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

In the Matter of	)	
	)	
Applications of XM Satellite Radio Holdings Inc., Transferor, and Sirius Satellite Radio Inc., Transferee, For Consent to Transfer Control	)	MB Docket No. 07-57
	)	
2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 06-121
	)	
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
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-235
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	

COMMENTS OF CLEAR CHANNEL COMMUNICATIONS, INC.

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COMMENTS OF CLEAR CHANNEL COMMUNICATIONS, INC.

Clear Channel Communications ("Clear Channel")[1] respectfully submits these comments on the above-referenced Applications of XM Satellite Radio Holdings Inc. ("XM"), Transferor, and Sirius Satellite Radio Inc. ("Sirius"), Transferee (collectively, the "Applicants" and the "Application"), seeking consent to transfer control of Commission licenses and authorizations held by Sirius, XM, and their subsidiaries pursuant to Section 310(d) of the Communications Act of 1934, as amended.[2]

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[1] Clear Channel Communications, Inc. is a global media and entertainment company specializing in "gone-from-home" entertainment and information services for local communities. Clear Channel owns 1,168 local radio stations and a leading national radio network operating in the United States that produces or distributes more than 70 syndicated radio programs and services for more than 5,000 radio station affiliations.

[2] See 47 U.S.C. § 310(d); Applications of XM Satellite Radio Holdings Inc., Transferor, and Sirius Satellite Radio Inc., Transferee, For Consent to Transfer Control, DA-2417, MB Docket No. 07-57 (June 8, 2007).

I. SUMMARY

The record of this proceeding already is replete with reasons why the proposed merger of the nation's only two providers of satellite digital audio radio service ("SDARS") should be rejected by the Commission due to the virtual certainty of anticompetitive and anti-consumer outcomes that could result from the proposed combination of XM and Sirius, and why the purported public interest benefits claimed by Applicants are neither certain, adequate nor merger-specific. These concerns have been articulated compellingly by broadcasters, antitrust experts and consumer groups, and form a sufficient basis to require rejection of this merger.

Of greatest concern to Clear Channel is that, under current regulatory conditions, permitting the merger of the only two SDARS competitors into a single, intramodal SDARS monopoly would create a firm that would be unconstrained by free, local radio, but at the same time would greatly undermine free, local radio's ability to provide a locally-focused and diverse audio service. That would be the case regardless of how one defines the relevant market for antitrust purposes. To mitigate the adverse effect of the proposed merger upon free, over-the-air, terrestrial broadcast radio, the Commission should determine contemporaneously to eliminate local radio ownership regulations. Absent such Commission action regarding local radio ownership rules, rejection of the proposed merger would appear to be the only course of Commission action that would be consistent with the public interest.

II. THE EXISTING RECORD IN THIS PROCEEDING ESTABLISHES A FORMIDABLE ARRAY OF REASONS WHY THE PROPOSED MERGER IS NOT IN THE PUBLIC INTEREST

Even before the Commission established a formal pleading cycle in this proceeding, the record already was very heavily weighted against approval of the proposed merger of XM and Sirius. Indeed, multiple parties – including independent experts in antitrust and competition law and a broad swath of consumer groups – provide multiple, compelling reasons why the Commission should reject the proposed merger, ranging from its violating the Commission's own standard of review for such mergers (including its specific rule barring the formation of an intramodal SDARS monopoly), to its impact on competition and consumer choice. These arguments create an insurmountable hurdle for Applicants, who bear the burden of proof, by a preponderance of the evidence, to show that approval of the merger would serve the public interest, convenience, and necessity.[3]

A. The Proposed Merger Is Prohibited Under FCC Rules, Thus Violating The Commission's Standard of Review Under Its Public Interest Test

Pursuant to Section 310(d) of the Communications Act, the Commission may only approve the transfer of licenses necessary for a merger of XM and Sirius if it determines that doing so would serve "the public interest, convenience and necessity."[4] The first prong of that test, based on the Commission's stated policy in several recent merger reviews, is to determine "whether the proposed transaction complies with the specific provisions of the

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[3] See, e.g., Time Warner-Comcast-Adelphia Order, 21 FCC Rcd 8218 ¶ 23; News Corp.-Hughes Order, 19 FCC Rcd at 483 ¶ 15. See also, AT&T-BellSouth Order, 22 FCC Rcd 5662, 5672 ¶ 19; SBC-AT&T Order, 20 FCC Rcd at 18300 ¶ 16; Verizon-MCI Order, 20 FCC Rcd at 18443 ¶ 16; and Comcast-AT&T Order, 17 FCC Rcd at 23255 ¶ 26.

[4] 47 U.S.C. § 310(d).

[Communications] Act, other applicable statutes and the Commission's rules."[5] In this case, the proposed merger violates the Commission's rule prohibiting SDARS licensees from merging with each other.[6] Such a clear violation of the Commission's legally binding rule warrants disapproval of the proposed merger.[7]

While the Commission could revise or waive its SDARS anti-merger rule, any such decision would be inconsistent with its policy of promoting intramodal competition. Indeed, approval of the proposed merger and the creation of an intramodal SDARS monopoly would be, as NAB states, "[not only…inconsistent with the anti-merger rule and the entire competitive SDARS scheme…, [it] would also be inconsistent with decades of Commission precedent and congressional policy favoring competition over monopoly."[8] AAI concurs in this view, stating that "…Applicants have the burden of persuading the Commission to…abandon its 'long-standing policy of promoting competition in the delivery of spectrum based communications services' (intramodal competition)."[9] As the Commission itself has noted, the Commission's reliance on competition in the licensing of spectrum – and its rejection of monopoly – spans multiple services – including cellular, PCS, CMRS and DBS.[10] Indeed, the same reasons driving

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5 AT&T Corp. Applications for Approval of Transfer of Control, 20 FCC Rcd 18290, 18300 ¶ 16 (2005); Echostar Communications Corp., 17 FCC Rcd 20559, 20574 ¶ 25 (2002) ("Echostar/DirecTV Merger Order").

6 *See* Ex parte of Larry Walke, National Association of Broadcasters, in MB Docket No. 07-57 (April 12, 2007) ("*April 12, 2007 Walke Ex Parte"),* attaching a memorandum dated February 23, 2007, from David H. Solomon to David K. Rehr ("*Solomon Memo to NAB*") at 2, 4 (citing the Commission's *Satellite DARS Report & Order,* 12 FCC Rcd at 5823 ¶ 170). *See also* Ex parte of Richard M. Brunell, American Antitrust Institute ("AAI"), MB Docket No. 07-57 (June 5, 2007) ("*AAI Comments*") at 4.

7 NAB further notes that the Commission's prohibition against one satellite DARS licensee acquiring control of the only other remaining satellite DARS license has binding legal effect as an "…'uncodified' substantive rule," due to its contemporaneous publication in the Federal Register. *See Solomon Memo to NAB* at 4, n. 17. *See also AAI Comments* at 5, n. 6. Clear Channel notes that the Commission recently has released a *Notice of Proposed Rulemaking* seeking comment on this very question, and further notes that a decision on the instant Application cannot occur prior to the Commission's resolution of that critical threshold legal matter.

8 Solomon Memo to NAB at 4.

9 *AAI Comments* at 4 (citing *Echostar/DirecTV Merger Order,* 17 FCC Rcd at 20559, 20598 ¶ 88).

10 See Echostar/DirecTV Merger Order at 20598 ¶ 88.

the Commission's prior rejection of the proposed merger of the nation's only two DBS licensees (DirecTV and Echostar) – that such a merger "…could likely undermine [the Commission's] goals of increased and fair competition…," apply with equal if not greater force in the instant case.[11]

In fact, Applicants offer no sustainable reason that could justify the Commission suddenly doing an "about-face" and overturning the decision it made originally to have no fewer than two SDARS licensees companies engage in head-to-head competition. There is no contention, for instance, that SDARS competition is an experiment that has failed; in fact, just the opposite is true: Sirius CEO Mel Karmazin has testified before Congress that both companies will succeed with or without their merger.[12] Furthermore, as discussed *infra*, the various efficiencies and consumer benefits claimed by Applicants are illusory because they can (and should) be attained without the merger. What, then, makes circumstances today any different from when the FCC determined to require intramodal SDARS competition? There are none. XM and Sirius simply ask that concentration replace competition as the policy best able to serve the public interest. However, their position is directly contrary to the dominant theme in the Communications Act, especially in the last two decades, that monopoly must give way to competition.

B. The Proposed Merger Raises Serious Anticompetitive and Anti-Consumer Concerns

Determining the impact a combined XM-Sirius would have on competition is another crucial prong of the Commission's public interest analysis of the proposed merger, and one by

[11] *Id.* at ¶ 3 (also cited in *Donovan Memo to NAB* at 5).

[12] *See AAI Comments* at 9, n. 21.

which the Commission has been guided by traditional antitrust principles.[13] Here again, the existing record already reveals why the proposed merger should be disapproved.

The American Antitrust Institute raises multiple concerns with regard to the proposed merger, concerns that are echoed by a bevy of consumer advocacy groups. These concerns stem principally from the fact that, as discussed *supra*, approval of the proposed merger would result in the elimination of any intramodal competition within the SDARS, competition the Commission historically has preferred, "…because [it] generally brings lower prices, greater diversity, more innovation and greater efficiency."[14] AAI concludes that, "…the merger poses a significant risk of anticompetitive effects, including higher prices, reduced quality and reduced consumer choice."[15]

AAI characterizes as "dubious" the purported public interest benefits of the merger. For example, AAI points out that one of principal benefits of the merger claimed by Applicants – that it "will allow the combined company to offer consumers programming choices on a more a la carte basis at lower prices," is "not cognizable because [it] is not merger specific," and that "Applicants have not explained what prevents them from offering a la carte programming today."[16]

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[13] See SBC A&T Merger Order, 20 FCC Rcd at 18302 ¶ 18; see also Echostar/DirecTV Merger Order, 17 FCC Rcd at 20575 ¶ 27.

[14] AAI Comments at 8.

[15] *Id* at 16.

[16] *Id.* at 10.

Similarly, Applicants' claim that the merger will result in more diverse programming through the consolidation of redundant programming[17] does not withstand critical scrutiny. As AAI notes:

> [A]s long as the merged company continues to operate two systems, which allows customers to receive substantially the same channel line up of either Sirius or XM on their existing receivers, there can be no additional programming. Indeed, until the merged company adopts a single system, the diversity of programming available to the public will be *reduced* because the Applicants promise to use existing channel capacity to provide the "best of the best" services on each service. This means that opportunities for niche programmers will be reduced over the foreseeable future … [possibly not until 2017 or 2018, when Sirius CEO Mel Karmazin expects the parties to be able to operate on a single platform].[18]

Additionally, Applicants' claim that the merger will yield interoperable receivers for consumers is belied by the fact that both XM and Sirius have for 10 years failed to comply with the Commission's *requirement* that such receivers be made available.[19] To point to such an important consumer benefit as necessitated by the elimination of all competition within the SDARS services makes a mockery of the FCC's long-ignored requirement.[20]

Consumer groups echo AAI's concern about the elimination of intramodal SDARS competition, warning that "…there is no circumstance more disturbing from the point of view of the antitrust laws and the Communications Act than a merger within a distinct product market that takes the number of competitors from two to one," and questioning strongly Applicants'

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[17] See Application at 12-13.

[18] *AAI Comments* at 12-13 (emphasis in original).

[19] *See SDARS Report and Order*, 12 FCC Rcd at 5796, ¶ 103; *see also* 47 C.F.R. § 25.144(a)(3)(ii).

[20] *See AAI Comments* at 10-16. *See also,* Ex Parte of Lawrence A. Walke, National Association of Broadcasters in MB Docket No. 07-57 (May 22, 2007) attaching an antitrust analysis of the proposed merger by the law firm of Crowell & Moring ("*Crowell & Moring Antitrust Analysis*") at 9.

claimed public interest benefits of the merger as "[un]supported by reliable evidence."[21] In particular, consumer groups focus on the negative impact of the merger on pricing, stating, "…only head-to-head competition delivers clear relief from anti-consumer, anticompetitive pricing."[22]

III. THE MERGER OF XM AND SIRIUS WOULD ADVERSELY AFFECT LOCAL RADIO BROADCASTERS

Regardless of the market definition, a combined XM-Sirius would threaten local radio's ability to provide a free, locally-focused and diverse audio service. As a consequence, a combined XM-Sirius will likely face less competition from free, local radio as XM-Sirius's power grows and free, local radio becomes increasingly marginalized.

A. A Combined XM-Sirius And The Peril of Content Exclusivity

The harm to local broadcasters posed by a combined XM-Sirius is especially evident in relation to the ability of local broadcasters to compete for content. The proposed merger would yield a new entity that would: (1) control an enormous swath of spectrum (greater even than that recently set-aside by Congress which could enable the creation of a nationwide interoperable *public safety network*), giving it an insurmountable spectrum advantage vis-à-vis local radio in every market in the country; and (2) have the incentive and ability to lock up high-value content, potentially shutting out free, local broadcasters from access to that content. With poorer content, local radio stations will lose listeners, and, consequently, advertisers, not because local radio

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[21] Regarding the XM-Sirius Merger: Monopoly or Competition From New Technologies: Hearing Before the Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, 110th Cong., March 20, 2007, Written Statement of Common Cause, Consumers Union, The Consumer Federation of America, Free Press, Media Access Project, and Prometheus Radio Project ("Consumer Groups") at 2 (the testimony was included as an attachment to the *April 12, 2007 Walke Ex Parte*).

[22] *Id.*

would face a better competitor after the merger, but because it would be able to offer only an inferior product to listeners and advertisers.

1. Spectrum Advantage

The merger of the only two SDARS licensees would result in the *control by a single licensee* of the *entire available spectrum allocated to the service*. As discussed below, such a concentration of ownership in a single commercial licensee of the entire available spectrum allocated to a single service has been rejected previously by the Commission as antithetical to its goals of increased and fair competition.

A combined XM-Sirius would control the entire nationwide grant of 25 MHz of spectrum allocated to the SDARS, putting in the hands of a single entity more spectrum than that which is allocated to the FM and AM radio broadcast services combined (21.18 MHz). On a practical and operational basis, *exclusive access* to this sizeable swath of spectrum would give a combined XM-Sirius control of more than 300 channels of audio programming. Incredibly, the spectrum grant to this one commercial entity would exceed even that (24 MHz) allocated by Congress that could enable a nationwide, interoperable public safety network (and even that block of spectrum likely will not be under the exclusive control of a single entity – either commercial *or* public safety).

By contrast, even in the largest markets, under the current local radio ownership rules, a single entity may control only slightly more than 1 MHz of spectrum, or up to 8 channels, and even then, only in an extremely limited geographical area (*i.e.*, a single radio market). Thus, a combined XM-Sirius would control nearly 25 times more spectrum, and 40 times more channels than any other single competitor in any given market (and even 2 to 3 times the number of channels for *all other competitors in that market* (AM and FM) combined).

Of course, because it is a national service, the combined XM-Sirius would enjoy this extraordinary spectrum advantage (which increases dramatically in smaller markets) in every local radio market, while even its largest competitor, unable to offer even a single national radio channel, would have no access to that national market.

The very thought of vesting in a single licensee ownership of the entire available spectrum allocated to a specific service is what made the proposed merger of the nation's only two DBS licensees "unthinkable." In that instance, the Commission found:

> We are concerned that ownership of all satellites in the full-CONUS orbital location by one entity…could likely undermine our goals of increased and fair competition in the provision of DBS service. We are also concerned that the claimed benefits of efficient and expeditious use of spectrum are outweighed by the potential harms associated with the concentration of ownership of key DBS spectrum licenses in a single licensee.[23]
>
> * * *
>
> The 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.[24]

The Commission's reasoning in the Echostar/DirecTV Order should be controlling here.

In short, if allowed to combine forces, the result of a merged XM-Sirius would be an entity that would control a block of spectrum that is an order of magnitude greater than any one of its terrestrial competitors, each of which would be restricted by FCC regulation from growing to constrain this dominant firm.

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[23] *Echostar/DirecTV Merger Order*, 17 FCC Rcd at 20562 ¶ 3.

[24] *Id* at 20661-62 ¶¶ 275-77.

2. Migration of High Value Content to Satellite And Its Attendant Anticompetitive Harm To Local Broadcasters and Local Advertisers

A combined XM-Sirius, freed of any need to compete with another national satellite radio service for program content, would have the means and incentive to use its market power to lock-up high value audio content. This trend, in the cable context, has drawn critical attention from some in Congress, who view the migration of high-value major league and college sports content (*e.g.*, Monday Night Football, Big Ten Football) from broadcast television to cable and satellite TV as not serving consumers or the public interest.[25]

In fact, were XM-Sirius strategically to attract high-value audio content away from free, local radio to its own national, subscription-based platform, it would set in motion a debilitating scenario, not only for local radio broadcasters, but ultimately for local advertisers as well. And there is no reason to believe it would not be the case: if free, local radio stations cannot obtain high-value content on terms consistent with their cost structure, they and their listeners would see an unavoidable decline in the quality of their local broadcast content. Such a decline would inevitably lead to a drop-off in listenership, which ultimately would deeply undermine local radio broadcasters' ability to attract local advertising. Such a weakened competitive posture would directly threaten free, local radio broadcasters' ability to carry out their mission and obligation to invest in programming and services that respond to the needs of their local communities.

Moreover, such a scenario would harm local advertisers, as well, which would be left with a Hobson's choice of a local radio service that, due to the flight of high-value content, has a

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[25] *See e.g.*, Ken Thomas, Associated Press, "*Congressman Concerned About Access To Big Ten Network*," June 26, 2007 (at http://www.examiner.com/printa-798945~Congressman_concerned_about_access_to_Big_Ten_Network.html?cid=tool-print-top) (quoting House Energy and Commerce Committee Chairman John D. Dingell, "…I am increasingly concerned about the migration of previously free, over the air content to a pay television tier…").

diminished capacity to reach mass local audiences, versus a national satellite audio service with no meaningful capability to target local audiences or offer cost-effective advertising to local advertisers. Clear Channel urges that neither of these scenarios is an acceptable outcome, either from a public interest or competitive point of view, and warrants rejection of the merger.

B. Impact of Uneven Regulation on Free, Local Radio

The proposed merger would create a single entity that would have a significant spectrum advantage over all other regulated providers of audio content. High-value content would continue to migrate away from free, local radio to pay services, and free, local radio likely would see a harmful decrease in its revenue from advertising. This competitive squeeze on local terrestrial broadcast radio would be all the more troubling because, unlike other providers of audio content, free, local radio *alone* is subject to not only stringent local ownership limits – directly inhibiting its ability to compete against other audio services – but also to a raft of other operational, content and economic regulations. By contrast, satellite radio and other forms of audio entertainment are essentially unregulated. With no ownership restrictions, they are effectively unlimited in their ability to grow. This disparity of regulation would undermine the one service — terrestrial radio — that actually has and continues to have local employees in every market they serve and has an obligation to provide localism and diversity.

IV. THE COMPETITIVE HARMS POSED TO LOCAL RADIO BY THE PROPOSED MERGER OF XM AND SIRIUS CAN ONLY BE MITIGATED BY CONCURRENT ELIMINATION OF ALL LOCAL RADIO OWNERSHIP RULES

All of the threats posed, under any market definition, by the proposed XM-Sirius merger are magnified by the fact that – unlike SDARS and every other audio service from which consumers can presently choose – free, local radio *alone* is precluded by law from realizing *further meaningful growth*. As Clear Channel consistently has advocated, elimination of archaic ownership restrictions is entirely warranted wholly apart from the proposed XM-Sirius merger. Moreover, Clear Channel has shown that the greater efficiencies and economies of scale flowing from increased ownership by the numerous radio groups would yield competitive benefits that are pro-consumer, including the ability to increase investments in more locally-produced and focused programming and services, and increased diversity in programming and formats.[26]

Indeed, free radio finds itself today in a financial vice, being artificially constrained from investing in new stations that could provide station owners with the financial flexibility to improve their services and thus more effectively compete. Were the Commission to grant the XM-Sirius Applications without contemporaneous ownership relief for free local radio, it would severely tilt the market against free, local radio, undermining the Commission's and Congress's longstanding goals of promoting competitive, locally-focused and diverse audio programming, and local radio's unique responsibility to provide a truly local service. Indeed, without such relief, free, local radio should not be considered an effective counterweight to a SDARS monopoly.

Conversely, were the Commission to eliminate the local radio ownership rules, such a regulatory change could at least provide free, over-the-air radio the flexibility it already needs to be strong and viable, better able to discharge its duty, as directed by the Commission and Congress, to provide all Americans with free, high quality, local, diverse audio programming services.

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[26] *See, e.g.*, Comments of Clear Channel in MB Docket No. 06-121, MB Docket No. 02-277, MM Docket No. 01-235, MM Docket No. 01-317 and MM Docket No. 00-244 (January 16, 2007) ("*Clear Channel Quadrennial Review Comments*") at 17-41; Comments of Clear Channel in MB Docket No. 04-233 (Nov. 11, 2004) at 9-29.

A. **The Radio Ownership Reforms In The 1996 Telecommunications Act Reveal that Further Ownership Reform Is A Prerequisite to Local Radio's Being Considered An Effective Competitor To A Monopoly SDARS Provider**

The deregulatory actions taken by Congress in the 1996 Telecommunications Act enabled free, local radio to lift itself out of dismal economic circumstances to a more sustainable posture, enabling terrestrial broadcast radio to meet consumers' needs for more locally-focused and diverse programming. Indeed, the contributions that local radio stations are able to make to their local communities in terms of diversity and local programming and services – what makes free, local radio an attractive service to listeners – is largely due to the fact that station clusters can better support diverse and locally-targeted programs. Formats and content that appeal to small demographic groups simply do not generate enough revenue to support the costs associated with running a single, stand-alone radio station. When a station airing a niche format or particularized programming is part of a cluster, however, an owner can spread costs among multiple stations, paving the way for experimentation and the provision of programming that serves unique, and often otherwise unserved or underserved, audiences.

Larger station groups can also take more risks. The operator of a single station cannot afford to fail – if he does, his business will end. Even the operator of a small cluster of, for example, three stations, necessarily has a low tolerance for risk-taking. If one station among three fails, then the company's bottom line is devastated. However, if one format among ten fails, the financial impact is far more diffuse. This dynamic enables larger group owners to take risks with creative formats because the price of failure is far lower than with a smaller group.

Larger station groups can also invest more resources in upgrading facilities and in news and other local programming. Indeed, as it has grown, and as discussed in the context of the

Quadrennial Regulatory Review, Clear Channel's per-station capital expenditures have increased substantially.[27]

While the greater degree of common ownership in radio that was permitted after the 1996 Telecommunications Act has resulted in efficiencies and economies of scale that are largely responsible for lifting free, local radio out of the financial hole in which it found itself prior to enactment of the Act, local radio is by far the least consolidated of all media, based on market share. The 13,700-plus radio stations in the United States are owned by more than 4,400 owners.[28] Clear Channel is but one of the companies owning radio stations, and while it may be the largest single owner with 1168 stations,[29] it owns only approximately 8.5% of the nation's total stations; the 90 percent-plus other stations are owned by thousands of other companies. By contrast, the recording industry is dominated by 4 companies, which together garner 81.9% of the recorded music market.[30] In the film production industry, 6 companies have a 90.3% share

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[27] *See Clear Channel Quadrennial Review Comments* at 42 ("In 1994, when Clear Channel owned only thirty-nine stations, its total capital expenditures were $1.9 million, with $240,000 out of that figure spent on local news operations, across all of its stations. Average per-station expenditures at that time were only $49,000 per station overall, with $6,000 of that being spent on capital expenditures relating to news operations. Between 1999 and 2002, by contrast, during the period that Clear Channel acquired a substantial number of stations as permitted under the 1996 Act, its total capital expenditures rose to an average of more than $114 million per year, with capital expenditures on news-related purchases averaging more than $10 million per year. During this period, Clear Channel spent an average of $111,250 per year on total capital expenditures for each station, with an average of $10,000 per station per year earmarked for news-related capital expenditures. These figures represent an increase of more than 127% in overall capital expenditures, and a 66% increase in news-related capital expenditures, on a per-station basis, between the 1994 and 1999-2002 period. And in 2006, Clear Channel will spend a total of more than $94.2 million overall on capital expenditures, with more than $13.1 million of that earmarked for news.")

[28] These figures are based on data from the FCC Media Bureau (found at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269784A1.pdf) and BIA.

[29] As announced by Clear Channel on November 16, 2006, Clear Channel is in the process of selling 448 of its radio stations, all located outside the top 100 U.S. media markets (as well as all of its television stations). *See* "Clear Channel Announces Plan to Sell Radio Stations Outside the Top 100 Markets And Entire Television Station Group" (available at: http://www.clearchannel.com/Corporate/PressRelease.aspx?PressReleaseID=1825).

[30] *See* Nick Bell, Bear Stearns Equity Research, *EMI (EMI.L-255p) – Outperform*, at 2 (Jan. 31, 2006). The 81.9% figure was calculated by adding the shares for each of the four companies listed.

of the market,[31] and, as to movie theatres, "one company alone . . . owns 18% of all U.S. screens."[32] The top 5 cable companies enjoy a 95% share of the market,[33] and the top 5 wireless telecom companies have an 81% share.[34] Of course, in both the DBS and SDARS services, only 2 entities have a 100% share. In the radio industry, by contrast, the top 15 companies do not garner even *half* of the market, only enjoying a combined 45.6% share.[35]

Yet, while free, local radio remains unconcentrated, it is not, and cannot be, a meaningful constraint on satellite radio. The four thousand radio owners cannot provide a meaningful alternative to XM or Sirius, each of which has exclusive and unregulated control over the programming of over 100 channels, and cannot match XM's or Sirius's ability to acquire content. With the current ownership caps in place, free, local radio cannot be considered anything near a meaningful competitor to a merged XM-Sirius.[36]

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[31] *See* Jeffrey B. Logsdon, BMO Capital Markets, *Weekend Box Office a Little Light, but Still Sees Year-Over-Year Gain*, at 5 (Sept. 5, 2006). The 90.3% figure was calculated by adding the shares for the top six companies listed.

[32] Robert Marich, *Radio M&A Slides to Historic Norms, Weighed Down by Soft Ads*, Kagan INSIGHTS (July 19, 2006), http://www.kagan.com/ContentDetail.aspx?group=5&id=223.

[33] *See* Doug Mitchelson, Deutsche Bank, *Cable/Satellite Spotlight: 1Q06 Preview – It's All About the VOIP Ramp*, at 9 (Apr. 9, 2006). The 95% figure was calculated by adding the number of subscribers for each of the top five cable companies, and dividing that number by the total number of cable subscribers. Subscriber numbers for Comcast and Adelphia were listed separately in the report, but combined for purposes of this calculation, because the merger between the two companies has now closed.

[34] *See* Ted Schadler, Forrester Research, *The State of Consumers and Technology: Benchmark 2006*, at 9 (July 27, 2006). The 81% figure was calculated by adding the shares for each of the top five companies listed.

[35] *Who Owns Radio*, Top 50 Radio Group Owners by Revenue, http://www.whoownsradio.com/WowRankings.asp?sType=r (last visited Sept. 27, 2006) (subscription required, on file with Clear Channel) (indicating that the top 15 radio group owners had 2005 revenues of approximately $9.793 billion); Radio Advertising Bureau, Radio Facts: Annual Revenue, http://www.rab.com/public/pr/yearly.cfm (indicating total 2005 revenue for the radio industry of approximately $21.455 billion) (last visited Oct. 20, 2006). The 45.6% figure was calculated by adding the advertising revenues for each of the top fifteen radio group owners provided by *Who Owns Radio*, and dividing that number by the total radio advertising revenue provided by the Radio Advertising Bureau.

[36] To be sure, the antitrust analysis that would rationalize the XM-Sirius merger would also justify substantial relaxation of the ownership limits applicable to free radio. However, unlike the rule change XM and Sirius are demanding, the relief sought here for free, local radio would not supplant current antitrust precedent and would not result in a single free radio provider controlling all local channels in any market.

V. CONCLUSION

There is already ample evidence in the record that the proposed merger of the nation's only two SDARS licensees, beyond the threshold fact that it would violate the Commission's unambiguous prohibition against such a combination, should be rejected by the Commission due to the anticompetitive and anti-consumer effects that would flow from creating an intramodal SDARS monopoly.

Regardless of the market definition, the proposed merger, if approved, would undermine the viability of America's free, local radio stations, which would not be able to match the merged firm's ability to obtain high value content, largely because they are unable to respond to this competitive threat through any meaningful growth.

For these reasons, the Commission should deny the proposed merger of XM and Sirius as not serving the public interest, convenience and necessity. Indeed, the only circumstance under which approval of the proposed merger might survive scrutiny under the Commission's public interest test would be if the Commission were to contemporaneously eliminate all local radio ownership regulations, thus freeing local radio broadcasters to be in a position to match the competition between XM and Sirius that would be lost.

Respectfully Submitted,

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