $205 million in potential savings); *Sirius Satellite Radio, And then there was one*, MERRILL LYNCH, Feb. 20, 2007, at 1 (estimating "annual cost synergies of ~$400mm in the near-term").

[39] *Sirius Satellite Radio, And then there was one*, MERRILL LYNCH, Feb. 20, 2007, at 3 ("[o]ver the next 10 years, we believe MergeCo could have a present value of future cost synergies of $4.3 bb"); *Consolidation of SIRI and XM Announced*, UBS INVESTMENT RESEARCH, Feb. 20, 2007, at 1 (noting that long-term cost synergies could range from $3 to $4.7 billion).

more effectively by adopting the best and most efficient practices of the two companies based on each Applicant's core competencies.[40]

The proposed merger will also preserve and expand an FCC success story. The efficiencies from combining these two companies will produce a stronger, more stable competitor in the audio entertainment market. Satellite radio is a capital-intensive and expensive business given the significant cost of designing, launching, and operating satellites, and the significant investment each Applicant has made to design chipsets and encourage their distribution, to market their brands, and to create compelling programming for subscribers. Sirius and XM each have invested over $1 billion in their initial in-orbit constellations and over $5 billion each in their business overall and continue to report significant operating losses, including reported net losses of $1.1 billion (Sirius) and $719 million (XM) in 2006.[41] The vast preponderance of each company's annual expense is associated with the operation, depreciation, and management of its infrastructure and cost of acquiring new subscribers. Both providers must

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[40] These operational efficiencies clearly benefit the public interest in that they will allow the combined entity to provide consumers with greater choice at lower prices and innovative products and services as detailed above. *See, e.g., Applications of Nextel Commc'ns, Inc. and Sprint Corp. For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 20 FCC Rcd 13,967, 14,016 (¶ 137) (2005) ("Sprint Nextel will achieve merger specific efficiencies in information technology, billing, customer care, sales and marketing systems"); *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20,063 (¶ 158); *AT&T-Comcast Order*, 17 FCC Rcd at 23,317 (¶ 184) (noting that the "greater scale and scope of [a] merged entity is likely to spur new investment" including by allowing "significant up-front . . . investment costs" to be "spread . . . across a larger customer base" and enabling the sharing of "expertise" that "should contribute positively to consumer experience").

[41] Sirius and XM have generated total cumulative net losses of $3.8 billion and $3.5 billion, respectively, from inception through December 31, 2006. *See* Sirius Satellite Radio Inc., 2006 Form 10-K Annual Report, at 26 (filed Mar. 1, 2007), *at* http://www.sec.gov/Archives/edgar/data/908937/000093041307001865/c47044_10k.htm (last visited Mar. 17, 2007); XM Satellite Radio Holdings Inc., 2006 Form 10-K Annual Report, at 32 (filed Mar. 1, 2007), *at* http://www.sec.gov/Archives/edgar/data/1091530/000119312507044379/d10k.htm (last visited Mar. 17, 2007).

continue to maintain and update this infrastructure and fund replacement spacecraft before the current satellites' end of life.[42]

Such an advanced, next-generation system will be facilitated by the combined entity's increased scale, expertise, and resources. Post merger, the best minds from both companies will be able to cooperate on research and development and technical issues. Moreover, the proposed merger will enable the combined company to achieve efficiencies in the near term through an integrated system sparing plan and in the longer term through the coordination of satellite architecture and procurements. Further, as a more viable competitor in the audio entertainment market, the combined company will have improved access to the capital markets, thereby ensuring that consumers can continue to count on state-of-the-art technology providing even greater choice and flexibility.

IV. THE TRANSACTION WILL NOT HARM COMPETITION IN THE MARKET FOR AUDIO ENTERTAINMENT SERVICES.

The various public interest benefits that would result from the proposed satellite radio merger will not be undercut by any adverse effects on competition. The Commission has emphasized that competition depends on consumers having choices among products that can be substituted for each other.[43] The availability of such choices restrains all market participants,

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[42] Efficiencies in this area will be realized in a relatively short term, perhaps as short as five years, because the planning stages for deploying a next-generation system must begin well in advance of a satellite's end of life. Indeed, XM has recently launched its replacement satellites and is constructing its system spare satellite, and Sirius is building the first of its replacement spacecraft.

[43] *See, e.g.*, *Adelphia Order*, 21 FCC Rcd at 8234 (¶ 59); *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21,552 (¶ 57).

because it enables consumers to respond to one carrier's practices by simply switching to a substitute.[44]

The Commission already has an extensive record relevant to these issues. As the National Association of Broadcasters ("NAB") explained to the Commission just two months ago, "there can be no reasonable doubt that the current media marketplace is robustly competitive, and indeed exploding at the seams with consumer choices for both delivery mechanisms and content."[45] Similarly, Clear Channel Communications, one of the largest owners of radio stations in the nation, has stated:

> Today's media marketplace is accurately characterized as bearing "abundance" and "multiplicity"—not "dominance" or "scarcity," let alone "monopoly." Within this vast and constantly-expanding media marketplace, terrestrial radio broadcasters are subject to fresh and ever-growing competition from a vast array of new technologies and services that deliver music, entertainment, and news.[46]

Given this indisputably competitive environment, economic forces will be more than sufficient to ensure that the proposed merger will have no anti-competitive effects in the market for audio entertainment services.

A. Satellite Radio is a Small Part of a Highly Competitive and Ever-Expanding Market for Audio Entertainment.

The Commission's product market analysis necessarily begins with the product supplied by the merging firms. As of December 31, 2006, XM and Sirius combined had approximately

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44 *Adelphia Order*, 21 FCC Rcd at 8234 (¶ 59).

45 *2006 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Reply Comments of the National Association of Broadcasters, MB Docket No. 06-121, at 34 (filed Jan. 16, 2007).

46 *2006 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Comments of Clear Channel Communications, Inc., MB Docket No. 06-121, at 10 (filed Oct. 23, 2006) ("Clear Channel Comments, *2006 Quadrennial Regulatory Review*").

14 million subscribers. One study predicts this will grow to 25 million by the beginning of 2010,[47] and others have projected similar growth.[48] Although satellite radio has proven to be an appealing and popular new product, the current 14 million subscribers pales in comparison to terrestrial radio's approximately 230 million weekly listeners[49] (and is also dwarfed by Internet radio's 72 million monthly listeners[50]). Both companies offer many channels of music and a range of other programming, including national and international news, sporting events, and talk shows. Both also offer consumers a variety of ways to access this programming, including in their cars, on their computers, at home, and in a portable capacity. Despite strong initial growth, satellite radio's market penetration remains quite limited: A recent Arbitron study found that satellite radio accounted for *just 3.4 percent of all radio listening*, spread out among the approximately 300 channels that XM and Sirius combined currently offer.[51]

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[47] Bridge Ratings, *Digital Media Growth Projections*, Feb. 19, 2007, *at* http://www.bridgeratings.com/press_021907-digitalprojectionsupd.htm (last visited Mar. 15, 2007).

[48] *See, e.g.*, Credit Suisse, *2007 Satellite Radio Outlook*, Jan. 16 2007, at 7 (projecting 25.5 million subscribers by the end of 2009 and 28.9 million by the end of 2010); Stifel Nicolaus, *Satellite Radio Merger Attempt Likely, Based on History & Risk/Reward*, Nov. 27, 2006, at 10, 12 (projecting 27.0 million subscribers by the end of 2009 and 31.7 million subscribers by the end of 2010).

[49] *See infra* n.59.

[50] *See* Bridge Ratings, *Digital Media Growth Projections*, Feb. 19, 2007, *at* http://www.bridgeratings.com/press_021907-digitalprojectionsupd.htm (last visited Mar. 15, 2007).

[51] 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 the Arbitron study); *see also* The Katz Radio Group, *Satellite Radio Penetration*, RADIOWAVES, Dec. 2006, *at* http://www.katz-media.com/pubs/RadioWaves/121206/RadioWavesDEC2006.pdf (last visited Mar. 17, 2007) (finding that satellite radio constituted 4.1 percent of the market).

This modest market share is not surprising. Today's audio entertainment marketplace includes services that did not even exist when the Commission first authorized satellite radio, many of which provide music as well as news, talk formats, public safety information, and a range of other valuable programming over the Internet and on handheld devices that can be used in a variety of locations, including through car stereo systems. Further, new devices and services emerge every day.[52] The Commission has acknowledged this competition before,[53] but it has yet to account fully for the many market developments of the past several years.[54] Nationwide, the

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[52] For example, Slacker recently introduced an Internet and satellite radio-based service. The service will be received by consumers through a device designed and distributed by Slacker. The Slacker will come with 4-inch color display, will support MP3, WMA, WMV, and MPEG-4 files, and will come with built-in WiFi and satellite reception capabilities. *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. 15, 2007); *see also* J.D. Biersdorfer, *Now, A Radio Station for (Your Name Here)*, NEW YORK TIMES, Mar. 15, 2007, at C8.

[53] *See Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 1962, 1988 n.110 (¶ 44 n.110) (2003) (noting that satellite radio "appears in many respects to compete directly with segments of the terrestrially based broadcast market") (citing Brian Steinberg, *XM Satellite Radio's Ads Generate Some Heavy Static*, WALL ST. J., Feb. 1, 2002).

[54] *See 2006 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Reply Comments of Clear Channel Communications, Inc., MB Docket No. 06-121, at 5 (filed Jan. 16, 2007) (stating that "the vast majority" of the competitive alternatives now available for audio entertainment "did not become real participants in the marketplace" until after 2003). In 2003, when the Commission last reviewed its media ownership rules, it identified "radio listening" as a product market that included only free AM and FM radio. *2003 Media Ownership Order*, 18 FCC Rcd at 13,715-16 (¶ 245). At that time, the Commission further observed that the only other audio entertainment services, satellite radio and "Internet audio streaming," competed directly with broadcast radio but were not adequate substitutes. *See id.* Specifically, the Commission found that "satellite radio may be a substitute for broadcast radio," but only for the 600,000 people that subscribed to it at the time. *Id.* It similarly observed that Internet audio "may be a substitute for broadcast radio when listening takes place while working on a computer or in a small office environment," but not in the mobile environment. *Id.*

audio entertainment marketplace today is characterized by a diversity and multiplicity of options that, despite some differentiation, offer consumers similar content and features.[55]

1. Terrestrial Radio

Foremost among the audio entertainment options available to consumers is terrestrial, "over-the-air" AM and FM radio. By any measure, and for 80 years, terrestrial radio—offered free of charge to all consumers—has been and remains the most dominant form of audio entertainment service by a substantial margin. Nearly 14,000 radio stations exist in the United States today,[56] an increase of almost 14 percent over the last ten years.[57] Much of the content available over terrestrial radio mirrors that available over satellite radio.[58] Approximately 230

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[55] Of course, the following list of competitive services is not exhaustive, as there are many other audio entertainment options. For example, many cable and satellite television providers provide subscribers with a wide variety of music channels.

[56] *See* News Release, Federal Communications Commission, *Broadcast Station Totals as of December 31, 2006*, Jan. 26, 2007 (announcing that there were 13,837 full power AM and FM radio stations as of December 31, 2006).

[57] *See* News Release, Federal Communications Commission, *Broadcast Station Totals as of December 31, 1996*, Jan. 21, 1997 (announcing that there were 12,140 terrestrial radio stations operating in the United States as of December 31, 1996).

[58] The extent of this overlap was illustrated during questioning by Representative Anthony Weiner of Sirius CEO Mel Karmazin and NAB President and CEO David Rehr, during the February 28, 2007 hearing before the House Judiciary Committee:

> WEINER: . . . Mr. Rehr, do your member stations compete with Mr. Karmazin's product?
>
> REHR: They do – yes.
>
> WEINER: All right. Do your member stations play music, have music on some of them?
>
> REHR: Yes, 13,000 radio stations, yes.
>
> WEINER: Mr. Karmazin, do some of your broadcast stations have music?
>
> KARMAZIN: Yes sir.

million Americans choose to listen to terrestrial radio each week,[59] *more than fifteen times* the total number of subscribers to satellite radio. These figures are not necessarily surprising when considered in light of the overwhelming ubiquity of terrestrial radios.

Terrestrial radio continues to thrive despite the emergence of competing audio entertainment services. One study noted that 89 percent of Americans aged 15-24—a demographic that may be the most likely to adopt new technologies—cited terrestrial radio as a

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(Continued . . .)

WEINER: Mr. Rehr, do some of your broadcasters have talk?

REHR: Yes.

WEINER: Mr. Karmazin, some of your stations have talk?

KARMAZIN: Yes sir.

WEINER: Mr. Rehr, do some of your stations have sports?

REHR: Yes.

WEINER: Mr. Karmazin, do some of your stations have sports?

KARMAZIN: Yes.

Hearing of the Antitrust Task Force Subcommittee of the House Judiciary Committee, *Competition and the Future of Digital Music*, Feb. 28, 2007, *at* 2007 WLNR 4055618.

[59] *See* Arbitron, *Radio Today: How America Listens to Radio*, 2006 Edition, at 2, *at* http://www.arbitron.com/downloads/radiotoday06.pdf (last visited Mar. 19, 2007) (estimating that 93 percent of Americans twelve years old and over listen to radio each week); *The 2007 Statistical Abstract*, The National Data Book, U.S. Census Bureau, at Table 11, *at* http://www.census.gov/compendia/statab/population/ (estimating 2005 resident population by age). According to another report, this number is even higher. *See* Bridge Ratings, *Digital Media Growth Projections*, Feb. 19, 2007, *at* http://www.bridgeratings.com/press_021907-digitalprojectionsupd.htm (last visited Mar. 15, 2007) (estimating 282 million weekly radio listeners). Even NAB acknowledges terrestrial radio's dominance. *See* Remarks of David Rehr, President and CEO, National Association of Broadcasters, "The Future of Broadcasting," The National Press Club – October 4, 2006, *at* http://www.nab.org/AM/Template.cfm?Section=News_room&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=6937 (last visited Mar. 17, 2007) ("Satellite radio says it has at most 12 million subscribers. By contrast, 260 million people listened to local radio last week. This is week in and week out.").

primary source of music listening in 2006.[60] Moreover, research shows that 46 percent of teen- and college-aged owners of MP3 players are also interested in listening to AM/FM radio on their MP3 players.[61] The continued dominance of AM/FM radio is further reflected in its ongoing economic clout; for example, in 2005, the largest ten radio operators posted revenue of $9 billion and billions in positive cash flow.[62]

2. HD Radio

HD Radio offers an expanded array of programming as compared to traditional AM and FM radio and is spreading rapidly. Through the HD Digital Radio Alliance—a consortium of broadcasters that includes almost all major players, including Clear Channel Communications, CBS, and ABC Radio—the terrestrial radio industry has committed hundreds of millions of dollars to promoting this technology.[63] That investment already has had proven effects. Approximately 1,200 HD Radio stations are already on the air,[64] and hundreds more have

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60 Bridge Ratings, *Youth Audience Media Use Study 2007*, Feb. 14, 2007, *at* http://www.bridgeratings.com/press_02.14.07-Youth%20Media%20Use.htm (last visited Mar. 13, 2007).

61 *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) (summarizing results of Ipsos Insight, TEMPO digital music market report).

62 Project for Excellence in Journalism, *The State of the News Media 2007: An Annual Report on American Journalism*, "Economics," *at* http://www.stateofthemedia.org/2007/ (last visited Mar. 15, 2007) (reporting BIA data).

63 *See* Tom Lowry, *HD Radio Still Taking the Rap*, BUSINESSWEEK, Jan. 29, 2007, *at* http://www.businessweek.com/technology/content/jan2007/tc20070129_381520.htm (last visited Mar. 13, 2007) (describing a $250 million advertising campaign for HD Radio).

64 Statement of Peter H. Smyth, President and Chief Executive Officer, Greater Media, Inc., on behalf of the National Association of Broadcasters, Hearing of the Telecommunications and the Internet Subcommittee of the House Energy and Commerce Committee, *Digital Future of the United States: Part II-The Future of Radio*, Mar. 7, 2007, at 3, *at* http://energycommerce.house.gov/cmte_mtgs/110-ti-hrg.030707.NAB_Smyth-Testimony.pdf (last visited Mar. 17, 2007) (reporting 1183 HD Radio stations in operation).

licensed HD Radio technology.[65] These new multi-channel competitors are expected to exceed 3,000 within the next few years,[66] and the HD Digital Radio Alliance has combined the resources of its dominant national members jointly to establish program offerings and formats in order to provide compelling, coordinated, multi-channel program offerings across major markets throughout the country. More than 500 sidebands of HD Radio multicasts are available in 50 U.S. radio markets, including 42 of the top 50 markets[67] and 85 of the top 100 markets.[68] By some estimates, almost one-third of one million Americans already listen to HD Radio on a weekly basis, and this number is expected to increase to approximately 12 million by 2010.[69] As of August 2006, Clear Channel already was airing HD Radio multicasts on 269 of its stations in 66 of its markets.[70]

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[65] Bridge Ratings, *HD Radio Study – Consumer Satisfaction*, May 22, 2006, *at* http://www.bridgeratings.com/press_5.22.06.HDSatisf.htm (last visited Mar. 13, 2007).

[66] *See* Press Release, HD Digital Radio Alliance, *BMW First Auto Maker to Offer HD Radio Receivers Throughout its Entire Product Range*, Jan. 5, 2007, *at* http://www.hdradio.com/press_room.php?newscontent=51 (last visited Mar. 14, 2007).

[67] Bridge Ratings, *HD Radio Study – Consumer Satisfaction*, May 22, 2006, *at* http://www.bridgeratings.com/press_5.22.06.HDSatisf.htm (last visited Mar. 13, 2007); Letter from John M. Burgett, Counsel to iBiquity Digital Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission, MM Docket No. 99-325, Attach. at 2 (filed Feb. 22, 2007) ("iBiquity HD Radio Presentation") (noting 555 multicasting stations).

[68] Tom Lowry, *HD Radio Still Taking the Rap*, BUSINESSWEEK, Jan. 29, 2007, *at* http://www.businessweek.com/technology/content/jan2007/tc20070129_381520.htm (last visited Mar. 13, 2007).

[69] Bridge Ratings, *Digital Media Growth Projections*, Feb. 19, 2007, *at* http://www.bridgeratings.com/press_021907-digitalprojectionsupd.htm (last visited Mar. 15, 2007).

[70] Clear Channel Comments, *2006 Quadrennial Regulatory Review*, at 30.

The availability of HD Radio receivers is steadily and rapidly increasing. A year ago, there were only four or five HD Radio models available and the lowest price was $599.[71] Now there are 30 manufacturers of radios and price points under $200.[72] HD Radio is now available on all new BMW vehicles[73] and in RadioShack stores.[74] In addition, Wal-Mart, the nation's largest retailer, recently announced plans to sell HD Radio receivers.[75]

3. Internet Radio

Many consumers are not waiting for the prevalence of HD Radio to find digital-quality sound for their audio entertainment. Increasingly, consumers are turning to Internet radio, which requires a device, such as a personal computer, connected to the Internet.[76] In one survey, 34.5

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[71] Bunzel Media Group, *The State of Radio: 2007*, Jan. 5, 2007, at 17, *at* http://www.arbitron.com/downloads/State_of_Radio_2007.pdf (last visited Mar. 17, 2007).

[72] *Id.* at 14, 17.

[73] iBiquity HD Radio Presentation at 3; Tom Lowry, *HD Radio Still Taking the Rap*, BUSINESSWEEK, Jan. 29, 2007, *at* http://www.businessweek.com/technology/content/jan2007/tc20070129_381520.htm (last visited Mar. 13, 2007) (noting BMW's announcement in January 2007 that it would become the first carmaker to offer factory-installed HD Radio receivers as an option in all of its 2007 models).

[74] *See* Tabletop & Clock HD Radios, RadioShack Home Page, *at* http://www.radioshack.com/family/index.jsp?categoryId=2032185&cp=2032057&allCount=17&fbc=1&f=PAD%2FProduct+Type%2FHD+radio&fbn=Type%2FHD+radio (last visited Mar. 18, 2007).

[75] Associated Press, *Wal-Mart to sell HD digital radio receivers*, L.A. TIMES, Mar. 6, 2007, *at* http://www.calendarlive.com/tv/cl-fi-radio6mar06,0,7415452.story?coll=cl-tvent (last visited Mar. 18, 2007).

[76] Broadband Internet is available to the vast majority of American consumers. *See* Industry Analysis and Technology Division, Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of June 30, 2006*, Jan. 2007, at 3 & Tbls. 14-16, *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270128A1.pdf (reporting that 99 percent of zip codes have at least one high-speed connection in service to an end user, and estimating (1) that high-speed DSL connections were available to 79 percent of the households to whom incumbent LECs could provide local telephone service as of June 30, 2006, and (2) that high-speed cable modem service was available to 93 percent of the households to whom cable