

July 9, 2007



Marlene Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

RE: Docket MB Docket No. 07-57

Dear Ms. Dortch:

On behalf on Prometheus Radio Project and U.S. Public Interest Research Group, Media Access Project submits this Informal Objection to the proposed transfer of control of Commission licenses and authorizations held by Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM") to a single, merged entity, with XM being the surviving entity. As discussed further below, the proposed merger, which will result in a monopoly satellite provider ("XM Radio"), must be denied because it would not be in the public interest. Approval of the merger will: (1) lead to further media concentration, (2) harm unserved and underserved communities, and (3) harm content providers.

### **The Parties**

The Prometheus Radio Project ("Prometheus") is a non-profit organization that works to promote a free, diverse, and democratic media, which is critical to the political and cultural health of the nation. Since its inception, Prometheus has been concerned with the unprecedented levels of consolidation, homogenization, and restriction in the media landscape and has worked toward a future characterized by easy access to media outlets and a broad, exciting selection of cultural and informative media resources.

U.S. Public Interest Research Group ("U.S. PIRG") is a nonprofit, nonpartisan advocacy group that protects and promotes the public interest. U.S. PIRG works to defend the environment, ensure consumer protections, and promote democracy through election reform and diverse, accessible media. With regional offices in twenty-seven states, U.S. PIRG mobilizes citizens across the country to speak out against groups and government decisions that threaten the interest of the American people.

Media Access Project ("MAP") is a non-profit, public interest law firm that pursues the public's First Amendment right to hear and be heard on the electronic media. MAP has long been dedicated to promoting democracy by creating an open and diverse media, accountable to the public and accessible to all.

## The Merger Is Not In The Public Interest

### The Merger Would Violate Antitrust Law Standards

In determining whether the proposed merger is in the public interest, one standard the Commission is guided by is the antitrust law standard. That is, the Commission must determine whether the transaction raises traditional antitrust concerns of reducing competition in the relevant market. While it is apparent that the proposed transaction is a merger to monopoly, XM and Sirius (collectively the “Applicants”) nonetheless claim the merger will not harm competition. Consolidated Application For Authority to Transfer Control, *In the Matter of XM Satellite Radio Holding Inc. And Sirius Satellite Radio Inc.*, MB Docket No. 07-57 (March 20, 2007).

However, as a monopoly, XM Radio, as the surviving entity, will be the sole provider of satellite radio service. Allowing XM Radio to operate as a monopoly will inevitably reduce competition in all aspects, including price, service, choice, and innovation. Yet, the Applicants rely on an overly broad definition of the relevant market to assure the Commission that XM Radio will be constrained from engaging in any type of anticompetitive conduct.

The Applicants define the relevant market to include terrestrial and HD Radio, mp3 players, and Internet radio. However, as more fully detailed in the Petition to Deny submitted by Consumers Union, *et al.* (“CU Petition to Deny”),<sup>1</sup> satellite radio is a separate and distinct product, while terrestrial and HD Radio, mp3 players and Internet radio are complementary products, not substitutes for satellite radio. Thus, as the CU Petition to Deny illustrates, it is evident that the proposed transaction would violate the letter and spirit of the antitrust laws.

### The Merger Undermines the Commission’s Policies and Goals

The Commission not only operates under an antitrust law standard, but also a much broader public interest standard. See *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee*, 16 FCCRcd 6547 (2001) (*Time Warner/AOL Order*). Under this standard, the Commission must consider the effects of the merger on the rules, policies, and objectives of the Communications Act. *Id.* at 6549. The public interest standard mandates the Commission to consider the Act’s objectives of preserving competition and ensuring a diversity of voices. In this instance, this includes a review of the merger’s impact on media consolidation, unserved and underserved communities, and content providers’ ability to provide diverse and innovative programming.

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<sup>1</sup>Prometheus generally supports the analysis and conclusions presented in the CU Petition to Deny.

### *The Merger Will Lead to Greater Media Consolidation*

A merger between XM and Sirius could only move forward if the Commission were to find that a competitive market existed. The Commission could conclude that a competitive market existed if it viewed the relevant market in the broadest of terms. Expanding the definition of the relevant market for competition and competitive products would open the floodgates for mergers among other media entities, on a theory that a competitive market exists and therefore the public would suffer no harm. Moreover, a broad view of the relevant market will also undermine the Commission's basis for sustaining media ownership regulation.

The Commission is already well aware of the importance of sustaining limits on ownership and limiting mergers among media entities. As MAP and numerous others have already argued, media ownership regulation is designed to insure a vibrant marketplace for democracy, civic discourse, and diverse viewpoints, which is the lifeblood of America's democracy and culture, as well as an engine of growth for its economy. See Comments of CCTV, Center for Media and Democracy, *et al.*, *In the Matter of 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*, MB Docket No. 06-121 (Oct. 16, 2006). However, the Commission's goals for such a vibrant media, full of diverse and competing voices, would be severely undermined and threatened if it were to conclude that all media outlets, regardless of their limitations and distinctions, were competitive to one another.

### *The Merger Will Impact Unserved and Underserved Communities*

In creating the satellite radio service, the Commission and applicants interested in providing the service touted satellite radio's ability to serve communities that were not being adequately served by terrestrial radio. *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCCRcd 5754, 5759-5762 (1997) (“SDARS Order”). In the *SDARS Order*, the Commission recognized that a “significant number of persons in the U.S.” were underserved by quality FM signals. *Id.* at 5760. Thus it was the Commission's view that satellite radio would serve these communities by providing not only more radio stations, but also more radio formats. *Id.* at 5760.

The Commission also recognized satellite radio's ability to provide services to unserved communities that local radio would not be able to provide. The Commission highlighted satellite radio's ability “[w]ith its national reach...[to]...provide continuous radio service to the long-distance motoring public, persons living in remote areas, and [potentially] new forms of emergency services.” *Id.* at 5760. The Commission also recognized satellite radio's ability to aggregate demand and “foster niche programming” and fulfill a need for more educational, ethnic, religious, and specialized musical programming. *Id.* at 5761.

If the Applicants are allowed to merge, these unserved and underserved communities will now only have one provider of the types of services the Commission recognized were not generally

available to certain communities. Being left with one provider, these communities will have no option with respect to price and content. While one of two options itself may not be ideal, at the least, there currently exists a choice between two providers which offer similar types of programming.

Additionally, these communities can benefit from better programming as a result of one company trying to provide more attractive programming than the other. Left with one provider, unserved and underserved communities will be forced to accept whatever programming XM Radio decides to provide, without the ability to switch to a service that would operate as an adequate replacement. Such a result would seem contrary to the Commission's desire to "provide audio programming to audiences to that may be unserved or underserved by currently available audio programming" when it first established satellite radio service. *Id.* at 5791.

#### *Approval of Merger Will Impact Content Providers*

Sirius and XM executives have stated that programming will be consolidated to avoid duplicative or similar types programming, which will free up additional spectrum for other uses. While this may result in some efficiencies, it completely ignores the effect on content providers and, consequently, consumers. Content providers will only have one option for carrying their programming and will no longer have an incentive to create unique and innovative programming

Because of the capacity of satellite radio and the ability to aggregate demand, XM and Sirius have often touted their ability to provide content not offered elsewhere. David Balto, a former and long-time attorney with the Department of Justice and Federal Trade Commission, illustrated the merger's negative effect on content providers when he testified that:

Product variety, diversity, and choice is an important aspect of competition from the perspective of those who develop content. Imagine for a moment that you are interested in starting a radio channel of talk and news about pets. (After all there is a television channel focusing on pets). Now it is highly unlikely that the economics of terrestrial radio would support such a format, even with the added stations from HD Radio. And a web based format would not have that many listeners, nor is it portable like satellite radio. Currently, the provider of this content would have two satellite radio stations to pitch its content to. Perhaps one of them will take the risk and add the pet radio content in order to differentiate its product from the other. If the merger is approved, however, there will be only one firm dictating what can be found on satellite radio. There will be only one toll booth to the single highway to satellite radio and [XM Radio] will be the toll keeper.

Testimony of David A. Balto, *The XM-Sirius Merger: Monopoly or Competition from New Technologies*, *Senate Committee on the Judiciary Subcommittee on Antitrust, Competition and Consumer Rights*, March 20, 2007.

Moreover, competition among the two satellite radio providers increases competition among

content providers. Competition between content providers, as a result, increases the quality of programming. Indeed, “many of [the] programming additions were brought about because of the arms race between Sirius and XM. For example, Spanish-language sports programming may never have come to satellite radio absent competition between the parties.” *Id.* Thus, without a relevant competitor, diversity will suffer and the incentive to innovate will be curtailed.

### **Conditions And Public Interest Obligations Must Be Attached To Any Grant Of The Application**

Despite the overwhelming evidence that the proposed merger would harm the public interest, if the Commission were nonetheless inclined to grant the applications, it must do so only with conditions and public interest obligations. The Commission has the authority to approve a merger on the condition that the merged entity will abide by certain conditions. *See Time Warner/AOL Order*, 16 FCCRcd at 6555. Imposing conditions and public interest obligations would somewhat minimize the adverse effects resulting from a monopoly in satellite radio service.

Prometheus, *et al.* recommend that in the event the merger is approved the following conditions should be attached:

1. A set-aside for non-commercial, educational programming. Section 335 of the Communications Act requires Direct Broadcast Satellite Providers to set aside 4%-7% of its capacity for non-commercial education and informational programming. Similarly, XM radio should be required to provide 4% of its capacity for noncommercial programming, priced at no more than direct cost, over which XM Radio would not exercise any editorial control. The set-aside would help to ensure that a diversity of programming choices were available.
2. Leased access of channels. Section 612 of the Communications Act requires a cable operator to designate capacity for commercial programmers who are not affiliated with the cable operator. Similarly, XM radio should be required to provide a reasonable amount of capacity at true market rates for commercial programming, over which XM Radio would not exercise any editorial control. This would help to ensure that a diversity of programming choices were available and content providers would have the ability to innovate and access a national platform.
3. Require a portion of the allocated spectrum be returned for auction. The merger will result in one entity controlling double the spectrum. XM Radio should be required to divest some portion of the spectrum it will have after the merger. In the *SDARS Order*, the Commission opted to license two 12.5 MHz licenses, 12 FCCRcd at 5812, and conditioned grant of the licenses on the notion that “one licensee will not be permitted to acquire control of the other.” *Id.* at 5823. By divesting the additional spectrum, the public could benefit from other uses of the spectrum.

4. Require must carry for local non-commercial, educational channels. In the event satellite radio were permitted to provide local programming at some time in the future, XM Radio should be required to carry local non-commercial, educational stations, including low power stations. This would help to ensure that communities would have access to local programming.

### **Conclusion**

A rigorous assessment of the merger's impact on the public interest can lead the Commission to only one conclusion: the merger would be contrary to the public interest. Allowing for a monopoly provider for satellite radio would lead to greater media consolidation, harm underserved and unserved communities, and discourage content provider. Prometheus, *et al.* request that the Commission not allow the merger, but if the Commission were to do so, only with the imposition of strict conditions.

Respectfully submitted,

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Parul P. Desai  
Andrew Jay Schwartzman  
Media Access Project  
Suite 1000  
1625 K Street, NW  
Washington, DC 20006  
(202) 232-4300

*Counsel for Prometheus Radio Project, et al.*