



A D V A N C I N G E Q U A L I T Y

July 6, 2007

Commission's Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: MB Docket No. 07-57

Dear Commissioners:

Attached please find the comments of the Asian American Justice Center in response to MB Docket No. 07-57. If you have any questions or concerns, please do not hesitate to contact me at 202-296-2300, x121 or at veng@advancingequality.org.

Sincerely,

A handwritten signature in black ink that reads "Vincent A. Eng". The signature is written in a cursive style.

Vincent A. Eng
Deputy Director

ASIAN AMERICAN JUSTICE CENTER

COMMENTS TO THE FEDERAL COMMUNICATIONS COMMISSION REGARDING APPLICATIONS FOR MERGER BY SIRIUS SATELLITE RADIO INC. AND XM SATELLITE RADIO HOLDINGS, INC.

The **Asian American Justice Center** (AAJC; formerly NAPALC, the National Asian Pacific American Legal Consortium) is dedicated to the preservation and advancement of the human and civil rights of the Asian American community through advocacy, public policy, public education, and litigation. AAJC is one of the nation's leading experts on issues of importance to the Asian American community including: affirmative action, anti-Asian violence prevention/race relations, census, immigrant rights, immigration, language access, and voting rights.

Part of our mission and ongoing work is to prevent discrimination against language minorities in the United States, and to ensure their access to critical rights and services. Because the Asian American community is largely foreign-born, lack of translated information has a disproportionate impact on Asian American immigrants who have limited English proficiency and are thus less likely to understand and exercise their rights and obligations, less able to access government services, and less able to achieve economic stability. We also strongly advocate for racial and ethnic diversity and greater representation of Asian/Pacific Islanders in the broadcast media.

The following responds to the June 8, 2007, Federal Communications Commission's request for comments on the Consolidated Application submitted by Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM") seeking consent to transfer control of Commission licenses and authorizations held by Sirius, XM and their subsidiaries pursuant to Section 310(d) of the Communications Act of 1934, as amended.¹ The proposed transaction and an Agreement and Plan of Merger (dated February 19, 2007) would merge Vernon Merger Corporation, a wholly owned subsidiary of Sirius, with and into XM.² XM would be the surviving entity of this subsidiary merger.³

The proposed merger between the only two satellite radio companies would create a monopoly, to the detriment of the non-English-language minority radio market in general, and Asian-language radio programming in particular.

I. Detrimental effect on satellite radio content diversity and development

A. The proposed merger would create a monopoly and a single content gatekeeper

Satellite radio is a distinct and easily identifiable product, separate and different from other mobile and stationary forms of audio programming, including locally based terrestrial radio, current models

¹ *Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Seek Approval to Transfer Control of FCC Authorizations and Licenses*, DA 07-2417, MB Docket No. 07-57 (rel. Jun. 8, 2007).

² *Id.*

³ *Id.*

of streaming Internet radio, and podcasting.⁴ These other forms of audio programming thus do not compete with satellite radio in terms of product(s) offered, conditions imposed on consumers, or markets served.⁵ Sirius and XM are the only two satellite radio companies; a successful merger between them would under antitrust law create a monopoly⁶ and a single gatekeeper for all satellite radio content.

Thus far, competition between Sirius and XM has led to some headway in minority-focused satellite radio programming: there are currently a number of “niche” channels on satellite radio that are geared toward minorities and non-English-speaking audiences, and a limited number of Asian- and/or Asian American-focused “niche” channels and/or programs also exist.⁷ Eliminating competition will decrease the chances of minority content providers of gaining access to satellite radio and adequate compensation for their services. It will also work to the detriment of non-English-language programming, which in the Asian American community generally serves very specialized and/or regionally concentrated markets.

Audio programming in Asian languages in the United States, with its more regionally-focused nature and lack of critical mass of listeners on a national level, has traditionally had less appeal to a single national radio broadcaster. Upon its introduction, satellite radio technology offered a valuable chance to connect the highly concentrated, but geographically disparate, Asian-language listener markets on a national level. However, neither XM nor Sirius has individually made significant efforts to cultivate and connect these markets.

Eliminating competition through a merger between the two companies creates no incentive for the surviving company, in this case XM, to connect separate Asian-language listener markets and further develop Asian-language satellite radio offerings. Without the spur of innovation created by competition, the single content gatekeeper can easily arbitrarily determine that there is no “need” to provide in-language programming to a certain market, or at all.

B. Space and technological limitations will constrain Asian-language content development

The fact that Sirius and XM use different and technologically incompatible platforms means that radios using one service cannot receive programming from the other.⁸ Any channels carried simultaneously on both systems (as would be the case post-merger) must fit separately on each system. However, channel capacity on both systems is already saturated.⁹ To create a “merged”

⁴ Common Cause et al., *The XM-Sirius Merger: Monopoly or Competition from New Technologies*, Statement Before the Senate Committee on the Judiciary – Subcommittee on Antitrust, Competition Policy and Consumer Rights, Mar. 20, 2007.

⁵ *Id.*

⁶ 15 U.S.C. § 18.

⁷ Sirius currently carries stations that broadcast in Spanish, French, and Korean. See Sirius Satellite Radio Channel Guide, available at <http://www.sirius.com> (last visited July 6, 2007). XM currently carries stations that broadcast in Spanish and French. See XM Channel Lineup, available at <http://xmradio.com/onxm/full-channel-listing.xmc> (last visited July 6, 2007).

⁸ National Association of Broadcasters, *XM-Sirius Merger Will Not Benefit Minorities*, June 7, 2007.

⁹ Charles Babington, *Radio Deal Could Face Technical Difficulties: XM, Sirius Systems Already Strained*, WASH. POST, Mar. 19, 2007, at D01.

menu of channels that is fully supported by both platforms, certain channels supported by only one platform would have to be dropped on a one-for-one basis to make room for channels which the single content gatekeeper wishes to carry on both platforms. The implications of this are that already-extant “niche” channels – such as those targeted toward minorities – would stand a higher chance of being dropped in favor of programming with mass market appeal.¹⁰

These technological and space limitations also make it unlikely that new in-language or minority-focused channels or programs would be developed after the proposed merger.¹¹

II. Detrimental impact on terrestrial radio

Allowing this sort of mega-merger in the satellite radio industry could open the door to other mega-mergers within the terrestrial radio industry, and/or to a satellite radio monopoly engaging in unfair competition and anticompetitive practices against terrestrial radio broadcasters.¹² We believe it is highly possible that this negative domino effect would result in adverse effects (similar to those outlined in Part I) on Asian-language terrestrial radio stations and on the programming offered by such stations.

One of the most serious potential adverse effects of the economic harm done to local terrestrial radio stations is on Asian American political participation and emergency preparedness, as locally-owned stations play a particularly important role in minority, limited English proficient, and non-English-speaking communities as providers of information and news in both of these areas.¹³ Consolidation of terrestrial radio outlets could reduce the amount of information available about local emergencies and political issues, and favor national stories that are more likely to generate revenue for the owner.¹⁴ The problem is especially severe for populations who do not speak English at all, as there are even fewer media outlets serving their specific needs.¹⁵

III. Minority consumer concerns

Competition ensures that product and service prices stay low, or at least do not rise to unreasonable levels. Mergers to monopoly have thus been enjoined on the grounds that the combined company

¹⁰ David K. Rehr, Testimony Before the U.S. House of Representatives Committee on the Judiciary – Antitrust Task Force, Feb. 28, 2007.

¹¹ The National Association of Broadcasters offers a particularly pertinent example of how competition promotes in-language programming innovation: Spanish-language sports programming was introduced to satellite radio primarily because Sirius and XM were locked in an “arms race” to capture the Spanish-speaking sports radio audience. National Association of Broadcasters, *supra* note 8.

¹² Rehr, *supra* note 10. See also Steven Pearlstein, *Sirius-XM Merger Would Send Wrong Signal*, WASH. POST, Feb. 23, 2007, at D01 (arguing that “...we are about to enjoy a competitive free-for-all among various companies and technologies to determine which is the most effective in bringing digital music to consumers...[F]or precisely that reason, this is the wrong time to give one technology a leg up in that competition by allowing it to become a monopoly, while other companies are forced to compete on two fronts – against other companies using the same technology, and against companies using different technologies”).

¹³ Katherine Musbach, *The FCC, Media Diversity, and Media Consolidation*, civilrights.org, available at http://www.civilrights.org/press_room/buzz_clips/civilrightsorg-stories/the-fcc-media-diversity.html (last visited July 2, 2007) (quoting Federico Subervi, journalism professor at Texas State University).

¹⁴ *Id.*

¹⁵ *Id.*

produced by a merger of this kind would be able to increase prices or maintain anticompetitive price levels.¹⁶ In the case of satellite radio, Sirius and XM, with their separate technologies, are unlikely to be able to reduce operating costs and thus reduce subscriber prices. The high costs of subscribing to satellite radio would lock out a significant portion of the potential audience for satellite radio, with the adverse impact felt significantly more by minorities as a whole than by well-off mainstream consumers.

Price caps and other FCC consumer protection regulations will be temporary, meaning that a monopoly satellite radio broadcaster will at some point raise prices, revert to the most economical and/or consumer-demanded programming packages, and most likely cut out diverse non-English-language programming in the process.¹⁷ Without competition, opportunities for minority and/or non-English-broadcasting radio personalities will decrease. Moreover, given Sirius' and XM's exclusive long-term contracts, or possible future deals,¹⁸ with controversial radio personalities (so-called "shock jocks")¹⁹ who have on past occasions created and broadcast programming found to be indecent and offensive,²⁰ a merger may significantly decrease minority groups' power as consumers to challenge and protest racially offensive programming.

¹⁶ *FTC v. Staples*, 970 F. Supp. 1066, 1081-81 (D.D.C. 1997).

¹⁷ National Association of Broadcasters, *supra* note 8.

¹⁸ See, e.g., Larry McShane, *What's Next For Imus?: Retirement, Satellite Radio Among Options*, REC. N. N.J., Apr. 14, 2007, at A13.

¹⁹ See, e.g., Eric A. Taub, *As His Sirius Show Begins, Radio Ponders the Stern Effect*, N.Y. TIMES, Jan. 9, 2006, at C3; Rafer Guzman, *No Shock from Jocks*, Newsday, Apr. 27, 2006.

²⁰ See, e.g., Noel C. Paul, *Behind the Media's New Propriety*, CHRISTIAN SCI. MONITOR, Mar. 1, 2004, at 2.