

Introduction

The Applicants are the sole satellite radio broadcasters licensed by the FCC to serve the United States with satellite-delivered radio programming. By these applications, the licensees seek to merge into a single entity and to conduct their business as the sole provider of satellite radio service to the public. Notwithstanding clear Commission policy against single monopoly control of the entire spectrum assigned for the satellite radio service,³ the Applicants do not offer to relinquish control over either license that they hold or to relinquish any portion of the spectrum rights conveyed by the licenses.

Accordingly, for the reasons explained below, TAP opposes grant of the Applications as presented to the Commission. As originally articulated by the Commission and consistent with its precedent in other services, the Commission cannot and should not bequeath monopolistic control over the entire satellite radio broadcast service to a single licensee. Furthermore, here and now in this proceeding the Commission has the rare opportunity to increase the diversity of ownership, particularly for minorities and the underserved.

Only if the Applicants propose or otherwise agree to relinquish a significant amount of the satellite radio bandwidth to an independent minority entity to program and control, and to provide satellite transmission services to that entity, should the Commission consider that its objectives of diversity in program control and ownership would be satisfied and the public interest served.

The record before the Commission in this proceeding already contains substantial

³ See *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd 5754 at 5823, ¶ 170 (1997) (“*Establishment of Rules and Policies*”). Whether this policy should be continued, amended, or repealed is the subject of a Notice of Proposed Rulemaking recently issued in this proceeding, *see* FCC 07-119 (rel. June 27, 2007).

arguments and analyses that persuasively demonstrate multiple reasons why the Applications should not be granted. TAP will not address or repeat many of those arguments not because it disagrees with them, but because the arguments and analyses already are compelling. Rather, we seek to add information to the record on issues that otherwise may not be completely addressed and to focus on the need for diversity of control and voices and a continuation of incentives for technological innovation in the satellite radio service. IF the Commission should ultimately decide that the Applications might be granted, it should do so only subject to conditions consistent with these objectives and the overriding public interest.

Single, Unfettered Control of Satellite Radio Broadcasts Would Harm Consumers and Remove Incentives for Innovation

Spectrum with which to provide satellite radio services is limited to a narrow 25 megahertz band, notwithstanding that double this amount -- 50 megahertz -- was allocated internationally for the satellite radio service in the United States. As explained by the Commission in 1997, it could make available only one-half of the 50 megahertz allocated for satellite radio broadcasting.⁴ Thus instead of the three or four licensees originally envisioned, the Commission provided only two licenses. It made clear when doing so that “one licensee will not be permitted to acquire control of the other remaining satellite DARS license. This prohibition on transfer of control will help assure sufficient continuing competition in the provision of satellite DARS service.”⁵

Ownership and Program Control

Notwithstanding this explicit prohibition, XM and Sirius now ask the Commission to approve their merger and the joining of the only two licenses. Doing so without providing for

⁴ See *Establishment of Rules and Policies*, *supra* note 3 at ¶¶ 5-6.

⁵ *Supra* note 3 at ¶ 170.

another service provider is unthinkable. The entire selection of programs would be in the hands of one single entity – something that the Commission viewed as untenable in 1997 and which is just as untenable today.

The total number of channels provided consumers is not the issue. Rather, the issue is whether a single entity will control which programs will be broadcast to the public and which programs will be denied carriage. Having more than a single “gatekeeper” is essential to the public interest in order to ensure that programs unpopular or disliked by one particular entity, for whatever reason, nevertheless may have an opportunity to find another outlet for delivery to consumers. This is the safeguard that listeners obtained with the Commission’s two-provider policy, and ensuring that this safeguard continues is essential to the public interest. Furthermore, in this proceeding the Commission has the rare opportunity to increase the diversity of ownership, particularly for minorities and the underserved.

Availability, Pricing, and Programs

Much has and will be written about the potential effect of this merger on consumer prices and program control and competition. We observe that there appears to be a real danger that prices will rise and program choices will remain the same or decline, notwithstanding the Applicants’ protestations to the contrary.

XM and Sirius use two incompatible transmission systems, and it will take many years before the systems can be merged technically because of embedded consumer equipment as well as the satellite location of the transmitters. How can consumers “enjoy the benefits” of the merger when the satellite receiver they recently purchased can work only with XM or Sirius, but not both? There is no magical solution – or at least none has been offered in the record – for how consumers will be able to receive more programming than now unless they trash their

current receiver if and when new receivers become available that are capable of decoding the signals of both providers.

The only way to increase the number of programs available to the millions of current subscribers appears to be to consolidate programming on either XM or Sirius. But half of the subscribers – either those of XM or those of Sirius -- would be forced to purchase a receiver of the other provider in order to receive all of the programming. This hardly can be viewed as practical in a marketplace where millions of relatively new receivers exist, many of them built into automobiles. Will consumers be required to install completely new receivers in their cars and trucks or go without service?

Given that NO multi-standard radio exists today in the marketplace, the only way apparent that new expanded programming can be made available to consumers any time soon seems to be to lessen or terminate service to one-half of the existing consumers, or to require that everyone buy a second receiver to use with their first receiver. Which will it be? Or is the promise of more program choices only feasible a decade from now, after today's single-standard receivers and the satellites that transmit to them have been replaced?⁶

It also is unclear from the record exactly what is being proffered with regard to lower prices for more programming. For example, if XM's MLB broadcasts are to be made available to Sirius subscribers, multiple programs now on Sirius would have to be terminated since Sirius already is using its full channel capacity and Sirius subscribers can't receive XM broadcasts with their current receivers. What broadcasts will be deleted to make room for this "new"

⁶ A comparison can be drawn to the transition from an analog standard to a digital standard for over-the-air television. The transition will take a decade, even with the help of a \$1.5 billion appropriation from Congress to help consumers upgrade their receivers. *See, e.g.,* <http://www.ntia.doc.gov/dtvcoupon/consumer.html> (last visited July 6, 2007).

programming? Will consumers have to pay hundreds of dollars for new receivers to receive the full panoply of programming, if and when such receivers are marketed? Or will multiple channels be deleted from the current program schedule of each service to make room to simulcast the most popular programming on both systems? Who will serve those who subscribed for the programs that will be deleted?

Technological Innovation

The importance of ensuring at least two providers goes beyond program control and competition in the program marketplace. Satellite radio technology has been used to deliver radio programs to the public for just a few short years. The benefits of competition extend beyond program selection, to the technology itself and its uses. The existing competition between XM and Sirius for listeners, for example, has resulted in Sirius devoting resources to exploring the technology for means to deliver multiple channels of video programming to portable and mobile devices.⁷

Reducing satellite radio to a single licensee will deter innovative new technologies and services, perhaps including some of the current plans and developments not yet rolled out. It is competition that provides the impetus to invest in technological innovation and new programs and services. New satellite and broadcast services and the technologies to provide them are unlikely to be developed and delivered in a monopoly environment.

⁷ See, e.g., Sirius Taps Microsoft for Mobile Video, describing plans of Sirius to launch a mobile video service to complement its audio service:

http://news.com.com/Sirius+taps+Microsoft+for+mobile+video/2100-1041_3-5513229.html

(last viewed on July 6, 2007).

An Alternative

We start from the premise that approval or disapproval of the Applications need not be a zero-sum proposition. The applicants deny that the merger is needed because of financial distress, and indeed, Sirius' CEO clearly stated that both XM and Sirius will be able to continue to compete with each other if the applications are denied. Nevertheless, if continuing as two completely separate entities is not attractive, then the applicants and the Commission might explore options such as voluntary requirements or imposed conditions with the public interest goal of increasing minority ownership.

Like struggling newspapers are allowed to share facilities and services in the same market and yet remain editorially independent, XM and Sirius might be required to convey control over some portion of its bandwidth – such as one-quarter (6.25 MHz) – and to provide an independent minority competitive provider carriage services. This would permit the satellite entities to recover something more than their cost for transmission services while providing the public interest benefit of diversity in the ownership and control of the program services.

Conclusion

Providing an alternative for programmers, listeners, and advertisers while fostering the Commission's competitive and ownership diversity goals would benefit consumers and listeners, even while allowing XM and Sirius to realize the efficiencies for which they strive. Without some effective and real means for introducing diversity in the ownership of this service, however, the Applications should be denied.

Respectfully submitted,



Stanley Kelly
Executive Director
The Telecommunications Advocacy Project
1221 Eleventh Street, NW
Washington, DC 20001

Of Counsel:

David R. Siddall, Esq.
Paul, Hastings, Janofsky & Walker LLP
875 15th Street, NW
Washington, DC 20005
Tel: (202) 551-1700

July 9, 2007

DECLARATION OF STANLEY KELLY

I declare upon personal knowledge that the Telecommunications Advocacy Project is interested in this proceeding as a representative of citizens who are consumers of satellite digital radio services and small businesses interested in expanding growth opportunities in the direct broadcast satellite industry.

I further declare upon personal knowledge that the factual assertions in the foregoing *Petition to Deny* are true.

I declare under penalty of perjury
that the foregoing is true and correct.
Executed on July 9, 2007

A handwritten signature in cursive script that reads "Stanley Kelly".

Stanley Kelly
Executive Director
Telecommunications Advocacy Project

CERTIFICATE OF SERVICE

I, Miracle-Dawn Alston, hereby certify that, on this 9th day of July, 2007, copies of the foregoing Petition to Deny were delivered by UPS overnight service to the following:

Richard E. Wiley
Robert L. Pettit
Peter D. Shields
Jennifer D. Hindin
Wiley Rein LLP
1776 K Street, N.W.
Washington, DC 20006

Gary M. Epstein
James H. Barker
Brian W. Murray
Latham & Watkins LLP
555 Eleventh Street, N.W.
Suite 1000
Washington, DC 20004

Patrick L. Donnelly
Executive Vice President, General Counsel,
and Secretary
Sirius Satellite Radio Inc.
1221 Avenue of the Americas
36th Floor
New York, NY 10020

Dara Altman
Executive Vice President, Business and
Legal Affairs
XM Satellite Radio Holdings Inc.
1500 Eckington Place, NE
Washington, DC 20002

Miracle-Dawn Alston