

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In re: Applications of)
)
XM Satellite Radio Holdings Inc., Transferor,) MB Docket No. 07-57
and Sirius Satellite Radio Inc., Transferee)
)
For Consent to Transfer Control)

To: Secretary
Attn: Chief, Media Bureau

PETITION TO DENY

American Women in Radio and Television, Inc. (“AWRT”), pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended (the “Act”), 47 U.S.C. § 309(d)(1) and the Commission’s Public Notice of June 8, 2007,¹ hereby requests that the Commission deny the above-captioned applications (collectively the “Consolidated Application”) of XM Satellite Radio Holdings, Inc. (“XM”) and Sirius Satellite Radio Inc. (“Sirius,” collectively with XM, the “Applicants”). In support hereof, the following is respectfully shown:

I. Statement of Interest.

AWRT is a national, non-profit organization dedicated to advancing the impact of women in electronic media and allied fields through educating, advocating and acting as a resource for its members and the industry. AWRT members are professionals employed in all facets of the electronic media industries, including radio, television, video and audio programming, advertising and closely allied fields. For the past 56 years, AWRT’s mission has been to promote the entry and advancement of women in management and ownership of

¹ *Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. Seek Approval to Transfer Control of FCC Authorizations and Licenses, Public Notice*, DA 07-2417 (rel. June 8, 2007).

broadcast companies and related businesses. As an integral part of its support of women's advancement in broadcasting and media industries, AWRP has actively participated in numerous Commission proceedings that have addressed ownership and employment issues.² As AWRP has demonstrated in those proceedings, consolidation in the electronic media directly and adversely impacts the opportunities of AWRP's members for employment and advancement.³ Consequently, AWRP has standing to oppose the Consolidated Application.⁴

II. The Consolidated Application Will Decrease Competition and Diversity, Contrary to the Public Interest.

Before it may grant an application for the transfer of control of any spectrum licensee, the Commission must find that the transaction will serve the public interest, convenience and necessity. *See* 47 U.S.C. 309; 47 C.F.R. § 25.119(a). The Consolidated Application, which would allow a single entity to hold a monopoly over Digital Audio Radio Satellite ("DARS") services, violates well-established Commission policies favoring competition, threatens to decrease diversity of viewpoints in the mass media, and will disserve the public interest.

² *See, e.g.,* Comments of AWRP submitted October 16, 2006, 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket 06-121; Comments of AWRP submitted January 2, 2003, 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277; Comments of AWRP submitted March 27, 2002, *In the Matter of Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets and Definition of Radio Markets*, MM Docket Nos. 01-317 and 00-244.

³ *See e.g.,* Comments of AWRP submitted October 12, 2004, at 4, *Elimination of Market Entry Barriers For Small Telecommunications Businesses and Allocations of Spectrum-Based Services For Small Businesses and Businesses Owned By Women and Minorities*, MB Docket No. 04-228

⁴ "An organization has standing to bring a suit if its members suffer an actual or threatened injury." *See Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001); *citing Texans United for a Safe Economy Educ. Fund v. Crown Central Petroleum Corp.*, 207 F.3d 789 (5th Cir. 2000).

A. Grant of the Consolidated Application Would Violate Commission Policies.

In licensing two DARS systems, the Commission sought “to create as competitive a market structure as possible[.]” *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd. 5754, ¶ 77 (1997) (“*DARS Order*”).⁵ To achieve that goal, the Commission expressly prohibited acquisition of both DARS licenses by the same entity. Said the Commission:

“Licensing at least two service providers will help ensure that subscription rates are competitive as well as provide for 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 ¶ 78.

Moreover, the Commission stated that the prohibition on any single entity holding both DARS licenses would extend beyond initial licensing at auction:

“Even after DARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellite DARS licensee. This prohibition on transfer of control will help assure sufficient continuing competition in the provision of satellite DARS service.”

Id. at ¶ 170.

The Consolidated Application seeks to eliminate the competitive structure that the Commission so carefully crafted when creating the DARS service. However, there is no public interest justification for doing so. As the Commission noted in the *DARS Order*, other aural

⁵ AWRT notes that the Commission has commenced a rulemaking proceeding to address whether the restrictions on DARS license ownership established in the *DARS Order* constitutes a binding rule, and, if so, whether that rule should be waived or modified. *In the Matter of Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, Notice of Proposed Rulemaking*, FCC 07-119 (released June 27, 2007). AWRT does not address here whether the prohibition on a DARS monopoly is a binding rule or a statement of Commission policy; and regardless of the particular legal status of that prohibition, AWRT submits that permitting the monopoly proposed by the Consolidated Application is contrary to the public interest and must therefore be denied.

services are not a true substitute for DARS. *Id.* at ¶ 77. Furthermore, the then DARS applicants and the Commission alike noted the ability of DARS to serve populations unserved or underserved by terrestrial services. *Id.* at ¶ 90. Thus, no other audio service is fully substitutable for DARS and consolidation of the only two DARS licensees would result, at the very least, in a significant diminution in competition in aural services and a loss of all competition in nationwide subscription services.

In addition to violating the Commission’s DARS-specific prohibition on monopolization, a grant of the Consolidated Application would be contrary to competitive trends in communications policy that have been in place since at least the enactment of the Telecommunications Act of 1996 (the “Telecommunications Act”). Indeed, the primary purpose of the Telecommunications Act was to foster a “procompetitive, de-regulatory national policy framework . . . *by opening all telecommunications markets to competition[.]*” *Joint Explanatory Statement of the Committee of Conference*, House Report 104-458 (emphasis added). Pursuant to that legislative mandate, even the historical “natural monopoly” of communications – the local public switched telephone network – has been opened to competition. The Applicants now request that the Commission make an exception to this pro-competitive regime under which all sectors of the communications industry operate for their special benefit. The Commission should decline to make such an exception.

B. Grant of the Consolidated Application would Harm Diversity.

Diversity is one of the core goals of the Act and Commission policy.⁶ The Commission has long held that diversity of ownership of media outlets, including ownership by women and minorities, adds to the diversity of viewpoints available to the public.⁷

Among the most effective ways to encourage diversity in media ownership is through making employment opportunities broadly available, thereby expanding the pool of potential future owners with the experience necessary to operate a media venture. The Commission has found “that there is a strong nexus between employment of minorities and females and ownership opportunities.” *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, 15 FCC Rcd 2329, ¶ 45 (2000). Consolidation in the electronic media undermines diversity not merely by creating fewer ownership opportunities, but also by decreasing the number of jobs (especially managerial-level positions) available in the combined companies. As AWRT previously has observed, consolidation results in fewer senior management opportunities, which in turn reduces

⁶ See e.g., *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (“assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment . . . ‘it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public’”) (internal citations omitted); *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, 15 FCC Rcd 2329 ¶ 48 (2000) (“Moreover, Congress amended Section 1 of the Communications Act in 1996 to make it clear that the Commission’s mandate is to regulate interstate and foreign communications services so that they are ‘available, so far as possible, to all people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex . . . This recent amendment . . . amplifies the Commission’s general public interest mandate to ensure that broadcasting and other programming services serve the needs and interests of all sectors of the community . . . without discrimination on the basis of race or any other suspect classification’”) (emphasis in original); *Review of the Commission’s Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules*, 14 FCC Rcd 12903 ¶ 7 (1999) (describing diversity as among the Commission’s “bedrock goals”).

⁷ See e.g., *2002 Biennial Regulatory Review -- Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620 ¶¶ 26-28 (2003), *aff’d in part and remanded in part, Prometheus Radio Project v. FCC*, 373 F.3d 732 (3rd Cir. 2004).

the need to train lower level employees for management positions, leading to a dearth of women in management positions.⁸

If consolidation in any sector of media industries results in the loss of management and ownership opportunities for women, which AWRT respectfully submits has been amply documented,⁹ then the complete monopolization of one sector cannot help but do the same. The loss of jobs faced by employees of the merged entities, coupled with the loss of future employment opportunities inherent in reducing an industry sector to a single firm, will further undermine crucial opportunities to preserve diversity in the media.

⁸ Numerous studies have clearly and repeatedly documented that women hold only a small number of management positions in the broadcasting industry. See e.g., *The Glass Ceiling Persists: The 3rd Annual APPC Report on Women Leaders in Communication Companies*, The Annenberg Public Policy Center of the University of Pennsylvania, <http://www.annenbergpublicpolicycenter.org/> (finding women comprise just 15% of executive leaders and just 12% of board members in top communications companies); M Street 2005 Gender Analysis conducted on behalf of the Mentoring and Inspiring Women in Radio group (“MIW”), <http://www.radiomiw.com/PDFs/MIW2005stationsummary.pdf> (finding women make up only 15.2 percent of radio station general managers, 30.1 percent of radio station general sales managers and 10.6 percent of radio station program directors).

⁹ See *id.* See also, *Whose Spectrum is it Anyway?: Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing 1950-Present* at 68-78, 99-101 (Ivy Planning Group LLC, December 2000), http://www.fcc.gov/opportunity/meb_study/historical_study.pdf.

Conclusion

For all the foregoing reasons, AWRT respectfully submits that the Consolidated Application would deviate from Commission policy and disserve the public interest, and should be denied.

Respectfully submitted,

**AMERICAN WOMEN IN RADIO AND
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DATE: July 9, 2007

CERTIFICATE OF SERVICE

I, Maria Brennan, hereby certify that on the 9th day of July, 2007, a copy of the foregoing Petition to Deny was sent via first class U.S. mail, postage prepaid, to the following:

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