

*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of: )  
 )  
Sirius Satellite Radio Inc. and )  
XM Satellite Radio Holdings ) MB Docket No. 07-57  
Seek Approval to Transfer Control of )  
FCC Authorizations and Licenses )

To: The Commission

**ERRATUM**

Public Knowledge hereby submits this erratum in the above-referenced docket. We are resubmitting the attached comments due to formatting errors in the previous submission. Please consider this version the official copy of our comments.

Respectfully submitted,

Sherwin Siy  
/s/  
Staff Attorney  
Public Knowledge

July 9, 2007

*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of: )  
 )  
Sirius Satellite Radio Inc. and )  
XM Satellite Radio Holdings ) MB Docket No. 07-57  
Seek Approval to Transfer Control of )  
FCC Authorizations and Licenses )

To: The Commission

**COMMENTS OF PUBLIC KNOWLEDGE**

Sherwin Siy  
Gigi B. Sohn  
Public Knowledge  
1875 Connecticut Avenue, NW  
Suite 650  
Washington, D.C. 20009  
(202) 518-0020

Elizabeth Gonsiorowski  
Kimberly Maynard  
Law Clerks  
Public Knowledge

July 9, 2007

## TABLE OF CONTENTS

<b>I.</b>	<b>INTRODUCTION AND SUMMARY .....</b>	<b>1</b>
<b>II.</b>	<b>THE PROPOSED MERGER IS IN THE PUBLIC INTEREST .....</b>	<b>3</b>
<b>III.</b>	<b>THIS MERGER SHOULD NOT INCLUDE ANY CONDITIONS THAT WOULD LIMIT SATELLITE RADIO FROM PROVIDING LOCAL PROGRAMMING ....</b>	<b>6</b>
<b>IV.</b>	<b>THIS MERGER SHOULD NOT BE CONDITIONED ON ANY LIMIT ON CONSUMERS' RIGHT TO RECORD SATELLITE RADIO .....</b>	<b>7</b>
<b>V.</b>	<b>THE FAILED 2002 MERGER OF DIRECTV AND ECHOSTAR DOES NOT PROVIDE A BASIS FOR DENYING THE MERGER OF XM AND SIRIUS.....</b>	<b>9</b>
<b>VI.</b>	<b>THE BROADCAST INDUSTRY'S OPPOSITION TO THE MERGER IS HYPOCRITICAL AND ANTICOMPETITIVE .....</b>	<b>12</b>
	<b>A. THE NAB HAS OPPOSED THE DEVELOPMENT OF SATELLITE RADIO SINCE LICENSES WERE FIRST ISSUED. ....</b>	<b>13</b>
	<b>B. THE NAB HAS OPPOSED SATELLITE RADIO USING TERRESTRIAL REPEATERS. ....</b>	<b>14</b>
	<b>C. THE NAB HAS OPPOSED MEASURES THAT WOULD FACILITATE SATELLITE PROVIDERS' ABILITY TO PROVIDE LOCAL PROGRAMMING. ....</b>	<b>15</b>
	<b>D. THE NAB'S CONTINUED OPPOSITION INDICATES THAT TERRESTRIAL RADIO IS A COMPETITOR TO SATELLITE RADIO. ....</b>	<b>16</b>
<b>VII.</b>	<b>CONCLUSION .....</b>	<b>16</b>

*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of: )  
 )  
Sirius Satellite Radio Inc. and )  
XM Satellite Radio Holdings ) MB Docket No. 07-57  
Seek Approval to Transfer Control of )  
FCC Authorizations and Licenses )

To: The Commission

**COMMENTS OF PUBLIC KNOWLEDGE**

Public Knowledge submits these comments in response to the *Public Notice*<sup>1</sup> in the above docketed proceedings. If the proposed merger withstands antitrust analysis, Public Knowledge supports the merger subject to conditions that will result in greater program diversity, increase consumer choice and keep prices in check.

**I. INTRODUCTION AND SUMMARY**

The merger of XM Satellite Radio and Sirius Satellite Radio presents a dilemma for public interest advocates. On one hand, the only two providers of satellite radio services are seeking to consolidate, which raises questions about the impact on prices and choice for consumers. On the other hand, competition has left both services weakened in a world where Internet radio, HD Radio, cable radio and other multichannel music, entertainment and information services have become increasingly popular.

In making its decision, the Commission should consider the merger based not on the companies' past financial decisions, but on the impact the merger would have on consumers and

---

<sup>1</sup> Public Notice, FCC DA Docket No. 07-2417 (released Jun. 8, 2007).

the benefits it could provide to the public. If the proposed merger survives the scrutiny of an antitrust analysis, the only pertinent questions are 1) whether the merger would benefit the public interest, and 2) whether denying the merger would harm consumers. Absent a merger, the two companies would likely avoid investing in programming that meets the needs of underserved communities. In contrast, a merged company could provide more diverse programming at better prices. It is important, however, to require certain safeguards that will ensure that the benefits of the merger will be passed on to consumers. Thus, the merger should only be approved subject to the following conditions:

- the new company supplies consumers with pricing choices such as a la carte or tiered programming;
- the new company makes 5% of its capacity available to non-commercial educational and informational programming over which it has no editorial control; and
- the new company does not raise prices for three years after the merger is approved

In addition, Public Knowledge urges the Commission not to impose two other conditions on this merger. First, it should not place any limits on satellite radio providers' ability to broadcast local programming. The increased provision of local traffic, weather, and emergency information would be an obvious benefit to the public, and increased competition in local programming would likely improve its quality.

Second, the merger should not be conditioned on regulations that would limit consumers' ability to record programming. Such restrictions would be tantamount to repealing the Audio Home Recording Act,<sup>2</sup> which specifically protects a consumer's ability to record digital music.

Despite the benefits of a merged XM/Sirius, some have cited the failed 2002 merger of Echostar and DirecTV as a reason for denying this merger. There are striking differences between the failed Echostar/DirecTV merger and the proposed XM/Sirius merger. Notably, the

---

<sup>2</sup> Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237.

market is significantly different. In the five years since the failed EchoStar/DirecTV merger, the audio entertainment market has grown to include a variety of competitors, including terrestrial radio, HD Radio, Internet Radio, and MP3 players, and new competitors on the horizon.<sup>3</sup>

Finally, it should be noted that the National Association of Broadcasters (NAB) is one of the most vocal opponents of the merger.<sup>4</sup> This opposition is hypocritical and anticompetitive. If satellite radio did not compete directly with terrestrial radio, it is doubtful that the NAB would take such pains to voice their concerns.

## II. THE PROPOSED MERGER IS IN THE PUBLIC INTEREST

Public Knowledge understands that additional information is required to determine whether the proposed merger will survive antitrust analysis.<sup>5</sup> Essentially, approval of the merger hinges upon the definition of the relevant product market. Several studies have concluded that the relevant product market includes a wide range of competing products and services and that the merger has the ability to provide significant benefits to the public.<sup>6</sup> If this is the case, the Commission should revoke the 1997 licensing rules specifying that a single satellite company should not control both licenses, and approve the merger under conditions which promote

---

<sup>3</sup> For example, Slacker is in the process of offering a mobile internet radio service. See, e.g., Associated Press, *Start-Up Launches 'Personal Radio' Service*, Mar. 14, 2007, available at <http://online.wsj.com/article/SB117388069334336810.html>.

<sup>4</sup> Statement of Peter H. Smyth, President and CEO of Greater Media Inc. On Behalf of the National Association of Broadcasters, *Digital Future of the United States: Part II—The Future of Radio*. Hearing before the House Committee on Energy and Commerce, 110th Congress, 1st Sess. (2007) available at [http://www.nab.org/AM/Template.cfm?Section=Press\\_Releases1&CONTENTID=8384&TEMPLATE=/CM/ContentDisplay.cfm](http://www.nab.org/AM/Template.cfm?Section=Press_Releases1&CONTENTID=8384&TEMPLATE=/CM/ContentDisplay.cfm).

<sup>5</sup> A former official of the Department of Justice's Antitrust Division apparently agrees with this assessment. See Statement of Charles E. Biggio, Wilson Sonsini Goodrich & Rosati, PC Before the Antitrust Task Force, Committee on the Judiciary, United States House of Representatives Concerning Competition and the Future of Digital Music, Feb. 28, 2007. ("Right now, we do not have all the facts necessary to determine the legality of the merger.")

<sup>6</sup> See Comments of Furchtgott-Roth Economic Enterprises, FCC MB Docket No. 07-57 (Jun. 27, 2007); Comments of Thomas Hazlett, FCC MB Docket No. 07-57 (Jun. 14, 2007).

diversity, preserve consumer choice and keep prices in check.<sup>7</sup> These conditions are necessary to ensure that when the merger results in increased efficiencies alongside any market concentration, consumers inherit the benefits of these efficiencies without suffering the side effects of any concentration.

Such a merger would be in the public interest, providing more benefits to the public than an outright denial. Given the financial state of both companies, the slowing growth of their customer base, and the increasing competition in the market, it appears likely that in the absence of a merger, both services will not invest in new and diverse programming. In contrast, a stronger merged company will allow for more diverse programming, and will ultimately improve consumer choices.

Over the past several years, both XM and Sirius have consistently lost money, and experienced stunted subscriber growth.<sup>8</sup> These trends have crippled the companies' abilities to invest in alternative programming and programming for underserved communities. For example, in 2005, XM dropped almost all of its world music channels, including one devoted entirely to African music. It also replaced its alternative Spanish-language music programming with more popular Spanish fare. Attracting the largest number of listeners while managing the high fixed costs of operating a satellite service will continue to make it difficult for each service, with its relatively small subscriber bases, to take chances on alternative programming and/or lower

---

<sup>7</sup> The language prohibiting the combination of the two licenses may not constitute a binding rule. The FCC currently seeks comment as to whether language in the 1997 Order establishing the Satellite Digital Audio Radio Service that prohibited combining the licenses constitutes a binding rule that should be waived, modified or repealed. See Notice of Proposed Rulemaking, FCC Docket No. 07-119 (released Jun. 27, 2007).

<sup>8</sup> See, e.g., Craig Moffett, *XMSR and SIRI: Where to from here?* BERNSTEIN RESEARCH, Feb. 20, 2007, 8-13 (showing projected losses and declining net subscriber growth for both companies). See also Richard Siklos and Andrew Ross Sorkin, *Merger Would End Satellite Radio's Rivalry*, N.Y. TIMES, available at <http://www.nytimes.com/2007/02/20/business/media/20radio.html> (noting combined \$6 billion in losses and slower-than-expected growth). One business and technology writer has surmised that many consumers have hesitated to subscribe to satellite radio services "because they didn't know which company would survive." James Surowiecki, *Satellite Sisters*, THE NEW YORKER, Mar. 19, 2007.

prices. In contrast, combining the companies and their subscriber bases would allow the new company to eliminate the costs of producing duplicative channels. For example, producing one sixties channel instead of two will allow resources to be allocated to generate underserved programming. Public interest groups that advocate for minorities recognize support this merger, recognizing the potential it creates for more diverse programming platforms.<sup>9</sup>

As discussed below, these efficiencies would also allow the new company, subject to the Commission's action, to provide increased local news and public affairs programming to listeners. Furthermore, the merged company would be able to give consumers access to exclusive programming that they currently cannot receive without subscribing to both services.

It should be noted that even within a larger defined market, this merger will increase market concentration to some extent. Existing satellite subscribers may have significant switching costs, and will certainly have no perfect substitutes. To ensure that the efficiencies from the merger will in fact result in greater program diversity, increased consumer choice, and better pricing, the merger should only be approved subject to the following three conditions:

*Consumer Choice:* The new company should make tiered program choices available to its customers. For example, the new company could offer a music tier or a sports tier that would cost less than subscribing to the entire service.

*Non-Commercial Set Aside:* The new company should make available 5% of its capacity for noncommercial educational and informational programming over which it will have no editorial control. There is precedent for this kind of non-commercial set-aside.<sup>10</sup> This would ensure a diversity of programming choices and would grant access to a national service to programmers who otherwise would be unable to reach the public on a national level. As with the DBS set-aside, the new company should be prohibited from filling it with programmers

---

<sup>9</sup> See Comments of Hispanic Federation, FCC MB Docket No. 07-57 (Jun. 5, 2007); Comments of African Methodist Episcopal Church, FCC MB Docket No. 07-57 (Jun. 11, 2007); Comments of Women Impacting Public Policy, FCC MB Docket No. 07-57 (Jun. 12, 2007); Comments of National Council of Women's Organizations, FCC MB Docket No. 07-57 (Jun. 20, 2007).

<sup>10</sup> Existing law requires a direct broadcast satellite provider to "reserve a portion of its channel capacity, equal to not less than 4 percent nor more than 7 percent, exclusively for non-commercial programming of an educational or informational nature." 47 U.S.C. § 335(b)(1).

already on its system, and no non-commercial programmer would be able to control more than one of these channels.

*Three-Year Freeze on Price Increases:* Because of the expected gains from the merger and because competing services are still nascent, the new company should be prohibited from raising prices from its current rate of \$12.95 per month for three years after the merger is approved. Nor should subscribers be required to pay additional fees to receive a small amount of exclusive content from the other company.<sup>11</sup>

In addition to implementing these conditions, the new company should bear the burden of demonstrating that it requires all 25 MHz currently allocated to satellite radio. Since the new company should operate more efficiently, it should be required to demonstrate that its ownership of this spectrum is in the public interest.

### **III. THIS MERGER SHOULD NOT INCLUDE ANY CONDITIONS THAT WOULD LIMIT SATELLITE RADIO FROM PROVIDING LOCAL PROGRAMMING**

The broadcast industry currently enjoys a monopoly on local radio programming. While satellite radio providers are generally prohibited<sup>12</sup> from providing local programming, other audio entertainment providers are not capable of real-time, mobile transmissions. Over the past several years, the broadcast industry has focused on maintaining its monopoly on local programming, attempting to use the Commission and Congress to prevent satellite radio from providing local programming, such as weather, traffic, and emergency information.<sup>13</sup> Clearly, one of the broadcast industry's incentives for opposing the merger is to develop conditions that would, if not entirely prohibit satellite radio from providing local programming, prevent any

---

<sup>11</sup> Public Knowledge understands that the new company intends to offer consumers three programming plans soon after the merger is complete. The first plan will allow consumers to subscribe a tier of fewer channels, such as a sports tier, at a price lower than \$12.95. The second plan allows consumers to maintain their current programming at the same cost of \$12.95. The third plan, for example, would give XM subscribers their current XM programming, plus selected content currently exclusive to Sirius, and vice versa. None of these packages should be subject to price increases over the next three years.

<sup>12</sup> The relevant restriction prohibits satellite broadcasters from using terrestrial repeater networks to provide local programming. See XM Radio, Inc., Application for Special Temporary Authority, 16 FCC Rcd. 16781 (2001).

<sup>13</sup> See, e.g., the Local Emergency Radio Service Act of 2007, H.R. 983, 110th Cong. (2007).

increase in that programming. Under the guise of saving local radio, the broadcast industry seeks to have the government prohibit more local radio, thereby perpetuating its own comfortable monopoly. This merger puts front and center the debate over whether broadcasters should have a monopoly over local programming.

Therefore, Public Knowledge urges the Commission to initiate a rulemaking to determine whether it is in the public interest to maintain current prohibitions on satellite radio's provision of local programming.

The anticompetitive restriction that currently prohibits satellite radio from providing local programming has already forced consumers to accept what many believe to be a dearth of quality (if any) local programming on broadcast radio.<sup>14</sup> As long as broadcasters continue to enjoy a monopoly on local programming, there is no incentive to improve the quality of that local programming.<sup>15</sup> Competition in the local programming market would push broadcasters and satellite radio alike to deliver up-to-date, accurate traffic and weather *and* high quality, substantive news reports and other programming that meets the needs of local communities.

#### **IV. THIS MERGER SHOULD NOT BE CONDITIONED ON ANY LIMIT ON CONSUMERS' RIGHT TO RECORD SATELLITE RADIO**

---

<sup>14</sup> See, e.g., Statement of FCC Commissioner Michael J. Copps, dissenting, *re* Review of the Commission's Broadcast Ownership Rules (Jun. 2, 2003), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-235047A9.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A9.pdf) (commenting on the consolidation of local radio ownership: "Diversity of programming suffered. Homogenized music and standardized programming crowded out local and regional talent. Creative local artists found it ever more difficult to obtain play time. Editorial opinion polarized. Competition in many towns became non-existent as a few companies bought up virtually every station in the market."); Statement of FCC Commissioner Jonathan S. Adelstein, dissenting, *re* Review of the Commission's Broadcast Ownership Rules (Jun. 2, 2003), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-235047A8.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A8.pdf); See also Jonathan Rintels and Philip M. Napoli, Ph.D. "Ownership Concentration and Indecency in Broadcasting: Is There a Link?" (2005), *available at* [http://www.freepress.net/docs/ownership\\_indecency.pdf](http://www.freepress.net/docs/ownership_indecency.pdf).

<sup>15</sup>A condition limiting local programming via satellite radio should not be imposed even though Sirius CEO Mel Karmazin recently testified that the new company would have no interest in providing such programming. Such a condition would limit the ability of any future satellite radio service or any entity that might in the future purchase the new company to provide local programming, giving broadcasters a "state-sanctioned monopoly control" over local programming.

For almost two years, the recording industry and XM Satellite Radio have been engaged in a battle over whether XM should pay an extra licensing fee for selling a receiver that allows consumers to record blocks of programming and disaggregate them into individual songs. Meanwhile, the recording industry has attempted to force XM to embed technological protection measures that would prohibit this activity. This dispute is the subject of an ongoing lawsuit in the Second Circuit<sup>16</sup> and pending legislation in the Senate.<sup>17</sup>

Public Knowledge is concerned that the recording industry may attempt to use this merger as an opportunity to limit consumers' ability to record satellite transmissions. Consumers have been permitted to record radio transmissions since the invention of the tape player, and that ability is specifically protected under the Audio Home Recording Act, 17 U.S.C. § 1001 *et seq.*, which prohibits any copyright infringement action

based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or *based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.* (Emphasis added.)

The recording industry has questioned whether the Audio Home Recording Act should be repealed or revised in light of the changing technological landscape. While these might be legitimate questions for Congress, it is not appropriate to address them in the context of a merger. Moreover, the federal courts have already ruled that the Commission does not have the power to require particular technological design mandates in the absence of express

---

<sup>16</sup> See *Atlantic Recording Corp. v. XM Satellite Radio, Inc.*, No. 06 Civ. 3733 (S.D.N.Y. Jan. 19, 2007).

<sup>17</sup> Platform Equality and Remedies for Rights Holders in Music (PERFORM) Act of 2007, S.256, 110th Cong. (2007).

Congressional authority.<sup>18</sup> Nor can the Commission require XM to pay a licensing fee for selling receivers that allow consumer recording that is lawful under the Audio Home Recording Act.

## **V. THE FAILED 2002 MERGER OF DIRECTV AND ECHOSTAR DOES NOT PROVIDE A BASIS FOR DENYING THE MERGER OF XM AND SIRIUS**

Some opponents<sup>19</sup> of the proposed XM/Sirius merger have argued that the merger should be denied based on its similarity to the failed merger of the direct broadcast satellite (DBS) providers Echostar and DirecTV. Upon closer examination, it is clear that this argument is not only a misguided attempt to capitalize on superficial similarities; it also ignores significant differences between the two mergers. When carefully considered, these distinctions illustrate that the failed 2002 Echostar/DirecTV merger is not instructive when analyzing the proposed merger.

The most fundamental difference between the mergers is the shape and definition of the relevant product market. In 2002, when the Echostar/DirecTV merger was denied, consumers' options for multichannel video programming were drastically different. Neither telephone companies nor webcasters were providing any significant multichannel video services. Today, however, the landscape is quite different. For example, Verizon's FiOS, AT&T's U-verse, and Virtual Digital Cable, an internet video-streaming company, are new alternatives to cable that provide additional ways for consumers to receive multichannel video services.

Similarly, there have been major changes in the audio programming market. Industry-wide competition over the past five years has prompted automobile dealers to insert iPod jacks in

---

<sup>18</sup> *Am. Library Assoc. v. FCC*, 406 F.3d 689 (D.C. Cir. 2005).

<sup>19</sup> *See, e.g.*, Statement of David K. Rehr, President and CEO, Nat'l Ass'n of Broadcasters. Hearing on Competition and the Future of Digital Music. United States House of Representative, Committee on the Judiciary Antitrust Task Force, Feb. 28, 2007, *available at* <http://judiciary.house.gov/media/pdfs/Rehr070228.pdf>, Statement of Dr. Mark N. Cooper, Director of Research, Consumers Fed'n of Am. Hearing on Competition and the Future of Digital Music. United States House of Representative, Committee on the Judiciary Antitrust Task Force, Feb. 28, 2007, *available at* <http://judiciary.house.gov/media/pdfs/Cooper070228.pdf>.

new vehicles and cellular phone companies to provide mobile music services. Further innovation growing out of this competition has led to the development of WiMax and other mobile Internet services, giving consumers yet another option for listening to audio programming of their choice.<sup>20</sup> Accordingly, today's XM and Sirius, unlike the Echostar and DirecTV of 2002, are a small part of a highly competitive audio entertainment industry that has expanded over the last five years to include not only terrestrial radio broadcasting, but also HD Radio, mobile Internet radio, and other mobile audio services such as MP3 players and cellular telephones.

Additionally, several of the Commission's own reasons<sup>21</sup> for denying the Echostar/DirecTV merger are not applicable to the proposed merger:<sup>22</sup>

*No Merger to Monopoly:* The Commission found that the Echostar/DirecTV merger would be a merger to monopoly in rural and other areas where consumers did not have access to cable.<sup>23</sup> Here, as there are a significant number of competitors available to consumers, rural customers included, the XM/Sirius merger would not result in a monopoly.

*Free Market Competition will Continue to Thrive:* The Commission denied the Echostar/DirecTV merger in part because the companies proposed a complex "national pricing" regime<sup>24</sup> to protect consumers against price inflation,<sup>25</sup> stating that "[i]t would be costly and difficult for the Commission" to monitor and enforce the proposed pricing system."<sup>26</sup> By contrast, the proposed merger would require no complex pricing plan. Instead, Public Knowledge proposes a simple condition requiring the merged company to maintain the current price of \$12.95 per month for three years. Beyond this, competition

---

<sup>20</sup> For example, Slacker aims to provide mobile radio via satellite and demonstrates the direction that competition fueled-innovation can take. See, e.g., Associated Press, *Start-Up Launches 'Personal Radio' Service*, Mar. 14, 2007, available at <http://online.wsj.com/article/SB117388069334336810.html>. See also *infra* note 6.

<sup>21</sup> *Application of EchoStar Commc'ns Corp.*, Hearing Designation Order, 17 FCC Rcd 20559 (2002).

<sup>22</sup> See Comments of League of Rural Voters, MB Docket No.07-57 (Jun. 21, 2007) (filing a study entitled "Sirius/XM vs. Echostar/DirecTV: A Fundamentally Different Merger for Rural Consumers"), available at [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519533927](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519533927).

<sup>23</sup> *Id.* at ¶ 99.

<sup>24</sup> It is useful to note that the "national pricing" plan was proposed to answer concerns about a lack of competition in the multichannel video market. Here, where satellite radio makes up only a small portion of the audio entertainment market, vibrant competition supersedes any need for a pricing system.

<sup>25</sup> *Id.* at ¶ 178—179.

<sup>26</sup> *Id.* at ¶ 183. The Commission also stated that effective enforcement of the pricing plan would require "extensive regulatory oversight, extending to tens of thousands of equipment retailers." *Id.* at ¶ 184.

from already vibrant national competitors such as terrestrial radio, MP3 players, and Internet radio will force the merged company to keep prices low, without a need for additional Commission oversight.

Differences in multichannel video and audio services further distinguish the proposed merger from the failed 2002 Echostar/DirecTV merger. Most revealing is that many, if not most, subscribers to cable and DBS purchase these services in order to receive better (or any) local TV reception.<sup>27</sup> Thus, “free” over-the-air TV has had little effect on the price of multichannel video services, as consumers do not consider one a replacement for the other, but rather subscribe to the multichannel services as a means to receive the free services. This is not the case with multichannel audio services. With some rare exceptions, XM and Sirius do not carry local radio stations, and consumers subscribe to those services only because they are willing to pay for content that terrestrial broadcasters do not carry. However, should satellite radio prices rise significantly or competitors (such as terrestrial radio) provide cheaper, comparable content, consumers will be unlikely to continue to subscribe to XM or Sirius.

Lastly, it is important to note that, in hindsight, denying the Echostar/DirecTV merger did not necessarily benefit consumers. Supporters of that merger argued that one strong satellite TV company would provide better competition to incumbent cable providers than two weak companies. Nevertheless, the merger was denied.<sup>28</sup> As a result, cable prices have continued to

---

<sup>27</sup> Before DBS providers were required to carry all local stations if they carried one such station, many rural residents would subscribe to get access to television of any kind, whether local or not.

<sup>28</sup> Some have speculated that the opposition of News Corporation, which had sought to purchase DirecTV, was very influential in this decision. See, e.g., Jeffrey Chester, *Murdoch Adds to Empire with Control of DirecTV*, ALTERNET, May 20, 2003, available at <http://www.mindfully.org/Reform/2003/Murdoch-Empire-DirecTV10apr03.htm>; Laura M. Holson and Seth Schiesel, *Diverse Groups Opposes Echostar-DirecTV Deal*, N.Y. TIMES, Jan. 30, 2002.

increase, and the two separate, weak, DBS companies lack the capacity to provide broadband service that can truly compete with cable.<sup>29</sup>

In this context, the parallels between Echostar/DirecTV and XM/Sirius are significant: one strong satellite radio company will compete with radio broadcasters, forcing them to provide better, more diverse programming and fewer commercials, particularly as broadcasters provide multiple HD Radio streams. As broadcasters are acutely aware, two weak companies are less able and unlikely to provide any competitive or political pressure on broadcasters.

## **VI. THE BROADCAST INDUSTRY'S OPPOSITION TO THE MERGER IS HYPOCRITICAL AND ANTICOMPETITIVE**

Claiming that it “fully supports competition on a level playing field,” the National Association of Broadcasters opposes this merger for a variety of reasons, including the argument that it would result in “state-sanctioned, monopoly control over the 25 MHz of spectrum allocated to satellite radio service,” that it “will not provide sufficient...public interest benefits,” and that it is “a government bailout for questionable business decisions.”<sup>30</sup> Among the many ironies in the NAB's opposition to this merger<sup>31</sup> is the broadcast industry's current pursuit of FCC relief allowing consolidation,<sup>32</sup> a movement motivated by the supposedly uncertain and deteriorating financial state of the broadcast industry.<sup>33</sup>

---

<sup>29</sup> For example, the separate DBS companies lacked the resources to bid successfully for new Advanced Wireless Services spectrum, access to which might have given them adequate broadband capacity to become a competitor to cable.

<sup>30</sup> Statement of David K. Rehr, President and CEO, National Association of Broadcasters, Hearing on Competition and the Future of Digital Music, United States House of Representatives, Committee on the Judiciary, Antitrust Task Force, Feb. 28, 2007.

<sup>31</sup> See Gigi Sohn, *From the Unmitigated Gall Department*, PUBLIC KNOWLEDGE POLICY BLOG, <http://www.publicknowledge.org/node/836>. For example, despite its alleged desire for a “level playing field,” the NAB is actively opposing any and all efforts to require their members to pay the same “performance” fees to artists that webcasters and satellite radio pays, going so far as to call that fee a “performance tax.” See also <http://www.publicknowledge.org/node/850>.

<sup>32</sup> Fears that granting the XM/Sirius merger will result in automatic approval for all future digital media mergers are unfounded. This merger, like all mergers, is attended by a unique set of facts that must be considered in determining

The NAB's opposition to the proposed merger is simply the last in a very long history of broadcaster efforts to place regulatory roadblocks in the path of the satellite broadcast industry.

**A. The NAB has opposed the development of satellite radio since licenses were first issued.**

As early as 1982 the NAB filed suit against the Commission in an effort to prevent the authorization of satellite radio (then called Digital Audio Radio Service, or DARS) and television. In 1994, the NAB opposed the issuing of licenses for operating any satellite radio technology (which was then called SDARS). In 1995, in an attempt to block issuance of SDARS licenses, the NAB filed reports from Kagan Research and Strategic Policy, arguing that that satellite radio "will fragment radio audiences and make local radio unprofitable." In 1997, even after SDARS licenses were awarded, the NAB continued to complain to the Commission about the grave damage to terrestrial radio from authorization of SDARS.<sup>34</sup>

In 1994, the NAB opposed CD Radio's (now Sirius) request to issue shares of common stock to raise capital.<sup>35</sup> The NAB continued its fight against deployment of SDARS satellites, demanding that CD Radio change its technical plan when it attempted to add a third satellite<sup>36</sup>

---

if it is in the public interest. In contrast, the level of consolidation achieved in the terrestrial broadcast market has had demonstrable effects against the public interest.

<sup>33</sup> See, e.g., Shira Ovide, *Clear Channel's Profit Declines 54%*, WALL STREET JOURNAL, Feb. 24, 2007 at A6; Associated Press, *Earnings Preview: CBS Corp.*, available at <http://www.chron.com/disp/story.mpl/ap/fn/4583381.html>, Feb. 26, 2007 (noting losses in the "troubled radio unit," apparently caused by "stagnation in the overall radio market"), Comments of the National Association of Broadcasters, FCC Quadrennial Ownership Review, MB Docket No. 06-121 (Filed Oct. 23, 2006) 29-35 available at <http://www.nab.org/Content/ContentGroups/Legal/Filings/2006/QuadrennialOwnership2006Final.pdf> ("In sum, the combination of competition from cable, satellite, the Internet and other digital technologies is forcing broadcasters to fight even harder in the advertising marketplace.").

<sup>34</sup> See "The NAB: A History of Hypocrisy," (Apr. 17, 2007), <http://www.orbitcast.com/archives/the-nab-a-history-of-hypocrisy.html>.

<sup>35</sup> See In the Matter of Request for Declaratory Ruling Filed by Satellite CD Radio, Inc., *Declaratory Order*. 9 FCC Rcd. 2569 (1994).

<sup>36</sup> See In re Establishment of Rules and Policies for the Digital Audio Satellite Serv., *Petition for Declaratory Ruling*, IB Docket No. 95-91 (Apr. 14, 2004) available at [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6516087974](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516087974).

and opposing the application of WCS Radio to deploy two satellites for DARS.<sup>37</sup> WCS Radio eventually withdrew its application.

**B. The NAB has opposed satellite radio using terrestrial repeaters.**

Shortly after the SDARS approval order was issued in 1997, the NAB went on the attack, characterizing itself as “an ardent opponent of SDARS” and demanding the prohibition of terrestrial repeaters.<sup>38</sup> In 1999, the NAB attempted to persuade the Commission to forbid the deployment of terrestrial repeaters until extensive proceedings to provide explicit authorization were conducted.<sup>39</sup> In 2000, the NAB demanded that the Commission require extensive technical filings from XM and Sirius before considering approval of satellite radio operators to supplement satellite feeds to repeaters with terrestrial feeds and insisted that the Commission prohibit use of terrestrial repeaters to transmit locally-originated programming.<sup>40</sup> Later, the NAB opposed requests from XM and Sirius for special temporary authority to operate DARS terrestrial repeaters.<sup>41</sup> More recently, in 2006, the NAB renewed demands for further regulation of satellite radio terrestrial repeaters.<sup>42</sup>

---

<sup>37</sup> Reply Comments of the Nat’l Ass’n of Broadcasters, In re Application of WCS Radio, Inc. SAT-LOA-1998 (Feb. 3, 1999), *available at* [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6006241630](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6006241630).

<sup>38</sup> Comments of the Nat’l Ass’n of Broadcasters, In re Establishment of Rules and Policies for the Digital Audio Radio Satellite, IB Docket No. 95-91, 1 (Jun. 13, 1997), *available at* [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=1851540001](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1851540001).

<sup>39</sup> See Nat’l Ass’n of Broadcasters, Ex Parte Filing, *available at* [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6009449567](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6009449567).

<sup>40</sup> Comments of the Nat’l Ass’n of Broadcasters, In re Establishment of Rules and Policies for the Digital Audio Radio Satellite Serv., IB Docket No. 95-91, *available at* [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6010955705](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6010955705).

<sup>41</sup> Comments of the Nat’l Ass’n of Broadcasters, In re XM, Radio, Inc. and Sirius Satellite Radio, Inc., IB Docket No. 95-91 (Aug. 23, 2001), *available at* [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6512763657](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512763657); Nat’l Ass’n of Broadcasters, Ex Parte Filing, In re IB Docket No. 95-91 (Sep. 14, 2001), *available at* [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6512765602](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512765602).

<sup>42</sup> Comments of Nat’l Ass’n of Broadcasters, In re Request of AT&T Inc., BellSouth Corp., Comcast Corp., NextWave Broadband Inc., NTELOS, Inc., Sprint Nextel Corp., Verizon Labs. Inc., and WaveTel NC License Corp., WT Docket No. 06-102 (Jun. 9, 2006), *available at* [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6518359477](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518359477).

**C. The NAB has opposed measures that would facilitate satellite providers' ability to provide local programming.**

Noting the potential for satellite radio to effectively and profitably utilize local programming like weather, news, and sports coverage, particularly after XM received a patent for "a method and system for providing geographic specific services in a satellite communications network," the NAB has vigorously opposed any use of terrestrial repeaters by satellite radio for locally-originated programming. In February 2001, the NAB filed an ex parte notice indicating its opposition to any locally-originated or locally-targeted programming on satellite radio. Later that year, the NAB again opposed satellite radio using terrestrial repeaters to transmit locally-originated programming,<sup>43</sup> and also demanded that the Commission prohibit local origination of satellite radio programming.<sup>44</sup> In March 2002, the NAB petitioned the Commission to condition SDARS repeaters on "iron-clad commitment that they will not be used to permit locally differentiated programming."<sup>45</sup> In April 2003, the NAB began to specifically target XM's offering of local weather services, and again in September 2003.<sup>46</sup> The NAB reiterated its opposition to satellite radio transmitting any locally-originated programming in 2004.<sup>47</sup> More recently, in this and the previous Congress, the NAB sought legislation to compel

---

<sup>43</sup> Comments of the Nat'l Ass'n of Broadcasters, In re XM, Radio, Inc. and Sirius Satellite Radio, Inc., IB Docket No. 95-91 (Aug. 21, 2001), *available at*

[http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6512763414](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512763414).

<sup>44</sup> Comments of Nat'l Ass'n of Broadcasters, In re Authorization of Satellite Digital Audio Radio Serv. Terrestrial Repeaters Network, IB Docket No. 95-91 (Dec. 14, 2001), *available at*

[http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6512975643](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512975643).

<sup>45</sup> Nat'l Ass'n of Broadcasters, Ex Parte Communication (Mar. 4, 2002), *available at*

[http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6513079502](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513079502). *See also* Nat'l Ass'n of Broadcasters, Ex Parte Communication (Mar. 14, 2002), *available at*

[http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6513081807](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513081807).

<sup>46</sup> Nat'l Ass'n of Broadcasters, Ex Parte Communication (Apr. 14, 2003), *available at*

[http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6513982013](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513982013). *See also* Nat'l Ass'n of Broadcasters, Ex Parte Communication (Sep. 15, 2003), *available at*

[http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6515082469](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6515082469).

<sup>47</sup> Nat'l Ass'n of Broadcasters, Petition for Declaratory Ruling, In re Establishment of Rules and Policies for the Digital Audio Radio Satellite Serv., IB Docket No. 95-91 (Apr. 14, 2004), *available at*

[http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6516087973](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516087973).

the Commission to prohibit satellite radio from offering any local traffic, weather, and public safety information.<sup>48</sup>

**D. The NAB's continued opposition indicates that terrestrial radio is a competitor to satellite radio.**

The NAB has continued these practices more recently with refusals by at least two broadcast groups to carry satellite radio advertising,<sup>49</sup> while another broadcast group insists that satellite radio carry broadcasters' scheduled advertisements when it programs channels on satellite radio.<sup>50</sup>

The NAB's aggressive opposition to satellite radio over the last decade is compelling evidence that the two audio entertainment services are, in fact, direct competitors. The time, effort, and resources that the NAB has devoted to challenging satellite radio at every step indicate that the NAB itself considers satellite radio one of its competitors in the broader audio entertainment market. Its opposition to the proposed merger, then, is hypocritical on two levels: first, the NAB opposes this merger at the same time that it seeks the Commission's blessing for its own consolidation efforts, and second, the NAB professes to enthusiastically support a competitive market while simultaneously devoting its energy to suppressing one of its own competitors: satellite radio.

## **VII. CONCLUSION**

If the proposed merger of XM and Sirius Satellite Radio survives antitrust analysis, Public Knowledge supports its approval subject to conditions that will promote diversity,

---

<sup>48</sup> Local Emergency Radio Service Preservation Act of 2007, H.R. 983, 110<sup>th</sup> Cong. (2007); Local Emergency Radio Service Preservation Act of 2006, S.2418, 109<sup>th</sup> Cong. (2006).

<sup>49</sup> See Sarah McBride, *Four XM Music Stations Will Start Running Ads*, WALL STREET JOURNAL, Mar. 8, 2006, available at <http://online.wsj.com/article/SB114178705518792190-email.html>.

<sup>50</sup> See *Clear Channel's New Plan for Satellite Radio: Make it Worse*, TECHDIRT, Mar. 8, 2006, <http://www.techdirt.com/articles/20060308/0836259.shtml>

preserve consumer choice and keep prices in check. By offering tiered programming, setting aside 5% of its capacity for noncommercial educational and instructional programming and freezing price increases for three years, the benefits of the merger will be passed on to the public. Furthermore, Public Knowledge urges the Commission to initiate a rulemaking to determine whether upholding the existing restrictions on satellite radio's ability to provide local programming is in the public interest.

Respectfully submitted,

Sherwin Siy  
Gigi B. Sohn  
Public Knowledge  
1875 Connecticut Avenue, NW  
Suite 650  
Washington, D.C. 20009  
(202) 518-0020

Elizabeth Gonsiorowski  
Kimberly Maynard  
Law Clerks  
Public Knowledge

July 9, 2007