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

In the Matter of	)	
	)	
Consolidated Application for Authority	)	MB Docket No. 07-57
To Transfer Control of XM Radio Inc.	)	
And Sirius Satellite Radio Inc.	)	

PETITION TO DENY OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS

The National Association of Telecommunications Officers and Advisors ("NATOA"), hereby submits this Petition to Deny the above-referenced application for authority to transfer control of XM Radio Inc. and Sirius Satellite Radio Inc.

NATOA's membership includes local government officials and staff members from across the nation whose responsibility is to develop and administer communications policy and the provision of services for the nation's local governments.

I. INTRODUCTION

In considering the Consolidated application ("Application") for transfer of control of the licenses held by Sirius and XM, the FCC must consider the impact that the proposed merger will have on the public interest.[1] As XM and Sirius acknowledge, this analysis must "weigh the potential public interest harms against the potential public

[1] 47 U.S.C. § 310(d).

interest benefits to ensure that, on balance, the proposed transaction will serve the public interest, convenience, and necessity."[2]

In reviewing this application, the FCC must "determine what effect the merger will have on the state of competition in the relevant market and whether the efficiencies created by the merger will be passed on as benefits to consumers."[3] Further, the FCC's review of the application must "balance the potential benefits against the potential harms of the merger" and go "beyond traditional antitrust considerations to encompass a broader public interest analysis."[4] Taking this analysis into consideration, the application of XM and Sirius fails to meet the criteria listed above.

Specifically, XM and Sirius discuss efficiencies that will not benefit consumers sufficiently to justify a merger between the parties. Additionally, XM and Sirius identify too broad a relevant market when assessing the impact of the proposed merger on the public interest, grouping incomparable offerings under the umbrella of "audio entertainment."[5] When the appropriate relevant market of subscription satellite radio is considered, the public interest is harmed by the proposed merger. As a result, the FCC should deny the proposed merger.

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[2] *XM Satellite Radio Holdings Inc., Transferor and Sirius Satellite Radio Inc., Transferee, Consolidated Application for Authority to Transfer Control*, MB Docket No. 07-57 (rel. March 29, 2007)("XM/Sirius Application"), *citing Lockheed Martin Corp., COMSAT Corp. and COMSAT Digital Teleport, Inc. Assignors and Intelsat, Ltd., Intelsat (Bermuda), Ltd., Intelsat LLC and Intelsat USA License Corp., Assignees Application for Assignment of Earth Station and Wireless Licenses and Section 214 Authorizations and Petitions for Declaratory Ruling*, Order and Authorization, 17 FCC Rcd 27,732, 27,739 (¶ 12) (2002).

[3] Separate Statement of Commissioner Kathleen Q. Abernathy, *Re: 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),* CS Docket No. 01-348 (adopted Oct. 9, 2002) ("Abernathy Statement").

[4] *Id.*

[5] *XM Satellite Radio Holdings Inc., Transferor and Sirius Satellite Radio Inc., Transferee, Consolidated Application for Authority to Transfer Control* (Application), MB Docket No. 07-57, pp. 20 (rel. March 29, 2007).

II. EFFECT OF EFFICIENCIES

The application lists numerous proposed benefits to consumers that will occur because of efficiencies that will exist if the merger between XM and Sirius is allowed to proceed. XM and Sirius specifically identify lower prices, more programming choices, and the deployment of enhanced technology as benefits consumers will reap if the merger is permitted. All three of these benefits, however, are contingent on the merged company's actions and are, arguably, unlikely to happen given the absence of competition in the relevant market.

A. Lower Prices

XM and Sirius claim that the new company will be able to provide consumers with lower prices for subscription satellite radio.[6] Currently, consumers pay $12.95 per month for either service and receive the full slate of channel offerings provided by the companies. According to XM and Sirius, the merged company would continue to offer consumers, using legacy hardware, "substantially the same" package for the current price of $12.95,[7] but would also offer a lower priced tier with "fewer channels." This proposal contradicts the lower price benefit XM and Sirius claim will arise from the merger.

Further, a major component to the promise of lower prices in the merged company is the offering of *a la carte* programming choices. What's troubling, however, is the process by which the proposed *a la carte* system will operate. The system would require consumers to purchase new hardware to access the service. Further, consumers will have to go online to select the channels they wish to subscribe to, with no other means (either in-store or on the phone) provided for consumers to use in selecting the

[6] XM/Sirius Application at 10.
[7] *Id.* at 11.

offerings in their *a la carte* package. Finally, the *a la carte* package limits the number of channels available in the flat per-month fee, and then charges extra for premium content. This may result in making the *a la carte* package price the same as that charged for the regular package, even though the consumer could receive fewer channels.[8] The promise of lower prices either entails less content, or paying premium rates to get the programming the consumer really wants – apparently, no middle ground exists where consumers can expect a true price break.

XM and Sirius counter this concern by saying the merger would allow subscribers to one service to enjoy a "best of" package that contains programming from the other provider. This benefit, however, would be available only to consumers willing to pay a "modest premium" for additional content.[9] What's more, some of the exclusive content that consumers might desire to gain access to by subscribing to the "best of" package could remain out of their reach because of agreements with programming partners.[10] Both the "modest premium" and limited access to the "best of" services fail to generate the kind of benefits to consumers necessary for this merger to warrant FCC approval.

B. More Programming Choices

XM and Sirius identify direct channel overlap and duplicitous programming as areas where the efficiencies of the merger could benefit consumers.[11] To be sure, with 87

[8] *See* XM and SIRIUS to Offer A La Carte Programming, *avail. at* http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=255847&cat=&newsroom=). Only the genre-specific and family-friendly tiers provide any price relief, but this comes at consumer willingness to part with programming options – a far cry from the promise of more diverse programming claimed in the Consolidated Application.

[9] XM/Sirius Application at 11. *See also* XM and SIRIUS to Offer A La Carte Programming, *avail. at* http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=255847&cat=&newsroom=) (listing "best of" packages for XM and Sirius customers at $16.99/month while adding only ten channels to the basic package.)

[10] *Id.* at 12, footnote 26.

[11] *Id.*

channels falling under this category, there is an opportunity for efficiencies to reduce the operating expenses of XM and Sirius. However, these efficiencies will not give rise to the kind of diverse programming alluded to in the application and provide little reason for the FCC to approve this merger. Any new offerings by the merged company would have to fit within the constraints of the systems currently deployed by XM and Sirius. Both insufficient capacity and the glut of legacy systems that will exist in the marketplace create a major obstacle to diverse programming taking hold.

With the overwhelming majority of subscribers still using the basic service package of both XM or Sirius, the merged company would be forced to ensure that programming options consumers enjoyed before the merger remain "substantially the same" afterwards. Even if the elimination of identical and duplicitous stations could be accomplished, neither provider has enough carriage space for the totality of offerings of the merged company, let alone to provide additional diverse programming.[12] It would appear that, despite the protestations of XM and Sirius to the contrary, the merged company will not be able to provide consumers with the kinds of diverse programming benefits as stated in the application.

C. Deployment of Enhanced Technology

Finally, XM and Sirius claim the proposed merger will benefit consumers on two technological fronts: (1) deployment of advanced technologies and (2) interoperable receivers. The wide-ranging benefits that XM and Sirius suggest may be substantial and beneficial to consumers. With a combined research department and greater resources, the merged company could produce additional offerings, such as "enhanced traffic, weather,

[12] XM/Sirius Application at 12, footnote 27.

and infotainment offerings," along with rear-seat video and other ingenious products.[13] Interoperable receivers would allow consumers to receive the totality of offerings from XM and Sirius on one device – currently impractical given the problems and lack of incentive for commercialized interoperable receivers as stated by XM and Sirius.[14]

But these benefits are only proposals. Once free of competitive market pressures, the merged company may have little incentive to invest substantial amounts of money into research and development.

D. Overall Picture

XM and Sirius paint a rosy picture of what would come to pass in a post-merger environment, promising better technology and more programming options, all at lower prices for consumers. But where an absence of competition leaves consumers with outdated equipment, while paying the same if not more to receive programming that is "substantially the same" if just slightly better, one is hard pressed to argue that such "benefits" outweigh the public interest harms that will arise in the event this merger is approved.

III. THE RELEVANT MARKET

In the application, XM and Sirius identify the relevant market as that of "audio entertainment." The "audio entertainment" market, as crafted by XM and Sirius, includes terrestrial radio, HD radio, Internet radio, MP3 players, mobile phones, and CD players.[15] But this market has been defined too broadly and is misleading.

In initial comments, Common Cause, Consumer Federation of America, Consumers Union and Free Press illustrate how the technologies that XM and Sirius

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[13] XM/Sirius Application, pp. 14-15.
[14] *Id.* at 16.
[15] *Id.*, pp. 24-38.

include in the "audio entertainment" market are in no way comparable to what satellite radio offers to consumers.[16] The myriad advantages that satellite radio has over both broadcast signals and personal audio devices makes it unreasonable to consider these "alternatives" as equivalent replacements for satellite radio.

Both terrestrial and HD radio are limited in range, and signal loss is common when traveling interstate or any significant intrastate distance. This limited range requires consumers to frequently search out new stations, and, in some cases, leaves consumers unable to find a station comparable to what they had been listening to before signal loss. Satellite radio has a footprint that reaches nearly all of the country, allowing consumers to listen to the same station for as long as their trip takes – a decided advantage over terrestrial and HD radio.

Internet radio offers consumers more channels than satellite radio, but this trend may suffer given the recent Copyright Royalty Board decision and subsequent denial of stay for enforcing the Royalty Board ruling.[17] Even if Internet radio still offers a comparable selection of channels, it lacks the portability of satellite radio, and cannot operate well at traveling speeds. Satellite radio can be used both while traveling and stationary, a marked advantage over Internet radio.

MP3 players have the portability that Internet radio lacks, but no matter how large its capacity, an MP3 player is ultimately limited by the drive space built into the device. Also, content offerings are limited to what the consumer already has in his or her library, and cannot be changed easily. Satellite radio provides access to a vast range of content,

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[16] Petition to Deny of Common Cause, Consumer Federation of America, Consumers Union and Free Press, MB Docket No. 07-57, p. 3 (rel. July 9, 2007).
[17] *Court denies Webcasters' stay petition*, Reuters (rel. July 12, 2007), avail. at http://www.reuters.com/article/internetNews/idUSN1234036620070712.

and provides this content continuously and without facing drive space limitations like an MP3 player. This argument also holds for CD players, which have substantially less storage capacity than MP3 players, and limit consumers even more in their selections.

Mobile phones may solve both the portability and range issues of the other options that XM and Sirius include in the "audio entertainment" genre, and many new phones have sufficient drive space to allow for meaningful amounts of content to be stored and played back. Where mobile phones fail is two-fold: The networks used to download new content are not as steady as those used by satellite radio, and mobile phones typically do not permit a consumer to stream content, precluding the consumer from enjoying formats that depend on streaming like news talk and sporting events.

The difference between satellite radio and the offerings lumped together under the "audio entertainment" heading is set in stark contrast when one considers how satellite radio has been used by the automotive industry. Numerous manufacturers offer satellite radio as an optional feature,[18] with some going so far as to include the hardware and a free subscription with the purchase of a vehicle. The presence of satellite radio and the unique problems the merger raises for automakers is seen in Toyota's initial comments.[19]

The value of satellite radio has been seen in the airline industry. A sampling of the carriers flying out of Reagan National Airport shows that AirTran, AirCanada, and United all offer XM satellite radio in-flight.[20] This is compared to the offerings of

[18] A review of major automobile manufacturers in the US market reveals that satellite radio is offered with service already provided or with the vehicle "satellite-ready" by every maker. General Motors, Chevrolet, Toyota, and Honda all offer XM service, while Ford, Dodge, and Chrysler offer Sirius service.
[19] Toyota identified its "primary concern" as being "that the merger not threaten the continued viability of equipment already installed in vehicles, or require excessive and time consuming investments in developing and deploying new hardware." *See* Toyota Comments on Satellite Radio Merger, MB Docket No. 07-57, p. 3 (filed July 9, 2007).
[20] AirCanada and United offer a sampling of XM's channels, while AirTran carries the full compliment of XM channel offerings. *See* www.aircanada.com, www.united.com, and www.airtran.com.

carriers using on-board audio systems where fewer listening options exist.[21] Both examples demonstrate the value of satellite radio compared to the other "audio entertainment" products.

The correct relevant market for the purposes of deciding the impact of the proposed merger on the public interest must be satellite radio itself, without including other services that are incomparable to satellite radio. Using the appropriate relevant market can only lead to the conclusion that the proposed merger does not serve the public interest, convenience, or necessity.

IV. EFFECTS OF THE PROPOSED MERGER

Currently, the satellite radio market has a paucity of competition, with only XM and Sirius offering service. The proposed merger would take the current duopoly and create in its stead a monopoly. Despite the protestations of XM and Sirius to the opposite, the proposed merger is unlikely to benefit consumers in either the short or long term, and should be denied by the FCC.

Competition may drive companies to develop new technologies to provide innovative services, and maintain lower costs for consumers. Without competition, consumers may be left with higher bills for antiquated services and technology. If the proposed merger goes forward, the subsequent company may have little incentive to develop new technologies for consumers, especially with respect to signal receivers. Hardware offerings are important to consumers and without competitive forces to drive development, consumers may languish with outdated models that fail to make use of satellite radio's full potential.

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[21] Continental Airlines generally offers only eight channels. *See* http://www.continental.com/web/en-US/content/travel/inflight/entertainment/music/default.aspx.

Yet a bigger concern for consumers will be the fact that one company will have control over all the content offerings to come over satellite radio. Even with the rash of media consolidation seen in terrestrial broadcasters, no one company wields the power to decide what will and will not be heard by consumers. Commenters in this proceeding, including the Prometheus Radio Project, U.S. Public Interest Research Group,[22] and Public Knowledge[23] have proposed that, in the event the merger is granted, 4 to 7 percent of the new company's offerings should be noncommercial and free from the new company's editorial control. But this still leaves 93 percent of the channels under the control of one company – a percentage that is entirely too high when one considers the 35 percent cap on terrestrial ownership.

Finally, the new company would be free to set service prices at whatever price points consumers will pay in this new, competition-free environment. Even though XM and Sirius propose a modest pricing scheme in their application, the reality is that once established, the new company will be able to charge prices as high as consumers are willing to pay without regard for whether the price is commensurate with the value of the services provided.

V. <u>CONCLUSION</u>

Almost five years ago, Commission Abernathy penned a succinct assessment of

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[22] Informal Objection of Prometheus Radio Project and U.S. Public Interest Research Group, MB Docket No. 07-57, p. 5 (filed July 9, 2007).
[23] Comments of Public Knowledge, MB Docket No. 07-57, p. 1 (filed July 9, 2007).

the proposed DirecTV/EchoStar merger that applies with equal force to the matter at hand:

> The record developed thus far demonstrates that this proposed merger will likely harm consumers by eliminating a viable competitor…driving up prices, and decreasing innovation and quality of service. The Applicants have not demonstrated any merger-specific public interest benefits that outweigh these harms. More specifically, the proposed merger will substantially increase the level of concentration in an already highly concentrated market.[24]

For the stated reasons, the FCC should deny XM's and Sirius's application.

Respectfully submitted,

Libby Beaty
John D. Russell
NATOA
1800 Diagonal Road, Suite 495
Alexandria, VA 22314
(703) 519-8035
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[24] Abernathy Statement.