

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

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

NOTICE OF PROPOSED RULE MAKING

Adopted: June 25, 2007

Released: June 27, 2007

Comment Date: 30 days after publication in the Federal Register

Reply Comment Date: 45 days after publication in the Federal Register

By the Commission:

I. INTRODUCTION

1. On March 20, 2007, Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM") (collectively, the "Applicants"), the only entities authorized by the Commission to provide satellite radio service in the United States,¹ submitted applications seeking permission to transfer control of Commission licenses and authorizations held by Sirius and XM to a single, combined entity owned by the current shareholders of XM and Sirius.² As discussed below, because the proposed transfer conflicts

¹ See 47 U.S.C. § 310(d); *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 March 20, 2007) (collectively, the "Consolidated Application"). On March 29, 2007, the Commission released a public notice designating this proceeding as "permit but disclose" for purposes of the Commission's *ex parte* rules. See *XM Satellite Radio Holdings, Inc. and Sirius Satellite Radio, Inc. Seek Approval To Transfer Control Of Licensee Entities Holding FCC Licenses and Other Authorizations*, DA 07-1435, MB Docket No. 07-57 (rel. Mar. 29, 2007). On June 8, 2007, the Media Bureau released a second public notice establishing the pleading cycle for parties to file comments with respect to the Consolidated Application. Comments are due July 9, 2007, and responses and oppositions are due July 24, 2007. *Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. Seek Approval to Transfer Control of FCC Authorizations and Licenses*, DA 07-2417, MB Docket No. 07-57 (rel. June 8, 2007).

² These licenses are held pursuant to Section 310(d) of the Communications Act of 1934, as amended (the "Act"). Under the proposed transaction and pursuant to an Agreement and Plan of Merger dated February 19, 2007, a wholly owned subsidiary of Sirius, Vernon Merger Corporation, will be merged with and into XM, with XM being the surviving entity of this subsidiary merger. The proposed surviving entity after all the transactional steps are completed, Sirius Satellite Radio Inc., will hold, through Satellite CD Radio, Inc. and XM Satellite Radio Holdings Inc., the Commission licenses and authorizations. The surviving entity will be controlled by a new Board of

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with language prohibiting such a combination in the Commission's 1997 Order establishing the Satellite Digital Audio Radio Service ("SDARS"),³ this *Notice of Proposed Rule Making* ("Notice") seeks comment on whether the language in question constitutes a binding Commission rule and, if so, whether the Commission should waive, modify, or repeal the prohibition in the event that the Commission determines that the proposed merger, on balance, would serve the public interest.⁴

II. DISCUSSION

2. Pursuant to the Commission's 1997 *SDARS Report & Order*, the Applicants each hold a license to provide satellite radio service in the United States and they collectively use all of the spectrum assigned by the Commission for such service.⁵ The *SDARS Report & Order* contained the following language:

Transfer. We note that DARS licensees, like other satellite licensees, will be subject to rule 25.118, which prohibits transfers or assignments of licenses except upon application to the Commission and upon a finding by the Commission that the public interest would be served thereby. Even after DARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellite DARS license. This prohibition on transfer of control will help assure sufficient continuing competition in the provision of satellite DARS service.⁶

3. The Applicants maintain that the above-quoted language is a policy statement under the Administrative Procedure Act ("APA") rather than a binding Commission rule because it was not codified in the Code of Federal Regulations.⁷ To the extent that the Commission considers the above-quoted language in the *SDARS Report & Order* to be a binding rule prohibiting the proposed transfer of control, the Applicants request that the Commission waive, modify, or otherwise alter the rule to the extent necessary to permit the proposed merger.⁸ We seek comment on these contentions. We seek comment specifically on the Applicants' contention that the Commission should waive, modify, or otherwise alter the prohibition to the extent necessary to permit the merger because the proposed merger, on balance, would serve the public interest. The Commission reviews license transfer applications to determine whether grant of an application would serve the public interest, convenience, and necessity under Section 310(d) of the Act.⁹ The Commission's associated review of the Consolidated Application,

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Directors, selected by both Sirius and XM, and its equity ownership will be represented equally by former shareholders of XM and Sirius. Consolidated Application at 6-7, Attachment A.

³ *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd 5754 (1997) ("*SDARS Report & Order*").

⁴ 5 U.S.C. §§ 551, *et seq.*

⁵ The Commission has allocated the entire 2310-2360 MHz band for use by SDARS. The 2310-2320 MHz band and 2345-2360 MHz band have been assigned for use by the Wireless Communications Service, but the spectrum remains allocated for SDARS. See 47 C.F.R. § 2.106.

⁶ *SDARS Report & Order*, 12 FCC Rcd at 5823 ¶ 170 (this language is found under the subheading "Safeguards"). In the quoted language, the term "DARS" refers to the same service that we refer to in this document as "SDARS."

⁷ Consolidated Application at 50.

⁸ *Id.* at 51-52.

⁹ See 47 U.S.C. § 310(d); see also *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time*

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pursuant to this standard, will include an assessment of whether the proposed transaction complies with specific provisions of the Act, other statutes, and the Commission's rules.¹⁰ If the Commission concludes that the transaction would not violate a statute or rule of continued applicability, it next will consider whether the transaction could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes. The Commission generally weighs any potential public interest harms of a proposed transaction against any potential public interest benefits.¹¹ The Applicants have the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.¹² The Applicants also contend that the prohibition need not be continued "because the preservation of two separate satellite radio licensees is no longer required to 'help assure sufficient continuing competition,'" which, they maintain, was the original purpose of the restriction set forth in the 1997 *SDARS Report & Order*.¹³ Further, the Applicants assert that the Commission has sufficient justification to waive, modify or otherwise alter the prohibition and approve the proposed transfers of control because the competitive environment within the audio entertainment marketplace has changed since 1997, when the Commission adopted the *SDARS Report & Order*.¹⁴ Based upon these changed market conditions, the Applicants assert that continuation

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Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee, 21 FCC Rcd 8203, 8217 ¶ 23 (2006) ("Time Warner-Comcast-Adelphia Order"); Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee, 15 FCC Rcd 9816, 9817 ¶ 1 (2000); Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee, 14 FCC Rcd 3160, 3168 ¶ 13 (1999).

¹⁰ See *Time Warner-Comcast-Adelphia Order*, 21 FCC Rcd at 8217 ¶ 23; *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, 19 FCC Rcd 473, 484 ¶ 16 (2004) ("*News Corp.-Hughes Order*").

¹¹ *Time Warner-Comcast-Adelphia Order*, 21 FCC Rcd at 8217 ¶ 23; *News Corp.-Hughes Order*, 19 FCC Rcd at 477 ¶ 5.

¹² See, e.g., *Time Warner-Comcast-Adelphia Order*, 21 FCC Rcd 8218 ¶ 23; *News Corp.-Hughes Order*, 19 FCC Rcd at 483 ¶ 15. See also *AT&T-BellSouth Order*, 22 FCC Rcd 5662, 5672 ¶ 19; *SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443 ¶ 16; *Comcast-AT&T Order*, 17 FCC Rcd at 23255 ¶ 26.

¹³ *Id.* at 50-51 (citing *SDARS Report & Order*, 12 FCC Rcd at 5786 ¶ 77). The Applicants contend that a merger would not enable them to exercise market power because the two companies currently serve only a very small fraction of what they define as the relevant market, and because consumers can readily substitute other products and services for satellite radio. *Id.* at 21-47. The Applicants further assert that a merger would not adversely affect competition among programmers, given their commitment to programming diversity and the myriad outlets available to programmers. *Id.* at 47.

¹⁴ *Id.* at 50. For the purposes of this rulemaking, one of the Applicants' key contentions is their assertion that, given the robustly competitive media marketplace, a merger of the two satellite radio companies would not have any adverse effects on competition. *Id.* at 20-21. They claim that despite its strong initial growth, satellite radio accounts for only 3.4 percent of all radio listening. *Id.* at 22 (citing Phil Rosenthal, *Satellite Deal Foes Don't Hear Message*, CHICAGO TRIBUNE, Feb. 28, 2007, at <http://www.chicagotribune.com/business/columnists/chi-0702280164feb28,0,1928140.column?coll=chi-navrailbusiness-nav> (last visited May 2, 2007) (summarizing the results of the Arbitron study)). They posit that the relevant market for purposes of the Commission's competitive review of the Consolidated Application should be the "market for audio entertainment services," which they state includes terrestrial radio, HD Radio, Internet radio, iPods and other MP3 players, mobile phones, and CD players. Consolidated Application at 24-39.

of the prohibition would not serve the public interest.¹⁵ We seek comment on this argument and request.¹⁶

III. PROCEDURAL MATTERS

A. Comment Information

4. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on the *Notice* on or before 30 days after date of publication in the *Federal Register*, and reply comments on or before 45 days after date of publication in the *Federal Register*. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (May 1, 1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments.
 - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

¹⁵ *Id.* at 52.

¹⁶ The Commission has legal authority to repeal or modify the prohibition on transfer of control pursuant to 47 U.S.C. §§ 151, 154(i), 303(r), and 310(d).

- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, S.W., Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

B. Initial Regulatory Flexibility Certification

5. Pursuant to the Regulatory Flexibility Act,¹⁷ the Commission certifies that the outcome of this rulemaking will not have a significant economic impact on a substantial number of small entities. This rulemaking affects satellite digital audio radio service ("SDARS") providers. SDARS provides nationally distributed subscription radio service. Currently, only two operators hold licenses to provide SDARS service, XM and Sirius, which requires a great investment of capital for operation. Because SDARS service requires significant capital, we believe it is unlikely that a small entity as defined by the Small Business Administration would have the financial wherewithal to become an SDARS licensee.¹⁸

C. Paperwork Reduction Act

6. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

D. Ex Parte Information

7. *Ex Parte Rules.* This is a permit-but-disclose notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

8. *Contact Information.* For additional information on this proceeding, please contact Rosemary C. Harold, (202) 418-7200, Royce Sherlock, (202) 418-7030, or Marcia Glauberman, (202) 418-7046, of the Media Bureau.

IV. ORDERING CLAUSES

9. IT IS ORDERED that pursuant to the authority contained in Sections 1, 4(i), 303(r), and 310(d) of the Communications Act of 1934, 47 U.S.C §§ 151, 154(i), 303(r) and 310(d), the *Notice of Proposed Rule Making* set forth herein IS ADOPTED.

¹⁷ See 5 U.S.C. § 605(b).

¹⁸ The small business size standard for the census category, "Radio Networks," which includes radio satellite broadcasting, is \$6.5 million or less in receipts, per year. *See* 13 C.F.R. § 121.201, NAICS code 515111.

10. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary