Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
XM Satellite Radio Holdings Inc.,	)	
	)	
Transferor	)	
	)	MB Docket No. 07-57
and	)	
	)	
Sirius Satellite Radio Inc.,	)	
	)	
Transferee	)	
	)	
Consolidated Application for Authority to Transfer Control of XM Radio Inc. and Sirius Satellite Radio Inc.	)	

PETITION TO DENY OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

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PETITION TO DENY OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB"),[1] by its attorneys, hereby files this Petition to Deny the above-captioned application. The nation's only two satellite digital audio radio service ("satellite DARS") providers – XM Satellite Radio Holdings Inc. ("XM") and Sirius Satellite Radio Inc. ("Sirius") – seek to merge into a satellite DARS monopoly.[2] The Commission should reject the proposed merger for the reasons set forth below.

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[1] As the leading trade association that promotes and protects the interests of radio broadcasters, NAB is the broadcasters' voice before the Commission, Congress, and the courts. NAB (on behalf of its members) is a party in interest to this transfer of control proceeding because the proposed merger would have substantial anti-competitive effects not only on consumers in the national satellite DARS market, but also on radio broadcasters with respect to the local markets in which they operate and the local listeners they serve. *See infra* text at Section IV.D.

[2] *See* Consolidated Application for Authority to Transfer Control (Mar. 20, 2007) ("Merger Application"). *See also* Public Notice, *Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. Seek Approval to Transfer Control of FCC Authorizations and Licenses*, DA 07-2417 (MB rel. June 8, 2007) ("*Public Notice*").

I. INTRODUCTION AND SUMMARY

This is a simple and straightforward case.[3] A decade ago, the Commission established satellite DARS as a distinct, "continuous nationwide" service that "local radio inherently cannot provide."[4] To ensure that consumers benefited from competition in the satellite DARS market, the Commission implemented a duopoly market structure and insisted that the two licensees have no interest in each other and "prohibit[ed]" them from ever merging.[5] It took these actions at the insistence of Sirius, who argued that such limitations were necessary to (1) "preserve intra-service competition and overall DARS diversity of programming" and (2) to prevent a "DARS monopoly."[6]

XM and Sirius now urge the Commission to abandon this carefully crafted competitive satellite DARS regulatory regime. No longer satisfied with a duopoly, which Sirius Chief Executive Officer ("CEO") Mel Karmazin has referred to as a "second best" market structure, XM and Sirius now seek to merge, consistent with Mr. Karmazin's vision that "[i]t would be great if there was a monopoly. . . ."[7] While Mr. Karmazin may be correct that a monopoly would be "great" for the companies, this is not a valid reason for the Commission to reverse the explicit

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[3] In the words of respected analyst Scott Cleland, this is a "no-brainer . . . . [I]t is anti-competitive and illegal under long time anti-trust precedent and competition policy. . . . This may be the simplest, most straight-forward antitrust violation the DOJ and FCC have ever been confronted with. It's obvious! . . . The XM-Sirius merger is so over-the-line that it is actually a monumental waste of valuable and scarce Federal resources. XM and Sirius can't be serious. They must be hoping that the Federal Government is comatose." The Precursor Blog, *XM-Sirius merger is anti-competitive: 'The Emperor has No Clothes,'* http://www.Precursorblog.com/node/340.

[4] *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd 5754, 5756 ¶ 1, 5760 ¶ 13 (1997) ("*Satellite DARS Order*").

[5] *Id.* at 5823 ¶ 170.

[6] Comments of CD Radio Inc., IB Docket No. 95-91 at 18 and n.31 (Sept. 15, 1995) ("1995 Sirius Comments") (CD Radio Inc. was Sirius's corporate predecessor).

[7] *See* Scott Donaton, *Is He Sirius?*, ADVERTISING AGE, Apr. 11, 2005 (interview with Mel Karmazin) ("Advertising Age Karmazin Interview").

prohibition against a monopoly in satellite radio or ignore the harmful effects that the merger would have for American consumers.

The Commission should not countenance this assault on competition. The Commission stood firm in favor of competition over monopoly the last time the only two licensees in a spectrum-based service sought to merge – rejecting the proposed direct broadcast satellite ("DBS") merger of EchoStar and DirecTV – and should do so again here.[8] Indeed, the case for denying the instant merger application is even more compelling than in the EchoStar/DirecTV case.

The Commission has said repeatedly that a threshold question in a merger case is whether the proposed merger would violate a Commission rule or policy.[9] The proposed merger of XM and Sirius would violate the satellite DARS anti-merger rule, long-standing Commission policies against spectrum monopolies, and the pro-competitive vision enshrined in the Telecommunications Act of 1996.[10] The proposed merger would create a monopoly in the national satellite DARS market, which would inevitably result in increased prices, fewer programming choices, less local programming for radio listeners, and other public interest harms. The Applicants, however, have not even come close to meeting their burden of demonstrating by a preponderance of the evidence that there are "extraordinarily large, cognizable, and non-speculative efficiencies" that justify the creation of a monopoly.[11] The Applicants also admit that a merger

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[8] *Application of EchoStar Communications Corporation (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations)*, 17 FCC Rcd 20559 (2002) ("*EchoStar/DirecTV Merger Order*").

[9] *See, e.g., id.* at 20574 ¶ 25.

[10] *See* Preamble, Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (1996) ("An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.").

[11] *See, e.g., EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20604 ¶ 102.

is not necessary for the future success of either company. In short, the Commission lacks any evidence sufficient to support a conclusion that the proposed merger would serve the public interest, convenience and necessity.

While some will undoubtedly argue that the Commission could craft conditions to offset the anti-competitive harms that would flow from approving the merger, no such conditions would be sufficient. Temporary price caps or other forms of regulatory intervention would be illusory and contrary to the pro-competitive vision of Congress and the Commission. Moreover, there is no reason to believe that the merged entity could be relied upon to comply with any such regulatory conditions, given each company's past history of substantial rule violations.

Accordingly, the Commission should summarily dismiss the application as violative of the satellite DARS anti-merger rule. In the alternative, the Commission should designate the application for hearing to determine whether grant of the application would serve "the public interest, convenience, and necessity."[12]

II. BACKGROUND: APPLICABLE LEGAL STANDARDS

Under the Communications Act of 1934, as amended, the Commission may grant authority for the license transfers that accompany the XM Radio/Sirius merger only if it determines that "the public interest, convenience, and necessity will be served" thereby.[13] In reviewing the license transfers, the Commission must first determine "whether the proposed transaction complies with the specific provisions of the Communications Act, other applicable statutes, and the Commission's rules."[14] As part of this threshold analysis, the Commission must

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[12] 47 U.S.C. § 309(a).

[13] *Id.*

[14] *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, 22 FCC Rcd 5662, 5672 ¶ 19 (2007) (subsequent history omitted) ("*AT&T/BellSouth Merger Order*"). The Commission has articulated the same standard in numerous other cases. *See, e.g., SBC Communications Inc. and AT&T*

examine whether the merger complies with Commission policies, including its "well-established federal pro-competitive spectrum policies."[15] If this review reveals no statutory or rule violation, the Commission must consider whether the proposed merger "could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes."[16] Where the Commission identifies potential public interest harms, it will weigh the "potential public interest harms of the proposed transactions against the potential public interest benefits."[17]

The Commission's review of proposed transactions also "necessarily encompasses" the "'broad aims of the Communications Act,' which include[], among other things, preserving and enhancing competition in relevant markets. . . ."[18] The Commission must also consider whether both applicants have the requisite "character" qualifications to hold Commission licenses, with particular focus on the character qualifications of the transferee, which in this case consists of both XM and Sirius.[19] With respect to FCC-related misconduct, the Commission will "treat any violation of any provision of the Act, or of the Commission's rules, as predictive of an

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Corporation Applications for Approval of Transfer of Control, 20 FCC Rcd 18290, 18300 ¶ 16 (2005) ("*SBC/AT&T Merger Order*"); *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20574 ¶ 25.

[15] *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20586 ¶ 57. In this regard, in the EchoStar/DirecTV merger, the Commission considered "Spectrum Policy Concerns" under the heading "Compliance with the Communications Act and Commission Rules and Policies." *Id.* at 20560 (Table of Contents).

[16] *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5672 ¶ 19; *SBC/AT&T Merger Order*, 20 FCC Rcd at 18300 ¶ 16; *see also EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20574 ¶ 25.

[17] *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5672 ¶ 19; *SBC/AT&T Merger Order*, 20 FCC Rcd at 18300 ¶ 16; *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20574 ¶ 25.

[18] *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5673 ¶ 20; *SBC/AT&T Merger Order*, 20 FCC Rcd at 18301 ¶ 17; *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20575 ¶ 26.

[19] *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5756 ¶ 191; *SBC/AT&T Merger Order*, 20 FCC Rcd at 18379 ¶ 171; *see also EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20576 ¶ 28.

applicant's future truthfulness and reliability and, thus, as having a bearing on an applicant's character qualifications."[20]

Throughout this process, the merger applicants bear the burden of proving, by a preponderance of the evidence, that the proposed merger will serve the public interest, convenience and necessity.[21] Where the application or pleadings filed in response to the application reveal "substantial and material questions of fact" regarding whether grant of the application would meet this standard, the Commission may not grant the application but must instead designate it for an adjudicatory hearing.[22]

III. AS A THRESHHOLD MATTER, THE MERGER WOULD VIOLATE COMMISSION RULES AND POLICIES

A. The Merger Application Violates the Commission's Satellite DARS Anti-Merger Rule

The Commission may dismiss or deny without a hearing any license transfer or assignment application that violates a threshold eligibility rule.[23] The proposed merger of the only two satellite DARS licensees would violate the Commission's rule "prohibit[ing]" such mergers.[24] Moreover, the Commission may not waive this rule since waiver would "eviscerate"

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[20] *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5756 ¶ 191; *SBC/AT&T Merger Order*, 20 FCC Rcd at 18379 ¶ 172; *see also EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20576 ¶ 28.

[21] *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5672 ¶ 19; *SBC/AT&T Merger Order*, 20 FCC Rcd at 18300 ¶ 16; *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20574 ¶ 25.

[22] 47 U.S.C. §§ 308, 309(a), (d), (e) & 310(d).

[23] *See, e.g.*, *Mobile Oil Exploration & Producing Southeast, Inc. v. United Distrib. Cos.*, 498 U.S. 211 (1991); *Heckler v. Campbell*, 461 U.S. 458 (1983); *United States v. Storer Broadcasting, Co.*, 351 U.S. 192 (1956); *Nuclear Inf. Res. Serv. v. NRC*, 969 F.2d 1169 (D.C. Cir. 1992); *Altamont Gas Transmission Co. v. FERC*, 965 F.2d 1098 (D.C. Cir. 1992); *Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405 (D.C. Cir. 1991); *Public Utilities Comm'n of California v. FERC*, 900 F. 2d 269 (D.C. Cir. 1990); *Hispanic Info. & Telecomm. Network, Inc. v. FCC*, 865 F.2d 1289 (D.C. Cir. 1989).

[24] "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." *Satellite DARS Order*, 12 FCC Rcd at 5823 ¶ 170.

the rule.[25] Accordingly, the Commission should dismiss the Merger Application without further consideration of other issues.[26]

The Commission has issued a Notice of Proposed Rulemaking calling for separately-filed comments regarding whether the language in the *Satellite DARS Order* that prohibits XM and Sirius from merging 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.[27] Accordingly, NAB will provide details regarding why the relevant language is a binding rule that should not be waived, modified or eliminated in its comments in response to the *NPRM*. NAB notes at this juncture that it is clear from the language and context of the merger prohibition, which was published in the Federal Register, that the Commission intended it to be a substantive rule imposing a legal obligation on satellite DARS licensees not to merge and a legal obligation on the Commission

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[25] *See, e.g., WAIT Radio v. FCC,* 418 F.2d 1153, 1159 (D.C. Cir. 1969). In this regard, the anti-merger rule was specifically intended to "assure sufficient continuing competition *in the provision of satellite DARS service*." *Satellite DARS Order,* 12 FCC Rcd at 5823 ¶ 170 (emphasis added). Thus, waiver of the rule to create a monopoly in the satellite DARS market would directly contradict the purpose of the rule. Unable to counter the force of this logic, the Applicants misquote the underlying purpose of the rule by eliminating the reference to satellite DARS service to make it appear that the rule was intended to promote competition generally, instead of promoting competition among satellite DARS providers. *See* Merger Application at 51 (the purpose was to "help assure sufficient continuing competition" with no reference to the "in the provision of satellite DARS service" language); *id.* at 50 (characterizing the Commission's view as being that "two satellite radio licenses were needed to have enough competition in the audio entertainment market.").

[26] *See, e.g., Applications for Authority to Construct and Operate an Automated Maritime Telecommunications System,* 3 FCC Rcd 4690 (1988) (waiver denied and applications then dismissed as defective without a hearing for non-compliance with rule); *Montclair Communications, Inc.,* 22 FCC Rcd 7271 (MB 2007) (affirming denial of ownership waiver and dismissal of assignment application for non-compliance with ownership rule); *Galaxy Communications, L.P.,* 21 FCC Rcd 2994 (MB 2006) (ownership waiver denied and application then dismissed without a hearing for non-compliance with ownership rule); *WKML License Limited Partnership,* 20 FCC Rcd 10877 (MB 2005) (ownership rule waiver denied and assignment applications then dismissed without a hearing for non-compliance with ownership rule).

[27] *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee,* MB Docket No. 07-57, Notice of Proposed Rulemaking, FCC 07-119 (rel. June 27, 2007) ("*NPRM*").

not to approve any such merger. Indeed, the Commission's decision to issue the *NPRM* underscores the strength of NAB's position that the prohibition against a satellite DARS merger is a binding rule.

B. Grant of the Merger Would Violate the Commission's Pro-Competitive Spectrum Policies

Separate and apart from whether the proposed merger would be unlawfully anti-competitive (*see* Section IV, *infra*), it is indisputable that it would provide the merged entity with a monopoly of all satellite DARS spectrum. For the Commission to permit such a spectrum monopoly in a situation where (as here) there is available spectrum to accommodate two competitors would be unprecedented.[28]

The same concerns the Commission expressed in connection with the proposed DBS spectrum monopoly in the EchoStar/DirecTV case are equally applicable here:

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[28] In the *EchoStar/Direct TV Merger Order,* 17 FCC Rcd at 20662 ¶ 277, the Commission said: "Applicants have cited no example where we have permitted a single commercial spectrum licensee to hold the entire available spectrum allocated to a particular service." The Applicants in this proceeding have cited no such instance either. NAB is aware of only one instance in which the Commission has approved a monopoly in "spectrum allocated to a particular service," *id.,* and, in that case, there was not enough spectrum for more than one licensee. And, in that instance, the Commission required the licensee to operate as a common carrier in order to mitigate "the monopolistic position" that a single licensee would hold. *Amendment of Parts 2, 22, and 25 of the Commission's Rules to Allocate Spectrum for and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services,* 2 FCC Rcd 485, 486 ¶¶ 4-9, 489 ¶ 32, 490 ¶ 34 (1987). The League of Rural Voters' ("League") citations to two cases in which the Commission has permitted a single licensee in a band are inapposite. *See* League of Rural Voters, "Sirius/XM v. EchoStar/DirecTV: A Fundamentally Different Merger for Rural Consumers," at 5 (June 2007), citing *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS),* 12 FCC Rcd 10785, 1080-09 ¶ 46 (1997); *Amendment to Parts 1, 22, 27 and 90 of the Commission's Rules to Licensee Services in the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1670-1675 MHz, and 2385-2390 Mhz Government Transfer Bands,* 17 FCC Rcd 9980, 9992-93 ¶¶ 21-22 (2002). In neither case was the Commission addressing "spectrum allocated to a particular service." *EchoStar/Direct TV Merger Order,* 17 FCC Rcd at 20662 ¶ 277. Instead, both the WCS spectrum, and the 1390-1392 MHz spectrum block to which the League refers, were allocated to flexible use, not to a particular service. *See* 12 FCC Rcd at 10797-98 ¶ 25 ("WCS licensees themselves will determine the specific services they will provide within their assigned spectrum and geographic areas."); 17 FCC Rcd at 9985 (chart describing the 1390-1392 MHz band as allocated for "Flexible Use").

> [T]he proposed transaction is not consistent with this Commission's long-standing spectrum policies, the bulk of which have been aimed at creating competitive spectrum-based communications services within and among the voice, video and data services markets. We have consistently found that from the perspective of spectrum policy, the public interest is better served by the existence of a diversity of service providers wherever possible. Today we have such diversity in the DBS service, and Applicants have presented no compelling reason, from a spectrum policy standpoint, why we should approve license transfers that would effectively replace facilities-based intramodal DBS competition with a monopoly . . . .[29]

The Commission has consistently ruled against spectrum monopolies in other services as well.[30] In 1981, for example, the Commission provided for two cellular radio licenses for every service area, finding that competition would "foster important public benefits of diversity in technology, service and price, which should not be sacrificed absent some compelling reason."[31]

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[29] *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20603 ¶ 96.

[30] *See also Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, 19 FCC Rcd 19078, 19146 ¶ 130 (2004) ("the Commission's spectrum policy goals include facilitating the efficient use of spectrum as well as fostering competition, and rapid, widespread service consistent with the goals of the Communications Act."); *Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS*, 12 FCC Rcd 12972, 12991 ¶ 32 (1997) ("the goal of our spectrum policy is not to preserve the value of the licenses that auction winners acquire, but to promote competition and service in the public interest.").

[31] *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, 86 FCC 2d 469, 476 ¶ 15, 478 ¶ 19 (1981) ("*Cellular Order*"). Consistent with this decision, the Commission also established service rules for the Personal Communications Services ("PCS") to promote the "competitive delivery" of services and to ensure that PCS licenses were "disseminated to a wide variety of applicants." *Amendment of the Commission's Rules to Establish New Personal Communications Services*, 9 FCC Rcd 4957, 4959-60 ¶ 4 (1994). The Commission intended to "enable PCS providers to compete effectively with each other and with other wireless providers so that the American Public can enjoy the greatest benefits from the delivery of these new services." *Id.* at 4960 ¶ 5; *see also id.* at 4983 ¶ 67 ("One of our goals in this proceeding is to promote competitive delivery of wireless services."). The Commission also capped at 45 MHz the total amount of combined broadband PCS, cellular, and SMR spectrum in which an entity may have an attributable interest in any geographic area. *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Third Report and Order,* 9 FCC Rcd 7988, 8100 ¶ 238, 8104 ¶ 248 (1994) ("If firms were to aggregate sufficient amounts of spectrum, it is possible that they could unilaterally or in combination exclude efficient competitors, reduce the quantity of service available to the public, and

In doing so, the Commission considered and rejected a proposal by Motorola in favor of a monopoly cellular licensee in each market specifically because such a proposal "would eliminate the opportunity for facilities-based competition."[32]

In short, the Applicants' request to consolidate 100 percent of the satellite DARS spectrum in one company would, by definition, violate the Commission's longstanding spectrum policies. As Sirius itself said in connection with establishment of satellite DARS (at a time when the Commission contemplated four licensees):

> Rules and policies that allow aggregation would encourage an evolution toward a smaller number of satellite DARS systems than the available spectrum will support . . . . Such a development would have serious anticompetitive repercussions. . . . . [T]he prospects for a DARS monopoly would loom on the horizon.[33]

Sirius has been proven to be prescient; it and XM are now proposing precisely the kind of satellite DARS spectrum monopoly that Sirius once sought to prevent.

The Commission should be particularly wary of permitting a spectrum monopoly here since it specifically barred such a spectrum monopoly in its *Satellite DARS Order*. As the Supreme Court has stated:

> [T]he revocation of an extant regulation . . . constitutes a reversal of the agency's former views as to the proper course. A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress." There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to. . . . Accordingly, an agency changing its course by rescinding a rule is

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increase prices to the detriment of consumers."). Although the Commission ultimately allowed the spectrum cap to sunset, it nevertheless confirmed that "[w]ith or without the spectrum cap rule, we have an obligation to ensure that acquisitions of CMRS spectrum do not have anticompetitive effects that render them contrary to the public interest." *See 2000 Biennial Regulatory Review; Spectrum Aggregation Limits for Commercial Mobile Radio Services*, 16 FCC Rcd 22668, 22696 (2002).

[32] *Cellular Order*, 86 FCC 2d at 478 ¶ 19.

[33] 1995 Sirius Comments at 18 and n.31.

> obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.[34]

Thus, consistent with decades of unbroken opposition to monopolies in spectrum allocated to a particular service, as well as its satellite DARS anti-merger rule, the Commission should act decisively to preserve competition in the satellite DARS spectrum.

IV. A SATELLITE DARS MONOPOLY WOULD BE ANTI-COMPETITIVE AND WOULD HARM CONSUMERS AND BROADCASTERS

A. Satellite DARS Is a Distinct National Product Market

The key threshold issue in evaluating the anti-competitive and other harmful effects of the proposed merger is defining the relevant product and geographic markets.[35] As discussed in detail below, the satellite DARS market is a distinct national, multi-channel, mobile audio market.

With respect to defining the relevant product market, the Commission, applying the *DOJ/FTC Guidelines*, has stated as follows:

> The *Guidelines* define the relevant product market as the smallest group of competing products for which a hypothetical monopoly provider of the products would profitably impose at least a "small but significant and non-transitory price increase," presuming no change in the terms of sale of other products. In other words, when one product is a reasonable substitute for the other in the eyes of consumers, it is to be included in the relevant product market even though the products themselves are not identical. Thus, the relevant product market includes "all products 'reasonably interchangeable by consumers for the same purposes.'"[36]

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[34] *Motor Vehicle Mfrs Ass'n v. State Farm Mut.*, 463 U.S. 28, 41-42 (1982) (citations omitted).

[35] *See, e.g.*, *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5673-74 ¶ 21; *SBC/AT&T Merger Order*, 20 FCC Rcd at 18303-04 ¶ 21; *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20605 ¶ 106.

[36] *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20605-20606 ¶ 106, quoting Horizontal Merger Guidelines, issued by the U.S. Department of Justice & Federal Trade Commission, April 2, 1992, revised April 8, 1997 ("*DOJ/FTC Guidelines*") § 4*; see also Annual Report and Analysis of Competitive Market*

With respect to defining the relevant geographic market, the Commission has said:

> DOJ identifies a relevant geographic market as the region where a hypothetical monopolist that is the only producer of the relevant product in the region would profitably impose at least a "small but significant and nontransitory" increase in the price of the relevant product, assuming that the prices of all products provided elsewhere do not change. This approach is consistent with the Supreme Court's definition of the relevant geographic market as the region "in which the seller operates, and to which the purchaser can practicably turn for supplies."[37]

Applying these definitions, which the Applicants do not even mention (let alone analyze) in their application, readily leads to the conclusion there is a distinct national, multi-channel mobile satellite DARS market. From the perspective of a consumer looking for an alternative source for a multi-channel, mobile audio service that is available as the consumer travels anywhere in the country, there is simply no one to turn to other than XM and Sirius. No other audio product or service provides more than a hundred pre-programmed audio channels – including out-of-town sports, numerous specialized channels, and material that would be subject to Commission forfeiture if aired on terrestrial radio – at the flip of a switch. And no one else provides such programming on a nationwide, seamless, mobile basis, or will do so for the foreseeable future (and certainly not within the two years required under the Merger Guidelines).[38] Not local broadcast radio stations. Not local HD radio. Not Internet radio. Not

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Conditions with Respect to Domestic and Int'l Satellite Communications Services, 22 FCC Rcd 5954, 5964-65 ¶ 30 (2007) ("*Satellite Competition Report*"); *AT&T/BellSouth Merger Order,* 22 FCC Rcd at 5675 n.85; *SBC/AT&T Merger Order,* 20 FCC Rcd at 18304 n.83.

[37] *EchoStar/DirecTV Merger Order,* 17 FCC Rcd at 20609 ¶ 117, quoting *DOJ/FTC Merger Guidelines* § 1.21; *see also Satellite Competition Report,* 22 FCC Rcd at 5965 ¶ 31; *AT&T/BellSouth Merger Order,* 22 FCC Rcd at 5675 n.86; *SBC/AT&T Merger Order,* 20 FCC Rcd at 18307 ¶ 28.

[38] *See Competition and the Future of Digital Music: Hearing before the H. Comm. on the Judiciary, Antitrust Task Force,* 110th Cong., Serial No. 110-3 at 60 (Feb. 28, 2007) ("House Judiciary Hearing") (written testimony of Mark N. Cooper, Director of Research, Consumer Federation of America) ("Satellite Radio is national, mobile, programmed radio entertainment. The two services deliver and

iPods or MP3 players. Not cellular telephones. And not CD players.[39]

Terrestrial Radio. As the American Antitrust Institute has explained, terrestrial radio is not a substitute for satellite DARS.[40] As a preliminary matter, it is important to recognize that terrestrial radio is not a single entity in the local markets in which each radio broadcaster competes. Rather, each local market consists of multiple terrestrial radio licensees competing vigorously with each other. With respect to channels and content, local broadcast stations (individually or collectively) cannot offer the hundreds of channels offered by satellite DARS providers. Nor can they provide geographically continuous service; each licensee serves a limited geographic area and there is no local radio owner with nationwide coverage. They also do not offer the range of out-of-town sports programming or niche programming offered by

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require consumers to purchase huge bundles of well over 100 channels.. There are two, and only two, entities providing such a service."). *See also id.* at 62. ("The touted competitors are not national, not mobile or not programmed."); *The XM-Sirius Merger: Monopoly or Competition from New Technologies: Hearing before the S. Comm. on the Judiciary Subcomm. on Antitrust, Competition Policy and Consumer Rights*,110th Cong. (Mar. 20 2007) ("Senate Judiciary Hearing") (written testimony of David A. Balto at 3) ("Based on these product characteristics - aggregating demand, ubiquitous service, product variety, diverse formulated programming, and unregulated content - there are strong reasons to believe that the appropriate relevant market is satellite radio.... [N]o other service offers the complete variety of audio entertainment options offered by satellite radio.").

[39] *See* Merger Application at 24-39 (arguing that all of these services or devices are in the same market as the satellite DARS licensees).

[40] Comments of the American Antitrust Institute in Opposition to Transfer Application at 22-23 (June 5, 2007) ("American Antitrust Institute Opposition"). *See also* Expert Declaration of J. Gregory Sidak Concerning the Competitive Consequences of the Proposed Merger of Sirius Satellite Radio, Inc. and XM Satellite Radio, Inc. at 27-28 (Mar. 16, 2007) (filed by the Consumer Coalition for Competition in Satellite Radio Mar. 28, 2007) ("Sidak Decl.") ("Bernstein Research believes that digital terrestrial radio 'poses little threat to the growth in satellite radio subscriptions' because it 'cannot address four key factors that drive consumer adoption of satellite radio: commercial-free music; a large range of channels in a variety of formats; exclusive programming; and satellite radio's distribution advantage as the auto OEMs [original equipment manufacturer]. . . .' Not only does satellite radio offer a much broader range of content, far fewer commercials, integration with other communications technology, often better quality sound, and national coverage, it also offers content that is *unavailable* on terrestrial radio – namely material that would invite indecency enforcement if aired over terrestrial broadcast radio outside the safe harbor period permitted by the FCC."); Philip M. Napoli, Market Definition in Satellite Radio: Why the Sirius/XM Merger Would Result in Anti-Competitive Conditions, at 5 (April 2007, filed June 18, 2007) ("Napoli Analysis").

satellite DARS, and cannot offer the kind of risqué programming offered by satellite DARS, which is unconstrained by indecency regulation.

Moreover, it is significant that terrestrial radio is a free, rather than subscription, service. If satellite DARS and terrestrial radio were substitutable products, it would defy common sense for anyone to pay $12.95 or any other price if they could get an essentially equivalent product for free. Satellite radio subscribers may also listen to terrestrial radio but that is because it is always there for free as another, different or complementary listening option, not because the subscriber is "switching" from one substitutable service to another.[41] As Sirius CEO Mel Karmazin has pointed out, "satellite radio subscribers are heavy listeners to radio in general, and spend even more time listening to AM/FM radio than they do satellite programming."[42]

In other words, terrestrial radio and satellite DARS are complementary rather than substitutable services. Listeners to free terrestrial radio simply would not pay for satellite DARS service unless they viewed the products as complementary or different, not interchangeable.[43] Complementary goods and services, however, cannot be combined to constitute a relevant market for antitrust purposes. Simply put, "[g]rouping complementary goods into the same market is not only economic nonsense, it also undermines the rationale for the policy against

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[41] *See* Crowell & Moring, Analysis of Antitrust Concerns Regarding XM/Sirius Merger, at 5 (filed by NAB May 22, 2007) ("Crowell & Moring Antitrust Analysis").

[42] *See Digital Future of the United States: Part II – The Future of Radio: Hearing Before the H. Comm. on Energy and Commerce, Subcomm. on Telecomm's. and the Internet*, 110th Cong. (Mar. 7, 2007) ("House Commerce Hearing") (written testimony of Mel Karmazin at 7).

[43] *See* House Judiciary Hearing, Serial No. 110-3 at 56 (testimony of Mark D. Cooper) ("The suggestion that free over-the-air radio will discipline price increases in ludicrous. They raised prices a few years go by 30 percent. Free over-the-air didn't do it when they were competing head-to-head. What makes you think it is going to discipline prices when they aren't even competing head-to-head with well-matched products?").

monopolization or collusion in the first place."[44] This is true even where the complementary goods occasionally substitute for one another.[45]

It is also significant that the "geographically continuous" satellite DARS service is available nationwide. A motorist or a truck driver thus has available – and can listen to without interruption – the same set of hundreds of channels of programming as she travels across the nation. As consumer groups have explained:

> [S]atellite radio travels with the listeners no matter where they are, operating in a *national market*. But terrestrial radio is a *local product*, stations vanish as the listener crosses market boundaries.[46]

Moreover, listeners in areas of the country with fewer terrestrial broadcast stations have the same nationwide, multi-channel programming options as those in areas with numerous broadcast channels.

Finally, it should be noted that the conclusion that local terrestrial broadcast radio is not a substitute for satellite DARS in the *national satellite DARS market* is not inconsistent with a conclusion that satellite DARS is a substitute for local terrestrial broadcast radio in the separate (and broader) *local audio market*.[47] According to consumer groups:

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[44] 2A Phillip E. Areeda, et al., ANTITRUST LAW, at 331 ¶ 565a (2d 2001).

[45] *Id.* at 332 ¶ 565b ("it would be improper to group complementary goods into the same relevant market just because they occasionally substitute for one another. Substitution must be effective to hold the primary good to a price near its costs, and that rarely occurs when the complements are produced with different inputs and technologies.").

[46] *XM-Sirius and the Public Interest: Hearing before the S. Comm. on Commerce, Science and Transportation*, 110th Cong. (April 17, 2007) ("Senate Commerce Hearing") (written testimony of Gene Kimmelman, Vice President – Federal and International Affairs, Consumers Union at 6) (emphasis added).

[47] *See generally* NAB Comments (Oct. 23, 2006) and Reply Comments (Jan. 16, 2007), MB Docket No. 06-121. Moreover, "the mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant market for antitrust purposes." *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1075 (D.D.C. 1997) (office supply superstores is the relevant market for antitrust purposes notwithstanding the multitude of other outlets at which office supplies could be purchased). As the American Antitrust Institute has explained, the fact that local broadcast radio and satellite radio

> [W]hile it may be true that satellite competes with terrestrial radio in local terrestrial radio markets, terrestrial radio does not and cannot compete with satellite radio in its relevant market – the national market.[48]

HD Radio. HD radio is an emerging radio service that offers improved audio quality and more programming variety than analog terrestrial radio.[49] Nevertheless, even with digital capabilities, local radio stations will not be able to offer the hundreds of channels satellite radio can, nor will they offer the nationwide scope of satellite radio. Even with HD radio, terrestrial radio will always be constrained within the limits of a radio station's FCC-licensed contours.

iPods, Other MP3 Players and CDs. iPods and other MP3 players do not offer the kind of variety of pre-programmed or live material as satellite DARs. They "offer a vastly different experience than what radio offers (i.e., programmed content, live events) . . . ."[50] The individual

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"compete to some extent . . . does not disprove the existence of a satellite radio market." American Antitrust Institute Opposition at 17 and n.50, citing *FTC v. Staples*. *See also* Senate Judiciary Hearing (written testimony of David A. Balto at 4).

That NAB is concerned about the impact a satellite DARS monopoly would have on the local audio market and other markets distinct from the national satellite DARS market does not alter the fact that the merger would create a monopoly in the national satellite DARS market, with all the attendant harms to consumers. In this regard, in the EchoStar/DirecTV merger, neither the Commission nor the Applicants suggested that television broadcasters were part of the relevant market for the Commission's core competition/public interest analysis simply because NAB opposed the merger. Indeed, the parties did not argue for the inclusion of television broadcasters in the market, and the Commission did not include them. *See EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20609 ¶ 115 ("we find that the relevant product market that includes DBS is no broader than the entire MVPD market, but may well be narrower. In fact, the relevant product market may be limited to just DBS services. . . ." *Compare with* Thomas W. Hazlett, The Economics of the Satellite Radio Merger (filed on behalf of XM and Sirius, June 14, 2007).

[48] Senate Commerce Hearing (written testimony of Gene Kimmelman at 7).

[49] *See generally* American Antitrust Institute Opposition at 23; Senate Commerce Hearing (written testimony of Gene Kimmelman at 7) ("In several important ways, HD radio is an extension of terrestrial radio. . . . It may expand the capacity of an individual broadcaster a little, but the capacity of local radio still is miniscule compared to that of satellite radio providers."); Sidak Decl. at 28-29. The merger would be anti-competitive even if HD Radio were included in the market definition. *See id.* at 36-41.

[50] American Antitrust Institute Opposition at 23. *See also* Senate Commerce Hearing (written testimony of Gene Kimmelman at 7); Sidak Decl. at 30. A supporter of the merger (with conditions) has characterized these services as "nascent" and recommended pricing conditions, thereby apparently

is responsible for his or her own more limited options. The same is true with respect to CDs.[51] Moreover, consumers must pay separately for each musical recording.[52]

Cellphones and Internet radio. It is not clear "when or if" the potential for these services to provide something comparable to satellite DARS "will be reached, and there is no evidence to suggest that any such service is likely to be a full fledged competitor to XM or Sirius in the next few years."[53] Moreover, "research indicates a significant positive relationship between a customer's likelihood of paying for on-line music downloading services and his/her likelihood of subscribing to satellite radio. Such patterns suggest a complementary, rather than a competitive, relationship between these services . . . ."[54]

As a result of the fact that XM and Sirius compete with each other in a distinct national market, if XM and Sirius were permitted to merge, a satellite DARS consumer that is faced with a price hike would not be able to "practicably turn" to some other "reasonably interchangeable"

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recognizing that the market itself will not constrain prices. *See* House Judiciary Hearing, Serial No. 110-3 at 51 (testimony of Gigi Sohn, President and Founder, Public Knowledge).

[51] With respect to programming versus individual choice, "for many media consumers (both now and for the foreseeable future), there is tangible value in the services provided by a programmer. The editorial functions of a programmer are a key mechanism via which consumers are exposed to new content. Programmers take audiences down paths they might not otherwise travel on their own, and save consumers the time and energy associated with having to make their own content selection decisions. For many consumers, the presence of a programmer represents a value-added component that is an important point of separation between a product such as satellite radio and a product such as an iPod or MP3 player." Napoli Analysis at 5. *See also* The Carmel Group, Higher Prices, Less Content and A Monopoly: Good for the Consumer? The Proposed Sirius-XM Merger, Its Harmful Impact on Consumers, Content Providers and Performing Artists at 4 (April 2007, filed by NAB July 3, 2007) ("Carmel Group Analysis").

[52] *See* Senate Judiciary Hearing (written testimony of David A. Balto at 5) ("an iPod with 1,000 songs would have approximately $1,000 worth of content, or approximately six and a half years of an XM monthly service.").

[53] American Antitrust Institute Opposition at 24. *See also* Sidak Decl. at 30-32; House Judiciary Hearing, Serial No. 110-3 at 63 (testimony of Mark D. Cooper) ("Claims that existing or emerging distribution systems, like cell phone or Internet radio, will discipline the satellite radio monopolists pricing practices are equally suspect.").

[54] Napoli Analysis at 6. *See also* Senate Judiciary Hearing (written testimony of David A. Balto at 3) ("Unlike Internet based radio, satellite radio can travel with your in the car, or on a hike, or on a beach.").

product. Rather, such a consumer would either have to accept the price increase or simply do without the kind of nationwide, multi-channel mobile audio service provide by satellite DARS. Thus, consistent with the *DOJ/FTC Merger Guidelines*/FCC approach to market definition, a satellite DARS monopolist would be able to impose a "small but significant and nontransitory" price increase without losing its customers to a market competitor.[55]

Indeed, even in the current duopoly satellite DARS market structure, it appears that demand is inelastic, which supports the conclusion that there would be no meaningful pricing constraints on the merged entity:

> Karmazin himself is quoted as saying earlier this year, "'there is elasticity' . . . in the price given high subscriber satisfaction with product, low churn and higher fees in Canada. While no price increase is imminent, it is a 'good option,' he said." In April 2005, XM raised its subscription price by 30% from $9.99 to $12.95 per month, matching Sirius's price, with apparently little diminution in demand. According to a report at the time, "Hugh Panero, chief executive at XM [said] he doesn't believe his business [would] lose customers because of the higher monthly price." Evidently, he was correct, as the number of XM subscribers jumped by 84% in 2005, and subscriber growth in the last three quarters of 2005 (i.e., following the price increase) was significantly higher than during the same periods of the prior year. . . . [E]xisting subscribers were relatively insensitive to the price increase.[56]

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[55] In addition, '[e]ven if the market is defined broadly to include other sources of audio entertainment, the merged firm may still be able to exercise market power. Under a theory of unilateral effects in a differentiated product market where the merged firms are their closest competitors, a merger might result in a price increase regardless of the combined firm's market share." American Antitrust Institute Opposition at 17 n. 48. *Accord* Senate Judiciary Hearing (written testimony of David A. Balto at 6-8). *See also* Crowell & Moring Antitrust Analysis at 6 ("The relevant issue here is whether satellite DARS subscribers consider terrestrial radio to be reasonably interchangeable with satellite DARS, and *not* whether terrestrial radio listeners consider satellite DARS to be reasonably interchangeable with terrestrial radio. There is no reason to expect that the cross-price elasticities are symmetric.").

[56] American Antitrust Institute Opposition at 19-20 (footnotes omitted; brackets in original); *see also id.* at 19 n. 57 (quoting Mel Karmazin as saying in December 2006 that "we think there is an opportunity for us to increase our pricing," and quoting a New York Times article in December 2006 as saying that Sirius "has no plans to raise prices, but the . . . company said studies it has done show it can raise its subscription price without alienating consumers."). *See also* Sidak Decl. at 12 (stating with respect to the XM price increase: "The fact that subscriber growth continued at such a rapid pace in the presence of [a]

XM and Sirius themselves seem to recognize that a satellite DARS monopolist would have the ability to raise prices without competitive constraints. If competition would impose sufficient price discipline to prevent price increases by a merged entity, there would be no reason for the merged entity to promise not to raise prices. Yet, XM and Sirius stress as a *benefit* of the merger the fact that they *promise voluntarily* not to raise prices (for some undetermined temporary period of time).[57]

XM and Sirius have in fact viewed each other as their primary competitor, which further supports defining satellite DARS as a separate market:

> To whatever extent satellite radio competes with terrestrial radio and other alternatives, it is clear that XM and Sirius compete more directly with one another. Indeed, this seems to be one of Wall Street's main complaints about the two companies. For example, in their SEC filings, each company refers to the other as its "direct competitor," or its "competitor." In conference calls with stock analysts, they measure their performance against each other and consider market shares of satellite subscribers to be a key metric.[58]

The evidence of this "vigorous head-to-head competition" between XM and Sirius is "considerable."[59] The fact the companies' pricing for a monthly subscription, one-year

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30 percent price increase underscores the low elasticity of demand faced by SDARS providers."); Crowell & Moring Antitrust Analysis at 4 (quotations from Mel Karmazin about price elasticity). For a more detailed discussion of the inelasticity of satellite DARS demand and why satellite DARS is a distinct market, *see* Sidak Decl. at 8-32.

[57] Merger Application at ii, 11. *See also* Crowell & Moring Antitrust Analysis at 6 ("The parties have not pointed to any evidence suggesting that if satellite DARS prices were to increase (or quality of service or level of output decrease), consumers would readily cancel their subscriptions and rely on listening to broadcast radio full time. Indeed, this argument is belied by the fact that the parties have suggested their willingness to agree to price caps as a condition of their deal. If terrestrial radio had a price disciplining effect on satellite DARS, such price regulation would not be necessary.").

[58] American Antitrust Institute Opposition at 24-25. *See also id.* at 24 (XM and Sirius "have apparently not promoted their services against any other technology, nor do they measure themselves against any other competitor."); Senate Judiciary Hearing (written testimony of David A. Balto at 5) ("I did review the public information available, and could not identify a single new initiative adopted by XM or Sirius in response to iPods, HD radio, digital media, or other music alternatives.").

[59] American Antitrust Institute Opposition at 25.

subscription, two-year subscription and "family plan" are all the same "underscores the fact that XM and Sirius are very close substitutes for one another."[60] Further evidence of the companies' competition with each other is the millions of dollars they each spend to obtain particular programming, often bidding against each other.[61] Because of the competition between the companies, these programming deals are exclusive.[62] In at least one instance, the result of competition for programming led one of the companies to compete by discounting equipment – when Sirius announced the additional of Howard Stern, XM lowered its equipment prices.[63] More generally, the companies have "regularly engaged directly in competition over equipment pricing and features" and "competed to obtain (and retain) exclusive distribution agreements with automobile manufacturers."[64]

The conclusion that there exists a distinct national satellite DARS product market is consistent with the Commission's treatment of satellite DARS over the past decade. In establishing the satellite DARS service, the Commission recognized that satellite DARS would compete to some extent with broadcast radio stations in the *local* markets in which broadcasters compete (competition that has now come to bear in full force).[65] At the same time, it stressed that the two satellite DARS providers would be competing with each other in a separate, *national* market for multi-channel mobile audio programming service that local broadcasters "inherently cannot provide" and thus by definition do not and cannot serve as a competitive substitute:

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[60] *Id*. at 25-26.

[61] *Id.* at 26.

[62] *Id*

[63] *Id.* at 27 and n.89.

[64] *Id.* at 27. *See also* Carmel Group Analysis at Appendix B ("Sirius v. XM Ping Pong Chart: A Sampling of Competitive Action and Reactions").

[65] *See* NAB Comments and Reply Comments *supra* text at n.47.

> Digital Audio Radio Service by satellite (satellite DARS) promises to provide continuous nationwide radio programming with compact disc (CD) quality sound. Motorists on the highways of America may soon be able to tune in to one of many satellite DARS channels offering a particular format without interruption or fading as they travel across the United States. . . . While, to some extent, DARS will compete with local radio, we anticipate that it will also complement terrestrial radio.[66]

The Commission repeatedly referred to DARS as a *national* service. Some examples are:

> [S]atellite DARS can provide new service that local radio inherently cannot provide. With its *national reach*, satellite DARS could provide continuous radio service to the long-distance motoring public, persons living in remote areas, and may offer new forms of emergency services.[67]
>
> * * * *
>
> Given the distinguishing features of satellite DARS – it is a *national service* . . . .[68]
>
> * * * *
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> A concern identified in the Notice was that satellite DARS signals be available to listeners, especially mobile ones, at every location *nationwide*.[69]

The Commission's recognition of the national satellite DARS market is also apparent through its repeated references to competition between the two satellite DARS licensees as an important goal in and of itself. The satellite DARS merger prohibition is the best example:

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[66] *Satellite DARS Order*, 12 FCC Rcd at 5756 ¶ 1. The Commission also noted that DARS would provide "additional high quality audio signals" to areas underserved by terrestrial radio and that satellite DARS "will particularly benefit communities where terrestrial broadcast service is less abundant." *Id.* at 5760 ¶¶ 11-12. It also said that "[s]atellite DARS may also be able to foster niche programming because it can aggregate small, nationally dispersed listener groups that local radio cannot profitably serve." *Id.* at 5761 ¶ 14.

[67] *Id.* at 5760-61 ¶ 13 (emphasis added).

[68] *Id.* at 5763 ¶ 18 (emphasis added).

[69] *Id.* at 5794 ¶ 100 (emphasis added). *See also id.* at 5760 ¶ 12 (channels to be provided "nationwide"); 5815 ¶ 149 ("DARS, a new national satellite service"); 5816 ¶ 152 ("nationwide licenses" and "nationwide system"); 5825 ¶ 175 (service that is "inherently national in scope").

"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."[70]

The Commission has subsequently reconfirmed that satellite DARS operates as part of a national market, not just a local market: "SDARS is by its nature a national service. . . ."[71] And, just this past March, the Commission treated the satellite DARS market as a distinct national market in its first *Satellite Competition Report*. Specifically, the Commission described the relevant product market as "satellite audio programming provided to persons within the United states for a fee."[72] It found the geographic market to be national:

> We find the geographic aspects of this market to be national. Individual customers face the same nationwide-licensed choices throughout the 48 contiguous states. Although each user is in one locality, the major participants in the market serve the entire country with mostly the same content."[73]

Finally, outside the context of their proposed merger, XM and Sirius themselves appear to have recognized that they compete in a distinct national satellite DARS market. According to Sirius CEO Mel Karmazin: "It would be great if there was a monopoly, but the second best thing is a duopoly. . . ."[74] The companies have jointly argued to the FCC in another proceeding that

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[70] *Id.* at 5823 ¶ 170. *See also id.* at 5786 ¶ 78 ("[l]icensing at least two service providers will help ensure that subscription rates are competitive as well as provide for a diversity of programming voices. The two DARS licensees will compete against each other for satellite DARS customers . . . . Accordingly, eligible auction participants may acquire only one of the two licenses being auctioned."); *id.* at 5796 ¶ 103 (receiver interoperability "will promote competition by reducing transaction costs and enhancing consumers' ability to switch between competing DARS providers.").

[71] *Review of the Emergency Alert System*, 20 FCC Rcd 18625, 18643 ¶ 46 (2005); *see also XM Radio Inc.*, 16 FCC Rcd 16781, 16782 ¶¶ 1, 3 (IB 2001) (providing authority to being DARS service on a "nation-wide basis" and referring to "nationwide service'); *Sirius Satellite Radio, Inc.*, 16 FCC Rcd 16773, 16774 ¶¶ 1, 3 (IB 2001) (same).

[72] *Satellite Competition Report*, 22 FCC Rcd at 5973 ¶ 55.

[73] *Id.* ¶ 56.

[74] Advertising Age Karmazin Interview.

"satellite radio is still a national service from both a content and a technological perspective. . . ."[75] As the American Antitrust Institute concluded based on a wide variety of statements by XM and Sirius:

> The Applicants themselves have articulated what makes satellite radio unique: an "endless variety" of programming, much of which is not available on terrestrial radio, including dozens of commercial-free music channels, musical formats unavailable in many radio markets, niche programming made possible by aggregating demand, comprehensive sports coverage, including a vast array of out-of-market games, "adult" programming, coast-to-coast listening or portability, and CD-quality sound.[76]

Accordingly, the Commission should define the market for its core competition/public interest analysis as the national, multi-channel mobile satellite DARS market.

B. XM and Sirius Are the Only Participants in the National Satellite DARS Market and their Merger Would Replace a Duopoly with a Monopoly

The next steps in the Commission's competitive analysis are to determine the market participants, the degree of market concentration that currently exists, and how concentration would change from the merger.[77] In this regard, the Commission just a few months ago concluded, in its *Satellite Competition Report,* that the only participants in the national satellite DARS market are XM and Sirius.[78]

With respect to the current concentration in that market, the Commission recently indicated that the satellite DARS market has a Herfindahl Hirschman Index ("HHI") of 5,779

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[75] Joint Reply of XM Radio Inc. and Sirius Satellite Radio Inc., MB Docket No. 04-160 at 7 (June 21, 2004).

[76] American Antitrust Institute Opposition at 22.

[77] *See, e.g., AT&T/Bell South Order,* 22 FCC Rcd at 5676 ¶ 25; *SBC/AT&T Merger Order,* 20 FCC Rcd at 18303-04 ¶ 21; *EchoStar/DirecTV Merger Order,* 17 FCC Rcd at 20612, 20612 ¶ 126, 20614 ¶ 133. *See also Satellite Competition Report,* 22 FCC Rcd at 5965 ¶ 32, 5975 ¶ 64.

[78] *Satellite Competition Report,* 22 FCC Rcd at 5973 ¶ 57.

with respect to revenue and 5,400 with respect to subscribers.[79] Under the *DOJ/FTC Guidelines*, a market with a HHI of over 1800 is considered highly concentrated.[80] In short, the satellite DARS market is already highly concentrated and the situation would only become worse if the XM/Sirius merger were approved. In that instance, the HHI would rise 4,600 points to 10,000 (the maximum possible HHI), as the merged entity would be a monopoly.[81]

C. Barriers to Entry in the Satellite DARS Market Are High

While the magnitude of the anti-competitive nature of a satellite DARS monopoly could potentially be ameliorated if barriers to entry are low, the barriers to entry here are extraordinarily high.[82] "[E]ntry is sufficiently easy to deter post-merger price increases 'if entry would be timely, likely, and sufficient in magnitude, character, and scope to deter or counteract the competitive effects of concern.'"[83] Entry is "'timely' only if it 'can be achieved within *two years* from initial planning to significant market impact.'"[84] It is implausible, however, to argue that a new satellite DARS licensee could become operational, let alone have "significant market impact," within two years after a merger of XM and Sirius.

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[79] *Id.* at 5980, Table 4.

[80] *See, e.g.*, *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20614 ¶ 134, citing *DOJ/FTC Guidelines*, § 1.51. As the Commission has explained: "The HHI is calculated as the sum of the squares of the market shares of each firm participating in a relevant market. The HHI can range from nearly zero in the case of an atomistic market to 10,000 on the case of a pure monopoly." *Id.* at 20614 n.368

[81] An increase in the HHI of 100 points creates a presumption that the merger "is likely to enhance market power or facilitate its exercise." *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20614 ¶ 134, quoting *DOJ/FTC Guidelines* § 1.51. Moreover, the XM/Sirius merger would exceed the HHI limits even if the Commission were to adopt a market definition that included complementary audio distribution formats such as analog radio and HD radio. Sidak Decl., Appendix 2.

[82] *EchoStar/DireTV Merger Order*, 17 FCC Rcd at 20616 ¶ 140 ("If entry is sufficiently easy, new entrants will likely render unprofitable any attempted post-merger price increase.").

[83] *Id.*, quoting *DOJ/FTC Guidelines* § 3.0.

[84] *Id.*, quoting *DOJ/FTC Guidelines* § 3.2.

"[E]ntry into satellite communications requires radio spectrum licenses and orbital slots. The lack of availability of commercial spectrum has the potential to create a significant barrier to entry into markets for commercial satellite communications services."[85] There is no other spectrum allocated for satellite DARS and it would take years to allocate and license new spectrum, even if the Commission decided to reallocate spectrum from other uses to satellite DARS. Moreover, "[s]atellite radio is a capital-intensive and expensive business given the significant cost of designing, launching and operating satellites, and the significant investment" in "design[ing] chipsets and encourage[ing] their distribution, . . . market[ing] their brands, and . . . creat[ing] compelling programming for subscribers."[86] In this regard, it took more than a decade (1990 to 2001) from the time that Sirius originally requested the Commission allocate satellite DARS spectrum until it began service.

Even if the Commission required the merged entity to return half of its combined spectrum for reassignment to a new satellite DARS competitor, entry into the market would take much longer than two years. Indeed, Primosphere, a losing bidder in the original satellite DARS auction and a company that has already paid satellite launch fees and has every incentive to minimize its estimate of the time period to enter the market, has claimed it would take five years for it to enter the market even if the Commission simply awarded it a license promptly without any opportunity for competing applications.[87] The Commission itself has recently indicated that

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[85] *Satellite Competition Report*, 22 FCC Rcd at 5987 ¶ 106. The Applicants have recognized that entry of a new satellite DARS competitor is unlikely: "And asking whether I think there will be another satellite competitor, the answer will be probably not." Senate Judiciary Hearing, Federal News Service Transcript (testimony of Mel Karmazin).

[86] Merger Application at 19. The Commission has similarly referred to the "large financial investments" needed to enter a satellite market. *Satellite Competition Report*, 22 FCC Rcd at 5987 ¶ 106.

[87] *See* Supplement to Application for Review, Primosphere Limited Partnership, File Nos. 29/30-DSS-LA-93; 16/17-DSS-P-93 at 3 (March 19, 2007).

"[f]rom the beginning of the planning for a new communications satellite to its commencement of service to customers requires more than two years."[88]

Finally, even assuming that a new satellite DARS entity could enter the market in the next five to 10 years – far beyond the two year standard set by the *DOJ/FTC Guidelines* – such an entity would have to compete against an entrenched satellite DARS monopolist that may well have locked up relevant key programming on a long-term basis. In sum, there is no basis to rely on a potential new competitor as a constraint on the anti-competitive practices of the DARS monopolist that would be created by the merger.

D. The Merger of XM and Sirius Would Harm Consumers and Broadcasters

1. The Merged Entity Would Be Able To Increase Prices or Otherwise Maintain Prices at an Anti-Competitive Level

As discussed above, the satellite DARS market is currently characterized by vigorous competition between the only two service providers in the market. The proposed merger would eliminate that competition, producing a monopolist with a 100 percent share of the national satellite DARS market. The economic and antitrust ramifications of such a merger to monopoly are beyond question – the merged entity would have the ability and incentive to raise prices or otherwise maintain prices at an anticompetitive level.

By definition, "[m]onopoly power is the power to control prices or exclude competition."[89] Thus, the lawfulness of a merger "turns on the purchaser's potential for creating enhancing, or facilitating the exercise of market power – the ability of one or more firms to raise

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[88] *Satellite Competition Report*, 22 FCC Rcd at 5981 ¶ 83.

[89] *United States v. E.I. du Point de Nemours & Co.*, 351 U.S. 377, 391 (1955), citing *American Tobacco Co. v. United States*, 328 U.S. 781, 811(1945); *Apex Hosier Co. v. Leader*, 310 U.S. 469, 501 (1939); *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1910).

prices above competitive levels for a significant period of time."[90] In *Staples, Inc.*, for example, the district court enjoined the merger of two competing office supply superstores where the merger would result in monopoly in certain markets.[91] The court found that "by eliminating Staples' most significant, and in many markets only, rival, this merger would allow Staples to increase prices or otherwise maintain prices at an anticompetitive level."[92]

The *DOJ/FTC Merger Guidelines* also reflect this line of analysis. For instance, section 2.2 of the *DOJ/FTC Merger Guidelines* states that where the merging firms have a combined share of at least 35 percent – far less than the 100 percent share that would be created here – they "may find it profitable to alter their behavior unilaterally . . . by elevating price and suppressing output." The Commission also applied this analysis in finding that it could not grant the EchoStar/DirecTV merger because "in the absence of any significant savings in marginal cost, the merger will result in a large increase in post-merger equilibrium prices."[93] In short, antitrust and Commission precedent indicate that, as a matter of law and economic theory, allowing the combination of the only two providers of satellite DARS would enable the merged entity to increase prices or otherwise maintain prices at an anti-competitive level.

In addition, there is substantial reason to believe that the monopoly satellite DARS provider would, as a matter of fact, exercise this power. Evidence before the Commission

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[90] *United States v. Archer-Daniels-Midland Co. and Nabisco Brands, Inc.*, 866 F.2d 242, 246 (8th Cir. 1988).

[91] *FTC v. Staples,*, 970 F.Supp. at 1082.

[92] *Id.* Similarly, the Federal Trade Commission has filed an action in the United States District Court for the District of Columbia to block Whole Foods Market's acquisition of Wild Oats Markets, alleging that the transaction would unlawfully eliminate the substantial competition between those two uniquely close competitors in numerous markets nationwide, notwithstanding the existence of numerous other grocery chains. *See Federal Trade Commission v. Whole Foods Market, Inc. and Wild Oats Markets, Inc.*, Civ. No. 07-cv-01021-PLF, FTC File No. 0710114 (filed June 5, 2007).

[93] *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20624 ¶ 169.

reveals that satellite DARS providers already have a significant ability to raise prices without losing subscribers.[94] As the independent American Antitrust Institute points out, demand for satellite DARS is somewhat inelastic, even in the current duopoly satellite DARS market structure.[95] The example of XM's 30 percent price increase is particularly instructive on this point. Despite the price increase, the number of XM subscribers jumped by 84 percent in 2005, and subscriber growth in the last three quarters of 2005 (i.e., following the price increase) was significantly higher than during the same periods of the prior year.[96] This example clearly suggests that existing satellite DARS subscribers are relatively insensitive to price increases.

This fact is not lost on Sirius; its CEO readily admits "there is price elasticity in [Sirius's] subscription price" which would allow for increases.[97] When asked whether Sirius would consider higher pricing in 2007, Mr. Karmazin said:

> Yeah. I mean we're open. . . . We have a price point of $12.95. We believe that there is elasticity in our price point. We think we offer great value for under fifty cents a day. Our churn rate reflects the fact that consumers are happy with it. We see what's happening in Canada, where we have a significant lead in satellite radio and we are priced at a higher price point. So, we have no announcement to make on anything regarding any price increases, but we think that that's an option that the company has, and it's a good option for us.[98]

Thus, even in the face of fierce intra-modal competition, the two satellite DARS providers enjoy a certain level of pricing flexibility. The proposed merger would exacerbate this problem by

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[94] *See supra* text at 18 and n.56.

[95] American Antitrust Institute Opposition at 19-20.

[96] *Id.*; *see also* Sidak Decl. at 12.

[97] Crowell & Moring Antitrust Analysis at 4, citing Mel Karmazin, Keynote Address at the Credit Suisse Media & Telecom Week: Sirius Satellite Radio (December 6, 2006) (transcript available from Voxant FD (FAIR DISCLOSURE WIRE)).

[98] *Id.*, citing Mel Karmazin, Citigroup 17th Annual Media & Telecommunications Conf. (January 10, 2007) (webcast available at http://investor.sirius.com/medialist.cfm, last visited Mar. 9, 2007).

eliminating even the limited constraints on pricing that XM and Sirius currently face. In Mr. Karmazin's words: "[I]t would be great if there was a monopoly."[99]

A temporary price freeze, such as the Applicants have suggested,[100] would not eliminate the fundamental anticompetitive consequences of the proposed merger, even during the period the temporary price freeze were in effect. With a price freeze, the proposed merger would still result in prices for consumers that are higher than would otherwise be expected if XM and Sirius continued to compete against one another. In this regard, both XM and Sirius are expected to maintain strong subscriber growth over the next two years.[101] A larger number of consumers permits service providers to lower prices; the competition between two satellite DARS providers will create pressure for each provider to in fact lower their prices below current levels.[102] "Without the stick of competition . . . the cost savings simply will not be passed through to the consumer."[103] In short, the proposed merger to monopoly would allow the merged entity "to increase prices or otherwise maintain prices at an anti-competitive level" and therefore should be rejected.[104]

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[99] Advertising Age Karmazin Interview

[100] Merger Application at 11.

[101] Sidak Decl. at 45-46.

[102] *Id.* at 54-55.

[103] House Commerce Hearing (written testimony of Gene Kimmelman at 6). *See also* House Judiciary Hearing, Serial No. 110-3 at 57 (testimony of Mark D. Cooper) ("Perhaps the most outlandish of all the claims being circulated by the merging parties is the argument that consumers will be better off with a benevolent monopolist than vigorous competitors. . . . Without the stick of competition, however, the costs savings simply will not be passed through to consumers and innovation will slow rather than speed up. It is competition that is the driver of innovation in our economy; competition is the best form of consumer protection.").

[104] *See FTC v. Staples*, 970 F.Supp. at 1082.

2. The Proposed Merger Would Likely Reduce Innovation, Program Quality and Diversity

A monopoly in the satellite DARS market would also likely reduce innovation, program quality and diversity. As the Commission recognized when it authorized satellite DARS, competition between service providers is necessary to provide incentives for each provider to innovate and to diversify their program offering, and to provide valuable niche programming.[105] The Commission was correct; competition between XM and Sirius has been fierce, with the companies spending millions of dollars to acquire exclusive rights to unique program content, such as national sports programming, niche programming (*e.g.*, Martha Stewart, Oprah Winfrey, Howard Stern, the Playboy channel), and exclusive music artists and series.[106] Moreover, XM and Sirius each offer bundles of content that are different from one another's offerings, much of which is not available elsewhere.[107]

Permitting the proposed merger, however, would eliminate the competitive incentives that would otherwise drive XM and Sirius to continue seeking out and promoting unique and innovative content. As consumer groups have explained:

> Today, consumers who want different options have the ability to switch providers, albeit at significant switching costs. But that possibility forces the two providers to continue innovating, improving their services, developing differentiating features like package flexibility, and competing on price. Because this is a unique product market, once the competition is eliminated, the primary drive of innovation in both programming and technology – competition in the market – will be eliminated. Innovation will slow to the pace preferred by the monopolist.[108]

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[105] *Satellite DARS Order*, 12 FCC Rcd at 5786 ¶ 78 ("Licensing at least two service providers will help ensure that subscription rates are competitive as well as provide for a diversity of programming voices.").

[106] *See, e.g.*, American Antitrust Institute Opposition at 26.

[107] *See* Napoli Study at 5.

[108] Senate Commerce Hearing (written testimony of Gene Kimmelman at 10).

In essence, the proposed merger would create a single satellite DARS content buyer (a monopsonist) who would, by definition, have both the ability and economic incentive to *reduce* the quantity and diversity of the satellite SDARS content offerings.[109] The example offered by David A. Balto, an independent antitrust expert, is instructive:

> Imagine for a moment that you are interested in starting a radio channel of talk and news about pets. . . . 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.[110]

That single provider, in turn, would have no need to differentiate itself from a competitor and thus would have no need to take risks on new or innovative content such as the pet radio channel. Simply put, without "rivalry, diversity will suffer and the incentive to differentiate and innovate will be significantly dampened."[111] For example "[s]panish-language sports programming may never have come to satellite radio absent competition between the parties."[112]

Furthermore, there is a significant risk that "a merger of Sirius and XM would create the kind of bottleneck in the flow of this type of national content from producer to consumer that long has been a source of concern for media policymakers."[113] XM and Sirius have already secured exclusive deals for out-of-market sports packages and national news and entertainment sources that are unavailable to terrestrial broadcasters.[114] As a monopsonist, the merged entity

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[109] Sidak Decl. at 42-43.

[110] Senate Judiciary Hearing (written testimony of David A. Balto at 7).

[111] *Id.*

[112] *Id.* at 9.

[113] Napoli Study at 4; *see also* Senate Judiciary Hearing (written testimony of Mary Quass, President and CEO, NRG Media, LLC at 11) ("There is also the very real risk that a combined XM/Sirius will use its market power to force content providers, including sports programmers, to deal only with them.").

[114] *See, e.g.,* American Antitrust Institute Opposition at 26; Napoli Study at 5.

would have even greater market power to force content providers like sports programmers to deal only with satellite radio.[115] Consumer groups have testified that this would result in less diverse programming for consumers:

> In addition, the merger harms independent content producers, DJs, artists and personalities who now have two competitors to play off one another when negotiating for carriage or "air time." As we have seen in cable, concentration in distribution reduces access for content producers. . . . At the end of the day, the loss of choice for content producer[s] translates into fewer choices and less program diversity for consumers.[116]

In sum, the merger of XM and Sirius would do nothing more than deny consumers the benefits they now realize from a competitive satellite DARS market – relatively competitive pricing and a diversity of programming.

3. The Merger of XM and Sirius Would Harm Broadcasters and Local Listeners

The proposed merger also poses a significant threat of unilateral anticompetitive effects for broadcasters that would ultimately threaten the important public interests served by localism. For example, the Applicants have pledged to unbundle their program offerings to offer programs on an *à la carte* basis, and to develop tiered service offerings to offer a lower-cost point of entry.[117] It is reasonable to expect that these lower-cost service tiers would be advertiser-supported.[118] Indeed, Sirius has already declared its intention to move aggressively into advertising as soon as the merger is approved.[119]

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[115] *See* Sidak Decl. at 42.

[116] Senate Commerce Hearing (written testimony of Gene Kimmelman at 11).

[117] Merger Application at 10-11.

[118] *See* Senate Judiciary Hearing (written testimony of Mary Quass at 16-17).

[119] *See* Thomson StreetEvents, SIRI – Sirius Satellite Radio & XM Satellite Radio to Combine in Merger of Equals, Final Transcript (Feb. 20, 2007) (statement of Mel Karmazin), *available at* http://online.wsj.com/documents/transcript-xmsr-20070220.pdf.

In this regard, approval of the proposed merger would severely harm the important values of localism by reducing critical advertising revenues to terrestrial broadcasters. The satellite DARS monopoly would be expected to use revenues from its higher-priced premium service offerings to cross-subsidize its national advertising rates with revenues from its premium service offerings, which would allow the merged entity to drive down advertising rates, to the detriment – in the first instance – of broadcasters.[120]

The loss of even a small amount of advertising revenues could be devastating to local radio stations. Facing reduced advertising revenues, local radio stations would have to reduce local programming. If local radio stations were forced to reduce local programming in response to aggressive advertising rates from a monopoly satellite DARS provider, the supply of local radio content would decrease. Local listeners and the public interest would suffer.

V. THE CLAIMED BENEFITS OF A SATELLITE DARS MONOPOLY DO NOT OUTWEIGH THE ANTI-COMPETITIVE HARMS

A. The Applicants Have Not Met Their Burden of Demonstrating Sufficient Benefits to Justify the Merger

As the Commission has recognized, where, as here, "a merger is likely to result in a significant reduction in the number of competitors and a substantial increase in concentration," the parties bear a heavy burden to prove "that there exist countervailing, *extraordinarily large,*

[120] *See* Senate Judiciary Hearing (written testimony of Mary Quass at 16-17).

cognizable, and non-speculative efficiencies that are likely to result from the merger."[121] Moreover, these benefits must be merger-specific,[122] as well as verifiable and non-speculative.[123] Reductions in marginal costs are more important than reductions in fixed costs.[124] Further, benefits that are not projected to occur until three or more years after the merger are "inherently speculative. . . ."[125] Finally, "[e]fficiencies almost never justify a merger to monopoly or near-monopoly."[126]

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[121] *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20604 ¶ 102 (emphasis added). *Accord FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720-21 (D.C. Cir. 2001) ("high market concentration levels . . . require, in rebuttal, proof of extraordinary efficiencies"); *DOJ/FTC Merger Guidelines* § 4 ("[w]hen the potential adverse competitive effect of a merger is likely to be particularly large, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive"). *See also EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20604 ¶ 103 citing IV Phillip E. Areeda, et al., ANTITRUST LAW ¶ 932 at 160 (Rev. ed. 1998) (mergers that significantly increase concentration in already highly concentrated industries "should carry a strong presumption of illegality that can be defeated only by a showing of extraordinarily easy entry or truly extraordinary efficiencies").

[122] *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20630 ¶ 189 ("claimed benefits must be *merger specific – i.e.*, the claimed benefits must be likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects"), citing *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp, Transferee, For Consent to Transfer Control of NYNEX Corp. and its Subsidiaries*, 12 FCC Rcd 19985, 20063 ¶ 158 (1987) ("*Bell Atlantic/NYNEX Merger Order*"); *DOJ/FTC Guidelines* § 4.

[123] *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20630-32 ¶ 190 ("claimed benefits must be *verifiable*. Because much of the information relating to the potential benefits of a merger is in the sole possession of the merging parties, those parties must provide sufficient support for any benefit claims so that the Commission can verify the likelihood and magnitude of each claimed benefit. In this regard, the magnitude of benefits must be calculated net of the cost of achieving them. Moreover, speculative benefits that cannot be verified will be discounted or dismissed. Thus, for example, benefits that are to occur only in the distant future may be discounted or dismissed because, among other things, predictions about the more distant future are inherently more speculative than predictions about events that are expected to occur closer to the present"), citing *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063 ¶ 157; *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14825 ¶ 255; *DOJ/FTC Guidelines* § 4.

[124] *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20631 ¶ 191 ("benefits are generally counted only to the extent that they can mitigate any anticompetitive effects of the merger. . . . [I]n general, reductions in marginal cost are more likely to result in lower equilibrium prices. We will more likely find marginal cost reductions to be cognizable than reductions in fixed costs"), citing *Bell Atlantic/NYNEX Merger Order*, 12 FCC FCC Rcd at 20063-64 ¶ 158; *DOJ/FTC Guidelines* § 4. XM and Sirius appear to disagree with this focus on marginal costs. *See* Hazlett Analysis at 41-42.

[125] *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20634 ¶ 202

[126] *Id.* at 20605 ¶ 102, quoting *DOJ/FTC Merger Guidelines* § 4.

The Applicants have not – and cannot – come even close to meeting their burden of demonstrating that the alleged benefits of the merger are "extraordinary," let alone that they outweigh the harms.[127] In sum, the benefits claimed by the Applicants are largely non merger-specific and are speculative rather than verifiable. Indeed, the proposed merger "benefits" appear to be designed solely to win visceral support for the merger, given the Applicants' failure to address how the merger is consistent with long-standing antitrust law or Commission precedent. Moreover, they relate significantly to fixed, not variable, costs, as XM and Sirius appear to recognize.[128] The fact remains, however, that when the serious harms that will result from the merger are factored in under the appropriate legal standards, it is readily apparent that the Applicants have not made their case.

1. The Merger Is Not Needed to Ensure the Viability of the Satellite DARS Industry

It is important to stress at the outset that the merger is not needed to ensure the continued viability of the satellite radio industry. The Applicants themselves have foresworn any such argument:

> We are not making a failing company argument and we are not saying that if in fact our merger were not approved at the end of the day we would not continue to go along and do business. . . . It

[127] In fact, the Applicants appear to question the standards rather than demonstrate compliance. In his filing on behalf of the Applicants, Harold Furchtgott-Roth admits that many of the merger benefits will take years to implement, but then dismisses the notion that the benefits of the merger must be measured within a reasonable (*i.e.*, three year) time frame without explaining how that comports with established antitrust analyses. *See* Harold Furchtgott-Roth, An Economic Review of the Proposed Merger of XM and Sirius (June 27, 2007) (filed on behalf of XM and Sirius) ("XM and Sirius have stipulated many changes in technology and service offerings as a result of the proposed merger. Some of these proposed changes will take years to implement, and it would be unreasonable to evaluate the proposed merger in a shorter time period.").

[128] *See* Merger Application at 19-20 (referencing the high fixed costs faced by XM and Sirius).

> doesn't have to be approved. We can go back to sitting there having our existing businesses.[129]
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> * * * *
>
> [I]f, in fact, it's decided that this merger is not allowed to go forward . . . Sirius . . . will be a very healthy company. So this is not about survival.[130]

Analysts agree that satellite DARS industry "is a viable one with or without this merger."[131]

Indeed, the Commission has recognized that, given its status as a new service less than six years old, the satellite DARS industry is doing well:

> As expected for a relatively new service, neither provider is currently profitable, but growth rates for both subscribers and revenues are high and revenues per user have begun to rise.[132]

The companies have also spoken positively about their success. For example, Sirius CEO Mel Karmazin recently stated: "2007 is off to a great start. . . ."[133] Accordingly, the Commission should disregard as unfounded suggestions by merger supporters that satellite DARS will not

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[129] House Judiciary Hearing, Serial No. 110-3 at 89 (testimony of Mel Karmazin). *See also* COMM. DAILY, April 27, 2007, at 7 (XM Radio Chairman Gary Parsons quoted as saying XM is "prepared to operate . . . as a stand-alone company" if the merger is not approved); American Antitrust Institute Opposition at 9 n.21 (quoting XM CEO Hugh Panero has saying "[s]hould [the merger] prove impossible, we are well positioned to be a strong and enduring leader").

[130] House Commerce Hearing, Federal News Service Transcript (testimony of Mel Karmazin).

[131] Senate Commerce Hearing (written testimony of David Bank, Managing Director – Equity Research, RBC Capital Markets at 2). *See also* Sidak Decl. at 46-47 ("*existing* penetration levels are sufficient to generate positive margins given the current costs of XM and Sirius").

[132] *Satellite Competition Report*, 22 FCC Rcd at 5955 ¶ 4, 5980 ¶ 80, 6002 ¶158, 6008-09 ¶ 180.

[133] Sirius Satellite Radio News Release, "Sirius Satellite Radio Reports Strong First Quarter 2007 Results" (May 1, 2007). *See also supra* text at 35; XM Radio News Release, "XM Satellite Radio Holdings Inc. Announces First Quarter 2007 Results, First Quarter Ending Subscribers Exceed 7.9 Million; First Quarter Revenue Increased 27 Percent Year over Year to $264 Million; First Quarter Net Loss Narrowed Year over Year by 18 Percent to $122 Million; Company Recently Surpassed 8 Million Subscribers" (April 26, 2007).

survive without the merger.[134] In sum, there is no need for the Commission to approve a merger to monopoly for this service.[135]

2. The Specific Benefits Touted by the Applicants Are Unpersuasive

a. Claim of Lower Prices and More Choices

Lower Price for Fewer Channels. The Applicants claim that "[c]onsumers 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."[136] This claimed benefit is not, of course, merger-specific. XM and Sirius could offer lower-priced packages with fewer channels now.[137] Indeed, under basic economic theory, competition is much more likely to lead to lower prices than monopoly.

In any event, this claimed benefit is wholly speculative and non-verifiable. What channels will be included in the package? What will they include? Will they be structured in a way to be attractive to customers? What will they cost? For how long will they be offered? What will happen after any short-term conditions recommended by parties run out? Will equipment prices go up to offset lost revenue? Will there be more advertising-supported

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[134] *See, e.g.*, Editorial, *A Good Merger*, WASH. TIMES, July 6, 2007, at A16; Letter from Niel Ritchie, League of Rural Voters, to Marlene H. Dortch, Secretary, Federal Communications Commission (April 13, 2007); Letter from Lillian Rodriguez-Lopez, President, Hispanic Federation, to Marlene H. Dortch, Secretary, Federal Communications Commission (June 5, 2007).

[135] *See* American Antitrust Institute Opposition at 9 ("Having spent billions of dollars to create the infrastructure for competing DARS services, the Applicants now suggest that the whole experiment in competition was a mistake. Before the Commission abandons this experiment, it should demand strong evidence that intramodel competition in satellite radio does not benefit consumers.").

[136] Merger Application at 11.

[137] *See* American Antitrust Institute Opposition at 10.

programming to offset lost revenues? With these and similar questions unanswered, this claimed benefit is meaningless.

Price Freeze for Existing Service. The Applicants claim as a benefit of the merger that subscribers would continue to be able to "receive substantially the same channel lineup of either Sirius or XM [and] may continue to do so at the same price -- $12.95 per month."[138] In other words, an anti-competitive monopoly will allow customers to continue receiving the same service at the same price. This cannot reasonably be characterized as "more choices at lower prices" as the Applicants claim[139] and is not a merger-specific benefit.[140] Moreover, with competition, prices would likely go down, not stay the same. Competition in the cellular radio industry, for example, has driven prices down year after year, even as usage increases.[141] The claimed benefit of continued service at the same price is also speculative and non-verifiable. For how long will the same package at the same rate be offered? What will happen after any short-term conditions suggested by parties run out? Will equipment prices go up to offset lost revenue? Will there be more advertising-supported programming to offset lost revenues?

As antitrust law has recognized, "the mere fact" that price freezes are offered in connection with a merger "strongly supports the fears of impermissible monopolization."[142] It is thus not surprising that the price freeze offer has been characterized by consumer groups as a

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[138] Merger Application at 11.

[139] *See id.* at 10.

[140] *See* American Antitrust Institute Opposition at 10.

[141] From 1985 to 2005, mobile telephone subscribership grew from 340,213 subscribers to 207,896,198, while the average monthly bill dropped from $96.83 in 1987 to $49.98 in 2005. *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 21 FCC Rcd 10947, Appendix A, Table 1 (2006).

[142] *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 67 (D.D.C. 1998).

"hollow promise that fails to address the real harms of the merger"[143] and denigrated as an offer that "would reduce consumer welfare" by protecting the company against future price reductions that would be caused by competition in the absence of a merger.[144]

Different Programming at a Higher Price. The Applicants claim that "Sirius and XM customers also will be able to access popular, previously exclusive programming of the other provider for a modest premium . . . ."[145] Sirius listeners "could" have access to Major League Baseball and Oprah and XM listeners "could" have access to the National Football League and Martha Stewart.[146] Consumers "might no longer" have to choose between Oprah and Martha Stewart or between Major League Baseball and the National Football League.[147] "[C]ertain" programming will be made available to subscribers on both networks.[148]

This claimed benefit is also not merger-specific.[149] The companies did not have to enter into exclusive contracts for programming; they chose to do so. As Sirius CEO Mel Karmazin has been quoted as saying: "There is nothing inherent that would preclude the companies from

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[143] Senate Commerce Hearing (written testimony of Gene Kimmelman at 9) ("It is a hollow promise that fails to address the real harms of the merger. Time-limited price freezes today for yesterday's services fail to address the added costs to consumers over time that result when competition is absent. In addition, a short term price freeze does not compensate for the price declines that might otherwise occur if the two competitors continue to compete. In the absence of a merger, it is not clear why prices should not eventually fall below $12.95/month for existing services as increasing subscribership drives down costs.").

[144] Sidak Decl. at 54 ("A price freeze at the current monthly price of $12.95 would reduce consumer welfare to the extent that the future price that would naturally emerge from continued oligopolistic competition between Sirius and XM in the absence of the proposed merger would fall below $12.95 per month. As penetration rates increase and the merging parties independently achieve greater economies of scale, there will be significant pressure for each SDARS provider unilaterally to decrease its price.").

[145] Merger Application at 11.

[146] *Id.*

[147] *Id.* at 11-12.

[148] *Id.* at 12.

[149] *See* American Antitrust Institute Opposition at 10; Senate Judiciary Hearing (written testimony of David A. Balto at 8-9).

having . . . shared content. It's not the current business plan, but nothing would stop that."[150] Moreover, the suggestion that the Applicants "could" provide access to "certain" programs such that consumers "might no longer" have to choose between programs of one company or the other is speculative and non-verifiable. Which programs will be available? What will the prices be? Will customers have to "buy through" a larger basic package before getting these combined programs at a higher price? What channels (including non-duplicative channels) will be dropped, thereby reducing consumer choice? If no channels are dropped, what kind of audio degradation will there be?[151] What will happen after any short-term conditions parties may suggest run out? One thing that is clear, however, is that *à la carte* programming will not be available.[152]

More Programming at a Higher Price. The Applicants state that, sometime beyond the "near term" and "over the long run," they will be able to provide their subscribers with programming from both companies through an interoperable receiver at a cost somewhere between $12.95 and $25.90 per month, i.e., lower than subscribing to both services.[153] This claimed benefit is speculative; the "long run" is clearly beyond the three-year period considered relevant by the Commission for taking claimed merger benefits into account.[154]

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[150] Advertising Age Karmazin Interview.

[151] *See* An Engineering Statement Prepared on Behalf of the National Association of Broadcasters Regarding the Technical Aspects of the SDARS Providers XM and Sirius, Dennis Wallace, Meintel, Sprignoli & Wallace (March 16, 2007, filed by NAB June 27, 2007) ("MSW Study").

[152] "REP MARKEY: Mr. Karmazin, will you permit consumers to buy channels a la carte? MR. KARMAZIN: No." House Commerce Hearing, Federal News Service Transcript (testimony of Mel Kamazin).

[153] Merger Application at 12 and n.27, 16. *See also* MSW Study at 1-2 (creation of interoperable receiver could take a significant amount of time).

[154] *See supra* text at 34.

Credit for Blocking Adult Programming. The Applicants' offer to credit customers for exercising existing options to block adult programming[155] is obviously not merger-specific. Nothing has ever stopped them from offering such credits as separate companies in the past, and nothing stops them from doing so now. It is little more than a decoy intended to dissuade natural merger opponents from actively opposing the merger. It is also speculative and non-verifiable. How much will the credit be? For how long will the credit be offered? What will happen after any short-term conditions that parties may recommend run out? Will equipment prices go up to offset lost revenue? Will there be more advertising-supported programming to offset lost revenues?[156]

b. Claim of More Diverse Programming

The Applicants claim that *"[i]n the long-term"* they will provide more diverse content because *"eventually"* the company will be able to consolidate redundant programs such that *"ultimately"* there will be free capacity for other programs.[157] The quoted language makes this the poster child for a speculative/non-verifiable claimed benefit. Indeed, Sirius CEO Mel Karmazin has indicated that the single platform that would enable such programming would not be available until "somewhere in the 2017, 2018" period.[158] Moreover, while the Applicants make claims about what types of programming the additional spectrum capacity "will allow,"

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[155] Merger Application at 12.

[156] *See also* Senate Commerce Hearing (written testimony of Gene Kimmelman at 10) ("The offer to give consumers greater pricing flexibility is not accompanied by . . . assurances that the 'cost' deducted from consumers for 'opt-out' channels will actually reflect the cost of programming for that channel. The cost to Sirius of Howard Stern's channel, which some listeners may find objectionable, is arguably higher than the cost of a music channel, where production costs are substantially lower. The merging parties' concession not only fails to provide the real channel-by-channel choice consumers demand, it is unlikely to provide any meaningful cost benefits.").

[157] Merger Application at 12-13 (emphasis added).

[158] House Commerce Hearing, Federal News Service Transcript (testimony of Mel Karmazin).

and speculate about what additional programming they might provide, they do not provide any concrete details.[159] Accordingly, just as in the EchoStar/DirecTV context, this claimed benefit is not sufficient to justify the merger.[160]

In any event, as the Commission has indicated, competition among satellite DARS providers, not monopoly, is more likely to lead to diverse programming: "Licensing at least two service providers will . . . provide for a diversity of programming voices."[161] And, the "Commission's prediction of programming diversity has proven correct. The two companies have competed fiercely to offer differentiated, exclusive, and original programming."[162]

c. Claim of Accelerating Advanced Technology

The Applicants claim that, through efficiencies, the combined company "will be able to" offer consumers access to advanced technology sooner than otherwise because the merger efficiencies, "including the marriage of two engineering organizations, will ensure better results from each dollar invested in research and development."[163] To a significant extent, the claimed benefits here are not merger-specific; for example, nothing currently prevents the companies

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[159] Merger Application at 13-14.

[160] *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20631-33 ¶¶ 194, 199 ("[T]he Applicants argue that the merger will greatly improve spectrum efficiency by eliminating substantial duplication of programming, which will allow the merged entity to offer new and better services to consumers. . . . For purposes of the Commission's public interest analysis, however, the relevant question is . . . how those spectrum savings will translate into new or improved products at lower costs. We find . . . that the Applicants have failed to satisfy their burden of demonstrating that these spectrum efficiencies will result in cognizable, merger-specific public interest benefits.").

[161] *Satellite DARS Order*, 12 FCC Rcd at 5786 ¶ 78. *See also id.* at 5762 ¶ 15 ("licensees will have an incentive to diversify program formats and thereby provide valuable niche programming").

[162] American Antitrust Institute Opposition at 13; *see also id.* at n.36.

[163] Merger Application at 14; *see also id.* at 18 (making the same argument with regard to operational efficiencies).

from working together to develop "common engineering standards and protocols."[164] Indeed, they were required to do so by the FCC with respect to receivers and have refused.

Here, too, the claims are speculative and non-verifiable. While the Applicants speculate about what they *might* do, there are no details about what they *will* do, or *when*, or *how*. The speculative nature of the efficiencies that will supposedly lead to advanced technology and new or improved services is underscored by the fact that the companies will not "have the ability to use one platform" for both services until "somewhere in the 2017, 2018" period.[165] Moreover, as the Commission recognized in connection with the proposed EchoStar/DirecTV merger, consolidating spectrum may lead to less technological efficiency than competition because the merged company "will have a reduced incentive to invest in productivity-enhancing technology. . . ."[166]

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[164] *See id.* at 15; *see also* American Antitrust Institute Opposition at 15 (the Applicants provide "no indication why such benefits 'would not be possible absent the proposed transaction.'").

[165] House Commerce Hearing, Federal News Service Transcript (testimony of Mel Karmazin). *See also* American Antitrust Institute Opposition at 15 (the Applicants "offer only the vaguest suggestions as to how this might occur"); MSW Study at 2 ("[T]he two SDARS providers have deployed significantly different system implementations. . . . These differences cannot be easily harmonized without significant disruption to current consumer receivers, the introduction of a new interoperable radio that will work with both systems, or by obsolescing the satellite receivers of one provider and adopting the technical parameters of the other.").

[166] *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20633 ¶ 201 ("An additional problem with the Applicants' efficiency claims is that they ignore the possibility that, because the merged entity will possess more spectrum, it will use it less efficiently than would EchoStar and DirecTV individually absent the merger. In particular, the merger may affect the incentive of the merged entity to adopt new, more productive technology, which in turn could affect how efficiently the spectrum will be used. The reason that the merged entity may be less willing to invest in productivity-enhancing technology is that the marginal value of a firm's spectrum will decline as the total amount of spectrum it controls increases. This suggests that, if as a result of the merger, New EchoStar doubles the amount of spectrum it controls, it will have a reduced incentive to invest in productivity-enhancing technology. . . .Thus, from a social welfare point of view, the merged entity may select a technology that is less efficient than it would select if each separate DBS competitor controlled less spectrum resulting in a public interest harm rather than a benefit.").

Finally in this regard, the claimed engineering and research and development efficiencies involve fixed, not marginal, cost savings.[167] As such, these are not the type of efficiencies to which the Commission gives weight in its merger analyses.

d. Claim of Greater Consumer Choice through Interoperable Receivers

With almost breathtaking gall, the Applicants claim that their merger will accelerate the ability of consumers "over the long run" to have the benefits of interoperable receivers.[168] Of course, the Commission required XM and Sirius to include such interoperable receivers in their system design more than a decade ago and the companies have yet to comply.[169] The reason they have not complied is clear – it would hurt each of them in their competition with the other. As Sirius CEO Mel Karmazin has explained: "[T]he reason we will not subsidize it today – because it's possible that Sirius would subsidize an inter-operable radio, which would result in XM getting a subscription. It doesn't make any sense for us to subsidize a radio where we don't get a subscription."[170]

It certainly is not much of a cognizable benefit that, "over the long run," the companies may do what they were required to do a decade ago, particularly given that they now propose to achieve that goal as an satellite DARS monopolist, while an original purpose of the interoperability rule was to promote satellite DARS competition.[171] In any event, the

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[167] *See* Sidak Decl. at 51.

[168] Merger Application at 15-16.

[169] *See infra* text at Section VI.B.1.

[170] House Commerce Hearing, Federal News Service Transcript (testimony of Mel Karmazin).

[171] *See Satellite DARS Order*, 12 FCC Rcd at 5796 (receiver interoperability rule will, *inter alia*, "promote competition by reducing transaction costs and enhancing consumers' ability to switch between competing DARS providers.").

development of interoperable receivers is not merger-specific, and the availability of such receivers in the "long run" is speculative.[172]

e. Claim of Operational Efficiencies

Duplicative Programming Expenses. The Applicants say they will "eventually" be able to reduce duplicative programming expenses. This is not necessarily a merger-specific benefit, however. According to one analyst, even without the merger, the companies are likely to reduce programming expenses.[173] In addition, the claim of "eventual" savings is speculative. This is particularly the case given that one analyst has indicated that programming expenses may initially *increase* after the merger such that there "are no net programming cost savings . . . ."[174] In addition, any savings here would involve fixed, not variable, costs.[175] Nor can the merged entity eliminate much of their most expensive programming because of their existing long-term contracts.

Operational Expenses for Infrastructure. The Applicants say they "will be able" to reduce operational expenses by no longer having to "maintain distinct broadcast operations

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[172] *See* American Antitrust Institute Opposition at 11-12 ("Assuming *arguendo* that the Applicants are in compliance with the interoperable receiver requirement, a merger is not necessary for the commercialization of interoperable receivers. The problem of a lack of subsidies could be solved by a joint venture between the Applicants (subject to oversight by the Commission) to subsidize interoperable receivers, or by a rule requiring the companies to offer subsidies for interoperable receivers comparable to those for non-interoperable receivers, or by a rule requiring all new satellite radios installed in automobiles to have an interoperable receiver.").

[173] Jonathan A. Jacoby, Bank of America, Satellite Radio 1Q07 Preview, at 11 (April 23, 2007) ("Jacoby Analysis").

[174] *Id.* at 2-3 ("[I]n order to be able to offer baseball or football to subscribers of both satellite networks, the merged entity might need to increase the current payments and/or extend the agreements. Our model now assumes that there are no net programming cost savings as lower costs for certain programming (e.g., music and talk channels) could be offset by higher sports rights fees. As a result, we now estimate that programming and content synergies could actually be negative in the first few years following the merger as overall fixed programming costs are relatively unchanged while revenue synergies generate additional music royalty fees.").

[175] Sidak Decl. at 51, Table 3.

infrastructure to facilitate the scheduling, storage, compression, transmission, and uplink of programming and content to the Applicants' satellites and terrestrial repeater networks."[176] As the Commission recognized in the EchoStar/DirecTV context, it is not clear that this benefit would be merger-specific; the companies could, for example, enter into a joint venture to save costs in this area.[177] Moreover, any benefit here is highly speculative, particularly in light of the fact that the companies will admittedly have to use separate platforms for another decade or so.[178] Finally, these are fixed, not variable, costs.[179]

Marketing and Subscriber Acquisition Costs. The Applicants state that the merged entity "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 user consumers."[180] As a preliminary matter, these claimed savings are not merger-specific; at least one analyst has indicated that the companies are likely to reduce marketing expenses even in the absence of the merger.[181] Moreover, the benefit to consumers of these alleged savings is highly speculative – at some uncertain point, they "should ultimately" result in lower costs to consumers. Finally, as the Commission recognized in the context of the proposed EchoStar/DirecTV merger, such savings

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[176] Merger Application at 17. *See also id.* at 19-20 & n.42.

[177] *See EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20646 ¶ 130 ("[I]t is not clear that the ability to combine customers and facilities is a merger-specific benefit. In particular, it is not clear that the benefits of consolidation could not be achieved by other means, such as a joint venture, that would be less likely to have anticompetitive effects.").

[178] *See supra* text at 43. *See also* Merger Application at 20 (referring to "longer term" infrastructure savings). Even certain savings in this area that the Applicants claim will be realized in "a relatively short term" will admittedly be realized in only "perhaps as short as five years," *id.* at 20 n.42, not within the three-year period cognizable by the Commission in evaluating merger benefits. *See supra* text at 34.

[179] Sidak Decl. at 51, Table 3.

[180] Merger Application at 17-18 (emphasis added).

[181] Jacoby Analysis at 11.

constitute in whole or in part fixed, not variable costs, "and therefore are unlikely to counteract any anticompetitive effects of the merger."[182]

General and Administrative Expenses. These claimed savings[183] are not merger-specific given the likelihood that the companies will reduce such costs in any event.[184] These costs are also fixed, not variable,[185] and should be discounted accordingly.

In sum, upon close analysis, the claimed benefits of a satellite DARS monopoly, and, in particular, the claimed benefits to consumers, are illusory – they largely are not merger-specific, speculative and not verifiable, and relate to fixed rather than variable costs. The conclusions reached by the Commission regarding similar claimed benefits in connection with the proposed EchoStar/DirecTV merger apply with equal force here:

> To summarize, as described above, the Applicants have failed to demonstrate that certain claimed efficiencies are merger-specific. Other claimed cost savings appear too speculative, while others simply are not credible. Finally, other alleged costs savings do not appear to be true efficiencies but rather represent a shift in surplus between parties without any necessary increase in social welfare. Again, as discussed above, what is important is the extent to which these lower costs lead to lower prices and can offset the reduction in competition, rather than whether the merged entity will achieve a lower cost structure as a *per se* matter.[186]

B. The Merger's Harms Outweigh the Claimed Benefits

In light of the above, this proposed merger mirrors the failed EchoStar/DirecTV merger. In both instances, the parties utterly "failed to meet their burden of proof to show that, on

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[182] *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20647 ¶ 234; *see also id.* at 20637 ¶ 210.

[183] Merger Application at 18.

[184] Jacoby Analysis at 11.

[185] Sidak Decl. at 51, Table 3.

[186] *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20637-38 ¶ 212. *See also* American Antitrust Institute Opposition at 16.

balance, the proposed merger is in the public interest."[187] Moreover, the record in both instances revealed that "substantial potential public interest harms may result from the transaction"[188] and the parties could not demonstrate that the proposed merger would be "*necessary* to achieve many, if not all, of their claimed public interest benefits."[189] Thus, the Commission should decline to approve the proposed XM and Sirius merger for the same reasons.

As discussed in detail above, the anti-competitive harms from a satellite DARS merger would be substantial. Not only is antitrust law "generally quite hostile" to a merger such as this because it is "likely to increase the incentive and ability to engage in anticompetitive conduct," but the merger would be in direct conflict with the Commission's "long history of establishing spectrum-based commercial services with no fewer than two participants per service, with the aim of creating competitive markets for spectrum-based voice, video and data services."[190] The merger would result in higher prices and reduced programming choices for satellite DARS subscribers and a reduction in local broadcast programming available to local radio listeners, with few, if any, corresponding benefits.

Accordingly, based on the record currently before it, the Commission cannot conclude that the application is consistent with the public interest. To the extent it does not dismiss the application for violation of the anti-merger rule, the Commission must, as in *EchoStar/DirecTV*, designate the application for an adjudicatory hearing before an administrative law judge.[191]

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[187] *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20661 ¶ 275. *See generally id.* at 20661-20664 ¶¶ 275-288.

[188] *Id.* at 20661-62 ¶ 275.

[189] *Id.* at 20664 ¶ 284.

[190] *Id.* at 20662 ¶¶ 276-277.

[191] *See* 47 U.S.C. §§ 308, 309, 310(d).

VI. NO PROPOSED CONDITIONS WOULD CURE THE PUBLIC INTEREST HARMS OF A SATELLITE DARS MONOPOLY

While the Applicants have made promises relating to the merger and they or others may recommend specific conditions in order to attempt to ameliorate identifiable harms, conditions are not warranted or appropriate here. In fact, any such conditions would necessarily conflict with the pro-competitive policies of Congress and the Commission.

Moreover, the Commission cannot rely on the combined entity to comply with any such conditions, given XM's and Sirius's individual histories of non-compliance with Commission requirements. Indeed, the fact that Applicants have even proposed the merger in the face of the Commission's longstanding and explicit merger prohibition underscores the conclusion that there is simply no reason for the FCC to have *any* confidence whatsoever that there is any FCC requirement or FCC condition that XM and Sirius view as sacrosanct. While they may say or promise whatever it takes to get the merger through, if compliance does not serve their economic interests, it is virtually certain that they will either ignore the requirement or seek Commission relief from it.

A. Any Conditions Would Be Inconsistent with Congressional and FCC Pro-Competitive Policies

In the proposed EchoStar/DirecTV merger, the Commission rejected out-of-hand the parties' proposed "scheme of national pricing" designed to offset the impact of the merger on prices.[192] The Commission reasoned that:

> [E]ven if the national pricing plan were likely to be an effective competitive safeguard, its implementation would not be consistent with the Communications Act or with our overall policy goals. In essence, what Applicants propose is that we approve the replacement of viable facilities-based competition with regulation. This can hardly be said to be consistent with either the

[192] *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20663 ¶ 281.

> Communications Act or with contemporary regulatory policy and goals, all of which aim at replacing, wherever possible, the regulatory safeguards needed to ensure consumer welfare in communications markets served by a single provider, with free market competition, and particularly with *facilities-based* competition. Simply stated, the Applicants' proposed remedy is the antithesis of the 1996 Act's "pro-competitive, de-regulatory" policy direction.[193]

Any such conditions would also be inconsistent with the antitrust laws.[194]

The Commission should, for the same reasons, reject any pricing, programming or other regulatory conditions offered by the Applicants or by others. Given the substantial record set forth above demonstrating that the public harms from the merger would strongly outweigh the benefits, at the very least, the Commission would have to designate the application for hearing to determine whether any proposed regulatory conditions could sufficiently ameliorate the public harms such that the merger could serve the public interest.

B. The Commission Cannot Reasonably Rely on a Merged XM-Sirius Entity to Comply with any Regulatory Conditions

Any conditions proposed by the Applicants or by others aimed at eliminating the anti-competitive harms associated with the XM/Sirius merger would be insufficient. The fact is that a combined satellite DARS entity cannot be relied upon to comply with any proposed conditions. In that regard, the Commission has made clear for decades that "[r]eliability" is a "key element

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[193] *Id.* ¶ 282.

[194] Crowell & Moring Antitrust Analysis at 1 ("This argument completely disregards the very reason the antitrust laws apply to mergers – to ensure that markets are structured in a way to encourage competition. The very notion that a competitive market structure, which so far has produced a given degree of price competition between the parties, should be replaced by a monopoly provider subject to price regulation is antithetical to the purpose and foundation of the antitrust laws."); Senate Judiciary Hearing (written testimony of David A. Balto at 9) ("As a policy matter, permitting a merger based on a promise not to increase prices is poor antitrust policy.").

of character necessary to operate . . . in the public interest."[195] Even where past violations do not necessarily raise character issues requiring a hearing, the Commission has made clear that such violations are relevant in evaluating the likelihood of potential beneficial results claimed in a merger application.

For example, in the closely analogous context of the proposed EchoStar/DirecTV merger, the Commission stated that "[r]ealization of these claimed merger benefits, as well as the effective operation of the proffered 'national pricing remedy,' depends in large part on the likelihood that EchoStar has correctly predicted how New EchoStar will implement certain business strategies."[196] After noting that EchoStar's compliance record "suggests a resistance to taking steps to serve the public interest that do not serve the company's view of its own private economic interest[,]" the Commission indicated that EchoStar's "history of past conduct will be taken into account in assessing the likelihood that potential beneficial conduct will occur in the absence of private economic incentives."[197]

As described in more detail below, XM and Sirius each have a history of ignoring the Commission's satellite radio rules. Indeed, that simple fact that XM and Sirius filed their merger application despite a Commission directive not to merge suggests a certain disregard for Commission mandates. In short, the Commission cannot reasonably rely on them to comply with any merger-specific regulatory conditions or promises, and it should not grant the application based on any guarantees or conditions promised by the Applicants or suggested by other parties.

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[195] *See, e.g., William L. Zawilla,* 18 FCC Rcd 14938, 14964 ¶ 101 (2003) (designating licenses for hearing because, *inter alia,* the licensee "has operated [its stations] substantially at variance from the terms of their authorizations").

[196] *EchoStar/DirecTV Merger Order,* 17 FCC Rcd at 20579 ¶ 35.

[197] *Id*.

1. XM and Sirius Have Violated the Satellite DARS Receiver Interoperability Rule

In 1995, in response to XM's assertion "that a single standard would encourage consumer investment in satellite DARS equipment and create the economies of scale necessary to make DARS receiving equipment affordable," the Commission sought comment on whether it should require specific receiver interoperability standards for satellite DARS.[198] In its comments, XM indicated it "continues to believe that creation of a common receiver capable of tuning in the entire DARS band is important in promoting consumer acceptance of the technology."[199] It indicated, however, that, working together, the satellite DARS applicants would better achieve the goal of a common receiver standard than the Commission.[200] Sirius took a similar position.[201]

The electronics industry warned the Commission not to rely on the commitments of XM, Sirius and other applicants: "The Commission should not relay on the DARS Applicants' commitments. To begin with, they are neither enforceable nor unequivocal. EIA/CEG fears that, once the DARS Applicants receive their licenses, they will seek a competitive advantage in developing their own unique transmission standards."[202] Notwithstanding this warning, the

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[198] *Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Notice of Proposed Rulemaking, 11 FCC Rcd 1, 16 ¶ 47 & n.48 (1995), citing Comments of American Mobile Radio Corporation (XM's corporate predecessor).

[199] Comments of American Mobile Radio Corporation, IB Docket No. 95-91 at 20 (Sept. 15, 1995).

[200] *Id.*

[201] Comments of CD Radio, IB Docket No. 95-91 at 91-92 (Sept. 15, 1995) ("CD Radio expects that satellite DARS receivers will be fully tunable in the sense that consumers can select the service provider of their choice. . . . The design and implementation of such receivers is a technical matter that will easily be resolved between licensees and receiver manufacturers."). *See also* Joint Comments of the DARS Applicants, IB Docket No. 95-91 at 3-4 (Sept. 15, 1995) ("There are clearly sufficient market incentives for industry, itself, to develop voluntary standards without the need for government intervention.").

[202] Reply Comments of the Consumer Electronics Group of the Electronic Industry Association ("EIA"), IB Docket No. 95-91 at 8 (Oct. 13, 1995).

Commission did not mandate a specific receiver standard, but did require the licensees to develop such a common standard.[203] The Commission also made clear that receiver interoperability was to occur prior to the initiation of satellite DARS service.[204] XM and Sirius both made the required certifications.[205]

Whatever XM's and Sirius's intentions were when they made these certifications in 1997, the fact is that they did not comply with the receiver interoperability rule prior to "final" system design and introduction of service in late 2001 and apparently have not done so six years later either. This matter came to the Commission's attention again in 2005 when XM failed to include a receiver interoperability certification in an application for replacement satellites. In light of the missing certification, the International Bureau indicated that it would send letters to XM and Sirius requesting that "they provide the current status of their efforts to develop an interoperable

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[203] *Satellite DARS Order*, 12 FCC Rcd at 5797 ¶ 106 ("we will require that a satellite DARS applicant, in its application, certify that its satellite DARS system will include a receiver design that will permit users to access all licensed DARS systems that are operational or under construction."). *See* 47 C.F.R. § 25.144(a)(3)(ii) (each applicant shall "[c]ertify that its satellite DARS system includes a receiver that will permit end users to access all licensed satellite DARS systems that are operational and under construction.").

[204] *Satellite DARS Order*, 12 FCC Rcd at 5797 ¶ 106 ("Satellite DARS licensees, *during the construction of their satellite systems*, will have an opportunity to work among themselves toward a final receiver design. . . . We believe that, at the very least, consumers should be able to access the services from all licensed satellite DARS systems and our rule on receiver interoperability accomplishes this.") (emphasis added).

[205] Amendment, American Mobile Radio Corporation, 26/27-DSS-LA-93; 10/11-DSS-P-93; 72-SAT-AMEND-97 at 5 (May 16, 1997) ("AMRC [XM]certifies that its satellite DARS system will include a receiver that will permit end users to access all licensed satellite DARS systems that are operational or under construction."); Submission and Amendment to Application of Satellite CD Radio, Inc., 49/50-DSS-P/L-90; 58/59-DSS-AMEND-90; 44/45-DSS-AMEND-92; 71-SAT-AMEND-97 (May 16, 1997) ("CD Radio [Sirius] will include a receiver that will permit end users to access all licensed satellite DARS systems that are operational or under construction.").

receiver and that they *provide a clear timeframe for making such an interoperable receiver available to the public*."[206]

Notwithstanding the Commission's clear intent (as reiterated by the International Bureau) that compliance required both development and availability to the public of an interoperable receiver, it appears that no such receiver has been developed, let alone made available to the public. In this regard, XM's most recent SEC Form 10-K states: "We have signed an agreement with SIRIUS Radio to develop a common receiver platform combining the companies' proprietary chipsets, but the companies have not completed the final design of an operational radio using this platform."[207] In turn, Sirius's most recent SEC Form 10-K states: "We have signed an agreement with XM Radio to develop jointly a unified standard for satellite radios to facilitate the ability of consumers to purchase one radio capable of receiving both our and XM Radio's services."[208] While Sirius has expressed its belief that "this agreement, and our efforts with XM Radio to develop this unified standard for satellite radios, satisfies the interoperability condition contained in our FCC license[,]"[209] the analysis above suggests that it does not.[210]

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[206] *XM Radio, Inc.* 20 FCC Rcd 1620, 1624-24 ¶¶ 11-12 (IB 2005) (emphasis added) ("*January 2005 IB Order*").

[207] SEC Form 10-K, XM Satellite Radio Inc. at 13 (March 1, 2007) ("XM March 2007 10-K").

[208] SEC Form 10-K, Sirius Satellite Radio Inc. at 14 (March 1, 2007). The Applicants say in the Merger Application that their jointly funded team already "has developed a radio that is interoperable with each other's networks." Merger Application at 15.

[209] *Id.* It appears that XM also interprets the agreement itself as demonstrating compliance. *See* XM March 2007 10-K at 13. *See also* Letter from William Bailey, Senior Vice President, Regulatory and Government Affairs, XM Radio Inc., and Patrick L. Donnelly, Executive Vice President and General Counsel, Sirius Satellite Radio Inc., to Thomas S. Tycz, Chief, Satellite Division, International Bureau, IB Docket No. 95-91 (March 29, 2005) ("March 2005 XM/Sirius Letter").

[210] There is some confusion regarding the companies' views on what constitutes compliance and what exactly they have done. Most recently, shortly after the filing of their Form 10-Ks quoted above, the companies indicated that they are in compliance because they "created a jointly funded engineering team that has developed a radio that is interoperable with each other's networks. These interoperable radios are currently larger, consume more power, and are more expensive and less feature rich than the current single-system radios." Merger Application at 15-16. In this connection, the companies refer to the

2. XM and Sirius Have Engaged in Widespread Violations of Part 15 Equipment Rules

Second, both XM and Sirius have engaged in apparently widespread violations of Commission equipment rules designed to ensure that their modulators/receivers do not interfere with broadcast radio stations.[211] As a result, as has been widely reported, listeners to religious and other non-commercial radio stations may not only receive interference, but may receive "signal bleed" that results in their unintentionally hearing on their car broadcast radios such programming as *The Howard Stern Show*.[212]

It is a matter of record that the violations were apparently intentional on Sirius's part.[213] In addition, with respect to both Sirius and XM, the Enforcement Bureau has indicated that the

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statement in the March 2005 XM/Sirius Letter that they have "designed and licensed receiver systems that share a common head unit, antenna, and wiring harness." *Id.* at 15-16 n.37, quoting March 2005 XM/Sirius Letter. Yet the March 2005 XM/Sirius Letter itself appears not to have viewed the availability of common headsets as compliance, as it references the companies' agreement to develop a "prototype" for an interoperable receiver "using a common antenna, a common RF tuner, and two baseband modules, one for XM and one for Sirius . . . ." March 2005 XM/Sirius Letter at 2. And, the *January 2005 IB Letter* suggesting the companies had not yet complied recognized the same headset development later referenced in the March 2005 XM/Sirius Letter at 2, which the Merger Application now cites as evidence of compliance with the receiver interoperability rule. To make things even more complicated, in April 2005 (after the March 2005 XM/Sirius Letter), Sirius CEO Mel Karmazin is quoted as suggesting that, notwithstanding the availability of common headsets, the company was not yet in compliance with the receiver interoperability rule: "There's nothing inherent that would preclude the companies from having interoperable radio . . . . It's not in the current business plan, but nothing would stop that. . . . The only talks that are going on is we committed to the FCC that we would develop an interoperable radio." Advertising Age Karmazin Interview. To the extent the Commission does not dismiss the Merger Application for non-compliance with the anti-merger rule, it may wish to explore in a hearing the nature of the companies' compliance (or plans for compliance) with the receiver interoperability rule and any related issues in light of these various statements.

[211] 47 C.F.R. Part 15.

[212] *See, e.g.* Jacques Steinberg, *A Mystery Heard on Radio: It's Stern Show, No Charge*, NEW YORK TIMES, January 26, 2007, at A17.

[213] SEC Form 10-Q, Sirius Satellite Radio Inc. at 35 (Nov. 8, 2006) ("certain SIRIUS personnel requested manufacturers to produce SIRIUS radios that were not consistent with these rules."). *See also* Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, to Patrick L. Donnelly, Executive Vice President and General Counsel, Sirius, File No. EB-06-SE-250 at 3 (Aug. 7, 2006) ("In its response to our June 20, 2006 LOI, Sirius stated that 'a number of Sirius' product management and engineering managers decided in July 2004 to increase emissions levels to be competitive with XM and

"employees who were involved in the decision to make such modifications or were aware of potential non-compliance" were "executive and senior-level employees."[214]

3. XM Has Engaged in Widespread Violations of Repeater Rules and Authorizations

In constructing its network of repeaters, XM has engaged in what is perhaps the most widespread violation of Commission technical rules by a major licensee in the history of the Commission. XM's own submissions to the Commission indicate that *more than 40 percent* of its nearly 800 repeaters were operating illegally.[215] Sirius has engaged in analogous, although less extensive, violations.[216]

XM's pattern of illegal behavior includes the following:

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other products transmitting to car radios, and requested that manufacturers make necessary changes.'"). (The Enforcement Bureau provided a copy of this letter to NAB in response to NAB's Freedom of Information Act ("FOIA") request. *See* Letter from David H. Solomon, Counsel to NAB, to Kathryn S. Berthot, Chief Spectrum Enforcement Division, Enforcement Bureau (March 22, 2007)).

[214] Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, to David H. Solomon, Counsel to NAB, FOIA Control No. 2007-235 – Sirius Records at 4 (June 18, 2007); Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, to David H. Solomon, Counsel to NAB, FOIA Control No. 2007-235 – XM Records at 4-5 (June 18, 2007) ("EB XM Records Letter"). These letters granted in part and denied in part NAB FOIA's request filed in connection with Commission investigations into these equipment issues as well as the repeater issues discussed herein. Because XM and Sirius (as well as some of their employees) have filed applications for review of the Bureau's decision, NAB has not had an opportunity to review the materials the Bureau decided to release for which confidential treatment has been claimed. Those materials will likely shed further light on the violations and the impact on the reliability of the Applicants. NAB will supplement the record as appropriate when it receives those documents.

[215] *See* Letter from Scott Harris, Counsel to XM Radio Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, SAT-STA-20061002-00114 (filed March 22, 2007) ("XM March 2007 Letter"); Ex Parte Memorandum of XM Radio Inc. in Support of STA Request, SAT-STA-20061002-00114 (filed Nov. 21, 2006) ("XM November 2006 Memorandum"); Request of XM Radio, Inc. for Special Temporary Authority to Operate Satellite Digital Audio Radio Service Terrestrial Repeaters, SAT-STA-20061002-00114 (filed Oct 2, 2006) ("XM STA Request"). Specifically, at least 338 of XM's 799 repeaters were operating illegally.

[216] *See* Supplemental Information (filed by Sirius), SAT-STA-20061013-00121 & 001222 (April 26, 2007); Request of Sirius Satellite Radio Inc. for Special Temporary Authorization Regarding Digital Audio Radio Service Terrestrial Repeaters, SAT-STA-20061013-00122 (Nov. 17, 2006).

- XM operated 19 repeaters without any FCC authorization at all.[217]

- XM constructed and operated at least 125 of its repeaters at unauthorized locations that differed significantly – by more than five seconds (roughly 500 feet) – from their authorized FCC locations.[218] Five of the repeaters were built and operated between 21 and 113 miles from their authorized locations.[219]

- XM operated at least 221 repeaters at power levels in excess of its authorizations.[220]

- XM installed over 80 of its repeaters at heights that exceeded authorized levels.[221]

Significantly, when these violations came to XM's attention, it did not promptly remedy the situation. Rather, it continued to operate unlawfully while it worked to fix the problems and, even after bringing the matter to the Commission's attention, continued to operate four of the unauthorized repeaters[222] and two repeaters at unauthorized power levels.[223] As with the situation for both companies with respect to the modulators, the Enforcement Bureau has indicated that the XM "employees who were involved in the decision . . . or were aware of potential non-compliance" were "executive and senior-level employees."[224]

In sum, the imposition of price or other regulatory conditions to counter the anti-competitive harms from the merger would undermine the pro-competitive vision of Congress and the Commission. Moreover, evidence of the companies' widespread violations of existing rules

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[217] *See* XM November 2006 Memorandum at 4; XM STA Request at 2, 4.

[218] *See* XM March 2007 Letter at Revised Exhibit A.

[219] *See* Supplement No. 2 to XM Radio Inc.'s Memorandum in Support of STA Request, SAT-STA-20061002-00114 at 14, 19, 26 (filed Dec. 18, 2006); Supplement No. 1 to XM Radio Inc.'s Memorandum in Support of STA Request, SAT-STA-20061002-00114 at 12 (filed Dec. 11, 2006) XM November 2006 Memorandum at 19.

[220] *See* XM November 2006 Memorandum at 4; XM STA Request at 2.

[221] *See* XM March 2007 Letter at Revised Exhibit A.

[222] *See* XM November 2006 Memorandum at 4; XM STA Request at 2, 4.

[223] *See* XM November 2006 Memorandum at 4; XM STA Request at 2.

[224] EB XM Records Letter at 7 (cross-referencing earlier explanation, which is at 4-5 and quoted in the text) (June 18, 2007).

– at least some that were apparently intentional – raises serious questions about the degree to which the Commission could rely on a merged XM/Sirius entity to comply with any proposed conditions should it not be in its economic interest to do so.[225] Indeed, as the Commission recognized in connection with the EchoStar/DirecTV merger, the market power resulting from the merger would itself reduce the ability of the Commission to rely on the merged entity to comply with any promises or proposed conditions: "Our central concern . . . is that with the resulting high degree of concentration . . ., the Applicants' incentives to carry through on their promises . . . will be decreased, rather than increased."[226]

[225] *See* House Judiciary Hearing, Serial No. 110-3 at 57, 66-67 (testimony of Mark D. Cooper) ("Offers of conditions on this merger really, we don't give much credence to. . . . [T]he satellite radio industry has already proven that it cannot be trusted to live up to conditions imposed on it. Let us be clear. The licenses were issued subject to the condition that the licensees never merge. Yet here they are asking to be excused from that condition. The licensees promised to offer the public interoperable radios that would work with . . . both networks. Yet, ten years have passed and there is no such interoperability. . . . The parties have violated conditions about non-interference and use of terrestrial repeaters. In short, from day one they have failed to meet the conditions of their licenses and the public has suffered as a result.").

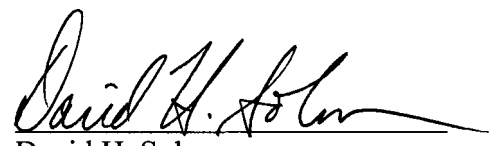
[226] *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20664 ¶ 284.

VII. CONCLUSION

For the reasons set forth above, the Commission should either summarily dismiss the application for violation of the Commission's satellite DARS anti-merger rule or designate it for hearing because the proposed merger would have substantial anti-competitive effects on consumers and broadcasters that would not be offset by any significant public interest benefits.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS

By: 

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CERTIFICATE OF SERVICE

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