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

JOINT PETITION TO DENY
OF FORTY-SIX BROADCASTING ORGANIZATIONS

July 9, 2007

SUMMARY

The Sirius/XM merger is a merger to monopoly under the antitrust laws that will harm consumers. Moreover, it would create a spectrum monopoly in satellite radio, which is contrary to the public interest. The undersigned Forty-six Broadcasting Organizations hereby oppose the merger and support and endorse the reasons for such opposition set forth more fully in the Petition to Deny of the National Association of Broadcasters.

The local radio broadcasting industry has continuously provided a very high level of service to the listening public over the years. The advent of satellite radio in 1997 did not change that. However, the specter of a merger of the only two providers of satellite radio service into a single monopoly provider, threatens to do irreparable harm to the competitive environment and to the public interest in localism. The proposed merger of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. threatens to harm localism in two fundamental ways.

First, by eliminating competition between the only two satellite radio licensees, the proposed merger would rapidly bring an end to the current commercial-free format of nearly all satellite radio channels. Not only would this deprive consumers of something they apparently value greatly and have paid for, but this would have a significant adverse effect on local broadcasting. Local stations operating with the thinnest margins, mostly serving rural populations and smaller markets, would face increased economic pressure to reduce costs, especially those costs associated with the local program production, and some may be forced to cease operation.

Second, a satellite radio monopoly would have the incentive and ability to do great harm to the current analog-to-digital transition in local radio. The future success of Hybrid Digital ("HD") radio, which has been rapidly implemented by more than 1200 local radio

stations, depends upon widespread consumer access to HD receivers in automobile dashboards. HD radio promises consumers near CD-quality sound and multiple program streams from local radio stations, which, in the hands of local listeners, would mean enhanced local service.

Satellite radio enjoys a substantial first-to-market advantage in the placement of satellite radio receivers in dashboards. With monopoly power, a combined Sirius/XM would have the incentive and ability to engage in anticompetitive practices aimed at impeding or retarding the growth of local HD radio. This would harm the public interest by greatly diminishing local broadcasters' opportunities to deepen their contributions to localism through new technology.

Local radio broadcasters do not seek to thwart competition, but they must demand a level playing field if they are to continue delivering to the public the high quality service their audiences are accustomed to receiving. Local radio broadcasters compete with other media for advertising dollars, but no other media would have as much relevant market power to exploit in anticompetitive ways against local radio broadcasters as a satellite radio monopoly. For this reason, the 46 undersigned radio broadcaster associations hereby unanimously oppose the merger.

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JOINT PETITION TO DENY OF FORTY-SIX BROADCASTING ORGANIZATIONS

The 46 undersigned organizations representing local radio broadcasters (hereinafter "Forty-six Broadcasting Organizations") hereby file this Joint Petition to Deny the above-captioned applications, pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(d)(1), and the Commission's Public Notice, DA 07-2417.[1] The Forty-six Broadcasting Organizations are parties in interest in this proceeding because the local radio stations they represent will suffer anticompetitive harm if the proposed merger of Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM") is approved and consummated.[2] For the reasons set forth below, the undersigned Forty-six Broadcasting Organizations join to demonstrate their strong and unified opposition to this merger.

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[1] *Applications of XM Satellite Radio Holdings Inc., Transferor, and Sirius Satellite Radio Inc., Transferee, For Consent to Transfer Control* (filed March 20, 2007) (the transfer applications are collectively referred to herein as the "Applications").

[2] Attached hereto as Exhibit A is an affidavit by a person with personal knowledge of the specific allegations of fact herein sufficient to show that the State Broadcaster Associations are parties in interest and that grant of the applications would be prima facie inconsistent with the public interest, convenience, and necessity.

I. INTRODUCTION

By design, Satellite Digital Audio Radio Service ("SDARS") has always been national and mobile. At the inception of SDARS, the Commission recognized that it would offer "nationwide radio programming," "new services that local radio inherently cannot provide," and "national reach."[3] Indeed, the nationwide availability of SDARS to dispersed mobile listeners traveling both in their communities and on remote roads and highways has sustained satellite radio programming that is primarily national in character. SDARS today delivers a predominantly commercial-free format of uncensored content and multi-channel offerings — over 130 channels for Sirius and approximately 170 channels on XM — to subscribers nationwide. By virtue of their limited geographic coverage areas and public interest obligations, local radio broadcasters cannot, and do not, compete with SDARS in the national radio market.[4]

Sirius and XM currently offer service solely on a subscription basis, thereby avoiding any public interest obligations under the Communications Act or the Commission's rules. By contrast, local radio broadcasters are licensed to serve the public interest, and they play a unique and vital role in their local communities. In service of the public interest, they provide not just music and entertainment programming, but up-to-the minute coverage of important local news, weather and emergency information. The radio broadcasting industry has built a

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[3] *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. 13 (1997) ("*SDARS Order*").

[4] *See, e.g.,* Written Testimony of Gene Kimmelman, Vice President-Federal and International Affairs, Consumers Union, *XM-Sirius and the Public Interest, Hearing Before the Senate Committee on Commerce, Science and Transportation* (Apr. 17, 2007).

substantial record of its many contributions to the public interest through service to local communities.[5]

The proposed merger threatens to undermine the ability of the local radio broadcasting industry to maintain its high level of service to the public in two critically-important ways. First, an SDARS monopoly would have the incentive and ability aggressively to misuse its market power. As it increases its presence in the advertising markets, it would have the incentive and ability to target the revenues that are essential to the maintenance of local service and the very survival of local radio broadcasters serving rural and smaller communities. Second, an SDARS monopoly would exploit its first-to-market advantage and use its market power thwart the development of HD radio in every way possible. Local broadcasters have made substantial investments to date in HD radio to remain competitive, but HD Radio remains in its infancy awaiting widespread HD receiver penetration in automobile dashboards.

II. HARM TO THE PUBLIC INTEREST IN LOCALISM

The FCC Chairman recently stated, "Establishing and maintaining a system of local broadcasting that is responsive to the unique interests and needs of individual communities is an extremely important policy goal."[6] This reflects the statutory intent of Congress and the long-standing policies of the Commission. Simply put, the public interest thrives when local broadcasters maintain strong ties to their communities and provide their characteristically local service to the public. Local radio is a vital local information source for school closings, storm alerts, local news, get-out-to-vote drives, and other public service announcements. Local

[5] *See, e.g.,* Record of Localism and Media Ownership Hearings in Portland, Maine on June 28 (June 8, 2007); Tampa-St. Petersburg, FL (Mar. 13, 2007); and in Harrisburg, Pennsylvania (Feb. 8, 2007).

[6] FCC Chairman Kevin Martin recently made this statement during the June 28, 2007 hearing in Portland, Maine on localism.

broadcasters invest in their local communities, making their stations far more than mere conduits for music. They are portals to the communities they serve. In short, by providing services designed to meet the needs of distinct local communities, radio broadcasters greatly contribute to an informed electorate, increase civic participation, and diversify and enrich American culture.

Local radio broadcasters have continued to provide a very high level of service to the public during the 10 years the current satellite radio duopoly has been authorized. However, the creation of a government-sanctioned satellite radio monopoly would portend drastic changes in the local competitive environment. When authorizing SDARS, the Commission pledged to "monitor and evaluate the potential and actual impact of satellite DARS" and to "safeguard the important service that terrestrial radio provides."[7] The proposed merger triggers the need for intense scrutiny by the Commission in this regard.

Once competition between satellite radio providers is eliminated, satellite radio no longer competes with itself. A satellite radio monopoly would then look to enter and dominate other markets. Indeed, this concern is not hypothetical. The day after the merger was publicly announced, Sirius CEO Mel Karmazin stimulated Wall Street investors and analysts with the promise of increased advertising revenue as a direct benefit of the merger.[8] It is clear that Sirius and XM believe that the combined entity will be able to use its monopoly SDARS status to increase its share of advertising revenues, to the detriment of all local broadcasters who already compete in a highly-competitive industry.

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7 *SDARS Order*, *supra* note 3, at para. 33.

8 Conference call with various Sirius and XM executives, (Feb. 20, 2007) (discussing proposed merger of Sirius and XM with multiple industry analysts) ("Merger Call"), *available at* http://www.sec.gov/Archives/edgar/data/908937/000095012307002469/y30604be425.htm.

According to Sirius CEO Mel Karmazin, the competition between Sirius and XM limited each company's take of the national advertising market.[9] His comment is not simply about the additive value of each company's respective share of the advertising market. It relates to the primary justifications of the merger — to reduce costs which result from intra-modal satellite radio competition. One of the greatest indirect costs — completely unarticulated in all of the filings by the merger parties in this proceeding — is the current competitive disincentive to maximizing satellite radio advertising sales.

With competition between two satellite radio providers, neither company can unilaterally make substantial increases in its advertising for fear of losing subscribers to its competitor. If one satellite radio firm begins to clutter-up its channels with advertising, the other firm would quickly exploit the difference. Indeed, consumers greatly value the dominantly commercial-free nature of satellite radio, and would likely favor the satellite radio provider <u>without</u> commercial clutter, all other things being equal. The commercial-free provider would likely make rapid gains in market share through new subscribers.

A satellite radio monopoly will aggressively pursue advertisers in all available markets once the merger is consummated. An SDARS monopoly with virtually no content regulation and the ability and incentive to use its monopoly rents to internally cross-subsidize its aggressive entry into the advertising markets would enjoy a substantial competitive advantage over local broadcasters. The marginal value of increased competition in advertising markets is grossly outweighed by the likely costs to the public at large in terms of the impact on local radio service.

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[9] *Id.*

Downward economic pressure on stations with fragile margins would threaten localism both in terms of reductions in the amount of programming with a local flavor, and in terms of the amount of local radio service available to listeners in rural and smaller communities. According to Ibbotson Associates, in 2003, the average net margin for all radio stations (SIC Code 483) was -3.02 percent, while the median net margin was 0.52.[10] Moreover, the radio industry exhibits significant economies of scale, as the net margin for the largest stations (4.92 percent) was significantly greater than the net margin for the smallest stations (-22.11 percent).[11] This implies that smaller radio stations are especially vulnerable to a reduction in advertising revenue.

While many broadcast stations will be able to adjust to downward pressure on advertising revenues without reducing programming aired to meet the needs of unique local communities, some will not. Contrary to the impression that XM and Sirius have tried to create, local radio is not a monolithic entity. Rather, there are thousands of local radio owners currently operating at different levels of economic success. With downward pressure on revenues, local stations will be forced to cut costs, and, in desperation, may substitute less costly programming that is more national in character.[12] Local stations with the smallest audiences (e.g., niche programming formats and stations serving rural populations) will be most vulnerable. Not only will the consequence be a net reduction in local content diversity, but rural and smaller

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10 IBBOTSON ASSOCIATES, COST OF CAPITAL 2003 YEARBOOK, at 4-19. Ibbotson relies primarily on data from Standard & Poor's CompuStat.

11 *Id.*

12 In order to produce high-quality and relevant local programming, a local station must employ a news staff, including on-air talent and community based research staff, as well as production personnel. In order to feature live broadcasts of local events, such as civic functions and high school sports, stations must make substantial financial investments in human resources, as well as in mobile production and communications equipment.

communities will likely experience an overall reduction in the number of local radio stations available.

With such thin margins, some local stations in small, rural communities operating at the edge would likely go out of business. The incentive for a satellite radio monopoly to pursue this result by targeting the advertising revenues of local stations in rural and smaller markets is abundantly clear. The majority of satellite radio subscribers today are residents of such areas. Perhaps this is so because of the relatively limited amount of local radio signal availability in such areas.[13]

The resultant loss of local service is a high cost to the public interest. The concern is not simply about the impact of a satellite radio monopoly on the profits of local radio stations or potential audience fragmentation. The local radio broadcasting industry will surely survive a satellite radio monopoly, although certain stations operating with the thinnest margins will likely be driven out. Moreover, there would likely be a significant adverse impact on the character of local radio service resulting from downward economic pressures from such unfair competition in markets of all sizes. So, the Commission should be concerned with the adverse impact of the merger on the public interest in unique local programming.

The Commission must carefully consider these implications in light of its statutory mandate in Section 307(b) of the Communications Act, which direct the Commission to allocate radio licenses to local communities so "as to provide fair, efficient, and equitable distribution of radio service."[14] The clear intent of Section 307(b) is to promote and ensure local radio service to all communities. The adverse impacts of the proposed merger on localism will

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[13] See the survey of satellite radio subscribers conducted by Wilson Research Strategies on June 28-29, 2007, summarized at http://www.w-r-s.com/press/WRS_NAB Sat Radio Survey_Press Release_070710.pdf.

[14] *See* 47 U.S.C. § 307(b).

not be minor or insignificant. In combination with the other harmful effects of the merger on consumers, especially all the satellite radio subscribers, the harmful effects of the proposed merger greatly outweigh the alleged benefits. Grant of the Applications would undermine localism and would be contrary to the public interest.

III. POTENTIAL HARM TO THE HD RADIO TRANSITION

HD radio is the future of local broadcast radio. The use of iBiquity's in-band-on-channel ("IBOC") digital audio broadcasting ("DAB") technology will allow local radio broadcasters to transmit in near CD-quality sound, broadcast multiple program streams (multicast), and offer increased data services (*e.g.*, station identification, song title, and artist name).[15] According to the FCC, currently 195 AM and 1,077 FM stations are authorized to broadcast using iBuquity's IBOC system, while around 700 FM stations have special temporary authority to multicast.[16] These stations primarily occupy the top 50 radio markets. Going forward, the transition to HD radio hopes to reach the remaining local communities, in which forty percent of the US population does not yet have HD service.[17]

HD radio technology has required significant investment by local radio broadcasters. To implement the necessary technological changes and secure additional programming if the station intends to multicast demands a substantial financial investment. Since access to HD programming requires an HD radio enabled receiver, the audience for HD radio largely depends on the availability of HD radio receivers. While HD radio has recently made in-roads with retailers such as Best Buy and Wal-Mart, and automakers Hyundai, Jaguar

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[15] *Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service, Second Report and Order, First Order on Reconsideration and Second Further Notice of Proposed Rulemaking*, FCC 07-33, paras. 3, 4 (released May 31, 2007) ("*DAB Second Report*").

[16] *Id.* at para. 11.

[17] *Id.*

and BMW, HD radio receivers are not yet widely available in new automobiles. So while HD radio promises to usher in a new era of increased quality and content for local broadcast radio stations, dissemination of receivers depends on the cooperation of automobile manufacturers and dealers, and consumer electronics manufacturers and retailers.

In the near and long term, the success of HD radio largely depends on the availability of HD radios as factory- or dealer-installed options on new automobiles. Sirius and XM are keenly aware of the importance of the automobile market. Both have made extensive inroads with automobile manufacturers – with characteristically *exclusive* arrangements.[18] Nearly every automobile manufacturer has reached an agreement with XM *or* Sirius. If the merger is approved, the satellite radio providers could exploit their downstream market power by seeking to extend the scope of those exclusive deals to include HD radio. Separate and apart from the SDARS market, without access to automobiles, HD radio would have little chance to compete effectively with satellite radio in local markets, as few car owners with a free trial to satellite radio would be inclined to swap their existing satellite equipment for HD radio equipment.

By virtue of the first-to-market advantage, factory- or dealer-installed XM radios are currently available in select models from Buick, Cadillac, Chevrolet, GMC, Hummer, Pontiac, Saab, Saturn, Honda, Acura, Toyota, Lexus, Scion, Hyundai, Nissan, Infinity, Porsche, Suzuki, Isuzu, Lotus, Subaru, Suzuki and Harley-Davidson.[19] Sirius radios are available as factory- or dealer-installed options in select models from Chrysler, Dodge, Jeep, Mercedes, Ford,

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[18] XM and Sirius have secured exclusive equipment contracts with a number of automobile manufacturers. *See generally* Sirius Satellite Radio Inc., SEC form 10-K, 3 (filed Mar. 1, 2007) (listing exclusive contracts) ("Sirius 10-K"); XM Satellite Radio Holdings Inc., SEC form 10-K, 4-5 (filed Mar. 1, 2007) (listing exclusive contracts) ("XM 10-K"). The Commission must investigate these arrangements to ensure that such contracts do not have the effect of impeding market access of HD radio.

[19] XM 10-K, *supra* note 18.

Lincoln, Mercury, Volvo, Mazda, Jaguar, Volkswagen, Audi, Kia, Land Rover, Mitsubishi, Nissan, Infiniti, Toyota, Lexus, Scion, Subaru, BMW, MINI, Bentley and Rolls-Royce.[20] In contrast, HD radios are available as factory-installed options on only a very few makes and current-production models at this time.

IV. CONCLUSION

Local radio broadcasters take seriously their role as servants of their local communities and stewards of the public interest. Localism is the cornerstone of local broadcast radio, and deterioration of unique local programming is a loss to the public. The proposed merger of Sirius and XM would work to the detriment of this important public interest. Local radio broadcasters seek a level playing field without anticompetitive practices by a satellite radio monopoly. For the reasons set forth above, and in the Petition to Deny of the National Association of Broadcasters, the undersigned Forty-six Broadcasting Organizations respectfully request that the Commission designate the Applications for hearing.

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[20] Sirius 10-K, *supra* note 18.

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CERTIFICATE OF SERVICE

I, Vicki Alston-Pressey, hereby certify that on this 9th day of July, 2007, copies of the foregoing Petition to Deny of Forty-six Broadcasting Organizations, and all exhibits and attachments thereto, were served by first-class U.S. mail, postage prepaid, to the following:

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EXHIBIT A

DECLARATION OF DOUGLAS F. EASTER

Under penalty of perjury I, Douglas F. Easter, hereby declare that:

1. I am the Executive Director of the Virginia Association of Broadcasters, and the Secretary Treasurer of the National Alliance of State Broadcasters Associations ("NASBA"). Each state broadcasters association that has joined the foregoing Joint Petition to Deny is a member of the NASBA.

2. I have read the foregoing Joint Petition to Deny, and, except where specifically noted, have personal knowledge of the specific allegations of fact therein. The factual allegations made in the Joint Petition to Deny are true and correct to the best of my knowledge and belief.

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

D. F. Easter

Douglas F. Easter