

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

In the Matter of: )  
XM Satellite Radio Holdings Inc., )  
                                  *Transferor* )  
                                  ) )  
and ) )  
                                  ) )  
Sirius Satellite Radio Inc., )  
                                  *Transferee* )  
                                  ) )  
Applications for Consent to the Transfer )  
of Control of Licenses, XM Satellite Radio )  
Holdings Inc. to Sirius Satellite Radio Inc., )  
as Amended )

MB Docket No. 07-57

**PETITION TO DENY**  
**OF THE CONSUMER COALITION FOR**  
**COMPETITION IN SATELLITE RADIO**

Christopher J. Reale  
Executive Director  
Consumer Coalition for Competition  
in Satellite Radio ("C3SR")  
1718 M Street, NW  
#335  
Washington, DC 20036  
202.558.7024

Julian L. Shepard  
D. Cameron Prell  
Benjamin D. Arden  
WILLIAMS MULLEN  
1666 K Street, NW  
Suite 1200  
Washington, DC 20006  
202.833.9200

*Attorneys for C3SR*

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## SUMMARY

Sirius Satellite Radio Inc. (“Sirius”) and XM Satellite Radio Holdings Inc. (“XM”) seek Commission consent to the transfer of licenses in connection with their plan of merger. The proposed merger will completely eliminate competition in satellite radio service, with no meaningful opportunity for competitive entry in the future. Sirius and XM are the only two firms licensed by the Commission to provide satellite radio service, which is the only nationwide, multi-channel, commercial-free radio service in the nation. The Consumer Coalition for Competition in Satellite Radio (“C3SR”), representing Sirius and XM subscribers, opposes the merger.

Consumers have a substantial stake in the proposed merger, and stand to lose the many benefits of competition in satellite radio. The Commission’s concern must extend not only to current subscribers, but to consumers-at-large who eagerly await price declines with continued competition. From a consumer perspective, satellite radio service is unique. No other commercial-free radio service is available in the marketplace today which provides a similar multi-channel mobile audio service with a ubiquitous national footprint. Recent survey research indicates that most of the unique characteristics of satellite radio (commercial-free music, national footprint, and multi-channel offerings) were important, or very important factors, in most consumers’ decisions to subscribe. Cost was also an important factor for the vast majority of subscribers.

There are no meaningful merger-related gains for consumers in this merger. When subscribers were asked whether they would be willing to pay more to receive the programming currently offered by both XM and Sirius, nearly three-quarters of the respondents said “no.” Moreover, a price freeze is an illusory pseudo-benefit. First, it requires a counter-

intuitive assumption – subscription prices would rise, not fall, with continued competition.

Second, it masks the reality that subscription price is but one part of a larger value equation. If price is held constant, but a subscriber receives less, then a price freeze does not protect the subscriber.

Consumers will lose commercial-free satellite radio with this merger, because it will eliminate competition. The merger will result in a rapid transition to advertising. Sirius CEO Mel Karmazin has promised this to Wall Street. Moreover, subscribers will lose some of the channels they may value the most. There simply is no way to cross-sell the content of each system on the other without reducing the total number of channels on each. So, even if a price freeze appeared to have value, there is a bait-and-switch element to this transaction: consumers will get fewer overall channels, with commercials.

Because the Sirius/XM merger is a merger to monopoly for all consumers in all areas, it is important for the Commission to consider the adverse impacts on consumers both within and outside of the larger Arbitron markets, especially in the areas where there is service by few, if any, local radio stations. C3SR provides the Commission with an analysis of geographic areas that have few, if any, local radio signals. The analysis reveals the extent of potential harm resulting from this merger by identifying rural, unserved and underserved geographic areas where satellite radio service may be the only available radio service, or where it is critically important because there are few, if any, free local radio stations. In 1997, when the FCC found that the public interest was served in granting licenses to Sirius and XM, the technological potential to provide service to rural and mountainous sections of the country that had historically been underserved by terrestrial radio was an explicit part of that public interest

finding. The consumers who are most vulnerable to a satellite radio monopoly are among the majority of all subscribers – those who reside in small cities, towns, or rural areas.

In sum, the Merger Parties have failed to meet their burden of proof under the public interest standard. This merger is a merger to monopoly under the antitrust laws that will harm consumers in many ways. This view is supported by several reputable economists and antitrust experts, including Professor J. Gregory Sidak, whose views have been made a part of the record by C3SR. The Merger Parties have only sought to cloud the antitrust issues by advancing an overbroad, fanciful market definition without legal precedent. C3SR has provided the Commission with a thorough assessment of the proposed merger under the relevant antitrust standards. This merger is a violation of the Clayton Act and contrary to the public interest.

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**COMPETITION IN SATELLITE RADIO**

The Consumer Coalition for Competition in Satellite Radio (“C3SR”),<sup>1</sup> by its attorneys, pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended (the “Communications Act” or the “Act”),<sup>2</sup> and Public Notice DA 07-2417,<sup>3</sup> hereby submits this Petition to Deny the above-referenced applications for authority to transfer control (the “Applications”) filed by XM Satellite Radio Holdings Inc. (“XM”) and Sirius Satellite Radio

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<sup>1</sup> C3SR is an independent, not-for-profit corporation organized under the laws of the District of Columbia, and has received financial support from the National Association of Broadcasters (“NAB”). The purpose of C3SR is to promote the interests of satellite radio subscribers in opposition to the proposed merger of Sirius and XM. Accordingly, C3SR is a party in interest in this proceeding pursuant to 47 U.S.C. § 309(d)(1). The affidavit of Christopher J. Reale, the founder of C3SR, a person with personal knowledge of the facts herein, is attached hereto as Exhibit A.

<sup>2</sup> 47 U.S.C. § 309(d)(1).

<sup>3</sup> *Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. Seek Approval to Transfer Control of FCC Authorizations and Licenses*, DA 07-2417 (released June 8, 2007).

Inc. (“Sirius”).<sup>4</sup> The Applications were filed in furtherance of an Agreement and Plan of Merger executed on February 19, 2007, whereby Sirius and XM (collectively, the “Merger Parties”) would combine to create a single Satellite-Delivered Digital Audio Radio Services (“SDARS”) provider, thereby eliminating all competition in SDARS without any meaningful opportunity for competitive entry. For the reasons set forth herein, and in Expert Declaration of J. Gregory Sidak Concerning the Competitive Consequences of the Proposed Merger of Sirius Satellite Radio, Inc. and XM Satellite Radio, Inc.,<sup>5</sup> and Supplemental Declaration of J. Gregory Sidak,<sup>6</sup> C3SR hereby opposes the Applications and respectfully requests that the Applications be denied.

## I. INTRODUCTION

In 1997, the Federal Communications Commission (“Commission” or “FCC”) authorized only two providers of SDARS. All of the spectrum available for SDARS (25 MHz) was equally divided between the two licensees.<sup>7</sup> The Commission explicitly rejected a single monopoly provider for SDARS in favor of competition.<sup>8</sup> To ensure continued competition, the Commission expressly forbade one SDARS licensee from subsequently conveying its license to the other licensee.<sup>9</sup> Moreover, the Commission expressly required both SDARS licensees to

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<sup>4</sup> *Applications of XM Satellite Radio Holdings Inc., Transferor, and Sirius Satellite Radio Inc., Transferee, For Consent to Transfer Control* (filed March 20, 2007).

<sup>5</sup> Expert Declaration of J. Gregory Sidak Concerning the Competitive Consequences of the Proposed Merger of Sirius Satellite Radio, Inc. and XM Satellite Radio, Inc. (Mar. 16, 2007) (“*Sidak Declaration*”), filed by C3SR in this proceeding on March 28, 2007.

<sup>6</sup> Supplemental Declaration of J. Gregory Sidak (July 9, 2007) (attached hereto at Exhibit B) (“*Sidak Supplemental Declaration*”).

<sup>7</sup> *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Bands, Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 5754, para. 41 (1997) (“*SDARS Order*”).

<sup>8</sup> *Id.* at para.170.

<sup>9</sup> The Commission has acknowledged that the Applications are in direct conflict with this prohibition. See *Notice of Proposed Rule Making*, MB Docket No. 07-57, para. 1 (released June 27, 2007). C3SR reserves the right to address the issues in the NPRM separately, to the extent they are not addressed herein.

certify that their systems would include an interoperable receiver design, a feature which would permit SDARS subscribers to switch from one system to the other, without replacing their SDARS receivers.<sup>10</sup>

Unfortunately, neither Sirius nor XM have complied in good faith with the Commission's interoperable receiver requirements.<sup>11</sup> Hence, today, Sirius serves a separate, isolated set of 6 million subscribers, with over 130 channels; and XM serves an isolated 7.7 million subscribers, and is the largest SDARS provider, with over 170 channels. Both SDARS licensees provide nationwide service on a private-carrier subscription basis, which is virtually commercial-free and without broadcast content-regulation.<sup>12</sup> Typically, after-market receivers range in price from approximately \$40.00 to \$300.00, with basic after-market installation costs in automobiles ranging from \$40.00 to \$72.00.<sup>13</sup> A high-quality, fully-integrated after-market in-dash receiver with parts and installation may cost as much as \$1,000.00.<sup>14</sup> Factory-installed

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<sup>10</sup> See *SDARS Order*, *supra* note 7, at paras. 102-107.

<sup>11</sup> In recent Congressional Hearings, Sirius CEO Mel Karmazin admitted that the interoperable SDARS receiver remains only a "design" – not a reality. Neither Sirius nor XM has manufactured and marketed an interoperable receiver because an interoperable receiver it would enable subscribers to switch SDARS providers and induce subscriber "churn." Not surprisingly, SDARS enjoys one of the lowest churn rates of any subscription communications services in history. *Sidak Declaration*, *supra* note 5, at para. 22 (churn rate less than 2 percent).

<sup>12</sup> Both SDARS licensees offer explicit content not available on terrestrial radio. XM identifies 9 channels that feature "frequent explicit language." XM Channel Guide, *available at* [http://www.xmradio.com/pdf/channel\\_guide.pdf](http://www.xmradio.com/pdf/channel_guide.pdf). The explicit content on Sirius includes, but is not limited to, the Howard Stern Show, Comedy Uncensored and Playboy Radio. Sirius Channel Guide, *available at* <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=ChannelLineup&cid=1139320914821>.

<sup>13</sup> Receiver and installation costs based on advertised prices at Circuit City ([www.circuitcity.com](http://www.circuitcity.com)) and Best Buy ([www.bestbuy.com](http://www.bestbuy.com)). Additional costs will likely be incurred for high-end receivers and special installation at local car-audio vendors.

<sup>14</sup> According to Crutchfield, an expert in car audio and a retailer of Sirius and XM, the cost of a dealer installed XM satellite radio sound system in a 2005 Honda Odyssey ranges from \$950 to \$1000. See *Satellite Radio In My Car*, *at* <http://www.crutchfield.com/S-zuhUfzeLE5J/satelliteradio/incar.html>.

receivers vary widely in price. Toyota dealers offer an integrated in-dash receiver on some models as a \$300.00 option, plus an additional \$300.00 for installation.<sup>15</sup>

## II. THE CONSUMER INTERESTS AT STAKE IN THE PROPOSED MERGER

The interests of consumers should remain at the forefront of the Commission's public interest analysis, and those interests should be paramount. Satellite radio service was created to serve consumers, and consumers will be harmed by the proposed merger. The majority of SDARS subscribers have purchased receivers which cost hundreds of dollars with installation, and most subscribers are parties to a service contract of at least one year in duration.<sup>16</sup> Some subscribers have purchased lifetime subscriptions.

The public interest would not be served if such subscribers are made the victims of a satellite radio monopoly. No consumers should be deprived of the benefits of competition by a merger that eliminates all choice in SDARS providers. Even though subscribers, today, are essentially hostages of the systems to which they subscribed, they at least had a choice of the features and program offerings of two different providers before they subscribed. While Sirius and XM have made it extremely difficult to exercise the right of choice, subscribers today can switch systems at a cost (stranded investment in receivers and installation). But there really are no substitutes for satellite radio service.

From a consumer perspective, satellite radio service is unique. No other commercial-free radio service is available in the marketplace today which provides a similar multi-channel mobile audio service with a ubiquitous national footprint. Based on recent survey

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<sup>15</sup> Source: Invoice for purchase of 2007 Toyota Camry Hybrid with Sirius satellite radio receiver from Koons Tysons Toyota, Vienna, VA (Oct. 31, 2006).

<sup>16</sup> Press Release, Wilson Research Strategies, Survey of Satellite Radio Subscribers Executive Summary 1 (July 9, 2007) ("Wilson Survey"), available at [http://www.w-r-s.com/press/WRS\\_NAB\\_Sat\\_Radio\\_Survey\\_Press\\_Release\\_070710.pdf](http://www.w-r-s.com/press/WRS_NAB_Sat_Radio_Survey_Press_Release_070710.pdf)

research, most subscribers purchased satellite radio service for use in their cars.<sup>17</sup> Most subscribers listen to satellite radio while they are traveling to and from work. Most have daily commutes of 30 minutes or more.

Satellite radio subscribers chose satellite radio service over all other alternative sources of audio at the time they subscribed. Subscriber rates for both Sirius and XM have skyrocketed over the last few years. During that time, AM/FM local radio, iPods, MP3 players, CDs, Internet radio,<sup>18</sup> cellular/PCS audio offerings, and other audio entertainment options were available to consumers – but these consumers chose satellite radio. They did so because of the unique qualities of SDARS.

When asked about their decision to subscribe to satellite radio, 87% of subscribers indicated that commercial-free music was an important factor in their decision (66% indicated that commercial-free music was very important).<sup>19</sup> In addition, multi-channel offerings and nationwide service were important factors to 77% of subscribers.<sup>20</sup> Eighty percent of subscribers said cost was an important factor in their decision to subscribe, of that number, 40% indicated it was very important.<sup>21</sup>

Ten years ago, when the Commission authorized SDARS, the marketplace was replete with consumer-electronic options for the enjoyment of audio entertainment. Pre-recorded media on cassettes and CDs was ready available to consumers for use in the home, in cars, and in portable devices. The not-so-recent advent of the iPod and MP3 storage devices does not

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<sup>17</sup> Wilson Survey, *supra* note 16, at 1.

<sup>18</sup> More than two-thirds of satellite radio subscribers report that neither they, nor anyone in their household, listen to Internet radio. *Id.* at 2.

<sup>19</sup> Wilson Survey, *supra* note 16, at 1.

<sup>20</sup> *Id.* at 2.

<sup>21</sup> *Id.*

meaningfully change that picture.<sup>22</sup> The Commission then did not consider pre-recorded media to be sufficiently comparable to satellite radio's live, multi-channel service to justify a monopoly SDARS provider. For very sound reasons, the Commission should not reverse itself now.

Moreover, the Commission then did not consider local radio service to be comparable to satellite radio service. In fact, it is not. First, local radio service is advertiser-supported, while subscription satellite radio service is generally commercial free. Second, local radio service is subject to the FCC's broadcast regulatory regime with public interest obligations, which include restrictions on program content that are not shared by SDARS licensees. Satellite radio offers entertainment choices that are not permissible on local radio stations during most day parts, including morning or afternoon drive time. Most importantly, there are many locations outside of urban areas where there are few, if any, local radio signals.

This view of SDARS' uniqueness was recently affirmed in the Commission's annual report on the status of competition in domestic and international satellite services, in which the Commission relied on "antitrust law, economic theory, and U.S. Department of Justice ("DOJ") and Federal Trade Commission ("FTC") *Horizontal Merger Guidelines*" to "identify the product and geographic markets in which providers of satellite communications services compete with each other and with service providers that use non-satellite technologies."<sup>23</sup> Based on its analysis, the Commission determined that the relevant product market for Sirius and XM

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<sup>22</sup> These devices are improved substitutes for pre-existing, pre-recorded media. The iPod stores more than an audio CD.

<sup>23</sup> *Annual Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Communications Services, First Report*, 22 FCC Rcd 5954, para. 29 (2007) (citing Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (1997) (originally issued on April 2, 1992, revised April 8, 1997) ("*Horizontal Merger Guidelines*" or "*Guidelines*") ("*Satellite Competition Report*"). The FCC also defined the geographic market as "national." *Id.*

was SDARS, and that the two entities were the only competitors using either satellite technology or non-satellite technology (e.g., terrestrial radio) in the SDARS market.<sup>24</sup>

The pre-merger SDARS market, as defined by the Commission, is highly concentrated. The Herfindahl-Hirschman Index (“HHI”), when calculated for revenue share, was nearly 5,800 (based on 69.7% revenue share for XM and 30.3% revenue share for Sirius). When calculated based on total subscribers, the HHI was 5,400 (XM accounted for 64.1% of subscribers, compared to 35.9% for Sirius).<sup>25</sup> As the companies trend toward an equal market share (both in subscribers and revenue) the HHI will approach 5,000 – a duopoly market with two equal competitors. To put this into perspective, the *Horizontal Merger Guidelines* consider a market with an HHI of above 1800 to be highly concentrated. For such markets, it will be presumed that mergers that increase the HHI by more than “100 points are likely to create or enhance market power or facilitate its exercise.”<sup>26</sup> The post-merger HHI in the SDARS market will be 10,000 (complete concentration) – an increase of approximately 4,200 to 5,000 based on current market share.

Even with such substantial pre-merger concentration, there can be no doubt that all consumers, especially the current subscribers, have greatly benefited from competition in SDARS. Competition in SDARS has produced many consumer benefits, including relatively stable prices, continuous equipment improvements, an ever-increasing diversity of programming, and the maintenance of a dominantly commercial-free format. Given the current growth trend in

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<sup>24</sup> *Satellite Competition Report*, *supra* note 23, at paras 55-57.

<sup>25</sup> *Id.* at Table 4 (calculating HHI based on 2005 financial and subscriber data contained in each company’s annual SEC 10-K report).

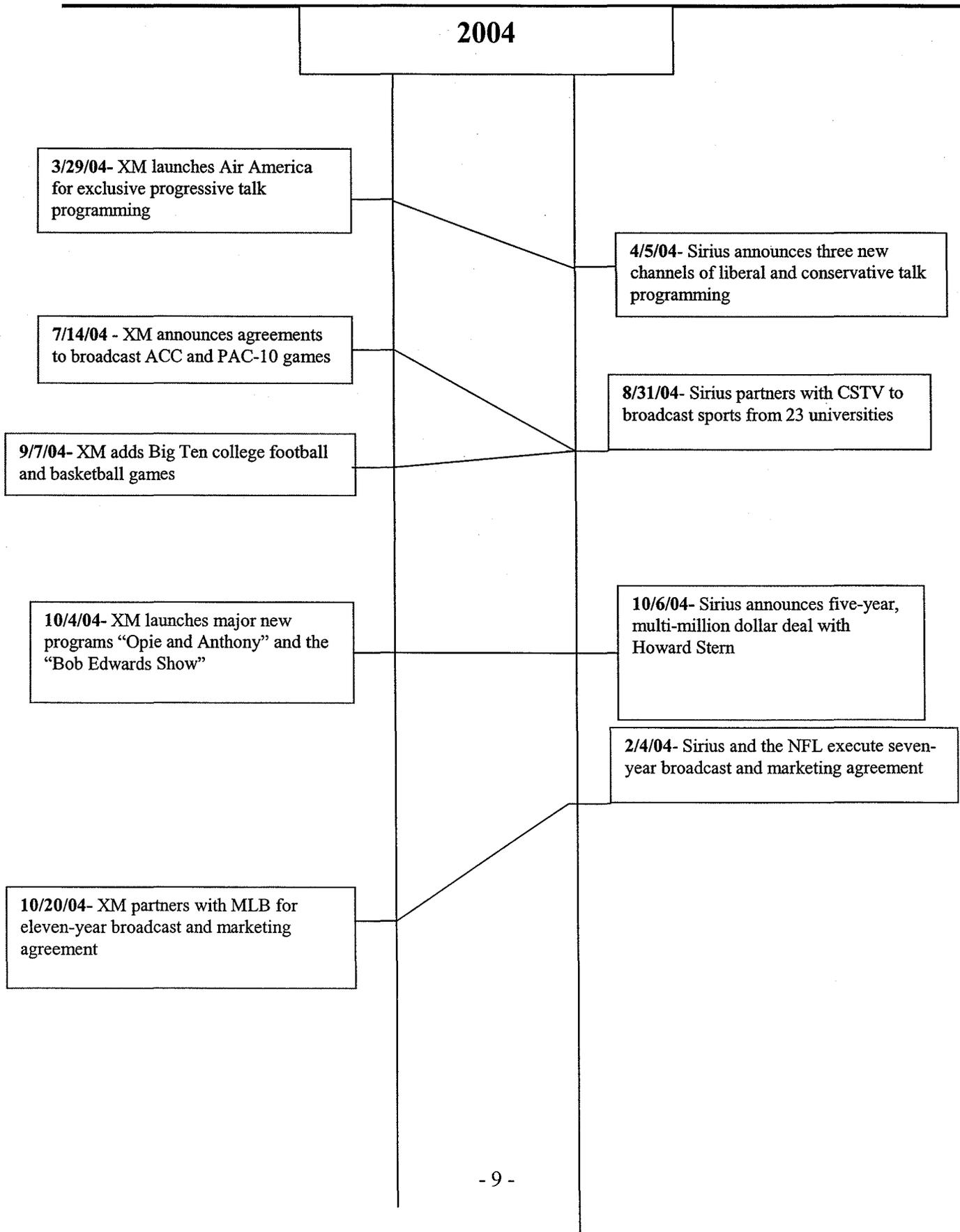
<sup>26</sup> *Horizontal Merger Guidelines*, *supra* note 23, at § 1.51.

SDARS, subscription prices can be expected to fall if competition continues, and the features, programming, and other services can be expected to improve.

The following information, drawn from the news releases of Sirius and XM, illustrates the competitive increases in equipment features and program offerings by each satellite radio provider to date. The benefits of SDARS competition given this stark record of quality improvements in satellite radio over the past three years are self evident.

[TEXT CONTINUES ON NEXT PAGE]

**DIRECT CONSUMER BENEFITS OF COMPETITION  
BETWEEN SIRIUS AND XM**



2005

1/5/05- XM announces the offering of thirteen new Panasonic head units

1/5/05- Sirius announce the availability of new tuner

3/23/05- XM announces agreement with Hyundai to install XM satellite radios

3/1/05- 3/23/05- Sirius announces partnerships with seven auto manufacturers to install Sirius satellite radios

4/13/05- XM announces partnership with Zipcar to install XM satellite radios

8/9/05- XM announces launch of Spanish language sports channel

9/2/05- Sirius announces it will air Spanish language broadcasts of NFL games

9/6/05- XM announces new women's talk channel featuring Ellen Degeneres and Tyra Banks

9/2/05- Sirius announces launch of Cosmopolitan branded women's channel

11/2/05- XM announces its service will be factory installed option in Nissan models

10/31/05- Sirius and Daimlerchrysler extend exclusive relationship

12/21/05- XM announces it will broadcast 14 college bowl games

12/21/05- Sirius announces it will broadcast Bowl Championship Series

2006

1/2/06- XM begins broadcasting Fox News Talk.

2/2/06- XM launches "Grammy Radio"

2/7/06- XM announces coverage of World Baseball Classic

2/9/06- XM signs \$55 million deal with Oprah Winfrey

2/13/06- XM announces coverage of Big East college basketball and football

03/06-07/06- XM offers complete coverage of FIFA World Cup

5/3/06- XM launches Bob Dylan show

10/31/06- XM announces launch of Andretti Racing show

2/17/06- Sirius announces broadcast of Fox News Talk Channel

3/14/2006- Cosmo Radio debuts on Sirius

2/15/06- ESPN Deportes debuts on Sirius

1/9/06- Howard Stern debuts on Sirius

3/9/06- Sirius announce the coverage of every game of the NCAA basketball tournament

09/19/06- Sirius and Chelsea Football Club announce exclusive broadcasting agreement

9/21/06- Sirius launches The Who Channel

12/14/06- Sirius launches the "Driver's Seat" for in-race NASCAR access

This competitive climate in SDARS has served the public interest. However, the resulting consumer benefits will cease forever if the proposed merger is consummated. An SDARS monopoly will destroy competition. As designed by the Merger Parties, this merger will never allow meaningful competitive entry in SDARS in the foreseeable future. In a recent congressional hearing, Sirius CEO Mel Karmazin was asked when the Merger Parties could divest of one of the two SDARS systems after the merger is consummated – it was completely unclear from his answer whether the Merger Parties will ever divest of one of the systems.<sup>27</sup> Mr. Karmazin's rationale for hoarding all 25 MHz of SDARS spectrum indefinitely was to prevent existing satellite radio receivers from becoming obsolete, as all the existing satellite radio receivers are incapable of receiving the signals of both competing services.<sup>28</sup> Migration to one satellite system, or the other, would force original subscribers to purchase new equipment. Of course, the only reason the existing receivers would become obsolete is the failure of the Merger Parties to honor the spirit of their regulatory obligation to produce an interoperable receiver.

The Commission has not authorized any additional spectrum for the provision of SDARS. Without such spectrum, a hypothetical new entrant could not establish a nationwide radio network (using satellites or any other transmission method) to rival that of Sirius or XM. Even with that spectrum, it took Sirius and XM nearly five years and billions of dollars to simply initiate operations. Any new entrant would need at least that much time to become a meaningful

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<sup>27</sup> *Hearing of the Telecommunications and the Internet Subcommittee of the House Energy and Commerce Committee: The Digital Future of the United States: Part II, the Future of Radio*, March 7, 2007 (testimony of Mel Karmazin, CEO, Sirius Satellite Radio) (transcript obtained from Federal News Service).

<sup>28</sup> *Id.*

competitor capable of imposing price discipline on the existing monopoly provider. Within the relevant two-year time frame, there will not be any competitive entry into the SDARS market.<sup>29</sup>

### **III. THE MERGER WOULD LEAVE CONSUMERS VULNERABLE TO MONOPOLY PRICING**

C3SR commissioned Professor J. Gregory Sidak to prepare an expert declaration analyzing the potential competitive impacts of the proposed merger on consumers, which was submitted to the record of this proceeding on March 28, 2007.<sup>30</sup> Specifically, Professor Sidak was asked to evaluate and comment on whether SDARS should be considered a distinct product market for purposes of analysis under the antitrust laws, and to assess the potential pricing effects of the proposed merger. Based on all relevant and publicly available information at the time, Professor Sidak concluded that: (1) SDARS is a distinct antitrust product market; (2) the proposed merger constitutes a monopoly under any reasonable market definition, and would result in unacceptable levels of market power under a more “expansive” market definition; (3) SDARS providers will not likely fail in the absence of a merger; (4) the market efficiencies propounded by Sirius and XM in their merger application would not result in real benefits to consumers; and (5) consumer welfare would not be advanced or preserved by the proposed merger.<sup>31</sup> Professor Sidak’s Declaration in its entirety is hereby incorporated by reference.<sup>32</sup>

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<sup>29</sup> The DOJ and the FTC will not consider competitive entry alternatives that “cannot be achieved within two years from initial planning to significant market impact.” *Horizontal Merger Guidelines*, *supra* note 23, at § 3.2. According to the *Horizontal Merger Guidelines*, if significant market impact will not occur within the two-year time horizon, the competitive entry “will not deter or counteract” the anticompetitive effect of proposed transaction. *Id.* at § 3.0.

<sup>30</sup> See *Sidak Declaration*, *supra* note 5.

<sup>31</sup> *Id.*

<sup>32</sup> Because the Sidak Declaration was prepared before the Applications were filed, C3SR asked Professor Sidak to supplement his analysis. See *Sidak Supplemental Declaration*, *supra* note 5.

Among other things, Professor Sidak applied the antitrust definitions and criteria established by the *Horizontal Merger Guidelines*,<sup>33</sup> and found that SDARS represent a distinct product market. Based on the “critical own-price elasticity” test, “a hypothetical monopoly provider of SDARS could profitably impose a small, non-transitory price increase [5% above the competitive rate],” reflexively implying a distinct market.<sup>34</sup> Such distinction is enforced by legislative, regulatory, and judicial treatment that clearly segments SDARS as separate and apart from other relevant radio broadcast markets from a regulatory perspective (e.g., FCC indecency standards, subscription-based media programming). Professor Sidak concludes that based on historical practice, the FCC has always considered SDARS to be a distinctly different medium from terrestrial broadcast radio.<sup>35</sup> Moreover, market-based evidence shows that no plausible alternative audio services or other substitute product market currently exists that is “reasonably interchangeable” with SDARS (including options such as podcasts, mobile Internet radio, terrestrial-based advertiser-supported radio, and Hybrid Digital (“HD”) radio).<sup>36</sup>

Professor Sidak found SDARS to be a distinct product market, and concluded that the proposed merger would “constitute a merger to monopoly” under the most reasonable definition of the term.<sup>37</sup> Relying on capacity shares rather than revenue shares as the measurable component, he found that under the basic definition the post-merger company’s market concentration would equal 10,000 under the HHI in every Arbitron local market. For purposes of context, Professor Sidak expands the definition of the distinct product market to include HD

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<sup>33</sup> *Sidak Declaration*, *supra* note 5, at para. 16 (citing the *Horizontal Merger Guidelines*, *supra* note 23.).

<sup>34</sup> *Sidak Declaration*, *supra* note 5, at paras. 17-24.

<sup>35</sup> *Id.* at paras. 30-42.

<sup>36</sup> *Id.* at paras. 43-55.

<sup>37</sup> *Id.* at para. 59.

and analog signals, finding in that scenario that the proposed merger would increase market concentration by at least 3,000 HHI.<sup>38</sup> Therefore, the expansive definition of the applicable market reduces, but does not eliminate, the large threat posed by the proposed merger to competition. Professor Sidak emphasizes this fact given that many U.S. households (approximately 22 million radio listeners) live beyond the reach of the existing HD or analog signals. This concern is compounded by his assessment that due to monopsony tendencies, the total programming output of the post-merger company would likely be reduced without any reduction in pricing.<sup>39</sup>

Professor Sidak's analysis disproves the claim put forward by some merger proponents that, unless the merger is approved, both Sirius and XM will fail. The "failing firm" theory states that a firm exits the industry when its average variable cost exceeds price, which implies that the last unit sold makes a negative contribution to the firm's margins.<sup>40</sup> The relevant question for evaluating the failing firm theory in this case is not whether Sirius and XM charges a price that exceeds its current average variable cost, as put forth by Merger Parties; rather, the relevant question should be whether Sirius and XM, as firms conducting business in a network-driven industry, are each separately charging a price that exceed its expected average variable cost given projected (higher) penetration rates. The empirical evidence demonstrates that the average cost per subscriber will decline as each firm's market penetration increases,

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<sup>38</sup> *Sidak Declaration*, *supra* note 5, at paras. 60-66. The *Horizontal Merger Guidelines* consider a post-merger HHI above 1,800 to be highly concentrated for purposes of exercising market power. *Horizontal Merger Guidelines*, *supra* note 23, at § 1.51(c).

<sup>39</sup> *Sidak Declaration*, *supra* note 5, at paras. 68-69.

<sup>40</sup> *Id.* at para. 70 (citing, e.g., Douglas McIntyre & Jon Ogg, *How Sirius & XM Would Look As a Merged Company*, 24/7WALLSTREET.COM, Feb. 19, 2007, available at [http://www.247wallst.com/2007/02/how\\_sirius\\_xm\\_w.html](http://www.247wallst.com/2007/02/how_sirius_xm_w.html) ("If . . . both companies have growth issues and a potential survival issue and then all of a sudden neither can run profitably, then they would have a better case of pressing the DOJ & FCC to approve a merger.")).

making the failing firm argument untenable. The Sidak Declaration highlights that Sirius and XM are currently earning positive margins on recent subscribers.<sup>41</sup>

Because of these and other serious negative impacts to competition of mergers to monopoly, to meet the burden of proof, XM and Sirius should be required to demonstrate extraordinary efficiencies that enhance competitive incentives which could result in lower prices, improved quality, or new products.<sup>42</sup> Professor Sidak concludes that the majority of specific efficiencies identified by the Merger Parties would not result in greater benefits for consumers. For example, only \$10 million (8.6%) of the \$115 million in purported cost savings would reduce the post-merger company's marginal costs. This reduction of marginal costs would not offset the monopoly pricing effect, and would not be sufficient to maintain pre-merger monthly customer prices so long as the industry elasticity of demand is less than or equal to 95% of the firm-specific elasticity of demand.<sup>43</sup>

Professor Sidak concludes by demonstrating that the proposed conditions offered by the Merger Parties would not remedy the likely anticompetitive effects. The proposed tiered pricing conditions represent "a *de facto* regime of price cap regulation that is antithetical to the deregulatory movement at the FCC over the past decade."<sup>44</sup> He concludes that a price freeze at the current monthly price of \$12.95 would be welfare-reducing to the extent that continued competition between Sirius and XM, in the absence of the proposed merger, would naturally cause the equilibrium price to fall below that price per month. Assuming it is possible to accurately calculate the appropriate price level and duration of price controls for the post-merger

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<sup>41</sup> *Sidak Declaration*, *supra* note 5, at paras. 72-75.

<sup>42</sup> *Id.* at para. 76 (citing *Horizontal Merger Guidelines*).

<sup>43</sup> *Id.* at para. 79.

<sup>44</sup> *Id.* at para. 81.

company, Professor Sidak states that there is no precedent supporting such a requirement as part of an antitrust consent decree.<sup>45</sup> Citing one prior case where merger applicants proposed similar post-merger welfare conditions, Professor Sidak notes that the reviewing court in that case stated “the mere fact that such representations [have] to be made strongly supports the fears of impermissible monopolization.”<sup>46</sup>

The conclusions reached by Professor Sidak are consistent with the analysis and conclusions of the American Antitrust Institute (“AAI”), an independent non-profit organization, whose mission is to “advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws.”<sup>47</sup> Members of the AAI include “prominent antitrust lawyers, law professors, economists, and business leaders.”<sup>48</sup> The AAI’s expertise in antitrust matters is beyond question. The AAI, independent of any request from an interested party in this proceeding, conducted an analysis of the antitrust impacts of the proposed merger of Sirius and XM. The analysis was submitted to the Commission on June 5, 2007. The AAI concluded that based on conventional merger analysis, “the merger poses a significant risk of anticompetitive effects, including higher prices, reduced quality, and reduced consumer choice.”<sup>49</sup> Furthermore, that “available evidence tends to suggest that satellite radio is a relevant antitrust market and that the potential substitutes ... are not now, no are they likely in the near future to be, sufficient to

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<sup>45</sup> *Sidak Declaration*, *supra* note 5, at paras. 85-87.

<sup>46</sup> *Id.* at para. 87 (quoting *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 67 (D.D.C. 1998)).

<sup>47</sup> See *Comments of the American Antitrust Institute in Opposition to Transfer Application*, MB Docket No. 07-57, n. 1 (June 5, 2007) (“*AAI Comments*”).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 2.

replace the significant competitive constraint that” Sirius and XM currently places on the other.<sup>50</sup>

Based on this market definition, the proposed transaction would be a merger to monopoly.

The AAI was particularly skeptical about the purported public interest benefits of the merger. The claimed benefits are “jury-rigged, not merger specific, and do not increase the company’s incentives to lower prices, improve quality, enhance services, or offer new products.”<sup>51</sup> The AAI concluded that the Merger Parties failed to meet their burden to prove that the proposed transaction is in the public interest.<sup>52</sup> What is more, the voluntary conditions suggested by the Merger Parties are contrary to FCC policy and the Communications Act. According to AAI, the Commission should deny the Applications.<sup>53</sup>

Other interested parties share these views, including the largest and most respected consumer protection organizations. Dr. Mark N. Cooper, Director of Research, Consumer Federation of America, in his February 28, 2007 testimony before the Intellectual Property Task Force of the House Judiciary Committee on behalf of Consumer Federation of America, Consumers Union and Free Press, concluded that the proposed transaction would constitute a merger to monopoly, and the conditions offered by the Merger Parties would not protect the public interest.<sup>54</sup> Dr. Cooper’s comments reflect extensive experience in communications policy and the consumer protection concerns raised by transactions such as this.

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<sup>50</sup> *AAI Comments, supra* note, at 2.

<sup>51</sup> *Id.* at 10.

<sup>52</sup> *Id.* at 2.

<sup>53</sup> The AAI Comments provide an in-depth analysis of a range of pertinent issues not discussed herein. C3SR strongly encourages the Commission to rely on the AAI Comments when evaluating the proposed transaction.

<sup>54</sup> *Hearing of the House Judiciary Committee Antitrust Task Force Hearing on the Competition and the Future of Digital Music*, Feb. 28, 2007 (statement of Dr. Mark N. Cooper, Director of Research, Consumer Federation of America) (“*Cooper Statement*”). Dr. Cooper’s testimony occurred before the Consolidated Applications were filed. Therefore, there is no discussion of the Merger Parties’ failure to meet their burden to prove that the proposed transaction is in the public interest.

Based on an analysis of the unique service offered by Sirius and XM and decades of Communications policy in intermodal competition, Dr. Cooper concluded that SDARS is a distinct product market. Products such as terrestrial radio, internet radio and MP3 players were not sufficient substitutes for SDARS, and only continued head-to-head competition between Sirius and XM will protect consumers from anticompetitive pricing and policies.<sup>55</sup> The merger of Sirius and XM would leave consumers at the mercy of a monopoly SDARS provider. As Dr. Cooper astutely notes, “[t]he short-term benefit of a monopolist who is subject to political oversight is simply not worth the long-term costs of abandoning the competitive engine of economic progress.”<sup>56</sup>

In sum, Professor Sidak and several other leading economists and antitrust experts have concluded that satellite radio is a unique product market, and their analyses conclude that a satellite radio monopoly could exercise its market power over consumers who would be quite vulnerable to price increases and service quality reductions.<sup>57</sup> A satellite radio monopoly will be free to raise prices in a variety of ways, even if direct price increases are temporarily frozen – a hollow concession offered by the Merger Parties.<sup>58</sup> Where the subscription price for satellite service is frozen, but the programming content, equipment and quality of the package remain variable, a price freeze is meaningless and illusory.

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<sup>55</sup> *Cooper Statement, supra* note 54, at 4.

<sup>56</sup> *Id.* at 8.

<sup>57</sup> See generally *Sidak Declaration, supra* note 5; *Cooper Statement, supra* note 54; *AAI Comments, supra* note 47; see also The Carmel Group, *Higher Prices, Less Content and a Monopoly: Good for the Consumer?* (April, 2007).

<sup>58</sup> Notably, in a competitive environment, as the subscriber base grows and costs fall, subscription prices would fall, not increase. Satellite radio is one of the fastest growing subscription services in the history of electronic mass media. Therefore, a price freeze masks the potential for real consumer gains from continued competition and falling prices.

The effective price of satellite radio service can be increased indirectly. For instance, each satellite radio system is operating at full-channel-capacity, so in order to cross-sell the content of each satellite radio system on the other system the overall number of channels currently offered on each system must be reduced. The Merger Parties intend to cross-sell the content of both systems in this manner, so there will be an overall reduction in current channel offerings between the two systems. By reducing the channel offerings, they are reducing the value of the programming. Price is relative to value, and value is not held constant (or meaningfully increased) under the price concessions offered by the Merger Parties.

All satellite radio subscribers who purchased satellite radio service to avoid radio commercials will face a tremendous loss in value as a result of this merger. Immediately following the announcement of the merger, Mr. Karmazin promised investors and analysts that the merger would enable satellite radio to become an advertiser-supported medium. He said, “. . . the merged company will be significantly more attractive to large national advertisers.”<sup>59</sup> Elsewhere, both Sirius and XM have stated, “. . . [the] advertising line is going to contribute significantly in the future towards ARPU [average revenue per user].”<sup>60</sup> The result for existing subscribers will be an added cost of enduring commercials in the rapid transformation of satellite radio from commercial-free to advertiser-supported/subscription service. The result for consumers-at-large will be the loss of a commercial-free alternative in radio service, and a higher price for a degraded service.

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<sup>59</sup> Conference call to discuss the merger of Sirius Satellite Radio and XM Satellite Radio (Feb. 20, 2007), available at <http://online.wsj.com/documents/transcript-xmsr-20070220.pdf>.

<sup>60</sup> *Id.*

#### IV. CONSUMERS IN RURAL, UNSERVED AND UNDERSERVED GEOGRAPHIC AREAS WOULD BE MOST VULNERABLE TO THE HARMS OF A SATELLITE RADIO MONOPOLY

Because the Sirius/XM merger is a merger to monopoly for all consumers in all areas, it is important for the Commission to consider the adverse impacts on consumers both within and outside of the larger Arbitron markets, especially in the areas where there is service by few, if any, local radio stations.<sup>61</sup> While the majority of the US population is urban (approximately 79%), and local radio stations within the Arbitron metro survey areas cover this population (approximately 71% of the US population resides within Arbitron's metro areas), 29% of the US population (age 12+) resides outside of Arbitron's metro survey areas. As illustrated in the attached analysis entitled "Consumer Vulnerability to a Satellite Radio Monopoly in Rural, Unserved and Underserved Areas" (the "Geographic Impact Study"), consumers in certain locations throughout the nation will experience the effects of monopoly more severely.<sup>62</sup>

In geographic areas where local radio service is effectively unavailable (*unserved* areas), or in geographic areas where local radio service is thinly available (*underserved* areas), the distinction between what local radio service offers to its communities and satellite radio service, becomes very stark. Consumers in these areas will suffer the greatest vulnerability to harm from a satellite radio monopoly. These unserved and underserved areas are significant not only to the residents of these areas, but especially to those individuals who travel the roads in these areas.

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<sup>61</sup> A complete list of Arbitron metro survey areas is attached to the Geographic Impact Study, as later defined herein, at Appendix A.

<sup>62</sup> Attached hereto at Exhibit C.

Table 1 in the Geographic Impact Study shows the growth trend in vehicle miles traveled each year.<sup>63</sup> Clearly, Americans are spending more time in cars, and the majority of satellite radio subscribers listen to satellite radios in their cars during their commutes to and from work.<sup>64</sup> Almost half of them have commutes of 30 minutes or more each day.<sup>65</sup>

Most local radio stations are quite limited in terms of their geographic coverage. Even among the most powerful AM clear-channel stations, it is impossible for each station to provide reliable radio service to more than a relatively small region of the United States, even during nighttime hours when service areas are at a maximum size (700-750 miles from the transmitter).<sup>66</sup> All other local radio stations are licensed by the Commission to serve even smaller geographic areas, as defined by their authorized transmission power and antenna height in their licenses.

The attached Geographic Impact Study follow the Commission's practice by relying on predicted signal contours as a measure of local service.<sup>67</sup> The maps included in Appendix C of the Geographic Impact Study were prepared for this report by Dataworld, a division of BIA Financial Network ("BIAfn"). These graphic illustrations are based on Dataworld's analysis of the number of predicted signal contours of local radio stations reaching each Census Block's centroid. The predicted signal contours of local radio stations are defined

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<sup>63</sup> All tables referred to are attached to the Geographic Impact Study at Appendix B.

<sup>64</sup> According to the Wilson Survey, 77% of respondents to a recent survey of Sirius and XM subscribers indicated that they listen to satellite radio most often in their cars. Sixty-eight percent of the respondents listen to satellite radio on their way to and from work, with nearly half spending over a half hour each day in the commute. Wilson Survey, *supra* note 16, at 1.

<sup>65</sup> *Id.*

<sup>66</sup> See Clear Channel Broadcasting in the AM Broadcasting Band, 78 FCC2d 1345 (1980) ("AM Broadcasting").

<sup>67</sup> It is not practical to measure the *actual reception* of all local radio signals in the United States in all locations. Such an undertaking would produce variable results depending on the time of day and season of the year, with variable atmospheric or propagation characteristics.

by the use of the 60 dBu contour for FM stations and the 2 mV/m contour for AM stations (groundwave service).<sup>68</sup> For FM radio stations, the 60 dBu contour is relied on by BIAfn and other valuation firms when determining the value of FM radio stations, and defines a listening area greater than the 70 dBu contour used by the FCC to define the required signal strength for coverage of an FM station's principal community. For AM radio stations, the 2 mV/m contour is commonly used by radio networks to determine exclusive market areas for AM radio network affiliates. It provides an accurate assessment of the actual listening area for an AM station.

These maps identify geographic areas that receive virtually no service (five or fewer local radio signals) compared to the average level of local radio service for the US population generally. They also identify areas with six to 15 local radio signals. US residents (age 12+) averaged across all 300 Arbitron Metro Areas have access to a mean number of 30 local radio stations. The unserved or underserved areas identified on these maps have half, or fewer, of that number of predicted signals. The Geographic Impact Study refers to areas with five or fewer stations as "unserved" and areas with access to six to 15 stations as "underserved." These characterizations refer only to the *quantity* of local radio signals available in certain geographic areas and should not be interpreted as any reference to the quality of local radio service in those areas.

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<sup>68</sup> The geographic skywave coverage of nighttime aural service in the AM broadcasting band is greatly variable due to propagation characteristics. "The service and interference ranges of groundwave signals are substantially constant day and night. There is therefore no significant difference, day and night, in the distance from the transmitter at which the groundwave signal's field strength will have a given service or interference potential. At night, however, a phenomenon called 'skywave transmission' very substantially increases the distances at which AM signals can render a usable service, and enormously increases the distances at which they can create destructive interference to the service of other stations operating on the same channel. The signals which radiate upward and outward have no consequential effect at the earth's surface during most daytime hours. At night, however (and to a lesser extent during certain transitional periods before sunset and after sunrise), that part of an AM station's radiation reflects off an atmospheric layer called the ionosphere. This enables such 'skywave' signals to return to the surface many hundreds and, under occasional conditions, thousands of miles away, thereby enormously extending the nighttime service and interference ranges of the station." See AM Broadcasting, *supra* note 66, at para. 11.

**Table 2** of the Geographic Impact Study identifies the locations in each State with maximum local radio signal coverage. For example, in Los Angeles, California, there are 69 local radio signals (AM and FM) depending on location (in East LA you receive signals unavailable in West LA, and *vice versa*).<sup>69</sup> Similarly, in Washington, DC, there are only 50 local radio signals (AM and FM). In Denver, Colorado, there are only 37 local radio signals (AM and FM). Most importantly, there is no location in the United States – even in the largest urban market — where a listener can receive as many local radio stations as either one of the two satellite radio systems offer (over 130 channels on Sirius and approximately 170 channels on XM).

**Table 3** in the Geographic Impact Study provides a summary of the unserved and underserved areas in each state based on data from the most recent US census and a local radio coverage analysis performed by Dataworld. The state-by-state impact is summarized narratively in the following section of the Geographic Impact Study, including an estimate of the traffic in the areas of concern. All road usage data supplied in the Geographic Impact Study are based on the most-recent, available bidirectional traffic data for each Interstate and major highway referenced for each individual state. These data reflect peak daily traffic points on these roadways in the unserved/underserved areas. Travelers throughout the United States make an estimated 44 million trips per week on major Interstates and highways through areas that have access to few, if any, local radio stations.

**Table 4** in the Geographic Impact Study provides a state-by-state breakdown of the major roadways affected and the estimated total weekly trips on such roadways.

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<sup>69</sup> Stated differently, the highest sum of the predicted service contours of all the local radio stations covering each Census Block centroid in LA equals 69 signals.

The Geographic Impact Study reveals the extent of potential harm resulting from this merger in rural areas by identifying areas where satellite radio service may be the only available radio service, or where it is critically important because there are few, if any, free local radio stations. In 1997, when the FCC found that the public interest was served in granting licenses to Sirius and XM, the technological potential to provide service to rural and mountainous sections of the country that had historically been underserved by terrestrial radio was an explicit part of that public interest finding. In sum, the Geographic Impact Study reveals the locations where the Commission's public interest analysis of the proposed merger must focus most intensely — in rural, unserved, and underserved geographic areas.

The Commission and antitrust authorities in a previous merger proceeding involving DBS service gave careful consideration to the impact on consumers in rural, unserved and underserved areas.<sup>70</sup> In designating the merger application of DirecTV and EchoStar for hearing, the Commission gave considerable weight to the potential impact on consumers in areas without cable television service.<sup>71</sup> In that case, consumers in local markets would have experienced a reduction in the number of suppliers from three (the incumbent cable operator, DirecTV and EchoStar) to two in locations where consumers were served by cable television systems. Notably, in the DirecTV/EchoStar merger, each of the three suppliers in local markets carried comparable content with similar channel capacities. The FCC identified some five million Direct Broadcast Satellite ("DBS") subscribers in areas not served by cable systems, and the DOJ with 23 State Attorneys General filed an action in Federal District Court under Section 7

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<sup>70</sup> See generally, *Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Hearing Designation Order*, 17 FCC Rcd 20559 (2002) ("*EchoStar-DirecTV Order*").

<sup>71</sup> *Id.* at para. 177.

of the Clayton Act to prohibit the merger.<sup>72</sup> As noted in the DOJ complaint, subscribers in unserved areas were most vulnerable to the merger because for them it was a merger of two to one – a merger to monopoly.<sup>73</sup>

In this case, the Merger Parties have advocated an expansive and nebulous market definition, which incorrectly includes local radio. The Merger Parties have failed even to recognize variations in the availability of local radio among and between local radio markets, and outside those markets. In fact, as discussed in Section III above, Professor Sidak's analysis using the *Horizontal Merger Guidelines* reveals that even if local radio is considered a part of the market definition, a harmful degree of market concentration would result from the merger in all Arbitron markets – even in the largest urban markets.<sup>74</sup> In large part, that fact is the result of a relatively simple observation: in even the largest urban markets, all of the local radio stations added together do not equal the channel capacity of even one of the two satellite radio systems to be merged. Most importantly, outside of the 300 Arbitron markets, a satellite radio monopoly's market power will be even higher, and consumers will be road-kill for the monopolist.

In weighing the alleged public interest benefits of the proposed merger – none of which appear to have any real value to consumers<sup>75</sup> – the Commission should give careful consideration and substantial weight to the following facts which are revealed in the Geographic

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<sup>72</sup> See generally Complaint, *United States v. EchoStar Comm. Corp.*, No. 1:02CV02138 (D.D.C. Oct. 31, 2002).

<sup>73</sup> *Id.* at para. 37.

<sup>74</sup> *Sidak Declaration*, *supra* note 5, at paras. 58-67.

<sup>75</sup> Professor Sidak observes that the price concessions offered by the Merger Parties are illusory, as SDARS subscription prices would be expected to decline with continued competition. *Id.* at para. 81. Moreover, in a recent survey of SDARS subscribers, nearly three-quarters of all subscribers said they would not be willing to pay more to receive the programming currently offered by both XM and Sirius. *Wilson Survey*, *supra* note 16, at 2.

Impact Study. In considering these facts, the Commission should bear in mind that the majority of SDARS subscribers reside in these rural, unserved and underserved areas:

- Substantial portions of the United States have few, if any, local radio signals;
- Significant portions of major highways in the United States traverse areas where there are few, if any, local radio signals;
- An estimated 44 million trips each week are made on major highways that traverse these areas;
- A majority of satellite radio subscribers are likely to be residents of areas with few, if any, local radio signals or travelers through these unserved and underserved areas;
- On average, the urban population of the United States receives 30 local radio signals;
- However, 2.3 million US residents are located in areas served by five or fewer local radio signals;
- An additional 45 million US residents are located in areas served by only six to 15 local radio signals;
- Almost 45% of the territory in the United States is served by five or fewer local radio signals;
- Approximately 48 million US residents of the 50 states are located in areas where there are few, if any, local radio signals; and
- Approximately 80% of the geographic area of the United States is served by 15 or fewer local radio signals.

**V. THE MERGER PARTIES HAVE FAILED TO MEET THEIR BURDEN OF PROOF**

The Merger Parties must affirmatively prove that the proposed transaction serves the public interest.<sup>76</sup> More specifically, the Merger Parties must demonstrate that the merger-specific public interest benefits outweigh the potential anticompetitive impact of the proposed

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<sup>76</sup> *EchoStar-DirecTV Order*, *supra* note 70, at para. 25.

transaction.<sup>77</sup> For the proposed transaction, with such an obvious anticompetitive impact, this is a heavy burden, indeed. If the Merger Parties fail to prove that the transaction is, on balance, in the public interest, “or if the record presents a substantial and material question of fact,” then the application must be designated for a hearing.<sup>78</sup>

The Merger Parties have failed to demonstrate that the benefits of the proposed merger would outweigh the injuries to the public interest. As required by Section 310(d) of the Communications Act, the FCC will not grant a transfer application “except...upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.”<sup>79</sup> The Commission’s broad public interest analysis is designed to preserve and enhance competition in the *relevant* product markets, and to promote diversity and technological advancement.<sup>80</sup>

The Commission’s public interest analysis includes an evaluation of the effect of the proposed transaction on competition and market power “in the *relevant* communications markets.”<sup>81</sup> The analysis goes beyond the antitrust principles applied by the DOJ and the FTC, though the Commission has relied on the *Horizontal Merger Guidelines*<sup>82</sup> and other relevant antitrust principles when evaluating a proposed transaction. Most notably, the *Guidelines* are forefront in an analysis of the likelihood of competitive harm from a proposed transaction. The

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<sup>77</sup> *EchoStar-DirectTV Order*, *supra* note 70, at para. 276.

<sup>78</sup> *Id.* (citing 47 U.S.C. § 309(e)).

<sup>79</sup> 47 U.S.C. § 310(d). *See also* 47 C.F.R. § 25.119(a).

<sup>80</sup> *EchoStar-DirectTV Order*, *supra* note 70, at para. 26 (“The Supreme Court has repeatedly emphasized the Commission’s duty and authority under the Communications Act to promote diversity and competition among media voices: It has long been a basic tenet of national communications policy that ‘the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.’” (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n. 27 (1972)))).

<sup>81</sup> *EchoStar-DirectTV Order*, *supra* note 70, at para. 27 (emphasis added).

<sup>82</sup> *Horizontal Merger Guidelines*, *supra* note 23.

Commission not only uses the same factors for determining the likelihood of competitive harm as are found in the *Horizontal Merger Guidelines*, but also relies on the *Guidelines* when defining those factors.<sup>83</sup>

**A. The Merger Parties Provide No Precedent for Their Proposed Market Definition**

An important issue to be decided in any merger review is the issue of relevant product market – a fact not lost on the Merger Parties. The Merger Parties have proposed an overly-broad market definition in an attempt to mask the anticompetitive impact in the merger. The Commission, when applying the *Horizontal Merger Guidelines*, defines the relevant product market as “the smallest group of competing products for which a hypothetical monopoly provider of the products would profitably impose at least a ‘small but significant and non-transitory price increase.’”<sup>84</sup> In essence, a consumer must view a product as a reasonable substitute for the Merger Parties’ product in order to be included in the relevant product market.<sup>85</sup>

The market definition offered by the Merger Parties, “audio entertainment market,” has no basis in law or fact, and should be disregarded. According to the Merger Parties, the audio entertainment market includes (at least): satellite radio; AM, FM and HD radio; Internet radio; iPods and other MP3 players; mobile phones; and CD players.<sup>86</sup> The Merger Parties cited no relevant antitrust or communications precedent in the Applications for this overly-expansive definition. Even after commissioning two separate economic analyses of the

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<sup>83</sup> See *EchoStar-DirectTV Order*, *supra* note 70, at paras. 104-74 (applying *Horizontal Merger Guidelines*, *supra* note 23).

<sup>84</sup> See *EchoStar-DirectTV Order*, *supra* note 70, at para. 106.

<sup>85</sup> *Id.*

<sup>86</sup> See Applications, *supra* note 4, at 21-39.

purported benefits of the proposed transaction, the Merger Parties (and their economists) could not provide a single example of the use of “audio entertainment market” as a relevant product market in an antitrust analysis.<sup>87</sup> In fact, the *Furchtgott-Roth Review* specifically rejects the idea of supporting the market definition with relevant precedent.<sup>88</sup>

Even had the Merger Parties thought it prudent to justify their expansive market definition with relevant precedent, they could not have. The fact is, “audio entertainment market” has never been recognized as a relevant product market in any merger review.<sup>89</sup> Quite the opposite, many distinct product markets that the Merger Parties are attempting to lump together in a single, omnibus product market have recently been recognized as small, distinct product markets for antitrust review.<sup>90</sup> There is no doubt that the availability of platforms for the delivery of audio content has increased since 1997, the year satellite radio was authorized. But has so much changed in the last two years to go from “portable hard drive digital music players” to an all-encompassing “audio entertainment market”? The Merger Parties, without offering any precedent to support this market definition, say yes. Satellite radio subscribers who have

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<sup>87</sup> See generally Thomas W. Hazlett, *The Economics of the Satellite Radio Merger* (June 14, 2007) (“*Hazlett Review*”); Harold Furchtgott-Roth, *An Economic Review of the Proposed Merger of XM and Sirius* (June 2007) (“*Furchtgott-Roth Review*”).

<sup>88</sup> See *Furchtgott-Roth Review*, *supra* note 87, at 26-27 (criticizing opponents of the merger for supporting their market definition with “historical opinions of the FCC”). With due respect to Dr. Furchtgott-Roth, “historical opinions of the FCC,” most commonly known as “precedents,” are legally significant. If the Merger Parties take umbrage with decades of antitrust laws, Congress is the appropriate forum for such grievances, not an FCC application proceeding.

<sup>89</sup> *Sidak Supplemental Declaration*, *supra* note 6, at para. 9.

<sup>90</sup> See, e.g., *United States v. Clear Channel Communications, Inc.*, *Competitive Impact Statement 2* (Nov. 15, 2000) (defining relevant product market to be the sale of radio advertising time to be the relevant product market, and individual cities affected by the proposed transaction to be separate geographic markets), available at <http://www.usdoj.gov/atr/cases/f6900/6985.htm>; *Slattery v. Apple Computer, Inc.*, 2005 WL 2204981 (N.D. Cal 2005) (pleading of product market for iPods as “portable hard drive digital music players” upheld by Court in Order Granting in Part, Denying in Part Defendant’s Motion to Dismiss).

benefited from the direct competition between Sirius and XM, and who wish to avoid the perils and pitfalls of a monopoly SDARS provider, implore the Commission to say no.

**B. The Merger Parties Have Failed to Justify Their Proposed Market Definition under the *Horizontal Merger Guidelines***

The Merger Parties fail to cite any authority for their novel product market definition, which appears to have never been accepted as a relevant product market in any prior FCC, FTC or DOJ decisions.<sup>91</sup> The Merger Parties have failed to produce any empirical evidence that consumers view terrestrial radio, MP3 players, cell phones, or Internet radio as reasonable substitutes for satellite radio.<sup>92</sup> While there has been extensive effort to chronicle every device and method for the production of aural media short of the local church choir and the man on the bus humming aloud his favorite tune, such a list provides no real insight into the consumers' perception of the proposed alternatives as substitutes for satellite radio. The Commission would be equally informed by spending a Saturday wandering through RadioShack, as reading the information provided by the Merger Parties in support of the proposed market definition.

The Merger Parties have failed to provide any empirical evidence to demonstrate that the multitude of devices in the proposed product market actually constrains the prices of satellite radio.<sup>93</sup> Considering the fact that the Merger Parties hired at least two consulting economists to provide supporting reports, one would expect that such evidence would be provided. Instead of providing the Commission with data on the cross-price elasticity of demand

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<sup>91</sup> *Sidak Supplemental Declaration*, *supra* note 6, at para. 9.

<sup>92</sup> *Id.* at para. 15.

<sup>93</sup> *Id.*

for satellite radio and MP3 players, the Merger Parties argue that the use of MP3 players is on the rise.<sup>94</sup>

The Merger Parties have failed to provide an HHI calculation to determine the market concentration under their proposed market definition, a key element of FCC and DOJ merger review. Indeed, a careful review of the economic reports provided in support of the application will produce scarce evidence of any *economic* analysis (though no shortage of conclusions). This failure is instructive. The ridiculously broad market definition is so vague and imprecise it cannot be operationalized. Therefore, it is not possible to apply the HHI analysis. The Commission should be wary of any such market definition, which invites a throwing out of the baby (antitrust analysis) with the bath water (competition).

The economic analyses provided by the Merger Parties are little more than advocacy pieces that argue for the unprecedented rejection of long-established FCC and DOJ merger review policies, in order to justify the unprecedented market definition put forth by the Merger Parties. It is the job of politicians and think-tanks to wax philosophic on the direction of antitrust policy. It is the job of economists to present unbiased data that will allow for appropriate review of the economic impact of a particular transaction based on existing policy. The consulting economists hired by the Merger Parties have failed in this task.

**C. The Merger Parties Have Not Justified the Transaction as Failing Firms**

Neither Sirius nor XM are failing firms, within the meaning of the *Horizontal Merger Guidelines*, and, indeed, do not make an explicit failing-firm argument in the Applications.<sup>95</sup> In the Applications, however, the Merger Parties suggest that the merger is

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<sup>94</sup> *Sidak Supplemental Declaration*, *supra* note 6, at para. 16.

<sup>95</sup> *Id.* at para. 35.

necessary to “preserve” satellite radio service.<sup>96</sup> In his analysis, former Dr. Furchtgott-Roth alludes to “unforeseeable harmful consequences” if the Commission fails to approve the merger.<sup>97</sup> The particular consequences for Sirius or XM are not specifically detailed, but the clear implication is that one or both SDARS providers will go out of business if the two companies are not allowed to merge. Furthermore, there are those in the public who appear to be making a failing-firm argument on behalf of the Merger Parties, so the issue must be addressed.<sup>98</sup>

Transactions that would otherwise create impermissible market power may be approved if one of the merging parties can establish that they are a failing firm.<sup>99</sup> In order to establish that a firm is failing, one of the merging parties must establish:

1) the allegedly failing firm would be unable to meet its financial obligations in the near future; 2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; 3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm that would both keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger; and 4) absent the acquisition, the assets of the failing firm would exit the relevant market.<sup>100</sup>

Neither Sirius nor XM have adduced sufficient evidence to support any of the necessary findings for a Failing-Firm argument. In fact, short of vague allusions to the failure of satellite radio without the merger, no specific evidence relating to any of the four criteria listed above has been provided by the Merger Parties.

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<sup>96</sup> Applications, *supra* note 4, at 19.

<sup>97</sup> Furchtgott-Roth Review, *supra* note 87, at 34.

<sup>98</sup> Indeed, even a casual review of the public record turns up scores of public comments by those who believe that if this merger is not approved that both satellite radio companies will go out of business. This “all or nothing” argument in favor of the merger is uninformed and incorrect.

<sup>99</sup> Horizontal Merger Guidelines, *supra* note 23, at § 5.0.

<sup>100</sup> *Id.* at § 5.1.

An economic analysis of both Sirius and XM illustrates that neither firm is in danger of exiting the satellite radio market.<sup>101</sup> As explained by Professor Sidak, “[t]he classic ‘shut down’ rule in economics holds that a firm exits the industry when its average variable cost exceeds price, which implies that the last unit sold made a negative contribution to the firm’s margins.”<sup>102</sup> An analysis of analyst reports from multiple high-profile equity analysts demonstrates that both XM and Sirius are currently earning *positive* margins on their last subscribers.<sup>103</sup> As each company’s subscriber base increases, these margins will increase.<sup>104</sup> Neither Sirius nor XM needs this merger to survive, and, according to Mr. Karmazin’s congressional testimony, neither company would dispute this conclusion.

**D. The Merger Parties Have Failed to Prove Any Merger-Specific Public Interest Benefits**

The merger of the only two entities authorized by the FCC to provide satellite radio services will harm the public interest. The burden is on the Merger Parties to establish that the proposed transaction will produce merger-specific public interest benefits sufficient to overcome the public interest harms created by the transaction.<sup>105</sup> The Merger Parties have not satisfied this burden as compared to any level of public interest harm (of which there would be a substantial amount), as none of the purported merger-specific public interest benefits of the proposed transaction are actually merger-specific.<sup>106</sup>

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<sup>101</sup> *Sidak Supplemental Declaration*, *supra* note 6, at paras. 35-36.

<sup>102</sup> *Sidak Declaration*, *supra* note 5, at para. 70; *see also Sidak Supplemental Declaration*, *supra* note 6, at para. 36.

<sup>103</sup> *Sidak Supplemental Declaration*, *supra* note 6, at para. 36.

<sup>104</sup> *Id.*

<sup>105</sup> *EchoStar-DirectTV Order*, *supra* note 70, at para. 276.

<sup>106</sup> *Sidak Supplemental Declaration*, *supra* note 6, at paras. 28-33.

The merger of Sirius and XM will produce no merger-specific public interest benefits. The Merger Parties have not presented any evidence that tiered subscription rates, rear-seat video, rebates for channel blocking, access to programming of both providers, or any other supposed benefits are actually merger-specific.<sup>107</sup> What is more, the Merger Parties have made only vague promises about increased subscriber access to each system's exclusive programming (the most desired programming). As the Merger Parties disclosed in the Applications, "[f]inal decisions to make currently exclusive programming available on both services will be subject to contractual negotiations with programming partners."<sup>108</sup> Even if such programming is made available, an overwhelming majority of satellite radio subscribers (around 75%) have indicated that they will not pay more for programming from both providers.<sup>109</sup>

As noted by Professor Sidak, the purported public interest benefits of the proposed transaction are merely "goodwill gestures...designed to please key political constituents."<sup>110</sup> The Applications are more appropriately viewed as an invitation to bargain for some portion of the future monopoly rent. In exchange for a protected SDARS monopoly, the Merger Parties are offering a package of concessions disguised as merger-specific benefits that will appeal to one political base or another.<sup>111</sup> Be it tiered programming or refunds for blocking certain explicit channels, there is no evidence that such measures require a merger to monopoly.

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<sup>107</sup> *Sidak Supplemental Declaration*, *supra* note 6, at paras. 29-33.

<sup>108</sup> Applications, *supra* note 4, at n. 26.

<sup>109</sup> Wilson Survey, *supra* note 16, at 2.

<sup>110</sup> *Sidak Supplemental Declaration*, *supra* note 6, at para. 29.

<sup>111</sup> *Id.*

## VI. CONCLUSION

For the reasons set forth in this Petition, in the Declaration and Supplemental Declaration of Professor J. Gregory Sidak, and in the attached Geographic Impact Study, the proposed merger is contrary to the public interest and C3SR respectfully requests that the Applications be designated for hearing.

Respectfully submitted,

**CONSUMER COALITION FOR  
COMPETITION IN SATELLITE RADIO**

By:



Julian L. Shepard  
D. Cameron Prell  
Benjamin D. Arden  
WILLIAMS MULLEN  
1666 K Street NW  
Suite 1200  
Washington, DC 20006  
202.833.9200  
Its Attorneys

July 9, 2007

## CERTIFICATE OF SERVICE

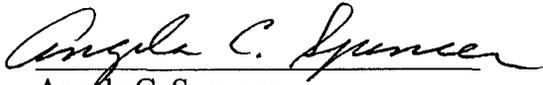
I, Angela C. Spencer, hereby certify that on this 9<sup>th</sup> day of July, 2007, copies of the foregoing Petition to Deny of the Consumer Coalition for Competition in Satellite Radio, and all exhibits and attachments thereto, were served by first-class U.S. mail, postage prepaid, to the following:

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

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

Patrick L. Donnelly  
Executive Vice President, General Counsel  
And Secretary  
Sirius Satellite Radio Inc.  
1221 Avenue of the Americas  
36<sup>th</sup> Floor  
Washington, DC 10020

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

  
Angela C. Spencer