Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications for Consent to the	)	
Transfer of Control of Licenses	)	
	)	MB Docket No. 07-57
XM Satellite Radio Holdings Inc.,	)	
Transferor,	)	
to	)	
	)	
Sirius Satellite Radio Inc.,	)	
Transferee	)	

COMMENTS IN OPPOSITION TO THE CONSOLIDATED APPLICATION FOR AUTHORITY TO TRANSFER CONTROL

When the Commission issued the Further Notice of Proposed Rulemaking regarding DARS in 1997, it clearly anticipated two DARS licensees. The Commission's goal was to create a competitive structure for DARS, and in doing so, decided the best way to do that was to auction two licenses. Indeed, the Commission stated in the Memorandum & Order that other audio media are not perfect substitutes for DARS and therefore requires a second nationwide broadcasting service. The Commission further concluded that it agreed with commenters that there should be more than one Satellite DARS license awarded. The work done by the Commission to serve the public interest by creating two Satellite Radio companies during the DARS proceeding demonstrate the Commission's vision and intention for

DARS in the short term and long term. The proposed merger typifies a lack of hope for the competitiveness and longevity of DARS. In the interests of the public over the long term, the Commission should deny the proposed application for transfer of control and reject the merger of the only two DARS licensees in the United States.

The creation of two separate services created choice among the public. Because both services offer original and unique programming, it would not be in the public's best interest to take away their right to choose between two competitors and two distinct styles of programming and content. Upon the licensing of DARS, the Commission also noted that the public is benefited by the new jobs created by two providers. A merger would surely mean layoffs of many employees, some of whom have been there since the licenses were granted barely a decade ago.

Whether or not Satellite Radio is considered an industry of its own, it is still very new. Neither company has allowed the industry to mature enough that a merger can be considered. A merger at this stage would be too early and would affect the satellite radio industry as a whole.

During the House Judiciary Hearing, Mel Karmazin, CEO of Sirius, stated that XM and Sirius compete solely with free radio. While Satellite Radio providers do compete with terrestrial radio, the competition they face with each other cannot be discounted. Every annual report for both of the companies always discusses the competition with the other Satellite Radio provider. If Satellite Radio competes with free radio, why would they have millions of subscribers? What would make anyone pay for radio if they can get it free? There is a distinct and fundamental value that people find in Satellite Radio, a value that is intrinsically different than that of terrestrial radio's offerings. Mr. Mark Cooper was absolutely right during the same Hearing when he stated that Satellite Radio complements local radio. Satellite Radio is uncensored, national, mobile, ubiquitous in its signal from the utmost rural areas to the most urban, and dynamically programmed with an abundance of content that terrestrial radio cannot produce; these facts alone create a distinct difference between that of terrestrial radio and they cannot be considered perfect substitutes that could warrant a merger. Mr. Karmazin stated at the House Judiciary Hearing, "Next to every Satellite Radio is an AM/FM button, so for us to duplicate what they do very well is not part of our plan." He went on to state that they do not sell local advertising and localized programming is not part of their business model. But Mr. Karmazin continued to argue throughout the remainder of the Hearing that Satellite Radio competes with free radio. If it is not the plan of Satellite Radio to duplicate what terrestrial broadcasters do, in what way are they actually competing as he claims? By that logic, Satellite Radio is a compliment to terrestrial radio instead of a direct substitutive competitor. A national service complimenting a local service should require more than one national provider. If Satellite can compete with local radio but local cannot directly compete with Satellite, then there must be at least two Satellite providers in direct competition with each other.

Besides, consolidation in radio has already long proven to have a bad reputation. People speak of Clear Channel and how they monopolize the radio industry; are not companies like Clear Channel and the way they have uniformed radio to the point of monotony the very reason DARS was considered in the first place? During the DARS proceeding, the DARS licensees debated with the NAB about the quality of radio and the reasons why radio had worsened over the years of consolidation and maturity which created the need for a service like DARS that would serve public interest. If that is true, then the lesson behind Clear Channel's consolidations should serve as a basis for what may happen to Satellite Radio in the future if all of the DARS spectrum were controlled solely by one company. While the differences between local radio and Satellite Radio are distinct, Clear Channel's attempt at nationalizing local radio and the reputation that has followed demonstrates the deteriorating effect that consolidation in Satellite Radio would cause.

Mr. Cooper's case that Satellite Radio can aggregate demand demonstrates a distinct difference from local radio. Local radio cannot aggregate demand in small markets, especially for niche programming and foreign programming that Satellite Radio provides. If a businessman wants to listen to CNBC, no local radio station could acquire enough local market demand to warrant a dedicated station for it. But with Satellite Radio, he or she as well as any other listener in the country can have the ability to listen to CNBC ubiquitously and seamlessly. Terrestrial radio simply cannot provide that level of niche programming. This creates an ability that only Satellite Radio can provide and there simply must be more than one provider of that kind of content. Indeed, Internet radio may be able to provide streaming of content like CNBC, but providing its signal could never be ubiquitous and seamless as that of Satellite Radio. In the middle of the most rural areas of Texas and Montana where cell coverage is scarce, Satellite Radio easily covers that area while Internet radio and terrestrial radio cannot afford to broadcast there. Satellite Radio can aggregate the demand of rural and urban listeners scattered across the country. No other broadcast medium can effectively compete by aggregating demand the same way as Satellite Radio. One provider would monopolize this unique ability. There must be choice for all consumers in where to receive news and valuable information, whether the consumer is rural or urban.

In addition to this niche programming that Satellite Radio provides, each of the two companies has their own exclusive and original content offerings. It would simply not be fair to the consumer to consolidate that exclusive content and make it available to people from a single company. Even Mr. Karmazin has stated in a recent interview that Sirius offers channels that simply cannot be found elsewhere.

Mr. Cooper also stated that Mr. Karmazin's case for synergies between the two companies would mean that competition is considered wasteful as redundant resources are underutilized. Senator Dorgan agreed that any two companies, no matter what industry they are in, could find synergies within their resources. While synergies may exist in the DARS licensees, it would be foolish to reason that these companies should merge simply to take advantage of those resources. Competition is never wasteful and it is an illusion to suggest that taking advantage of synergies outweigh the benefits of head to head competition.

To anyone studying the DARS proceeding, it is absolutely clear that the Commission worked very hard in handling international allocations of the DARS spectrum, analyzed the market and impending need for a new service like DARS, and weighed heavily its impact on the future of radio and consumer choice. The Commission's decision to license two DARS entities was done carefully with considerable understanding of the markets and the industries involved. A merger would simply reduce the Commission's work and decisions into a misunderstanding of what they are doing in the long term. As evident in the DARS Report & Order and Further Notice of Proposed Rulemaking, the Commission wisely foresaw two national radio services each competing head to head as well as both complementing and competing with terrestrial radio. A merger would undo years of analysis and planning by the licensees and the Commission.

With regard to competition of Satellite Radio with the iPod and other electronic distribution products, again Satellite Radio serves to complement these products. Satellite Radio does not compete with the iPod in broadcast services. The iPod is simply a storage device, not a broadcast receiver. The iPod cannot receive live news channels such as CNBC, it cannot receive traffic and weather updates, and must be customized and personalized with content relative to the tastes of its owner. While Satellite Radio caters to the entire country all at once, the iPod is a personal storage device. If the iPod competes with Satellite Radio, why does XM's Pioneer Inno portable radio have the ability to store MP3 content as an iPod does? If a storage device competes with a broadcast medium, then what would XM gain by incorporating competing technology in its receiver? The storage aspect of an iPod or any other MP3 player complements that of a live broadcast and does not perfectly or even directly serve to substitute it. XM & Sirius make the case that new automobiles contain iPod and MP3 jacks for easy listening of storage devices and that a merger would allow them to compete more effectively with these recent developments. However, virtually all automobiles contain CD players as well, and have contained them since XM and Sirius signed on their first subscribers. XM and Sirius have successfully been able to attain millions of subscribers despite the ubiquity of the CD player. Most CD players in automobiles these days play rewritable CDs and MP3 encoded CDs, much like the iPod. While the iPod has more capacity than a CD, they are virtually identical digital storage mediums. Millions of people clearly understand the difference between the live broadcast of Satellite Radio and the stored playback of a CD or MP3 to be willing to subscribe as they do. Why are XM & Sirius not worried about the CD player in virtually every automobile as they are about the iPod?

In the case of the DirecTV/EchoStar proposed merger, the FCC did not include DVDs and video cassettes in examining the relevant market. Accordingly, the Commission cannot consider CDs, iPods and other audio storage medium in the case for the XM/Sirius merger.

But unlike DirecTV and EchoStar, Sirius and XM are just now promising tiered pricing and newer entry points for the consumer. Why is a tiered pricing model warranted only as a condition of the merger? Tiered pricing is an evolutionary pricing model; there is no reason it should not have already been attempted by either XM or Sirius. Consumers are forced to be in favor of the merger simply to enjoy the certain content they want. Is this not a delusion to hide the truth that consumers are actually losing the number of choices they have in Satellite Radio? The same reasoning can be placed behind the case for the interoperable radio requirement set forth by the Commission in 1997. At the Hearings, Mr. Karmazin made the case that they had designed and built such a radio and it existed but could not be marketable without a subsidy. Indeed, the cost on such a radio would be high for the consumer, but there are people out there who would pay for it.

Instead of trying harder to put this radio into the hands of consumers, Mr. Karmazin dangles the prospect in front of consumers of finally marketing it after ten years in the hope that they would favor the merger.

As evident in the comments for this Proceeding, consumers who favor the merger have illustrated that their primary desire is to receive the competition's programming on one receiver. If that is the case then a merger of the only two Satellite Radio companies is simply overkill. An interoperable radio would provide for the wishes of the consumer in addition to tiered pricing models. A merger is not required for these two issues to be resolved for the consumer. The public interest can certainly be served by simply having an interoperable radio in the market and tiered pricing by both companies. This will allow consumers not to have to resort to paying the full price for both services, but rather a tiered price for both that may be nearly equal to what they are paying already for more than they bargained for. The public interest can easily be provided for without a merger.

Even if a merger were granted, the public interest would likely not be served in the long term by this merged entity. During all of the Hearings at least one person has brought up the issue that Satellite Radio's audience is dramatically small compared to that of terrestrial radio and therefore they would not be able to exploit the consumer or the market and express monopoly power. That may be the case for now, since both of these companies are so new and the market for Satellite Radio is still young. In twenty years though that could be a very different story, and the only Satellite Radio company in the country serving tens of millions of people or even more is a monopolistic idea. Even if the Commission allocated new DARS bandwidth in that ten year span, the barriers to entry are extremely high. Even Mr. Karmazin said that both companies would have to keep their current infrastructure in place until older OEM radios become obsolete which would take 10 to 12 years. By then would one company be able to express monopoly power in the market? The long term prospects of this merger must be considered with the growth that Satellite Radio has already had. During one of the Hearings, it was mentioned that the cable TV companies made that same argument when they first started and now the growth and market penetration is obvious. Indeed, if the merged company was determined to be a monopoly in ten or twenty years, it would be nearly impossible to split the company into more than one company. By then the interoperable radio will be standard and would receive the entire DARS spectrum. New satellites will have been launched that transmit the entire DARS spectrum as well. It would be virtually impossible to split the infrastructure into the two original companies. The only solution would be to allocate new spectrum and grant it to the split company or to a new entrant, and again, the barriers to entry are extremely high.

Satellite Radio is therefore a unique product that is entirely national with a signal that is inherently ubiquitous across the entire country. It is also uncensored, does not solely depend on advertising revenue, and it can offer many forms of exclusive niche programming that local radio cannot offer. Accordingly, for the aforementioned reasons I urge the Commission to consider that Satellite Radio is entirely unique to other forms of broadcasting and audio distribution, this merger is not in the public interest, and the purported "benefits" that Sirius and XM have proposed could easily be made available to the public without the need for a merger of the only two licensees of DARS in the United States.

Respectfully submitted,

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