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

In the Matter of	)	
	)	
Applications for Consent to the	)	
Transfer of Control of Licenses	)	
	)	MB Docket No. 07-57
XM Satellite Radio Holdings Inc.,	)	
Transferor,	)	
to	)	
	)	
Sirius Satellite Radio Inc.,	)	
Transferee	)	

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Comment

Released: July 7, 2007

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I. INTRODUCTION

1. On March 20, 2007, Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM") (collectively, the "Applicants"), the only entities authorized by the Commission to provide satellite radio service in the United States, submitted applications seeking permission to transfer control of Commission licenses and authorizations held by Sirius and XM to a single, combined entity owned by the current shareholders of XM and Sirius. However, this proposed transfer conflicts with language prohibiting such a combination in the Commission's 1997 Order establishing the Satellite Digital Audio Radio Service ("satellite DARS"), On June 28, 2007, the Commission issued a *Notice of Proposed Rule Making* seeking comment on whether the language in question constitutes a binding Commission rule and, if so, whether the Commission should waive, modify, or repeal the prohibition in the event that the Commission determines that the proposed merger, on balance, would serve the public interest.

II. DISCUSSION

2. Pursuant to the Commission's 1997 *SDARS Report & Order,* the Applicants each hold a license to provide satellite radio service in the United States and they collectively use all of the spectrum assigned by the Commission for such service. The *SDARS Report & Order* contained the following language:

> Transfer. We note that DARS licensees, like other satellite licensees, will be subject to rule 25.118, which prohibits transfers or assignments of licenses except upon application to the Commission and upon a finding by the Commission that the public interest would be served thereby. Even after DARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellite DARS license. This prohibition on transfer of control will help assure sufficient continuing competition in the provision of satellite DARS service.

III. ASSERTIONS OF THE APPLICANTS

3. The Applicants assert that the prohibition need not be continued "because the preservation of two separate satellite radio licensees is no longer required to 'help assure sufficient continuing competition,'" which, they maintain, was the original purpose of the restriction set forth in the 1997 *SDARS Report & Order*.

4. The Applicants contend that the Commission has sufficient justification to waive, modify or otherwise alter the prohibition and approve the proposed transfers of control because the competitive environment within the audio entertainment marketplace has changed since 1997, when the Commission adopted the *SDARS Report & Order*. Based upon these changed market conditions, the Applicants assert that continuation of the prohibition would not serve the public interest.

IV. COMPEDITIVE LANDSCAPE (1997)

5. As noted above, the Applicants assert that the Commission has sufficient justification to waive, modify or otherwise alter the prohibition because the competitive forces within and outside of the satellite DARS industry has changed so dramatically since the Commission adopted the *SDARS Report & Order* in 1997. So one could examine what exactly the Applicants considered their "competition" in the two time periods from 1998 to 2006. For this purpose, we can refer to submissions to the Securities and Exchange Commission during the respective periods.

6. Securities and Exchange Commission Form 10-K CD RADIO/SIRIUS.

Filed March 31, 1997. For the year January 1, 1996 thru December 31, 1996.

COMPEDITION:

The Company's satellite radio service will face competition from ***two principal sources****: (i) terrestrial AM/FM radio broadcasting, including, when available, terrestrial digital radio broadcasting; and (ii) another satellite radio broadcaster.*

The AM/FM radio broadcasting industry is very competitive, and certain ofthe Company's competitors in this industry have substantially greater financial, management and technical resources than the Company. Unlike the Company, the radio industry has a well established market for its services and generally offers "free" reception paid for by commercial advertising rather than a subscription fee. In addition, certain AM and FM stations, such as National Public Radio, offer programming without commercial interruption. Many radio stations also offer information programming of a local nature, such as local news or traffic, which the Company will be unable to offer. ***CD Radio will compete with conventional radio stations on the basis of the variety and focus of its programming, its commercial-free formats, signal coverage throughout the continental United States, and digital CD stereo sound quality.***

Currently, radio stations broadcast by means of analog signals, as opposed to digital transmission. The Company believes, however, that prior to the commencement of CD Radio, broadcasters may be in a position to implement technology that permits simultaneous transmission of both analog and digital signals on the AM and FM bands that will permit digital AM broadcasts to achieve monaural FM sound quality, and digital FM broadcasts to approach compact disc stereo sound quality. See "Forward-Looking Statements." In order to receive these digital AM/FM broadcasts, listeners would need to purchase new digital radios which are not currently commercially available. ***As a result, while the development of digital broadcasting would eliminate one of the advantages of CD Radio over FM radio, the Company does not believe it would affect broadcasters' ability to address the other advantages of CD Radio.*** *In addition,* ***the Company views the growth of terrestrial digital broadcasting as a positive force that would be likely to accelerate radio replacement and thereby facilitate the proliferation of satellite radios.***

. 7. Analysis of the above quoted statements from Sirius/CD Radio appears to show that the Applicant acknowledged that both Analog and futuristic Digital Terrestrial Radio were seen as direct competition back in 1996. However, the Applicant highlighted the competitive advantages of SDAR services over both Analog and the anticipated Digital Terrestrial Radio by pointing out superior “Digital CD Quality” sound, diverse programming, commercial-free formats, as well as complete uninterrupted CONUS coverage. The Applicant stated that it viewed the deployment of terrestrial digital broadcasting as a “positive force” that would likely accelerate radio replacement to the benefit of Satellite Radio.

V. COMPEDITIVE LANDSCAPE (2006)

8. Securities and Exchange Commission Form 10-K SIRIUS .

Filed March 13, 2006. For the year January 1, 1995 thru December 31, 1995.

We face competition for both listeners and advertising dollars. In addition to pre-recorded entertainment purchased or playing in cars, homes and using portable players, we compete most directly with the following providers of radio or other audio services:

XM Radio. Our direct competitor in satellite radio service is XM Radio, the only other FCC licensee for satellite radio service in the United States. XM Radio has announced that it had 5,932,957 subscribers as of December 31, 2005. ***XM Radio broadcasts certain programming that we do not offer and is offered on various car model brands which do not also offer SIRIUS radios****.*

Traditional AM/FM Radio. Unlike SIRIUS radio, traditional AM/FM radio has had a well established market for its services for many years and generally offers free broadcast reception paid for by commercial advertising rather than by a subscription fee. ***Also, many radio stations offer information programming of a local nature, such as local news and sports, which we do not offer as effectively as local radio****. The AM/FM radio broadcasting industry is highly competitive with respect to listeners and advertising revenues. Some radio stations also have begun reducing the number of commercials per hour, expanding the range of music played on the air and experimenting with new formats in order to compete more directly with satellite radio. Several major radio companies have launched advertising campaigns designed to assert the benefits of traditional local AM/FM radio.*

Currently, most traditional AM/FM radio stations broadcast by means of analog signals, not digital transmission. Traditional AM/FM radio broadcasters are able to transmit digitally into the bandwidth occupied by current AM/FM stations. ***Digital broadcasting offers higher sound quality than traditional analog signals. Digital radio broadcast services have been expanding, and an increasing number of radio stations in the U.S. have begun digital broadcasting or are in the process of converting to digital broadcasting****. The technology permits broadcasters to transmit as many as five stations per frequency. To the extent that traditional AM/FM radio stations adopt digital transmission technology, and to the extent such technology allows signal quality that rivals our own, any competitive advantage that satellite radio enjoys over traditional radio because of our digital signal would be lessened.*

Internet Radio and Downloading Devices. Internet radio broadcasts have no geographic limitations and can provide listeners with radio programming from around the country and the world. ***Currently, there are no Internet radios in vehicles. Although we believe that the current sound quality of Internet radio is below standard and may vary depending on factors that can distort or interrupt the broadcast, such as network traffic, we expect that improvements from***

higher bandwidths, faster modems and wider programming selections may make Internet radio a more significant competitor in the future.

The Apple iPod® is a portable digital music player that sells for approximately $100-$400 and allows users to convert music on compact discs to digital files and to download and purchase music through Apple's iTunes® Music Store, which features over 2 million songs and 11,000 audio books. Apple sold over 22.5 million iPods® and more than one million videos during its fiscal 2005 year. iPods® are compatible with certain car stereos and various home speaker systems. Availability of music in the public MP3 audio standard has been growing in recent years with sound files available on the websites of online music retailers, artists and record labels and through numerous file sharing software programs. These MP3 files can be played instantly, burned to a compact disc or stored in various portable players available to consumers. ***Our SIRIUS S50 portable satellite radio player competes with the iPod® and other portable music devices.***

Direct Broadcast Satellite and Cable Audio. A number of companies provide specialized audio services through either direct broadcast satellite or cable audio systems. ***These services are targeted to fixed locations, mostly in-home****. The radio service offered by direct broadcast satellite and cable audio is often included as part of a package of digital services with video service, and video customers therefore generally do not pay an additional monthly charge for the audio service.*

Digital Media Services. ***We may face competition from businesses that have announced plans to deliver entertainment and media content through cell phones and other wireless devices.*** *Sprint Nextel, Comcast, Time Warner Cable, Cox Communications and Advance/Newhouse Communications recently announced they are forming a joint venture to work toward accelerating the convergence of video entertainment, wireline and wireless data and communications products and services to provide customers throughout the United States access to advanced integrated entertainment, including streaming television programming, music, video clips, games and pre-recorded DVR programs, communications and wireless products. QUALCOMM has announced that its wholly owned subsidiary, MediaFLO USA, will offer interactive wireless multimedia services to consumers in cooperation with U.S. wireless operators through a nationwide network that will deliver multimedia content to mobile devices in the 700 MHz spectrum for which QUALCOMM holds licenses with a nationwide footprint. MediaFLO USA expects to begin commercial operation of the new network in 2006. Crown Castle International Corp. has also announced that it plans to deliver live mobile video in partnership with wireless operators through its Modeo LLC subsidiary. It will provide the service over 5MHz of its licensed spectrum in the1670-1675 MHz band and plans to commercially launch in select major U.S. markets, including New York City, in 2006.*

9. Analyzing the above quoted statements in 1996 from Sirius appears to show that the Applicant continues to acknowledge that both Analog and Digital Terrestrial Radio are still viewed as 'direct competition'. However, at the time of publishing, there were approximately 1338 "HD Radio" Stations operational in the continental United States. These HD Radio Stations provide on average one HD Radio station for every 2,242 square miles (roughly the size of Deleware). However, the Applicant updated its sources of claimed competition that included several new entrants. . These included Internet Radio, but the Applicant noted that there were no mobile Internet Radios available, and that generally the sound quality of Internet Radio was sub-standard. Likewise the Applicant listed IPOD® types of devices but noted that the competition from this device was in the form of the companies SIRIUS S50 combination receiver and MP3 player. However, it could be noted that other formats of "in-car audio entertainment" have been widely available for several decades. None of which provide neither the quality nor the diversity of Satellite Radio.

VI. COMPEDITION

10. There has been a great attempt to dissect satellite DARs aural offerings into multiple subcategories. The music channels have been categorized to compete against Terrestrial Analog and Digital Broadcasts. Yet, there is no single market in the United States that presents the range, quality and diversity of musical selections as afforded by Satellite Radio on terrestrial radio. Likewise, the cost and technology required to acquire comparable musical selections available on Satellite Radio, on Portable Music Players such as IPOD's® is prohibitive, and would require devices with Terabytes of storage that will not be available in the foreseeable future. Other technologies like Internet Radio do not provide the portability, or the sound quality comparable to satellite DARs. Likewise, much of the other audio entertainment has also been broken down into subcategories in order to provide a basis of competition in one form or another. Yet, there is simply no other competitive format that provides a single convenient format of cost effective, diverse, high quality, portable audio entertainment other than the two Applicants themselves.

11. There have been many special interests and minority groups which have opined on this merger. Yet, while many of these groups urge the Agency to permit the merger. In some cases, their comments explain exactly why Satellite Radio has little or no competition in rural America.

On April 13, 2007 *The League of Rural Voters* opined:

> *"Given the persistent digital divide that plagues much of rural America, many of the latest alternatives to terrestrial radio have yet to reach the heartland. Therefore the survival of satellite radio as a competitive alternative is critical."*

VII. CITIZENSHIP

12. Sec. 308(b), allows the agency to seek information about "citizenship, character, financial, technical and other qualifications of the Applicant." Do the Applicants present a favorable citizenship "track record"? Do they have a history of complying not only with the agreed written rules, but also with the "spirit of the law". This citizenship test appears paramount to this merger. The Applicants state that "public interest" would be represented by replacing facilities-based intermodal competition with various proposed "ala carte" pricing plans that would be subject to regulatory enforcement. However, regulation is only viable, and or in the public interest, if the Applicants intend to, and present a history of complying with regulations they agreed to comply with in a previous period.

13. The Applicants contend in their Consolidated Application that current regulations stating. "One licensee will not be permitted to acquire control of the other remaining satellite DARS license," are in fact, not a legal regulation at all, but more so, simply a "policy statement". They contend that since the exact language was not "Codified", that they are now exempt to some degree from the regulation in its entirety. In 1996, both Applicants were found by the Agency of violating Radio Frequency emission standards for many of their radio models. Likewise, another one of the Applicants disclosed in October 2006 that several hundred of their terrestrial repeaters were not built pursuant to the exact terms of their STAs with respect to location, antenna heights, power levels, and antenna characteristics. While another Applicant has stated their intention to begin video delivery services in which the Applicant states that authorization from the Agency is not required to implement these video services because it should be classified as "ancillary operations".

14. Do the Applicants present a track record of compliance with their previous commitments regarding Agency Rules and Regulations as written or implied? Is it in the "public interest" for the Agency to abandon facilities based competition in lieu of increased regulation given the Applicants citizenship "track record"? How can the public interest be assured, if increased regulation agreed upon today by the Applicants, becomes tomorrows battle of semantics, interpretation, and procedures? Does the Agency have the legal resources to actively regulate the Applicants self-interpretation of new regulations, and will their interpretations be at odds directly or indirectly with the law or the "spirit of the law"? Do the Applicants meet the Citizenship Test as allowed in Sec. 308(b)?

VIII. SPECTRIAL RESOURCES

15. The Applicants ask the FCC to transfer ownership of various space station, ground station, and terrestrial repeater licenses that combine to encompass 100% of the spectral resources dedicated to satellite DARS services. Such a combination will create a monopoly of the available spectrum resources dedicated to satellite DARS service in the United States. The Applicants claim in their consolidated application:

> *"In the long run, the combined company will be able to consolidate redundant programming, making it possible to use excess channel capacity to enhance programming diversity*."

16. However, it should be noted that the theoretical spectral capacity of both companies has nearly doubled on the space segment since the late 1990's while the spectrum dedicated to the space segment has diminished to support simulcast terrestrial repeater operations. Today both companies provide nearly 70 channels of near CD quality music channels and nearly 90 lower quality audio streams. Improvements in compression technology have reaped spectral efficiency rewards on both companies. In late 2006, one of the Applicants began operations with Hierarchical Modulation for increased spectral efficiencies. Yet the same applicant has publicly announced of their intention to launch up to 3 channels of Video Programming Services. A service which the Applicant claims falls under their Ancillary Services authority as once again, interpreted by the Applicant.

In early 2004 FCC spokesman David Frisk noted:

"The FCC has initiated discussions about whether Sirius' planned video programming is permitted under our current rules and their current authorization or whether it would require a formal request from Sirius and a regulatory decision from the commission,"

17. While the Applicants opine that a single unified satellite DARS provider will leverage the ability to use excess channel capacity to increase programming diversity. One of the Applicants apparently finds sufficient capacity in their current spectral allocations to announce and demonstrate such Video Programming services to the public. If one of the Mergers main goals is to increase programming diversity to better serve rural, minority, special interests, and public service users. Then why have the Applicants announced their intention to deploy multiple channels of non-core Video Programming Services in their current spectral allocations?

IX. CONCLUSION

18. The Agency must consider many items in their final analysis. Has the data supplied by the Applicants demonstrated that the goals of the merger will serve the public interest? Are those goals achievable through other means? Will compression technology continue to expand allowing the Applicants to expand their service offerings without a combination of spectral resources as proposed by the merger? Is replacing a successful model of facilities-based competition with a regulatory framework, a policy goal of the Agency and the Communications Act? Are the Applicants a failing concern? Do the Applicants pass the "Citizenship Test". Have the Applicants voluntarily abided by the current regulations they have previously agreed to be bound to? If not, then how can the Agency and the public interest be assured of future compliance of increased regulations that would drill even deeper into the Applicants everyday business dealings? Does the Agency have the resources to enforce the increased regulation every time there is a difference in the "interpretation" of the regulations agreed upon between the parties?

19. All of these issues should be carefully weighed by the Agency and its staff.