Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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Federal Communications Commission
Office of the Secretary

In the Matter of XM Satellite Radio Holdings Inc., Transferor and Sirius Satellite Radio Inc., Transferee Consolidated Application for Authority to Transfer Control	)	MB Docket No. 07-57

PETITION TO DENY
OF
NATIONAL PUBLIC RADIO, INC.

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Summary

One of the Commission's core goals is to maximize the diversity of points of view available to the public over the mass media. This fundamental policy goal arises from the First Amendment, which "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[1] In establishing the satellite digital audio radio service ("SDARS"), the Commission insisted on the presence of at least two facilities-based providers so that competition between them would foster a diversity of viewpoint over the SDARS platform. A mere 10 years later, the two SDARS providers, XM Satellite Radio Holdings and Sirius Satellite Radio, now ask the Commission to authorize their merger, leaving a single SDARS monopoly.

Reducing the number of SDARS providers from 2 to 1 would substantially harm the diversity of voices to the detriment of SDARS program producers, including NPR and NPR Member station licensees, and ultimately the public. While it is unclear how much programming overlap exists between the SDARS services, eliminating 1 of the 2 SDARS providers would clearly affect the editorial decision-making that results in the current SDARS program offerings. In the case of NPR and other public radio producers, we fear that a monopoly SDARS provider might reduce the amount and quality of public radio programming offered via the SDARS platform. A monopoly SDARS provider would certainly be able to demand less favorable licensing terms, thereby forcing NPR and others to decide between program quality and carriage.

Based on generally accepted antitrust principles, a national SDARS market constitutes the intersection of the relevant product and geographic markets. The breadth and depth of the

1 Associated Press v. United States, 326 U.S. 1, 20 (1945).

SDARS national programming fare sets it apart from any other audio entertainment offering, particularly among programmed services available in a mobile environment. This view of the SDARS market is shared by the Commission, program producers, and even the Applicants themselves. It is also borne out by audience research. While the future audio entertainment market may eventually evolve to subsume the SDARS market, the Commission may not approve the proposed transaction based on speculation about future technology. Particularly by comparison to terrestrial public radio stations, which are locally licensed, locally governed, locally staffed, and locally programmed, SDARS comprises a national geographic market.

Applying this market definition establishes that the proposed merger would convert an already highly concentrated market into a pure monopoly. Neither the prospect of imminent new market entry nor the promise of significant efficiencies justify the proposed merger. Establishing a new, fully competitive SDARS provider would be an extraordinary undertaking, and none of the suggested efficiencies are unique to the proposed merger or adequately documented.

If the Commission were to approve the proposed merger, it should do so only if it also imposes comprehensive structural and regulatory conditions. In that regard, the Commission should consider requiring (1) all SDARS receivers to include the capability to receive HD Radio, (2) the return of sufficient spectrum licenses to permit a second SDARS provider, and (3) at least until the restoration of intra-modal competition, a tariff-like regulatory regime to enable the Commission and the public to scrutinize the Applicants' SDARS service offerings and pricing options on an ongoing basis. Ultimately, we seriously doubt the effectiveness of conditions to protect the public interest, convenience, and necessity.

For these reasons, and as established more fully herein, we respectfully urge the Commission to deny the applications at issue.

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PETITION TO DENY
OF
NATIONAL PUBLIC RADIO, INC.

National Public Radio, Inc. ("NPR") hereby petitions the Federal Communications Commission (the "Commission") to deny the above-captioned consolidated application requesting Commission authority to combine the satellite direct audio radio service ("SDARS") licenses of XM Satellite Radio Holdings, Inc. ("XM") and Sirius Satellite Radio, Inc. ("Sirius") (collectively. the "Applicants") in a single SDARS provider on the grounds that the transfer would be contrary to the public interest, convenience, and necessity.[2]

[2] See Applications of XM Satellite Radio Holdings Inc., Transferor, and Sirius Satellite Radio Inc., Transferee, For Consent to Transfer Control, MB Docket No. 07-57 (filed Mar. 20, 2007) [collectively, the "Consolidated Application"].

I. NPR's Interest In This Proceeding

Established in February 1970, National Public Radio, Inc. is a non-profit membership organization of more than 800 full-service noncommercial educational radio stations nationwide. NPR produces and distributes such noncommercial educational programming as *All Things Considered, Morning Edition,* and *Talk Of The Nation.* NPR also programs two channels on the Sirius SDARS platform. NPR's member stations are, themselves, both producers of noncommercial educational ("NCE") programming for over-the-air broadcast and suppliers of programming to the SDARS market.[3] As described in the attached Declaration, reducing the number of SDARS providers from 2 to 1 by granting the Consolidated Application is likely to adversely affect the ability of program producers, including NPR and its Member station licensees, to distribute programming to the SDARS market.[4] Accordingly, NPR is a party in interest within the meaning of Section 309(d)(1) of the Communications Act.[5]

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3 For instance, the Trustees of Boston University, licensee of WBUR(FM), Boston, MA is an NPR Member licensee. Declaration of Ken Stern, NPR Chief Executive Officer, at 1, attached hereto [hereinafter "Stern Declaration"]. NPR has acquired the WBUR-produced programs *On Point* and *Only a Game* for distribution to NCE radio stations for over-the-air broadcast. Id. WBUR produces and distributes the program *Here and Now* through Public Radio International to NCE radio stations for over-the-air broadcast. Id. WBUR distributes all 3 programs to XM as part of its SDARS service. Id. Other radio producers of SDARS distributed programming include the licensees of WHYY, WAMU, WNYC, KQED, and WBEZ. Id. at 2.

4 Id. at 2-3.

5 47 U.S.C. § 309(d)(1).

II. Granting The Consolidated Application Would Harm The Public Interest By Creating A Monopoly SDARS Provider

For the Commission to grant the Consolidated Application, the Applicants must demonstrate by a preponderance of the evidence that, based on a balancing of the potential harms and benefits, the proposed transaction serves the public interest, convenience and necessity.[6] In making this public interest balancing, the Commission must assess the impact of the proposed merger in relation to the "broad aims of the Communications Act," which are principally focused on preserving and enhancing the diversity of voices available to the public and competition in the offering of spectrum based-services.[7] As demonstrated below, because the proposed merger will adversely affect viewpoint diversity and diminish competition in the SDARS market, the Applicants have not meet their burden and the Commission should deny the Consolidated Application.

A. The Proposed Merger Will Reduce The Diversity Of Programming Voices To The Detriment Of The Public And NPR, NPR's Member Station Licensees, And Other SDARS Program Producers

In the Consolidated Application, the Applicants claim that approval of the merger will necessarily increase program and viewpoint diversity because they will be able to eliminate redundant program offerings and offer subscribers the "best of" both services as well as new offerings.[8] This claim may have some superficial appeal, since there are purportedly 12 identical

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6 47 U.S.C. § 310(d); In the Matter of Application of EchoStar Communications Corporation, (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations); (Transferors) and EchoStar Communications Corporation (a Delaware Corporation); (Transferee), 17 FCC Rcd 20559, 20574 (2002) [hereinafter "Echostar/DirectTV Hearing Designation Order"].

7 Echostar/DirectTV Hearing Designation Order, 17 FCC Rcd at 20575.

8 Consolidated Application at 13-14.

channels on both SDARS services as well as some genre overlap among music channel offerings. We question, however, whether multiple channels devoted to a particular musical genre or time period on competing SDARS platforms necessarily constitutes inefficiency.[9]

More fundamentally, accepting the validity of this claim would require the Commission to renounce well-established federal pro-competitive spectrum policies, which have as a fundamental objective the promotion of a diversity of programming voices.[10] Competition in the provision of spectrum-based mass media services promotes viewpoint diversity because service providers are forced to compete through the editorial choices they make. The Commission explained the role of competing gatekeepers in its review of the failed Echostar/DirectTV merger:

> This gatekeeper role clearly affects which entertainment and news programming that millions of Americans can view. The aggregation of the vast majority of current DBS channels by one such editor reduces the potential for different editors to deliver a variety of news and current affairs to Americans through the carriage of different news and public affairs channels. This development harms viewpoint diversity by reducing the number of MVPD editors in all markets, and leaving only one in some markets.[11]

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9 See Consolidated Application at 12. Individual channels dedicated to music from the 1970s, to site the Applicants' example, might emphasize heavy metal over progressive rock or punk rock over disco.

10 See In the Matter of Establishment of Rules and Policies for the Digital audio Radio Satellite Service in the 2310 MHz Frequency Band, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5754, 5786 (1997) [hereinafter "SDARS Report and Order"].

11 Echostar/DirectTV Hearing Designation Order, 17 FCC Rcd. at 20584.

The Commission specifically cited a then-current example of competition resulting in increased viewpoint diversity.[12] Of note, the Commission in the Echostar/DirectTV case considered whether to authorize reducing the number of multichannel video providers from 3 (Echostar, DirectTV, and a cable operator) to 2 (Echostar/DirectTV and cable) in most markets. Approval of the Consolidated Application in this case would reduce the number of SDARS providers from 2 to 1 in every market.

We believe a merger of XM and Sirius would undoubtedly diminish viewpoint diversity. The presence of two SDARS providers forces each to compete in selecting the mix of program offerings they believe will attract the most subscribers. It is understandable that the Applicants would desire to conserve or reallocate the resources devoted to acquiring and compiling the most attractive program offerings, but the loss of competition would disserve the public.

From the perspective of a program producer, reducing the number of SDARS providers from 2 to 1 can only diminish the opportunities for NPR, its Member station licensees, and other program producers to develop and distribute programming to SDARS subscribers. Most obviously, the Applicants could decide to capitalize on their stated desire to eliminate redundancy and genre overlap by reducing the total amount of public radio programming currently offered on the SDARS platforms. Sirius currently offers 2 channels of NPR programming on the its service;[13] XM offers 1 channel containing programming from a variety of

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12 "Two [multichannel video programming distributors ("MVPDs")] (Cablevision and EchoStar) decided not to carry the [Yankee Entertainment Sports] channel, but a third MVPD (DirecTV) elected to carry that channel. The presence of DirecTV in the market, in this instance, clearly affected the programming that was made available to several million households. Echostar/DirectTV Hearing Designation Order, 17 FCC Rcd. at 20584.

13 Stern Declaration at 2.

public radio producers.[14] If the combined entity decided to offer a total of 1 or 2, rather than 3, "public radio" channels, NPR would face increased competition to secure space on the platform and, therefore, reduced bargaining power to secure favorable terms for SDARS distribution of its programming.[15] It is unclear whether the reduced license fees NPR could expect to receive would be sufficient to justify the cost of producing the programming, but we would expect it to challenge our ability to produce programming consistent with our high standards.[16] Other public radio program producers could be even more vulnerable.[17]

The proposed transaction would likely have other, less obvious, consequences. NPR believes it was able to enter into an exclusive arrangement with Sirius to provide 2 channels of programming because both parties perceived benefits in such an arrangement.[18] NPR was able to develop programming for a new distribution platform in a way that clearly established NPR's SDARS identity.[19] Sirius obtained a competitive advantage over its competitor, XM, as the

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14 See http://xmradio.com/onxm/channelpage.xmc?ch=xm_public_radio.

15 Stern Declaration at 2-3.

16 NPR's mission includes a commitment to "produce, acquire, and distribute programming that meets the highest standards of public service in journalism and cultural expression." http://www.npr.org/about/nprworks.html. Since its founding in 1970, NPR has been honored with literally hundreds of awards for its coverage of world events, including 39 George Foster Peabody Awards and 18 Alfred I. duPont-Columbia University Awards, two of the most prestigious in broadcasting. See Stern Declaration at 1.

17 Stern Declaration at 3.

18 Id.

19 Id.

exclusive SDARS source of NPR programming.[20] If NPR were to become part of a mix of program producers on a "public radio" channel, the value of the distribution channel would clearly be diminished,[21] although the combined entity, as the sole source of SDARS programming, would continue to enjoy SDARS exclusivity. While there is no guarantee that NPR will be able to negotiate equally favorable, or even minimally acceptable terms, with either Sirius or XM in the event the Consolidated Application is denied, a monopoly provider of SDARS service would have a clear economic incentive and market opportunity to offer less favorable terms to NPR.

In short, any increased spectrum efficiency that the proposed transaction might produce would necessarily come at a substantial cost to independent SDARS program producers and, ultimately, SDARS subscribers. Competition between two SDARS editorial "gatekeepers" over how best to attract and retain individual consumers would simply disappear. In its place, a single entity would alone determine the menu of program services existing and potential SDARS subscribers could receive. If decades of pro-competitive communications policy have taught anything, it is that any increase in spectrum efficiency would be well outweighed by the loss of viewpoint diversity, and the public interest would be the ultimate loser.

B. The Proposed Merger Would Produce Harms In The Provision Of SDARS To The Public That Would Substantially Outweigh Any Benefits Attributable To The Merger

Under generally accepted doctrines of antitrust law, a merger that will produce a monopoly must overcome a strong presumption of illegality by a showing of extraordinarily easy

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20 Id. 3. See also Sirius Satellite Radio, Press Release, SIRIUS Satellite Radio Renews Long-Term Programming Deal With NPR, Mar. 12, 2007, available at http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=233455.

21 Stern Declaration at 3.

entry or efficiencies.[22] In this case, unless the Commission were to require the Applicants to relinquish sufficient spectrum licenses to permit a new SDARS entrant as a condition of approving the merger,[23] a new SDARS entrant is highly unlikely.[24] Moreover, the merger-specific efficiencies would have to be particularly large, cognizable and non-speculative to justify a merger that results in a monopoly or near-monopoly.[25] As demonstrated below, the Consolidated Application proposes to reduce the number of SDARS providers from 2 to 1, substantially increasing concentration in an already concentrated market, and any merger-specific efficiencies are woefully inadequate to overcome the likely harm to program producers and consumers.

1. SDARS Comprises The Relevant Product Market

In determining the relevant product market for purposes of assessing the potential competitive effects of granting the Consolidated Application, the Commission historically has applied the Merger Guidelines.[26] Those Guidelines define the relevant product market as the smallest group of competing products for which a hypothetical monopoly provider would

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22 Echostar/DirectTV Hearing Designation Order, 17 FCC Rcd. at 20605 (citing IV Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, ANTITRUST LAW P932 at 160 (Rev. ed. 1998)).

23 See Section III, infra.

24 Even if such a condition were imposed, it is questionable whether such an entrant would be timely and sufficient in its magnitude, character and scope to counteract the adverse effects of the proposed merger. See Horizontal Merger Guidelines, issued by the U.S. Department of Justice & Federal Trade Commission, April 2, 1992, revised April 8, 1997, at ¶ 3.0 [hereinafter "Merger Guidelines"].

25 Id. at ¶ 4.0

26 See Echostar/DirectTV Hearing Designation Order, 17 FCC Rcd. at 20605-06.

profitably impose at least a "small but significant and non-transitory price increase."[27] If such a price increase would result in the loss of sufficient buyers to alternative products to offset the price increase, the product definition must be enlarged. The appropriate product definition is found once it is determined that consumers of the merging parties' product would have no sufficiently attractive alternative to which to turn to escape the price increase.

Applying the Merger Guidelines to the Applicants' product offering, it is abundantly clear that there are no sufficiently attractive alternative to which SDARS subscribers might effectively turn, particularly in the programmed, mobile media environment. XM and Sirius offer 170 and more than 130 channels of audio content, respectively, crossing a diverse range of music genres and information and entertainment content categories, including news, talk, sports, family, comedy, traffic, weather, and public safety, all on a 24 hour, 7 day per week basis, anywhere in the country.[28] These services, unlike terrestrial radio stations, are generally free of content restrictions, such as restrictions on the offering of indecent and profane programming[29] which many people find attractive.[30] Individually, and even collectively, terrestrial radio stations, personal listening devices, such as CD, cassette, and MP3 players, and emerging Internet and

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27 Merger Guidelines at ¶ 1.11.

28 Consolidated Application at 3, 5.

29 See Letter from W. Kenneth Ferree, Media Bureau Chief, FCC, to Saul Levine, President of Mt. Wilson FM Broadcastrers, 19 FCC Rcd. 24069 (Dec. 14, 2004) (declining to consider petition seeking to impose broadcast indecency regulation on SDARS providers).

30 In January 2007, Sirius announced the payment of approximately $83 million in Sirius stock as incentive compensation based on a more than 2 million subscriber increase attributable to the offering of the Howard Stern show on Sirius. Sirius Satellite Radio, Press Release, Howard Stern Earns Incentive Payment Reflecting Record Subscriber Growth, Jan. 9, 2007, available at http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=224917&cat=&newsroom=. Sirius ended 2006 with approximately 6,024,000 subscribers. Id.

cellular telephone offerings, could not restrain a combined SDARS provider from pricing its offerings above what a competitive SDARS market would otherwise permit.

This product definition is buttressed by how the Commission views the market. In establishing SDARS, the Commission clearly viewed SDARS and terrestrial radio as complementary but distinct product markets. "While, to some extent, DARS [sic] will compete with local radio, we anticipate that it will also complement terrestrial radio."[31] Indeed, the Commission found that other media, including terrestrial radio, CD players, and cable and DBS audio services, would all differ in a number of significant respects from SDARS.

> These media and satellite DARS [sic] all differ with respect to the programming menu (terrestrial radio can provide local programming and satellite DARS [sic] cannot), the sound quality, the cost of equipment, and the presence or absence of a subscription fee, but they all can provide music. The availability of these media, terrestrial radio in particular, varies across populated areas.[32]

In the years since, the Commission's view of the SDARS market has not materially changed. According to its most recent report on competition in satellite communications services, the Commission defined the "product market to consist of satellite audio programming provided to persons within the United States for a fee."[33] The Commission further identified the participants in this market to be "the two SDARS providers, XM and Sirius."[34]

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31 SDARS Report and Order, 12 FCC Rcd at 5756.

32 Id. at 5786. See also id. at 5760-61 (discussing possible SDARS services "that local radio inherently cannot provide").

33 In the Matter of Annual Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Communications Services, 22 FCC Rcd 5954, 5973 (2007) [hereinafter "2007 Satellite Competition Report"]. While the Commission cautioned that the market definitions contained in the report may not reflect the "appropriate markets to be considered in other Commission proceedings, including merger reviews," id. at 11, there is no reason to dispute the SDARS product market definition set forth in the report.

34 Id. at 5973.

Despite their attempts to define the relevant market more broadly to encompass various other forms of "audio entertainment,"[35] the Applicants admit to a more narrow definition. Thus, the Sirius web site contains helpful FAQs, including one answering the question "How is your programming different from regular radio?"[36] In the Consolidated Application, the Applicants also assert that, unless the merger is approved, "program diversity is unlikely, as both companies will be required to maintain overlapping, mainstream content in order to retain and attract customers."[37] If, as the Applicants claim, the relevant market includes SDARS, terrestrial radio, HD Radio, Internet radio, IPods and other MP3 players, mobile phones, and CD players,[38] and the SDARS providers are a small part of this "highly competitive and ever-expanding market,"[39] the Applicants should have little concern for the program offerings of each other compared to what they consider to be the dominant participants in the "audio entertainment" market.

Likewise, the Applicants tout as a significant merger efficiency their ability to combine advertising and marketing expenses.[40] Granted, not having to compete with each other should enable the Applicants to reduce "one of the largest expense items for each company."[41] However, if the relevant product market is the broad and ever-expanding audio entertainment

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[35] Consolidated Application at 21-39.

[36] http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=Page&cid=1018209032792

[37] Consolidated Application at 13.

[38] Id. at 21-39.

[39] Id. at 21.

[40] Id. at 17.

[41] Id.

market and they are a "small part" of that market, it would seem that advertising and marketing costs would continue to be a significant ongoing cost of competing in such a market.

Finally, if the relevant product market were as broad and all-encompassing as the Applicants suggest, one would expect consumers to engage in cross-substitution of the relevant product offerings to a substantial extent. It is cross-substitution that enables competing providers to respond competitively to a small, but significant price increase, thereby confirming a broader product market.[42] In fact, available research demonstrates that the public does not view the two product offerings as part of a common product market.

According to Arbitron and Edison Media Research, people who listen to digital radio platforms, including SDARS, do not spend significantly less time listening to AM/FM radio.[43] Among those who use digital radio platforms, defined as online radio, satellite radio, or an audio podcast, the average person 12 and older listens to 2 hours, 45 minutes a day; the average otherwise is 2 hours, 37 minutes a day.[44] This lack of media substitution exists despite a broad and increasing public awareness of the various digital radio platforms.[45] People also expect to

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42 "In considering the likely reaction of buyers to a price increase, the Agency will take into account all relevant evidence, including, but not limited to, . . . evidence that buyers have shifted or have considered shifting purchases between products in response to relative changes in price or other competitive variables." Merger Guidelines at ¶ 1.11.

43 Arbitron and Edison Media Research, The Infinite Dial 2007: Radio's Digital Platforms, at 13 (2007), available at http://www.arbitron.com/downloads/digital_radio_study_2007.pdf.

44 Id.

45 "Despite the growth reported in alternatives, such as the iPod, online radio and satellite radio, the time spent listening to AM/FM radio by users of digital radio platforms has not changed versus a year ago." Id.

continue listening to AM and FM radio as much in the future as they do currently, despite increasing advancements in technology.[46]

This data is consistent with audience research specifically of public radio listeners. A study of public radio listening by XM and Sirius subscribers demonstrates even less substitution between SDARS and terrestrial public radio.[47] Specifically, public radio's XM and Sirius subscribers listen about an hour less per week to public radio, which amounts to a single occasion per week.[48] Moreover, if SDARS and terrestrial radio were participants in the same product market, one would expect the availability of a given public radio program on XM or Sirius to reduce aggregate listening to that program on terrestrial public radio stations. Yet, that is not the case. Making programs available via XM or Sirius does not make them less attractive to XM and Sirius subscribers to listen to over-the-air, and keeping programs off the SDARS platform does not make them more attractive to XM and Sirius subscribers to listen to over-the-air.[49] These trends showing SDARS to be a complementary, but distinct, product market are expected to continue at least until 2010.[50]

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46 The percentages are as follows: 79% (Persons 12+); 77% (Online Radio, Monthly); 70% (SDARS Subscribers); 79% (Audio Podcast, Ever Listened). Id.

47 Walrus Rsearch and AudiGraphics, Audience 2010: Reinvigorating Public Radio's Public Service & Public Support at 5-6 (Feb. 21, 2006) available at http://www.rrconline.org/reports/pdf/Audience%202010-XM%20&%20Sirius.pdf [hereinafter "Audience 2010: XM & Sirius"].

48 The duration of the average "tune-in" is 70 minutes, whether or not the public radio listener is an SDARS subscriber. Id. at 6.

49 Id. at 7-8.

50 See id. at 10.

This data is consistent with how NPR has viewed the SDARS distribution platform. NPR views the SDARS platform as a different product market with a different audience and, therefore, an opportunity to reach additional listeners.[51] NPR did not license its signature news magazines, *Morning Edition* and *All Things Considered*, for SDARS distribution.[52] The news magazines are produced in segments and with detailed program "clocks" so that individual stations can "localize" them by inserting local news, traffic, weather, and other programming matter.[53] Certain NPR programming on the Sirius SDARS platform, such as *Tell Me More* and *News & Notes*, are aimed for a more ethnically diverse audience and are not available in many public radio broadcast markets.[54] NPR is also currently developing new morning news/talk programming for a younger audience, and SDARS distribution will be an important means of reaching that audience.[55]

More generally, while NPR has produced and acquired programming for broadcast by NCE stations since its founding, the stations themselves determine what programming to broadcast.[56] In the case of SDARS, by contrast, NPR's arrangement with Sirius has allowed NPR the opportunity to program the NPR channels on a 24-hour/day basis.[57]

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[51] See Stern Declaration at 3.

[52] Id.

[53] Id.

[54] Id.

[55] Id. at 3-4.

[56] See, e.g., In the Matter of Review of Commission Rules and Regulatory Policies Concerning Network Broadcasting by Standard (AM) and FM Broadcast Stations, 63 F.C.C.2d 674, 690 (1977) ("licensees have an affirmative, non-delegable duty to choose independently all programming for broadcast, in light of the tastes and ascertained needs and problems of the community").

Ultimately, the Applicants' definition of the relevant product market is based not on a current market for "audio entertainment," but on what they believe an audio entertainment market eventually may become. Indeed, wireless and internet functionality hold the promise of ubiquitous availability of readily substitutable pre-recorded and hosted audio entertainment options, but the promise of technology is often illusory,[58] and audio entertainment has yet to evolve to the point where such functionality is in general use. For similar reasons, NPR certainly believes HD Radio will bring an exponential increase in the quality and quantity of services terrestrial radio stations provide.[59] The current reality, however, is that terrestrial radio stations are only beginning to deploy and explore the technology and receivers are almost completely absent from motor vehicles, where a significant amount of listening occurs.[60] More importantly, assessing the competitive effects of the proposed transaction requires defining the relevant product market as it currently exists, since the ability to substitute competing products, thereby restraining anticompetitive behavior, requires general availability of the competing products. In this case, at this time, the relevant product market consists exclusively of SDARS services.

2. The Relevant Geographic Market Is National

Determining the level of concentration in a given product market next requires defining the relevant geographic market in which the producers compete. In this case, the relevant

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[57] Stern Declaration at 4.

[58] More than 40 years after AT&T debuted its Picturephone at the 1964 World's Fair, video phones have yet to emerge as a ubiquitous product offering. See www.corp.att.com/attlabs/reputation/timeline/70picture.html.

[59] Stern Declaration at 4.

[60] Id.

geographic market is a national one. SDARS was licensed on a national basis, and the providers are permitted to offer national, rather than local, services.[61] Based on most recent Commission analysis of competition in satellite communications services, moreover, the defining geographic characteristic of the SDARS market remains the same today.

> We find the geographic aspects of this market to be national. Individual customers face the same nationwide-licensed choices throughout the 48 contiguous states. Although each user is in one locality, the major participants in the market serve the entire country with mostly the same content.[62]

As a point of comparison, the public radio market is fundamentally a local one and the contrast between the two media could not be more stark.

As envisioned by Congress, public radio is fundamentally a system of locally licensed, locally governed, locally staffed, and locally programmed stations.[63] This inherent localism is directly attributable to a combination of social and institutional forces, many statutorily mandated, such as requirements for community advisory boards and open public meetings.[64] In addition, public radio stations are dependent for their existence on voluntary financial contributions from listeners. Indeed, public radio stations continue to thrive due to their deep roots in and ongoing engagement with their communities of service.

Public radio's success is a testament to the extensive local services stations provide to communities across the country. Public radio stations serve their communities every day in myriad ways, including through local news and public affairs programming, music programming,

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61 See note 32, supra, and accompanying text.

62 2007 Satellite Competition Report, 22 FCC Rcd. at 5973.

63 S. Rep. No. 222, 90th Cong., 1st Sess. 7 (1967). See Stern Declaration at 2.

64 See Revision of Programming Policies and Reporting Requirements Related to Public Broadcasting Licensees, Report and Order, 98 F.C.C.2d 746, 754 (1984)

support for local arts, culture and non-profit organizations, online and other non-broadcast initiatives, and services specifically targeted to underserved audiences, including the print-impaired and minority listeners. NPR itself reinforces stations' fundamental commitment to localism through training, program support, and programming. Particularly by reference to an inherently local medium, such as public radio, the SDARS market is unquestionably a national market.

3. Granting the Consolidated Application Would Create A Monopoly In An Already Highly Concentrated SDARS Market, And The Claimed Efficiencies Individually And Collectively Are Insufficient To Justify Such An Outcome

Having defined the relevant product and geographic markets, determining the competitive consequences of approving the consolidated application is a matter of tallying and comparing the levels of concentration before and after the proposed merger. The recent satellite communications competition report simplifies the task.[65]

MARKET CONCENTRATION IN SDARS

	2002	2003	2004	2005
XM Market Share (Revenue)	96.1%	87.7%	78.5%	69.7%
Sirius Market Share (Revenue)	3.8%	12.3%	21.5%	30.3%
HHI(Revenue)	9,262	7,843	6,627	5,779
XM(Subscribers)	92.1%	83.9%	73.6%	64.1%
Sirius (Subscribers)	7.9%	16.1%	26.1%	35.9%
HHI(Subscribers)	8,538	7,298	6,138	5,400

This Herfindahl-Hirschman Index ("HHI") table shows that, while the degree of concentration in the SDARS market has decreased due to increases in Sirius's market share, the market remains highly concentrated. A market dominated by a single monopolist has an HHI of 10,000.[66] Under the Merger Guidelines, "[w]here the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise."[67] In this case, an increase in market concentration from 5,400 or 5,779 to 10,000 is presumptively anticompetitive.

Although the presumption that a merger to monopoly is anticompetitive may be overcome by the prospect of new entrants or the promise of extraordinary efficiency gains, the prospects for new SDARS entry are remote,[68] and the efficiencies cited by the Applicants in this case are inadequate. To be relevant, claimed efficiencies must be "merger-specific," meaning they will only be accomplished with the proposed merger, and verifiable. Scrutiny of the efficiencies touted by the Applicants reveals that none of the suggested efficiency would overcome the heavy presumption against approving an SDARS monopoly.

The Applicants claim that the proposed merger will allow them to offer consumers more programming choices on a more a la carte basis at lower prices.[69] They have also promised to offer an interoperable receiver capable of receiving the full panoply of SDARS services.[70] In the

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65 2007 Satellite Competition Report, 22 FCC Rcd. at 5980.

66 Merger Guidelines at ¶ 1.5. The HHI is calculated by summing the squares of the individual market shares of all the participants. Id.

67 Merger Guidelines at ¶ 1.51(c).

68 Absent a merger condition requiring the Applicants to return sufficient spectrum to permit a news SDARS provider, see Section III, infra, the Commission would have to allocate new spectrum comparable to the current SDARS band.

69 Consolidated Application at 11.

70 Id. at 15-16.

long-term, the Applicants promise more diverse programming.[71] Finally, they claim that the merger will help accelerate the deployment of advanced technology, such as real-time traffic, rear-seat video, and "advanced data and telematics services," including enhanced traffic, weather, and infotainment offerings.[72]

The fundamental problem with the proposed efficiencies is that they are not specific to the proposed merger. There is nothing to prevent the Applicants from offering additional program choices or variable pricing plans. With regard to interoperable receivers, the parties were required by the Commission to develop and offer such equipment.[73] Realizing what is now characterized as an "efficiency" does not require the Commission to approve the Consolidated Application; short of a merger, the Applicants could pursue the commercialization of interoperable receivers through a joint venture, or the Commission could simply enforce the existing rule.

Finally, the promise of more diverse programming and advanced technology are cited with great fanfare but few specifics. It is also less than apparent that a merger is necessary to achieve these goals. Program and technology innovation are ultimately a function of resources, and a merger is not a necessary prerequisite to a reallocation of existing or the acquisition of new resources. As publicly-traded companies, moreover, there is no guarantee that the reallocation or acquisition of resources would benefit existing or future SDARS subscribers rather than SDARS shareholders.

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[71] Id. at 12.

[72] Id. at 14-15.

[73] 47 C.F.R. § 25.144(a)(3)(ii).

In sum, granting the Consolidated Application would create a monopoly SDARS provider, in exchange for which the public is unlikely to realize significant benefits. As a result, granting the Consolidated Application would not serve the public interest, convenience, and necessity.[74] For that reason, and as demonstrated above, NPR urges the Commission to deny the Consolidated Application.

III. If The Commission Were To Approve The Consolidated Application, Only The Adoption Of Significant Merger Conditions Could Possibly Protect The Public Interest

Based on the obvious harm to the public interest, we believe the Commission has no choice but to deny the Consolidated Application. If the Commission were to consider possible conditions that might allow it to approve the transaction, we believe that only the most far-reaching conditions would provide any hope of an effective safeguard. Toward that end, we encourage the Commission to consider the following among the possible conditions to impose on a monopoly SDARS provider.

First, if the SDARS market is to become part of a broader audio entertainment market, it is imperative that SDARS receivers contain the functionality necessary to receive HD Radio, which is the future of terrestrial radio. Even crediting the Applicant's explanation for failing to deploy interoperable receivers,[75] the cost of the HD chipset is falling as more manufacturers ramp up production.[76] Such a requirement might reduce

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74 47 U.S.C. § 310(d).

75 See Consolidated Application at 16.

76 See, e.g., iBiquity Digital Corp., Press Release, Samsung Developing New Low-Power, Low-Priced Chipset for HD Radio™ Receivers, May 9, 2007, available at http://www.ibiquity.com/press_room/news_releases/2007/1029

the potential harm to the public by encouraging the deployment of HD Radio capable receivers and assuring public access to terrestrial HD Radio stations. If so, it might eventually undermine the merged entity's ability to increase prices or reduce the quality of service.

Second, the Commission should require the Applicants to return sufficient SDARS licenses to permit a new SDARS entrant. There is no guarantee that a broader audio entertainment market will eventually subsume the SDARS market. Even if it does, the presence of a second SDARS provider would help address the harms posed by the proposed merger by assuring consumers the ability to choose from among multiple facilities-based SDARS providers.

Finally, at least until the emergence of a fully competitive SDARS market, the Commission would need to subject the merged entity to ongoing scrutiny of their service offerings and business practices to ensure that the Applicants do not abuse their anticompetitive position. The Applicants have made numerous promises about their future program offerings and pricing options. While a useful first step, the Commission cannot simply accept those promises at face value.

With only two SDARS providers currently, the SDARS market is less than fully competitive, and the Commission cannot assume that the current $12.95/month service pricing reflects a market rate. More generally, if the Commission were to approve a merger-to-monopoly, the Commission should impose comprehensive price and service regulation akin to telecommunications regulation under Title II of the Communications Act,[77] at least until effective competitive emerges. Indeed, the Commission might require the merged entity to submit proposed service offerings and pricing options to the Commission for its review and public