REDACTED
FOR PUBLIC INSPECTION

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

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

JOINT OPPOSITION TO PETITIONS TO DENY AND REPLY COMMENTS OF SIRIUS SATELLITE RADIO INC. AND XM SATELLITE RADIO HOLDINGS INC.

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Summary

This merger will bring unprecedented benefits to consumers and will significantly enhance, rather than harm, competition. Indeed, the transaction paves the way for a unique form of competition in the entertainment industry—one based on the individual programming preferences of listeners.

As a result of this merger, Sirius and XM will offer consumers the ability to pick and choose programming on an a la carte basis. Specifically, subscribers will be able to create a customized programming package of 50 channels for $6.99 a month, representing a *46 percent price decrease* from the current price of $12.95, or a customized programming package of 100 channels—including some "best of" programming from both services—for $14.99 a month.

The combined company will also offer a range of new programming packages, foremost among which will be "best of" packages that include popular, previously exclusive content from both companies for $16.99 per month—*34 percent less* than the current standard cost to subscribe to both companies' services. Other packages geared toward specific interests will include a "Mostly Music" package and a "News, Sports & Talk" package, each available for $9.99 per month. The combined company will also offer two "Family Friendly" packages that exclude adult-themed content, one for $11.95 per month and another, which includes "best of" programming, for $14.99 per month. And subscribers of either company may choose to receive substantially the same programming that they currently enjoy at the existing price of $12.95 per month.

These programming innovations reflect a much broader trend central to the Commission's analysis of the proposed merger: the rapid evolution of competition and technology in the market for audio entertainment services. The record demonstrates

unequivocally that new services—and new twists on existing services—are being unveiled at an incredible pace. Meanwhile, as the rest of the industry surges forward, XM and Sirius struggle to gain listeners' attention and to support their respective networks. In 2006, the two companies incurred total costs of approximately $3.4 billion. Despite strides, they have yet to turn a profit or even achieve free cash flow.

As economic experts and financial analysts recognize, the merger will result in extensive operational synergies that will make the combined company a more efficient competitor in the burgeoning market for audio entertainment. These efficiencies will trigger a range of public benefits for consumers that would not otherwise be possible. In addition to making possible the new programming offerings described above, in the long run, the merger will increase opportunities for content providers (including providers of programming directed at niche audiences), accelerate the production and commercial distribution of interoperable radios, and facilitate the development of new advanced services. In short, the cost savings generated by the merger will be passed on to consumers in the form of lower prices and better services—precisely the types of merger-specific consequences that advance the public interest.

Given these benefits, it is not surprising that the opening comments reflect enthusiastic and widespread support for the merger. Numerous groups, including a wide array of business, minority, women's, religious, and rural organizations, have recognized that the merger will advantage consumers and sharpen competition. Their support is based on the recognition that this merger will allow satellite radio to offer constituents more choices in the selection of programming at lower costs. And thousands of individual citizens have taken the time to voice their support for the merger at the Commission. Consumers are especially excited about the lower prices and greater choice that will result from the merger.

Overwhelmingly, the opponents of this merger are terrestrial radio broadcasters and surrogates funded by them. This is hardly surprising. Terrestrial broadcasters have the most to lose from increased competition, since they compete with satellite radio and other audio entertainment services for the same listeners. In fact, the scorched-earth opposition to the merger by the National Association of Broadcasters ("NAB")—not to mention the association's longstanding reflexive opposition to the very existence of satellite radio—is itself powerful evidence of the competition that so obviously exists. If there were any doubt on that score, one need only consult the NAB's earlier filings and public statements, which confirm that it perceives satellite radio as a competitive threat. Arguments to the contrary in this proceeding lack credibility and factual support.

All available evidence shows that consumers have a variety of reasonable substitutes for satellite radio, including, of course, terrestrial radio, but also HD Radio, wireless phones, iPods and other MP3 players—and new technologies are appearing by the day. With all of these alternatives, it is abundantly clear that a combined Sirius and XM would lose subscribers if it attempted to raise prices without providing greater content or quality of service. This conclusion is borne out by rigorous economic analysis, presented in this reply and by others.

When the market is properly understood to include the full panoply of audio entertainment services that are available today and that are likely to be available soon, it becomes clear that XM and Sirius have a very small share of the market. The charge that this is a "merger to monopoly" is an odd one coming from the terrestrial radio broadcasters, who clearly have a greater competitive presence in the audio entertainment market than satellite radio. Satellite radio accounts for just 3.4 percent of all radio listening. Similarly, satellite radio accounted for just 7 percent of overall radio revenues in 2006. And the total number of satellite radio subscribers—14 million as of December 2006—pales in comparison to the more than 230 million people who listen to AM/FM radio every week.

Merger opponents identify many of the particular features of satellite radio, such as its largely commercial-free platform and large and diverse content offerings, as reasons why satellite radio belongs in its own market. But it is well established that products in the same market need not be perfect substitutes for one another. And opponents conveniently ignore all of the innovative services that have been introduced recently or are likely to be available to consumers soon, such as HD Radio, streaming audio through mobile phones, podcasts, and mobile broadband Internet available in cars.

Terrestrial broadcasters attempt to disguise their real agenda by arguing that competition occurs only "one way." In other words, according to the NAB and others, satellite radio competes with terrestrial radio, but terrestrial radio does not compete with satellite radio. This is economic nonsense. The merger does not pose any anti-competitive concerns, but will lead to greater choices and lower prices for consumers—and that is exactly what the NAB fears will happen. In addition, economic experts confirm that the merged entity will have neither the incentive nor the ability to target anyone for higher prices, and in fact rural public interest groups have voiced their overwhelming support for the merger. In short, the opponents of this merger attempt to use antitrust and communications law not to promote the interests of the public, but to subvert competition.

Faced by these inconvenient facts, the merger opponents fire various other salvos in an effort to cloud the record, none of which hits its mark. Claims that the companies lack capacity to provide more programming are rebutted by technology experts. Indeed, since the companies launched their services, both have steadily increased their programming using their existing bandwidth and will be able to do so in the future, as explained in the attached reports by Dr. Deepen Sinha and Neural Audio Corporation. Those commenters arguing that the merger violates Commission policies effectively ask the Commission to turn back the clock and apply historical precedent to an industry that, by all accounts, is experiencing rapid change. Finally, aspersions cast on the companies' character as Commission licensees are both irrelevant and incorrect, and provide no basis for rejecting this merger.

It is clear that the proposed merger will deliver enormous public benefits. Accordingly, the FCC should reject the petitions to deny and other objections and grant these applications.

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JOINT OPPOSITION TO PETITIONS TO DENY AND REPLY COMMENTS OF SIRIUS SATELLITE RADIO INC. AND XM SATELLITE RADIO HOLDINGS INC.

Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM"), by counsel, hereby reply to the petitions to deny and other comments filed in the above-captioned proceeding.[1] The petitions variously seek denial, dismissal, or designation for hearing of Sirius

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1 Petitions to Deny were filed by the National Association of Broadcasters ("NAB"); the Consumer Coalition for Competition in Satellite Radio ("NAB Coalition"); Common Cause, Consumer Federation of America, Consumers Union, and Free Press (collectively "Common Cause"); Forty-Six Broadcasting Organizations ("46 Broadcasters"); the National Association of Black-Owned Broadcasters ("NABOB"); American Women in Radio and Television, Inc. ("AWRT"); the Telecommunications Advocacy Project ("TAP"); Mt. Wilson FM Broadcasters, Inc. ("Mt. Wilson"); and National Public Radio, Inc. ("NPR"). In addition, various objections to the merger were filed by the Asian American Justice Center, Bert W. King, Blue Sky Services ("Blue Sky"), Charles F. Summers III, Clear Channel Communications, Inc. ("Clear Channel"), Cox Radio Atlanta, Entravision Holdings, LLC ("Entravision Holdings"), Independent Spanish Broadcasters Association ("ISBA"), John Smith, Media Access Project on behalf of Prometheus Radio Project and U.S. Public Interest Research Group ("MAP"), and a variety of state broadcaster associations. All Petitions to Deny and Comments are short-cited herein.

and XM's March 20, 2007 applications[2] seeking Commission authority to merge.[3] As detailed below, the arguments made by opponents of the merger are without merit. Accordingly, their petitions should be denied, and the merger should be approved.

I. INTRODUCTION.

This merger will bring unprecedented benefits to consumers and will significantly enhance, rather than harm, competition. Indeed, because of the synergies and efficiencies that will be realized from this combination, the transaction will empower consumers to select

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[2] XM Satellite Radio Holdings Inc., Transferor, and Sirius Satellite Radio Inc., Transferee, Consolidated Application for Authority to Transfer Control of XM Radio Inc. and Sirius Satellite Radio Inc., MB Docket No. 07-57, File Nos. SAT-T/C-20070320-00054, SAT-T/C-20070320-00053, SES-T/C-20070320-00380, SES-T/C-20070320-00379, SES-T/C-20070625-00863, ULS 0002948781, 004-EX-TC-2007 (filed Mar. 20, 2007) ("Application").

[3] Several commenters have argued that language in the 1997 order authorizing satellite radio, *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5754 (1997) ("*Satellite Radio Authorization Order*"), prohibits one licensee from owning both satellite radio licenses. *See, e.g.*, AWRT at 3; North Carolina Broadcasters Association at 2; Clear Channel at 4. The Commission has issued a *Notice of Proposed Rulemaking* seeking comment on this issue. *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, Notice of Proposed Rule Making, FCC 07-119 (June 27, 2007). The parties will address any arguments made by opponents regarding this "rule" in the context of responding to that *Notice.*

In addition, one entity—Primosphere Limited Partnership ("Primosphere")—has sought to revive an application for satellite spectrum that it voluntarily withdrew years ago. That effort should be denied for the reasons previously set forth by the companies. *See* Motion to Strike, Sirius Satellite Radio Inc., File Nos. 29/30-DSS-LA-93, 16/17-DSS-P-93 (filed Apr. 23, 2007); Reply Comments in Support of Motion to Strike, XM Satellite Radio Inc., File Nos. 29/30-DSS-LA-93, 16/17-DSS-P-93 (filed May 21, 2007). Primosphere's recently filed motion to consolidate and related petition likewise should be denied, as the companies have explained separately in a July 18, 2007 Opposition that was filed in this docket. *See* Motion to Consolidate, Primosphere Ltd. P'ship, MB Docket No. 07-57 (filed July 3, 2007); Pet. of Primosphere Ltd. P'ship, MB Docket No. 07-57 (filed July 3, 2007); Opposition to Primosphere's Motion to Consolidate, Sirius Satellite Radio Inc., MB Docket No. 07-57, File Nos. 29/30-DSS-LA-93, 16/17-DSS-P-93 (filed July 18, 2007).

programming based on their individual programming preferences. As such, the Sirius-XM merger has the potential to re-shape the manner in which Americans receive entertainment and informational programming.

As a result of this merger, Sirius and XM will offer subscribers who elect to select their channels through the Internet and purchase next-generation radios the ability to pick and choose programming on an a la carte basis:

- Subscribers will be able to create a customized programming package of 50 channels for $6.99 per month. *This represents a 46 percent price decrease from the current standard subscription price of $12.95 per month.* Consumers selecting this package will be able to buy certain additional individual channels for 25 cents each.
- Subscribers also will be able to create a customized programming package of 100 channels—including some "best of" programming from both services—for $14.99 per month.

In announcing their support for the merger, numerous independent groups, including a wide array of business, minority, women's, religious and rural organizations, have recognized that it will advantage consumers and sharpen competition.[4] Their support is based on the recognition that this merger will allow satellite radio to offer their constituents more choices in

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[4] Even before comments were filed, a diverse group of organizations had expressed their support for the merger. *See* Press Release, Sirius Satellite Radio, *Sirius, XM Highlight Growing Momentum In Favor of Merger: Strong and Diverse Public Support Demonstrates Merger is in the Public Interest* (July 9, 2007) (noting comments in support of the merger filed by Circuit City, the NAACP, the League of United Latin American Citizens, American Trucking Associations ("ATA"), National Council of Women's Organizations, League of Rural Voters, and American Values).

the selection of programming at lower costs.[5]

Economic experts and financial analysts also enthusiastically support the merger. They recognize that it will result in numerous operational synergies that will make the combined company a more efficient competitor in the burgeoning market for audio entertainment. As Professor Thomas W. Hazlett, former Chief Economist of the FCC, correctly notes, "[t]he consensus forecast is that pronounced synergies would attend an XM-Sirius merger, placing satellite radio in a stronger and more competitive position."[6] Economist and former Commissioner Harold Furchtgott-Roth similarly finds that the merger likely will result in "many consumer benefits . . . over the long term" and that "competing choices [in the audio entertainment market will] discipline the prices that XM and Sirius charge subscribers today and will continue to do so."[7] Bear Stearns has characterized the merger as "a great move for both

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[5] *See* Letter from Hilary Shelton, NAACP, to Chairman Kevin Martin et al., FCC, MB Docket No. 07-57 (filed July 18, 2007) ("NAACP Letter") ("We are convinced that the pending Sirius-XM merger will be a positive development for consumers—more diverse, accessible and appealing options at lower prices in satellite radio will help further expand the reach of this medium."); Letter from Susan Scanlan, National Council of Women's Organizations, to Marlene H. Dortch, FCC, MB Docket No. 07-57 (filed June 20, 2007) ("National Council Letter") ("With expanded choices and better prices, satellite radio will be an even more attractive option for women, and this will benefit the 200-plus organizations that the National Council of Women's Organizations represents, as well as women all over the nation.").

[6] Thomas W. Hazlett, *The Economics of the Satellite Radio Merger*, 5 (filed June 14, 2007) ("Hazlett"). Thomas Hazlett is a professor of Law & Economics at George Mason University, and a principal at Arlington Economics, an economic consulting firm. Professor Hazlett has previously held faculty appointments at the University of California at Davis, Columbia University, and the Wharton School, and has published his research in the *Journal of Law & Economics*, the *Columbia Law Review*, and the *Journal of Financial Economics*. He is also a columnist for the *Financial Times*, where he contributes to the New Technology Policy Forum. Additionally, Professor Hazlett served as Chief Economist of the Federal Communications Commission from 1991 to 1992.

[7] Harold Furchtgott-Roth, *An Economic Review of the Proposed Merger of XM and Sirius*, 1-2 (filed June 2007) ("Furchtgott-Roth"). Dr. Furchtgott-Roth has worked as an economist for

companies due to the tremendous synergies that the merger could present."[8] And Merrill Lynch has noted that a merged company "could ultimately deliver greater content choice . . . , offer improved technology . . . , realize cost synergies, and help satellite radio remain competitive in the evolving audio entertainment landscape."[9]

In an extensive new economic analysis commissioned by XM and Sirius and attached as Exhibit A to this reply, Professor Steven C. Salop and other economists at Charles River Associates International ("CRA"),[10] similarly find that the efficiencies of the merger will result in significant public interest benefits. Specifically, CRA predicts that "the overall effect of the merger of Sirius and XM will be procompetitive," because the merger "will lead to an increase in the number of subscribers of the merged firm" and a reduction in "the level of prices relative to what likely would prevail if the merger does not occur."[11]

Thousands of individual citizens have also taken the time to voice their support for the

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over 20 years and currently is the President of Furchtgott-Roth Economic Enterprises, an economic consulting firm, and a senior fellow at the Hudson Institute. He was an FCC Commissioner from 1997-2001 and later was a visiting fellow at the American Enterprise Institute for Public Policy Research ("AEI").

8 Bear Stearns & Co. Inc., 1 (Feb. 20, 2007).

9 Merrill Lynch, 1 (Feb. 20, 2007).

10 Steven Salop is a professor of Economics and Law at Georgetown University Law Center, and a Senior Consultant with CRA. Professor Salop has been a guest scholar at the Brookings Institution and a visiting professor at the Massachusetts Institute of Technology, the University of Pennsylvania, and George Washington University. He also served as an economist at the Federal Trade Commission, the Office of Economic Analysis, and the Federal Reserve Board. Drs. Steven R. Brenner, Lorenzo Coppi, and Serge X. Moresi, Vice Presidents at CRA, also co-authored the study. Their curricula vitae are attached as Exhibit A to the study.

11 Charles River Associates International, *Economic Analysis of the Competitive Effects of the Sirius - XM Merger*, Exhibit A at 1 (¶ 2) (July 24, 2007) ("CRA Competitive Effects Analysis").

merger at the Commission. Consumers are especially excited about the combined programming,[12] lower prices,[13] and greater choice[14] that will result from the merger. The comments of Georgianna Fad are indicative of the overall tenor from citizens who love radio and believe in the merger. As she wrote, "I would love to have baseball and football programming on one factory installed satellite radio. I would also like to have the freedom of buying any car and have all programming available, instead of limited programming because of what make I buy in the future."[15]

Overwhelmingly, the opponents of the merger are terrestrial radio broadcasters[16] and surrogates funded by them.[17] This is hardly surprising. Incumbent over-the-air broadcasters and

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[12] *See, e.g.*, Brief Comments of Jeff Clements (filed June 14, 2007) ("As a Sirius listener, the idea of being able to listen to programming that is exclusive to XM such as Major League Baseball or a variety of other music for what is being promised as a nominal fee is extremely appealing.").

[13] *See, e.g.*, Brief Comments of Lynn Klein (filed June 12, 2007) ("[W]ouldn't it be in my best interest to allow the merger so I can cut my bill to $20 a month or less?").

[14] *See, e.g.*, Brief Comments of Laudon Williams (filed June 28, 2007) ("I would welcome the additional choice in programming that would come from a merger between XM and Sirius."); Brief Comments of Larry Hufty (filed May 21, 2007) ("The current fragmenting of satellite radio programming and satellite radio car deals among these two satellite providers is frustrating to consumers. I am for this merger because it will merge the programming of the two companies together and allow all current factory satellite radio hardware to work regardless of how it is branded.").

[15] Brief Comments of Georgianna Fad (filed May 23, 2007).

[16] Broadcaster opponents include the NAB, various state broadcast trade associations, and several individual broadcasters.

[17] One organization, ambitiously called the Consumer Coalition for Competition in Satellite Radio ("NAB Coalition"), alleges to be an "independent" group, but its "executive director" is a full-time lobbyist employed by the law firm that represents the coalition. *See* Williams Mullen, The Team, http://www.williamsmullen.com/wms/team.htm (last visited July 23, 2007). According to the Corporate Crime Reporter and the NAB Coalition's own filings, the group is supported by the NAB, though the group has refused to reveal the exact nature of the NAB's

satellite radio providers are vigorous competitors for the same listeners. In fact, terrestrial broadcasters' scorched-earth opposition[18] to the merger—not to mention the industry's reflexive opposition to the very existence of satellite radio[19]—is itself powerful evidence of the competition that so obviously exists.[20]

However, through a fog of NAB-funded analyses and incorrect and inconsistent[21] claims, broadcasters and other merger opponents attempt to obscure or simply ignore the following

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support. Other than the "executive director," the rest of the NAB Coalition's membership apparently consists of "four or five" other law students. *Law Student Consumer Group More Than Just Law Students and Consumers*, 21 Corporate Crime Reporter 10 (Feb. 28, 2007), http://www.corporatecrimereporter.com/williamsmullen022807.htm (last visited July 22, 2007). Accordingly, the NAB Coalition's claim to be "independent" is simply untrue. NAB Coalition at n.1. To the contrary, the NAB Coalition is a transparent attempt to add a gloss of consumer opposition to a merger that is overwhelmingly supported by the actual consumers who have filed in this proceeding. The NAB Coalition undoubtedly provides the NAB with a vehicle for saying things that it might not want to say directly—such as Mr. Sidak's theory that radio listeners pay a significant "cost" for "enduring" advertisements on commercial radio. *See* NAB Coalition at 5; NAB Coalition at Exhibit B, Supplemental Declaration of J. Gregory Sidak at 19, 28 (July 9, 2007) ("Sidak July 9 Supp. Decl."). *See infra* n.188.

18 The ferocity of the NAB's opposition to the merger has been remarkable even by Washington standards. As explained by the *Washington Post*, the NAB's president and chief executive officer has "employed two techniques" in opposing the merger: "slash, and burn." Charles Babington, *Shake Hands, Come Out Lobbying*, WASHINGTON POST, Mar. 13, 2007, at A15.

19 *See infra* at 49-50.

20 *See, e.g.*, Hazlett at 3 (stating that broadcasters' "fierce opposition is powerful evidence in itself that AM/FM radio—'free radio'—competes with satellite radio, and reveals the true concern of terrestrial stations: that the merger will create a stronger rival better able to meet the needs of consumers"); CRA Competitive Effects Analysis at 9 (¶ 14) ("The vehement opposition to this merger by the NAB indicates both that the merger benefits competition and that the relevant market extends beyond just satellite radio.").

21 As Common Cause said, "While the NAB argues in this case that the market should not be defined to include cross-platform and intermodal competition . . . [in other contexts] the NAB argues exactly the opposite. . . . This contradiction exists only in the warped world of the NAB." Common Cause at 11-12.

inconvenient facts:

- A combined Sirius-XM will offer unprecedented consumer benefits, not possible absent the merger. A la carte programming offerings will be based on the individual content preferences of listeners and available at a lower cost than pre-merger prices. Consumers who opt not to take advantage of an a la carte programming offering will be able to take advantage of the companies' existing offerings as well as other attractive lower-priced packages of programming that will be made available after the merger.
- Tremendous cost savings and merger-specific efficiencies will spur additional public interest benefits. These cost savings will drive equipment and programming innovation and will help make the combined company a more effective competitor while benefiting both companies' subscribers.
- This is not a "merger to monopoly." XM and Sirius have a very small share of the market. Sirius and XM combined account for approximately 3.4 percent of all radio listening. Satellite radio accounts for just under 7 percent of overall radio revenues, and its advertising revenue is just a minute percentage of the approximately $21 billion of advertising revenue generated by terrestrial radio. And the total number of satellite radio subscribers—about 14 million—pales in comparison to the more than 230 million people who listen to AM/FM radio every week.
- This is 2007, not 1997. Satellite radio competes vigorously with and is substitutable for numerous other audio entertainment services and devices—particularly terrestrial radio, but also a variety of new devices and services.

- Competition works both ways. Terrestrial broadcasters' argument that competition occurs only "one way"—that satellite radio competes with terrestrial radio, but terrestrial radio does not compete with satellite radio—is economic nonsense. In fact, the merger will lead to greater choices and lower prices for consumers—and that is exactly what terrestrial broadcasters fear.

Accordingly, the FCC should reject the petitions to deny and other objections and grant these applications.

II. THE RECORD DEMONSTRATES THAT THE TRANSACTION WILL PRODUCE MANY MERGER-SPECIFIC BENEFITS FOR CONSUMERS AND IS UNQUESTIONABLY IN THE PUBLIC INTEREST.

A central component of the Commission's review is to assess whether the merger of Sirius and XM "is likely to generate verifiable, merger-specific public interest benefits."[22] In conducting this inquiry, the Commission asks "whether the combined entity *will be able, and is likely*, to pursue business strategies resulting in demonstrable and verifiable benefits that could not be pursued but for the combination."[23] The efficiencies created by the merger of XM and Sirius will enable the combined company to do just that.

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[22] *AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5760 (¶ 200) (2007) ("*AT&T/BellSouth Order*") (citing *SBC Comm'cns, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18,290, 18,384 (¶ 182) (2005); *Verizon Comm'cns, Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18,433, 18,530 (¶ 193) (2005); *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer of Control*, Memorandum Opinion and Order, 15 FCC Rcd 14,032, 14,130 (¶ 209) (2000) ("*Bell Atlantic/GTE Order*"); *Applications of Ameritech Corp., Transferor, and SBC Comm'cns, Inc., Transferee, For Consent to Transfer of Control*, Memorandum Opinion and Order, 14 FCC Rcd 14,712, 14,825 (¶ 255) (1999) ("*SBC/Ameritech Order*"); *Application of WorldCom, Inc. and MCI Comm'cns Corp. for Transfer of Control of MCI Comm'cns Corp. to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18,025, 18,134-35 (¶ 194) (1998)).

[23] *AT&T/BellSouth Order*, 22 FCC Rcd at 5760 (¶ 200) (emphasis added).

While the companies individually have sought continually to improve service for their subscribers, their efforts have been constrained by their costs—$3.4 billion between them in 2006 alone,[24] and billions of dollars more before that.[25] Meanwhile, other audio entertainment providers have surged forward with significant advancements in technology and service. The merger will allow the combined company to keep pace by facilitating and accelerating the development and introduction of new products and services, resulting in enormous benefits for consumers. In particular, the new company will be able to offer American consumers an opportunity that they have never had before: the ability to choose programming on an a la carte basis.

A. <u>The Merger Will Facilitate Greater Choice and Convenience for Consumers, at Lower Prices.</u>

1. The Combined Company Will Provide A La Carte Programming and a Variety of Other Program Packages.

In its petition, the NAB confidently proclaims that it "is clear . . . that a la carte programming will not be available."[26] It could not be more wrong.

When they announced this merger, Sirius and XM pledged that "[t]he combined company is committed to consumer choice, including offering consumers the ability to pick and choose the channels and content they want on a more a la carte basis."[27] The synergies and efficiencies of

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24 Application at 17.

25 *See id.* at 19, n.41 (noting that Sirius and XM have generated total cumulative net losses of $3.8 billion and $3.5 billion, respectively, from inception through December 31, 2006).

26 NAB at 40. *See also* Common Cause at 44 (companies' proposal "not only fails to provide the real channel-by-channel choice consumers demand, it is unlikely to provide any meaningful cost benefits").

27 News Release, XM Satellite Radio, *SIRIUS and XM to Combine in $13 Billion Merger of Equals*, Feb. 19, 2007, http://xmradio.mediaroom.com/index.php?s=press_releases&item= 1423

the merger will allow the combined company to do precisely that. As a result of the merger, consumers who select their programming using the Internet and purchase next-generation radios will have the ability to pick and choose programming on an a la carte basis—designing specific programming packages that meet their unique needs and interests. In addition, subscribers (including those with existing radios) will have the ability to choose from a range of new programming packages matched to specific interests and offered at prices commensurate with the amount of programming the consumer wants.

These options, detailed in Exhibits B and C, will revolutionize the way entertainment and informational programming is offered to consumers in this country. For the first time, consumers who elect to subscribe via the Internet will be able to create a customized channel line-up on an a la carte basis. These a la carte options will be introduced on next-generation radios. The combined company will offer two such packages:

- <u>An a la carte package of 50 channels for $6.99 per month</u>. This represents a *46 percent decrease* from the currently available standard subscription price of $12.95 per month. Additionally, subscribers selecting this option will be able to purchase additional individual channels for 25 cents per month each as well as "premium" packages of certain Sirius channels for $5 or $6 each and of certain XM channels for

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(last visited July 18, 2007). Representatives of both companies reiterated this commitment repeatedly in their public statements about the transaction, including in testimony before Congress. *See, e.g.*, Testimony of Mel Karmazin, Chief Executive Officer, Sirius Satellite Radio, Before the House Energy and Commerce Committee's Subcommittee on Telecommunications and the Internet Regarding The Digital Future of the United States: The Future of Radio, Mar. 7, 2007, at 5-6, http://energycommerce.house.gov/cmte_mtgs/110-ti-hrg.030707.karmazin-testimony.pdf (last visited July 22, 2007). In the Application, Sirius and XM provided an overview of the programming options they intend to offer as a combined company, including its intention to provide programming on a more a la carte basis, and an explanation of how the synergies created by their merger would facilitate those plans. *See* Application at 11-12.

$3 or $6 each.[28]

- An a la carte package of 100 channels—which would include access to "best-of" programming offered by the other satellite provider—for $14.99 per month. For this modest premium over the existing price, subscribers would have the ability to craft an individualized line-up that includes some of the most popular and appealing programming currently offered by the other provider.

Through all of these new options, consumers will have access to a wider variety of programming, as well as much more flexibility to avoid receiving, and paying for, channels that they do not want.

The combined company will ensure that general advertising, marketing, and promotion materials, including subscribers' bills (if a bill is sent), contain a legible, separate notice in plain English presenting the a la carte programming option and explaining its details.

In addition, the combined company will offer a range of programming packages at lower prices than are currently available. The packages most eagerly anticipated by current subscribers are new packages that will include popular, previously exclusive programming from both companies. These "best of both" packages will each be available for $16.99—*a decrease of 34 percent* from the current standard subscription price of $25.90 that consumers must pay to obtain content from both companies.[29] This option would include approximately 140 channels for the Sirius package and approximately 180 channels for the XM package. For example, Sirius subscribers electing this option will be able to choose from among top selections from XM. Similarly, XM subscribers electing this option will be able to choose from among top selections

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[28] In any event, no subscriber will be required to pay more than the current $12.95 price for either company's existing program lineup or $16.99 for "best of both" programming.

[29] The final content for each of these packages is, of course, subject to negotiations with the companies' respective content providers, and thus could change as a result of those discussions. Contrary to some claims, an interoperable radio is not necessary to receive "best of" programming from the other provider. *See infra* Section V.B.

from Sirius.[30]

Consumers with a specific interest in certain types of programming also will be able to choose from a menu of options designed to meet these specialized interests. These are:

- A "Mostly Music" package, which includes commercial-free music as well as several family-oriented and religious channels, and emergency alerts, for $9.99 per month. This represents a *23 percent decrease* from the currently available standard subscription price of $12.95 per month.

- A "News, Sports & Talk" package, which includes various sports, talk and entertainment, family, news, traffic and weather, and emergency channels, for $9.99 per month. This, too, represents a *23 percent decrease* from the currently available standard subscription price of $12.95 per month.

- Two "Family Friendly" packages, which exclude adult-themed content. The first such package will be available for $11.95 per month, which is the functional equivalent of giving a $1.00 per month credit to subscribers of the current $12.95 per month plan who opt to block adult-themed content. The second package, which will include "best of" programming from the other provider, will be available for $14.99 per month, the functional equivalent of giving a $2.00 per month credit to subscribers of the new $16.99 "best of" packages who opt to block adult-themed content.

The credit for those who block adult-themed programming, which is unique among subscription programming services, offers a substantial savings to consumers who would prefer not to pay for programming that they find inappropriate or offensive. Today, all customers of Sirius and XM already have the ability to block adult-themed content, and subscribers will continue to have that ability immediately following the merger.

Further, because the companies have pledged from the outset that no satellite radio subscriber will have to pay more as a result of the merger,[31] existing customers will be able to

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30 The specific "best of" channels will be determined based on contract negotiations and other factors.

31 The companies do not have a predetermined time period during which the new prices will remain in effect. Obviously, consumer and market reaction to the new plans will have to be taken into consideration. But the merged company clearly would have an economic incentive to

keep a program package like that they currently have. Those subscribers of either Sirius or XM who are not interested in any of the new options discussed above will be able to receive substantially the same programming that they currently enjoy at the existing price of $12.95 per month.[32] Subscribers will also be able to continue their $6.99 multi-receiver subscriptions.

Beginning within one year after consummation of the merger, Sirius and XM will offer those customers who select their channels through the Internet and purchase next-generation radios the opportunity to subscribe to either the 50-channel or the 100-channel a la carte packages described above. In addition, beginning within six months of the consummation of the merger, Sirius and XM will offer consumers all of the other packages of programming described above. Of course, the current $12.95 Sirius and XM packages will remain available before and after the merger. The combined company also will offer these additional programming options to automakers, which, depending on their own schedules, will introduce them to purchasers and lessees of motor vehicles.

2. This Increased Choice in Programming and Prices Will Benefit Consumers.

The combined company's above-described offerings will result in public benefits analogous to—and, indeed, far more extensive than—those the Commission has applauded in prior mergers. The FCC has acknowledged consistently that lower prices and increased

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retain these pricing options based on the belief that they would contribute to increased subscribership. In any event, neither company has a prior practice of raising prices. In over five years of operation, Sirius has never raised its monthly charge, and XM has done so only once. However, over time, programming and other costs likely will increase and these factors might impact future pricing decisions.

32 Each company's channel line-up evolves over time, as individual channels are added or removed.

consumer choice are key public interest benefits to be considered in a proposed merger.[33] Moreover, Chairman Martin and others have advocated increasing choices for consumers and sparing them from paying for content they do not wish to receive.[34] Most recently, in Congressional testimony, the Chairman again emphasized that "offering channels in a more a la carte fashion will benefit all consumers," explaining that "[a] la carte pricing not only gives parents greater control over the content available to their families, but also has the potential to lower prices for consumers across the board."[35] As he summed up the issue: "Our message

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33 *See, e.g.*, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Comm'cns Corp. (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc., Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8307 (¶ 243) (2006) ("*Adelphia/Time Warner Order*") (stating that the Commission will consider whether a proposed transaction will enhance a combined company's "ability and incentive to compete and therefore result in lower prices, improved quality, enhanced service, or new products"); *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee for Consent to Transfer Control*, Memorandum Opinion and Order, 12 FCC Rcd 19,985, 20,063 (¶ 158) (1997) ("*NYNEX/Bell Atlantic Order*") ("Efficiencies generated through a merger can mitigate competitive harms if such efficiencies . . . result in lower prices, improved quality, enhanced service or new products."); *Merger of MCI Comm'cns Corp. and British Telecomms. plc*, Memorandum Opinion and Order, 12 FCC Rcd 15,351, 15,430 (¶ 205) (1997) ("*MCI/BT Order*") (describing "lower prices, improved quality, enhanced service or new products" as examples of consumer benefits resulting from merger-specific efficiencies that are relevant to the public interest analysis).

34 *See, e.g.*, Remarks of FCC Chairman Kevin J. Martin, National Cable & Telecommunications Association, Las Vegas, NV, May 7, 2007, at 3, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-272897A1.pdf (last visited July 23, 2007) ("Another belief I hold firm is that consumers should be able to purchase the products and services they want without being forced to buy something they do not want. . . . Fundamentally, I support consumers' ability to pick and choose the products they want.").

35 Remarks by FCC Chairman Kevin J. Martin, "Providing More Tools for Parents," U.S. Capitol, Press Conference on H.R. 2738 – The Family and Consumer Choice Act, June 14, 2007, at 1, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-274169A1.pdf (last visited July 23, 2007). It bears emphasis that each of these important benefits is directly tied to and dependent upon approval of the proposed merger. Without the synergies, efficiencies, and incentives that will be generated only by allowing Sirius and XM to join resources, none of these benefits will come to fruition.

today is very simple: no consumer should have to pay for content they do not wish to receive. Period."[36]

Sirius and XM's programming plans render much of the merger opponents' advance criticism inapplicable and irrelevant.[37] The stable price for the current $12.95 packages will not lead to a reduction in consumer welfare, as the NAB Coalition would have it.[38] And it is impossible to see how the introduction of additional consumer choices and lower prices could be anti-competitive.[39]

Opponents overlook the fact that the $12.95 per month package is but one option among many that will be available to consumers—several of which will be offered for substantially *less* than $12.95 per month. As CRA explains in its attached economic study, increasing choice through the introduction of new programming packages, without taking away current options, necessarily raises consumers' welfare, in part because none of the packages that combine content from the two providers would be available without the merger.[40] Similarly, Professor Hazlett has

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36 *Id.*

37 This proposal directly responds to the NAB's litany of questions relating to the specific channels, prices, and other aspects of these programming plans. *See* NAB at 40 ("Which programs will be available? What will the prices be? Will customers have to 'buy through' a larger basic package before getting these combined programs at a higher price? What channels (including non-duplicative channels) will be dropped, thereby reducing consumer choice? If no channels are dropped, what kind of audio degradation will there be?"). In a similar vein, Mr. Sidak speculates about the structure of "hypothetical a-la-carte offerings." Sidak July 9 Supp. Decl. at 20 (¶ 29).

38 *See, e.g.*, NAB Coalition at 16 (citing Sidak Mar. 16 Decl. at 54 (¶ 81)). *See also* NAB at 29.

39 NAB at 38 (stating that "'the mere fact' that price freezes are offered in connection with a merger 'strongly supports the fears of impermissible monopolization'") (quoting *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 67 (D.D.C. 1998)).

40 CRA Competitive Effects Analysis at 83 (¶ 167).

observed in this proceeding that

> [C]onsumers benefit from lower-cost products and services, as well as wider program choice. . . . Instead of making choices between channels carried exclusively by one satellite carrier or the other and then shouldering risks associated with changes in program line-ups or their own preferences down the road, customers will be able to confidently access their favorite satellite radio content.[41]

Common Cause, despite purporting to conduct a "careful analysis" of the issue, ignores key aspects of the companies' post-merger programming plans.[42] It argues that increased choice will "come at a cost" because consumers will have to pay more to get additional channels.[43] Of course, asking consumers to pay more in order to get more is hardly a revolutionary pricing concept. More importantly, however, Common Cause completely ignores the other side of the range of choices: *consumers who want less will be able to pay less.* In such cases, choice does not come at a cost—it comes at a discount.

Some parties claim that this increased choice is not a merger-specific benefit, generally asserting that "nothing prevents" the companies from providing such programming options now.[44] They are wrong. First, individually, the two companies have experienced billions of dollars in losses and, while they have made steady progress in developing their respective networks and services for over a decade, they have never turned a profit. Without the synergies and economies of scale generated by the merger, neither company could afford to introduce a la carte offerings. Moreover, offering a la carte programming requires modifications to important

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41 Hazlett at 3-4.

42 Common Cause at 42.

43 *Id.* at 43.

44 Sidak July 9 Supp. Decl. at 20 (¶ 29); *see also, e.g.*, NAB at 39-40; Common Cause at 43-44; Entravision Holdings at 17.

elements of the companies' infrastructures, including substantial changes to their subscriber management, customer service, and billing systems. In addition, even apart from the significant financial constraints, Sirius and XM cannot offer each other's programming to the extent they are bound by exclusive programming agreements or are limited by the technology in existing radios. Thus, even if the companies individually could feasibly offer comparable programming packages to those described above, consumers will obtain this benefit more rapidly and efficiently following the merger than they ever would without it—which, of course, is the relevant standard under the Commission's precedent.[45]

While Sirius and XM are providing significant new detail of their programming plans in this filing, their overall direction should come as no surprise. As noted above, the companies repeatedly have stated their intention to take full advantage of the efficiencies created by this merger to provide consumers with more programming choices and lower prices. And a diverse group of supporters—to borrow a phrase appropriate to the dynamic market for audio entertainment services—have clearly been listening. Indeed, commenters ranging from public interest groups,[46] to content providers,[47] to XM's and Sirius' commercial partners,[48] to individual consumers,[49] to many others,[50] already have responded enthusiastically to this theme of greater

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45 *See, e.g.*, *AT&T/BellSouth Order* at 5760 (¶ 200); *see also infra* Section II.E. (discussing efficiencies that will permit the introduction of a la carte and the other programming packages).

46 *See, e.g.*, Citizen Outreach Project at 1-2; Free State Foundation at 4-7.

47 *See, e.g.*, Frank Sinatra Enterprises at 1-2; New Life Ministries at 2; OutQ at 1; Steven Van Zandt at 1.

48 *See, e.g.*, Hyundai Motor America at 1-2; American Honda Motor Co. at 1; Loral Space and Communications at 1-2.

49 *See supra* notes 12-15.

choice and lower prices.

B. The Combined Company Will Be Able to Provide Increased Opportunities for a Wider Variety of Content Providers.

In addition to the obvious benefits for consumers, the combined company will be better equipped to invest in and promote diverse programming than either company is today. The merger will help to alleviate the financial constraints that may prevent the companies individually from taking chances on niche programming that, by definition, generates interest across a smaller spectrum of listeners.[51] In the longer term, the merger will increase the combined company's capacity to provide more programming because it will be able to eliminate duplicative channels and economically produce and market interoperable radios capable of receiving signals from both systems.[52]

The combined company will have every incentive to take advantage of these expanded capabilities to continue to promote diverse content[53]—something that consumers clearly want, if this proceeding is any indication. Indeed, many commenters—including content providers and their target audiences—recognize these benefits. A number of content providers have applauded

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[50] *See, e.g.*, Heritage Foundation at 3; Crutchfield at 1.

[51] Public Knowledge at 3 (stating that "a stronger merged company will allow for more diverse programming, and will ultimately improve consumer choices").

[52] *See* Application at 12-13, 47 (describing the combined company's ability to eliminate redundant channels); *see also infra* Section II.C. (discussing how the merger will eliminate disincentives to produce interoperable radios).

[53] Claims to the contrary are premised on the flawed view that satellite radio does not compete with other audio entertainment providers, *see, e.g.*, NAB at 30-32, or that the combined company will be required to drop channels, *see, e.g.*, Asian American Justice Center at 3. These assertions are rebutted *infra* Sections III and V, respectively. *See also* CRA Competitive Effects Analysis at 66-69 (¶¶ 130-137) (rebutting NAB and Common Cause claims of a satellite radio monopsony).

the prospect of reaching a wider audience as a result of the merger.[54] As the companies explained in their Application, providers of niche programming in particular stand to benefit from the increased opportunities that a combined satellite radio provider will be able to offer them.[55]

Likewise, several organizations have observed that the combined company will provide an expanded platform for news and entertainment targeted at a range of diverse communities.[56] This new, diverse programming will be available pursuant to the various programming packages

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54 *See, e.g.*, Frank Sinatra Enterprises at 1-2 (stating that the merger will benefit consumers by making the currently exclusive program "Siriusly Sinatra" available to more listeners); New Life Ministries at 2; OutQ at 1 ("the merger will broaden the accessibility of the distinctive and valuable material offered via OutQ"); Steven Van Zandt at 1 (satellite radio "will fulfill the ever-growing number of profoundly important niches, which include nothing less than the entire musical history of American culture"). A recent article by Archbishop Edward Cardinal Egan of New York recently expressed similar views. *See* Edward Cardinal Egan, *The Good Word—Via Satellite*, NEW YORK POST, July 20, 2007, http://www.nypost.com/seven/07202007/postopinion/opedcolumnists/the_good_word___via_satellite_opedcolumnists_edward_cardinal_egan.htm (last visited July 22, 2007) ("From my perspective . . . [the merger] offers a unique opportunity to extend the reach and breadth of religious programming. It is also an unmatched opportunity to strengthen this new medium and position satellite radio to compete with the ever-growing list of audio entertainment providers.").

55 *See* Application at 13, 47.

56 *See, e.g.*, NAACP Letter at 2 ("[B]oth XM and Sirius offer numerous music and entertainment channels of interest to the diverse taste of African-Americans—from the smooth sounds of Motown and Jazz to contemporary R & B and Hip Hop to cutting edge urban comedy. Synergies created by the merger of Sirius and XM will create new opportunities for this type of targeted programming that is frequently overlooked by terrestrial broadcasters."); Letter from Lillian Rodriguez-Lopez, Hispanic Federation, to Marlene H. Dortch, FCC, MB Docket No. 0757, 1 (filed June 5, 2007) (stating that "satellite radio provides expanding and vibrant platforms for news and entertainment for Hispanic Americans" and that "the acquisition could help strengthen both companies and enable them to expand the universe of diverse programming available to communities across the country and provide additional channel capacity"); National Council Letter at 1 ("Expanding the audience and diversity of satellite radio programming, would give women the opportunity to open new venues of entertainment and enlightenment while driving their children to school or sitting in traffic on their way to work.").

described above, just like programming intended to reach a wider audience.[57] Thus, the merger will allow the combined company to maintain and, in fact, further the commitment to diverse programming that both companies have exhibited on their own and which is now a hallmark of satellite radio.[58]

C. The Merger Will Facilitate the Commercial Availability of Interoperable Radios.

Sirius and XM have spent much effort and resources in designing an interoperable radio.[59] However, due to current size and cost constraints of an interoperable radio, manufacturers have expressed little interest in producing or distributing such a product; nor has any automobile company opted to include one in its vehicles. And neither company has chosen to subsidize the cost of producing an interoperable radio because of uncertainty that such an expense could be recouped in the marketplace.

As the CRA Competitive Effects Analysis shows, the merger will remedy these barriers by providing a commercial incentive to produce and distribute interoperable radios.[60] Increased subscribership will likely encourage radio manufacturers to produce, consistent with customer demand, radios that tune to all channels of the combined company's service. Indeed, over the

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57 Although a few parties question whether new programming and services can or will be introduced, those doubts generally are premised on a misperception concerning the companies' ability to expand their programming capacity. As explained below, XM and Sirius have consistently employed the latest technologies to use their existing bandwidth more efficiently and thus accommodate more programming and services, and will continue to do so while preserving audio quality. *See infra* Section V.B.

58 Even a cursory review of the channel line-ups attached as Exhibits B and C shows that both companies already offer an array of programming directed at specific audiences.

59 *See infra* Section VII.A.1.

60 CRA Competitive Effects Analysis at 65 (¶ 127) ("The merger will increase the introduction and promotion of interoperable radios, leading to product quality improvements.").

long run, such radios will enable the combined company to offer enhanced content and services. Thus, the merger will enhance the availability and distribution of interoperable equipment, allowing consumers to obtain all of the content available on both systems with a single consumer device.

In short, the proposed merger will eliminate the final barriers to the commercial availability of an interoperable radio. Again, this is the very definition of a merger-specific benefit, and claims to the contrary fall flat.[61]

D. The Combined Company Will Be Able to Offer New, Advanced Services.

The same efficiencies that will allow the combined company to offer the "best of both" networks and the other programming options described above will allow it to develop and introduce advanced data and telematics services.[62] These offerings, which have undeniable value for consumers,[63] will be made available more rapidly and with greater capabilities through a

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61 Some parties allege otherwise, based on the incorrect theory that the *production* of interoperable radios is already required by Commission rules. *See, e.g.*, NAB at 45. As discussed below, neither the Commission's rules nor the companies' licenses contain such a requirement, and the companies have complied fully with their actual obligations pertaining to interoperability by jointly designing an interoperable radio such that it is available for manufacturers to produce. *See infra* Section VII.A.1. The merger will allow them—and consumers—to reap the rewards from that design.

62 *See* Application at 14-15. For example, Sirius and Chrysler Group recently announced the launch of SIRIUS Backseat TV™, a dynamic and pioneering TV service that delivers live television to vehicles. This new service will provide customers with three channels of children's TV including Nickelodeon, Disney Channel and Cartoon Network. Both XM and Sirius offer integrated traffic and navigation systems for automobiles (XM NavTraffic and Sirius Traffic), as well as weather and navigation products for the aviation and maritime markets (XM WX and Sirius Marine Weather).

63 *See, e.g.*, Letter from Phil Boyer, Aircraft Owners and Pilots Association, to Marlene H. Dortch, FCC, MB Docket No. 07-57 (filed July 9, 2007) (describing the importance of weather services provided over satellite, and stating, "Without a doubt, satellite radio improves safety for aviation."); Hyundai Motor at 1-2 ("the merged company will likely improve upon current in-

combined research and development effort—an effort that will continue to develop technologies and services without harm to the audio quality currently available to satellite radio customers.[64] Although several parties suggest conditions to govern the combined company's provision of these types of services,[65] the combined company will have every incentive to maintain and improve upon these offerings without any need for Commission action.

This consolidation of resources will also enhance the merged company's ability to provide emergency alert and other emergency services. The dedication that each company already has shown to public safety and homeland security extends well beyond broadcasting national Emergency Alert Systems ("EAS") messages and testing EAS procedures and equipment as the Commission requires.[66] Sirius and XM have shown their commitment to aid disaster victims and rescuers on an ongoing basis respectively through Sirius Channel 184, which provides around-the-clock, up-to-date emergency information regarding catastrophic events to most Sirius radios regardless of subscription status, and XM Emergency Alert (XM Channel 247), which delivers such information free to all XM receivers nationwide, with no subscription required. Both companies also have aired extensive on-air fundraising appeals to listeners, such as XM's Operation Helping Hand and Sirius' charity radiothon for Hurricane Katrina victims. In addition, XM aired "Tsunami Aid: A Concert of Hope," to benefit victims of the 2004 tsunami in southern Asia. Moreover, the Federal Emergency Management Agency ("FEMA") recently

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vehicle services that support the driving experience, such as traffic and weather, and promote the introduction of exciting new services").

64 *See, e.g.*, Merrill Lynch, 3 (Feb. 20, 2007); Bear Stearns, 5 (Mar. 22, 2007).

65 *See, e.g.*, Rockwell Collins at 2.

66 47 C.F.R. §§ 11.1, 11.11 (2005) (as amended, 70 Fed. Reg. 71,023, 71,031 (Nov. 25, 2005)).

notified XM that it has been designated a Tier 3 EAS PEP Station, meaning that XM is now a Primary Entry Point with a direct link to FEMA. Finally, FEMA is installing XM's EAS receivers in state Emergency Operation Centers, which further highlights XM's critical role with respect to the EAS system and the distribution of emergency alerts.

Further, both companies have worked with the Commission, the Department of Homeland Security, and other federal and local agencies to develop and implement effective programs to distribute safety and survival information.[67] These officials have recognized the importance of satellite-based communications systems during natural disasters and other emergencies.[68] Satellite radio can continue to provide emergency information such as evacuation routes and other critical safety information even when terrestrial-based systems are impaired, and the merger will only enhance that role.

E. The Transaction Will Produce Significant Efficiencies and Will Safeguard the Future of Satellite Radio.

In evaluating the Application, the Commission's primary task is to determine whether the merger will serve the public interest.[69] The Commission has recognized that identifying potential "[e]fficiencies generated through a merger" is a critical aspect of this analysis because

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[67] For example, as discussed in the Application, during the Hurricane Katrina relief effort, Sirius broadcast 24/7 news and information while XM broadcast Red Cross Radio, which supplied critical information to victims and Red Cross relief workers. Both operators donated hundreds of satellite radios to rescue workers and shelters to ensure that they could access this information. *See* Application at 5, 14.

[68] *See, e.g.*, *Annual Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Communications Services*, Statement of Comm'r. Tate, FCC 07-34 (Mar. 26, 2007) (citing the "critical importance of satellite communications for emergency first responders" in the wake of Hurricanes Katrina, Rita, and Wilma).

[69] *See* 47 U.S.C. § 310(d) (2000) ("No . . . station license, or any rights thereunder, shall be transferred . . . to any person . . . except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.").

such efficiencies may "result in lower prices, improved quality, enhanced service or new products," which, in turn, would increase consumer welfare if those benefits offset any competitive harms.[70] The combination of Sirius and XM will produce considerable merger-specific efficiencies, leading to more innovative services for consumers, higher quality services, and lower prices—to the benefit of consumers. Without the merger, consumers will not realize these benefits.

Independent analysts have overwhelmingly agreed that the merger will produce considerable, merger-specific cost savings, in both the short- and long-term. For instance, UBS Investment Research observed that opportunities from the merger "could represent approximately $205 million in potential savings" in the near term, while long-term cost synergies are likely to be in the range of $3 to 4.7 billion.[71] Merrill Lynch observed that there could be "annual cost synergies of ~$400mm in the near term,"[72] and estimated cost synergies over 10 years to amount to $4.3 billion.[73] And Professor Hazlett agrees that consumers will benefit directly from "lower cost products and wider customer choice" as a result of, among other things, "greater scale economies in radio receivers and standardized technologies."[74] He also concludes that the newly formed entity will stimulate competition in the market for audio entertainment services, and will turn toward "innovation and product upgrades" that would be

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70 *NYNEX/Bell Atlantic Order*, 12 FCC Rcd at 20,063 (¶ 158); *see also SBC/Ameritech Order*, 14 FCC Rcd at 14,847 (¶¶ 319-20).

71 UBS, 2 (Feb. 20, 2007).

72 Merrill Lynch, 1 (Feb. 20, 2007).

73 *Id.* at 3.

74 Hazlett at 13.

"otherwise unaffordable," thereby causing other providers to do the same.[75]

The companies also have concluded that the merger is likely to produce considerable, merger-specific savings that will benefit consumers. Sirius and XM have identified areas where duplicate expenses can be eliminated, scale economies can be achieved, and where other cost and revenue synergies exist in a merged company.[76] As discussed in the Declaration of David Frear, Executive Vice President and Chief Financial Officer of Sirius,[77] significant merger-specific savings are likely to result in the following areas:

- *Satellite Operations.* In the nearer term, the combined entity will be able to eliminate significant redundancy in satellite uplink, control, and transmission facilities, including reducing costs necessary to communicate with satellites, as well as the costs of duplicative back-up control facilities. Over the longer term, capital expenditure savings in satellite network replacement will be substantial.[78]
- *Broadcast Operations.* The combined company can eliminate duplicative studio operating costs, including personnel, facilities, content storage and retrieval, and content delivery costs. The costs associated with webstreaming can also be rationalized post-merger.[79]
- *Terrestrial Networks.* Duplicative costs to operate and maintain terrestrial repeaters could be eliminated or reduced through the co-location of terrestrial

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75 *Id.*

76 Because of legal requirements limiting the types of information that the management of either standalone company can review regarding the other's operations, Sirius and XM have retained outside consultants for the purpose of reviewing the operations and financials of both companies and quantifying, based on the consultants' expertise, the potential efficiencies of the proposed merger. The quantification of these synergies is an on-going process, and because much of the information is commercially sensitive and proprietary, Sirius and XM will provide additional information to the FCC subject to a heightened Commission protective order limiting access to that information to the Commission and third parties' outside counsel and outside consultants.

77 Declaration of David Frear, Executive Vice President and Chief Financial Officer, Sirius Satellite Radio Inc., Exhibit D (July 23, 2007) ("Frear Decl.").

78 *Id.* at 3 (¶ 6).

79 *Id.* at 3 (¶ 7).

repeater sites. Further, incremental costs incurred to identify and build out new terrestrial repeater sites can be reduced by installing and co-locating new equipment at existing satellite radio repeater sites.[80]

- *Programming and Content.* The merged entity will generate significant merger-specific efficiencies by eliminating duplication in the overhead and production of similarly formatted channels and by improving scale economies in content acquisition. Moreover, satellite radio will become a more compelling distribution outlet because the combined firm will allow content producers to reach a larger audience than is currently possible. The combined entity should achieve considerable variable and fixed-cost savings in connection with contracts with providers for duplicative content.[81]
- *Customer Service and Billing.* Customer service and billing efficiencies can be achieved through economies of scale in call center service procurement, and in customer care and retention-specific telecommunication and information technology costs.[82]
- *Sales and Marketing.* Substantial fixed and variable cost savings are expected from the elimination of duplicative marketing expenses and through the benefits ensued to retail and OEM distribution partners that would otherwise be unattainable.[83]
    - *Marketing.* Marketing efficiencies will arise from the rationalization of duplicative headcount and related expenses, and the improved ability of the combined company to promote satellite radio against other audio entertainment alternatives. The marketing efforts of the merged firm will be more effective as the combined entity internalizes the existing "spill-over" effect (phenomenon whereby each standalone company benefits from the promotional efforts of the other, but neither is able to capture all the benefits of substantial marketing expenditures) allowing the firms to engage in more effective advertising aimed at expanding the satellite radio category.[84] In addition, the combined entity will achieve savings in promotions, website development, and advertising buys.
    - *Retail Distribution.* Substantial duplication exists across the companies' retail marketing organizations given coverage of the same retailers, presenting an opportunity for headcount rationalization. The merged

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80 *Id.* at 4 (¶ 8).

81 *Id.* at 4 (¶¶ 9-10).

82 *Id.* at 5 (¶ 11).

83 *Id.* at 5-6 (¶ 12).

84 *See infra* at 31-32.

company can also offer an improved value proposition to retailers and distributors potentially resulting in variable cost savings in retail distribution which can lead to lower equipment prices for consumers. The combined firm will drive higher sales volume per square foot through the availability of better and more innovative products on retail floors. Further, promotion of a single satellite radio brand/service will free up in-store and advertising circular space, while also reducing retailers' promotional spending requirements for the satellite radio category.

- *OEM Distribution.* The merged company will also offer an improved value proposition to its automakers. As conversion and retention rates increase over time through enhanced programming choices (*e.g.*, packages and a la carte offerings, coupled with the availability of previously exclusive content such as Oprah Winfrey for Chrysler and Ford vehicle owners), OEMs will experience an overall revenue share lift from a larger satellite radio subscriber base, further motivating automakers to install and market satellite radio.
- *OEM Contracts.* If the new combined offerings provide the company and its OEMs additional value through improvements in churn, conversion rate, revenue share and customer satisfaction, it is likely that contract term negotiations will result in improved economics and reduced variable costs for the combined company.

o *Subscriber Acquisition Costs.* Among other efficiencies in the supply chain, the combined company would be able to achieve cost savings by streamlining product offerings through the elimination of identical or similar devices and accessories, and by achieving economies of scale in sourcing materials and chip sets, and in absorbing manufacturing overhead and shipping costs.[85] These efficiencies will result in lower subscriber acquisition costs per gross OEM and retail subscriber added by the combined company.

o *General and Administrative.* The merged company will be able to eliminate duplicative executive management costs, reduce insurance costs, and eliminate overlap in legal, investor relations, external accounting and auditing costs. Additional efficiencies will be realized from more traditional business expenses such as office supplies.[86]

o *Product Development.* The merged entity would be able to draw from the best of the two product development efforts, accelerating the introduction of new and improved satellite radio receivers, services and chipsets. The combined company will also be able to achieve significant cost savings by eliminating duplicative

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85 Frear Decl. at 6 (¶ 13).

86 *Id.* at 6-7 (¶ 14).

efforts and personnel.[87]

- *Depreciation Costs.* The combined company would reduce future depreciation costs as it realizes significant capital expenditure efficiencies related to satellite expenditures, leasehold improvements, IT equipment, and other capital costs.[88]
- *Interest Expense.* The combined company will have superior credit quality and will, therefore, lower its borrowing costs.[89]

In addition to realizing these cost-savings, the combined company will experience synergies and efficiencies that result in increased revenues:

- *Subscriber Revenue.* By introducing a la carte and new programming packages, and by the availability of previously exclusive content, the combined entity will be able to attract more subscribers, reduce churn, and increase conversion rates among OEM subscribers. The result will be an increase in the subscriber base and revenue.[90]
- *Ad Revenue.* The combined company will be able to receive greater revenue from advertising as a result of offering advertisers broader reach, and therefore a more attractive and targeted audience.[91]
- *Equipment Revenue.* The combined company will be able to compete more effectively for consumer attention in online marketing and retail sales, resulting in increased revenue from the sale of subscriptions and equipment.[92]

The companies also expect that the merged company will simultaneously be able to improve satellite radio penetration and expand consumer choice and quality. Furthermore, the efficiencies that the companies have identified are expected to lead to increased output, or lower quality-adjusted prices. As discussed above, offerings that will be available post-merger include: (i) new service packages, (ii) additional and more diverse content, and (iii) devices with greater

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87 *Id.* at 7 (¶ 15).

88 *Id.* at 7 (¶ 16).

89 *Id.* at 8 (¶ 18).

90 *Id.* at 8-9 (¶¶ 19-23).

91 *Id.* at 9 (¶ 24).

92 *Id.* at 10 (¶ 25).

functionality at lower prices.

Opponents of the merger dispute that the transaction is likely to produce these merger-specific efficiencies and the attendant consumer benefits, such as lower prices and greater innovation, but they fail to engage the facts or the underlying economic analysis. For instance, the NAB argues that "XM and Sirius could offer lower-priced packages with fewer channels now,"[93] and it insists that the availability of more content is not merger-specific because "[t]he companies did not have to enter into exclusive contracts for programming; they chose to do so."[94] Such claims entirely ignore business and economic realities. The two companies would have neither the ability nor the economic incentive to exchange content to create a la carte offerings. Sirius and XM have invested over $5 billion each in their respective businesses overall, and continue to report significant operating losses—indeed, neither company has yet to achieve free cash flow or earn a profit. In 2006, the two companies incurred total costs of approximately $3.4 billion, much of which is attributed to the cost of acquiring new subscribers. It is completely unrealistic for the NAB to suggest that, even without the merger, it is financially feasible for Sirius and XM to offer these additional benefits to consumers. The facts clearly demonstrate that the combination of Sirius and XM will generate sizeable efficiencies that simply cannot be achieved in the absence of a merger—efficiencies that will be passed along to consumers in the form of greater choice and lower quality-adjusted price.[95]

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93 NAB at 37.

94 *Id.* at 39.

95 *See* Fed. Trade Comm'n & Dep't of Justice, *Commentary on the Horizontal Merger Guidelines*, at 50 (2006) ("*FTC/DOJ Commentary*") ("Economic analysis teaches that price reductions are expected when efficiencies reduce the merged firm's marginal costs, *i.e.*, costs

Satellite radio is still at a nascent stage of its life cycle and faces ever-intensifying competition from other audio entertainment services. Under these circumstances, both Sirius and XM have a strong incentive to engage in penetration pricing (*i.e.*, offer a relatively low initial entry price) and offer attractive content in order to expand their subscriber base and popularize their particular satellite radio services, with an eye toward long term profitability.[96] These dynamics largely explain why both companies have invested substantial amounts of capital to create demand for satellite radio, and have had to relinquish a substantial share of the value of each incremental customer to device manufacturers and distributors.

In the absence of the merger, each company is unable to capture all of the benefits of its long-term strategy because each satellite radio company is able to benefit from the promotional efforts of the other.[97] CRA identifies the economic conditions that give rise to this "dynamic demand spillover effect" and explains that it "generates a free-rider problem between Sirius and XM. Lower prices charged by XM also would increase the number of Sirius subscribers, and vice versa."[98] These dynamics may motivate Sirius and XM to "over-invest in brand-specific

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associated with producing one additional unit of each of its products."). Variable cost is simply the sum of marginal costs.

96 *See, e.g.*, Statement of Mel Karmazin, CEO, Sirius, *Final Transcript, SIRI—Q1 2005 Sirius Satellite Radio Earnings Conference Call*, Thomson StreetEvent, Apr. 28, 2005, at 11 ("What our focus today is on growing the category. It is a relatively small number of people that are currently subscribing to satellite radio. We want that number to grow huge, and we think that being attractively priced at retail, providing great content at good value is the way we grow the market.") (quoted in CRA Competitive Effects Analysis at 44, n.168 (¶ 77)); *see also* CRA Competitive Effects Analysis at 47 (¶ 83) ("Pricing and other marketing strategies of XM and Sirius are consistent with this longer-run focus and the penetration pricing strategy.").

97 CRA provides an extensive discussion of this problem in its economic analysis of the proposed merger. CRA Competitive Effects Analysis at 46-48 (¶¶ 81-86).

98 *Id.* at 47 (¶ 85).

advertising and under-invest in generic advertising."[99] In other words, this "dynamic demand spillover effect" artificially inflates certain investments (such as branding) that allow one satellite radio company to achieve greater penetration relative to the other company, in an effort to counteract (or at least mitigate) the effects.

The combined company will resolve this problem by "allowing the merged firm to obtain *all* the incremental satellite radio subscriptions generated by its low prices and other investment efforts."[100] This means that the merged entity "will have an increased incentive to undertake demand-enhancing investments, including penetration pricing"[101] and further "to reduce its variable costs."[102] This efficiency is clearly merger-specific because, without the merger, it is infeasible for these companies to reach a coordinated solution (and such coordination would, in any event, prompt allegations of anti-competitive behavior under Section 1 of the Sherman Act).[103]

Much of the anticipated efficiencies constitute variable-cost savings, but there are also cognizable fixed-cost savings that will directly translate into increased consumer welfare. For instance, as noted, the combined company will be able to eliminate redundancies in product and chipset design, facilitating the development of "next generation" products and the introduction of new services, such as advanced data and telematics services. The NAB contends that these benefits are not merger-specific because "nothing currently prevents the companies from

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99 *Id.* at 62 n.224 (¶ 119).

100 *Id.* at 61 (¶ 117).

101 *Id.*

102 *Id.* at 63 (¶ 120).

103 15 U.S.C. § 1 (prohibiting all unreasonable restraints of trade).

working together to develop 'common engineering standards and protocols,'" and it urges the Commission to ignore these efficiencies because they involve fixed, rather than variable, costs.[104] Both of these arguments lack merit.

First, the NAB's suggestion that the companies could achieve the same efficiencies by jointly developing innovative products or services is incorrect. As CRA observes, that approach is not practically feasible because it would require the more innovative firm to cede a potential comparative advantage, would involve significant coordination issues between the two companies, and would ultimately be less effective at producing the efficiencies expected from the merger.[105] Moreover, the sharing of innovation, as with the sharing of content, "would lead to classic promotional free-riding problems."[106] Indeed, the FCC, FTC, and DOJ have recognized that joint ventures or contracts are often not "practically feasible or impose substantial transaction costs (including monitoring costs)," and therefore an efficiency should not be disqualified from the analysis merely because it "theoretically could be achieved without a merger—for example, through a joint venture or contract."[107]

Second, the NAB is simply incorrect that only marginal costs matter in a merger analysis. The FTC/DOJ Horizontal Merger Guidelines explain that "[c]ognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in

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104 NAB at 42-43.

105 CRA Competitive Effects Analysis at 63 (¶ 122).

106 *Id.* at 65 (¶ 126).

107 *FTC/DOJ Commentary* at 50. *See also AT&T/BellSouth Order*, 22 FCC Rcd at 5762 (¶ 205) (acknowledging the "well-recognized inefficiencies" of joint ventures).

output or service."[108] As CRA correctly observes, some of the fixed-cost savings that will result from this merger "involve increases in the efficiency of advertising and other demand-enhancing expenditures" that will provide the merged firm with adequate "incentive to increase competition and output."[109] Other fixed-cost savings "will increase the likelihood that the merged firm will remain viable in the longer-run and maintain longer term investment incentives. These fixed cost savings all would be treated as cognizable under the current merger enforcement policy."[110]

As noted above, significant portions of these fixed- and variable-cost savings will be shared with customers through lower prices and improved service offerings. The Commission has repeatedly acknowledged that lower prices and increased consumer choice are cognizable public interest benefits that would support a merger if they outweigh any adverse effects.[111] The evidence clearly demonstrates that the efficiencies generated by the transaction will outweigh the competitive harms (if any), and the public will benefit. The opponents of the merger have failed to establish any legitimate ground—either factual or economic—that would explain why this merger should not be permitted.

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108 Fed. Trade Comm'n and Dep't of Justice, *Horizontal Merger Guidelines* at § 4 (Apr. 8, 1997) ("Horizontal Merger Guidelines").

109 CRA Competitive Effects Analysis at 64 (¶ 123).

110 *Id.* (citing *FTC/DOJ Commentary* at 58 ("The Agencies consider merger-specific, cognizable reductions in fixed costs, even if they cannot be expected to result in direct, short-term, procompetitive price effects because consumers may benefit from them over the longer term even if not immediately.")).

111 *See, e.g.*, *Adelphia/Time Warner Order*, 21 FCC Rcd at 8307 (¶ 23); *NYNEX/Bell Atlantic Order*, 12 FCC Rcd at 30,063 (¶ 158) ("Efficiencies generated through a merger can mitigate competitive harms if such efficiencies . . . result in lower prices, improved quality, enhanced service or new products."); *MCI/BT Order*, 12 FCC Rcd at 15,430 (¶ 205) (describing "lower prices, improved quality, enhanced service or new products" as examples of consumer benefits resulting from merger-specific efficiencies that are relevant to the public interest analysis) (citation and quotation omitted).

III. THE RECORD DEVELOPED IN THIS PROCEEDING CLEARLY DEMONSTRATES THAT THIS IS NOT A "MERGER TO MONOPOLY."

Nearly all of the opposing commenters reflexively argue that the proposed transaction constitutes a "merger to monopoly."[112] If this were true, the evidence would reveal that the two companies combined would have the ability and incentive to raise quality-adjusted prices or decrease output—or, put differently, the anticipated competitive harm to consumers would outweigh the benefits. But the facts show precisely the opposite. As shown in the preceding section, the merger will generate many benefits that the companies alone would not be able to achieve, and Section IV, *infra*, explains why the opponents' predictions of competitive harm are very unlikely to come to pass.

This section explains why the assumption underlying the well-worn refrain of "merger to monopoly"—that Sirius and XM compete in a market comprised only of these two companies—is demonstrably false. In delineating the outer boundaries of the relevant market, the key is to identify all products that are reasonable substitutes for the product at issue.[113] All available evidence demonstrates that consumers have an abundance of reasonable substitutes for satellite radio, including most directly terrestrial radio and HD Radio, as well as wireless phones, iPods and other MP3 players, and Internet radio—and consumer choices are rapidly increasing over time. All these forms of audio entertainment shape the competitive landscape and constrain the ability of the combined company to raise prices or restrict output.

The market definition analysis, properly applied, clearly disproves the claim of a

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112 *See, e.g.*, Sidak July 9 Supp. Decl. at 3 (¶ 1); NAB at 23-26; Common Cause at 1.

113 *See, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *Adelphia/Time Warner Order*, 21 FCC Rcd at 8234 (¶ 59); *Applications of AT&T Wireless Inc. and Cingular Wireless Corp. for Consent to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 21,522, 21,552 (¶ 57) (2004).

"satellite radio-only" market and shows that satellite radio commands nowhere near the market share necessary to demand higher-than-competitive prices. In going through the exercise of evaluating the opponents' market definition (and the accompanying market share analysis), however, it is critical not to lose the forest for the trees. Market definition and market share are convenient analytical tools for assessing competitiveness, but as Professor Hazlett correctly notes, "[a]rguments as to the relevant market and its competitiveness are secondary" to the question "whether a given transaction will benefit consumers and the economy."[114] Here, there is ample evidence that sizeable merger-specific efficiencies will lead directly to more choices and lower prices for consumers, with little if any offsetting competitive harm.[115] This evidence confirms that Sirius and XM are not duopolists now and that the combination of these companies will not produce a "merger to monopoly."

A. Sirius and XM Compete with a Broad Array of Audio Entertainment Services.

The Commission's review of potential competitive harms ordinarily begins with determining the appropriate product market in which the merging firms' products compete.[116] This exercise provides the Commission with an initial framework to evaluate the likely competitive effects of the proposed transaction. Here, the record plainly demonstrates that the merger will lead to many competitive benefits that outweigh any harms, under any reasonable

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114 Hazlett at 13. *See also id.* at 12 ("The determinative policy cut is *whether the proposed merger will likely increase or decrease the value of services available to consumers*.").

115 *See FTC/DOJ Commentary* at 10 ("In some investigations, before having determined the relevant market boundaries, the Agencies will have evidence that more directly answers the 'ultimate inquiry in merger analysis,' *i.e.*, 'whether the merger is likely to create or enhance market power or facilitate its exercise.'") (quoting Horizontal Merger Guidelines at § 0.2).

116 Application at 21.

understanding of the market. The evidence shows exactly what the anecdotal comments of actual satellite radio subscribers suggest: [117] Satellite radio competes with and is substitutable for numerous other audio entertainment services and devices. This is particularly true for terrestrial radio, but it is clear that satellite radio also competes with Internet radio, iPods, MP3 players, wireless phones, and HD Radio. Commenters' allegations and arguments to the contrary are inaccurate, internally inconsistent, and ignore market reality.[118]

<u>There already exists substantial substitution among satellite radio and various other audio services and devices—and particularly between satellite radio and terrestrial radio</u>. Recent studies performed by both Sirius and XM demonstrate that when people activate a satellite radio subscription, they substitute satellite radio programming for other audio entertainment to which they historically listened. As CRA found:

> [[REDACTED [redacted]

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[117] *See, e.g.*, Brief Comments of Alan Simmons (filed June 15, 2007) (stating that podcasts and Internet radio are "interchangeable" with satellite radio); Brief Comments of Christopher Modiano (filed May 18, 2007) (stating that he is going to cancel his satellite radio subscription and "get an iPhone and switch over to podcasts and online radio"); Brief Comments of David W. FitzGerald (filed June 19, 2007) ("the technology DOES NOT define the market; this is just aural media delivery and it is served by iPods, iPhones, MP3 Players, AM, FM, HDFM, Internet Radio, CD Players, cell phones, and etc. all in fierce battle for my ears.").

[118] *See, e.g.*, NAB at 13-17; Common Cause at 16-35.

[redacted][119]]]

The CRA Competitive Effects Analysis identifies the various substitutes for satellite radio, including terrestrial radio, wireless phones, iPods and other MP3 players, and the countless new products that are surfacing in the near term.[120] It carefully evaluates the evidence of substitution with respect to each of these alternatives, and concludes that "the proper relevant market is audio entertainment products, not satellite radio alone."[121]

Satellite subscribers who deactivate service more often than not return to terrestrial radio. CRA's research confirms that only a small percentage of existing subscribers switch from one satellite radio service to the other service, while there has been substantial substitution from satellite radio to terrestrial radio.

[[REDACTED [redacted][122]]]

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119 CRA Competitive Effects Analysis at 12-13 (¶ 22) [redacted]

120 *Id.* at 17-29 (¶¶ 30-47).

121 *Id.* at 48 (¶ 87).

122 *Id.* at 13 (¶ 23) [redacted]

This substitutability will grow over the next several years as terrestrial radio, wireless audio services, HD Radio, and other audio entertainment services continue to evolve.[123]

The relationship between satellite radio penetration and terrestrial radio coverage provides clear evidence of substitution between satellite and terrestrial radio. As the American Antitrust Institute ("AAI") correctly stated:

> A degree of cross elasticity might be shown if the rate of satellite radio subscriptions is higher in markets with fewer terrestrial radio stations. On the other hand, if the rate of satellite subscriptions is geographically uniform throughout the country, this would tend to indicate little cross elasticity.[124]

CRA performed this exact analysis. CRA found

> [A] clear, relatively smooth inverse relationship between average satellite radio penetration and the number of AM/FM radio stations received. Satellite radio penetration generally is higher in geographic areas where there are fewer AM/FM stations. The inverse relationship between satellite radio penetration and AM/FM coverage [[REDACTED [redacted]]] Average satellite radio penetration falls [[REDACTED [redacted]]] in [Zip Code Tabulation Areas, or "ZCTAs"] receiving zero AM/FM stations, [[REDACTED [redacted]]] in ZCTAs receiving two AM/FM stations. Average satellite radio penetration [[REDACTED [redacted]]][125]

Substitutability is further demonstrated by intermodal competitive responses—how terrestrial radio, satellite radio, and other services have responded to the introduction and evolution of other audio entertainment options. Again, the evidence is clear that "firms operating in one format have responded directly to competition from developments in other modes by

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123 *Id.* at 27-29 (¶¶ 43-47).

124 AAI at 21, n.68.

125 CRA Competitive Effects Analysis at 15 (¶ 27). The claim of some opponents that the merger will harm rural consumers is incorrect, for the reasons discussed below in Section IV.C. In fact, the transaction will bring the same tremendous benefits to rural consumers, which is why rural groups have shown overwhelming support for the merger.

rapidly adding new products and repositioning the products they sell."[126]

- Satellite radio obviously responded to terrestrial radio's primary mode of delivery by paying automakers to install their radios in cars alongside ubiquitous AM/FM radios and also paid for premium content, such as play-by-play sports, historically heard on terrestrial radio.[127]

- Terrestrial radio has responded to competition from satellite radio by reducing, nationwide, the number and length of commercials, developing HD Radio[128] (which will soon be able to be offered on a subscription basis[129]), and offering a wider variety of music.[130] In addition to these dramatic changes in their overall strategy, terrestrial radio broadcasters are also experimenting with other formats that they believe might retain more listeners. For example:

    - Clear Channel recently announced that it will no longer run traditional advertisements on one of its stations.[131] Instead, advertisers can sponsor an hour of programming during which the on-air personalities will promote the product conversationally.

    - Clear Channel is experimenting with a new type of advertisement it calls "blinks."[132] These two-second ads pop up in between songs and in the middle of

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126 *Id.* at 16 (¶ 29).

127 *Id.* at 32 (¶ 53).

128 *See, e.g.*, ABI Research, *HD Radio Could Cure US Broadcasters' Satellite Radio Woes*, May 22, 2006, http://www.abiresearch.com/abiprdisplay.jsp?pressid=651 (last visited July 20, 2007).

129 *See* CRA Competitive Effects Analysis at 20 (¶ 34) (citing Bear Sterns (June 29, 2007); *Digital Audio Broad. Sys. and Their Impact on the Terrestrial Radio Broad. Svc.*, Second Report and Order, First Order on Reconsideration and Second Further Notice of Proposed Rulemaking, FCC 07-33, ¶ 49 (May 31, 2007) ("*Digital Audio Broad. Sys. Order*").

130 *Id.* at 19 (¶ 32).

131 *See* Andrew Adam Newman, *In Dallas, Commercial Radio Without Commercials*, N.Y. TIMES, Apr. 23, 2007, http://www.nytimes.com/2007/04/23/business/media/23radio.html?ex=1183089600&en=494d05d7f82ad664&ei=5070 (last visited July 22, 2007).

132 Paul Farhi, *And Now For A Syllable From Our Sponsor, The New Radio Spots Shrinking Into Freckles*, WASHINGTON POST, June 17, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/06/16/AR2007061601296.html (last visited July 22, 2007).

programs and simply say something like "Iced coffee at McDonald's." These new advertising models competitively respond to satellite radio's commercial-free programming.

- The HD Digital Radio Alliance, a consortium that includes many of the largest terrestrial radio companies,[133] has coordinated the rollout of HD Radio throughout the United States. There are now more than 1350 HD Radio stations, covering over 82 percent of the U.S. population.[134] One of the express purposes for the Alliance is to "coordinat[e] the formats on new multicast channels known as HD2."[135] Through these joint efforts, the HD Radio Alliance has introduced a wider variety of genres and programming offerings compared to what is currently available on traditional broadcast radio.[136] The terrestrial broadcasters also have combined forces to mount an aggressive advertising campaign to promote HD Radio rather than satellite radio. In 2005, the NAB ran an advertising campaign with the slogan, "Radio: You shouldn't have to pay for it."[137] And in 2007, the Alliance committed $250 million to promote HD Radio— [[REDACTED [redacted]]][138]

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133 The HD Radio Alliance includes ABC Radio Networks, Beasley Broadcast Group, Inc., Bonneville International, CBS Radio, Citadel Broadcasting Corporation, Clear Channel, Cumulus, Emmis Communications, Entercom, and Greater Media, Inc. *See* HD Radio.com, *HD Digital Radio Alliance Members*, http://www.hdradio.com/press_room.php#alliancemembers (last visited July 21, 2007).

134 CRA Competitive Effects Analysis at 19 (¶ 32).

135 Press Release, HD Radio Alliance, *Unprecedented Radio-Industry Alliance Will Advance Rollout of HD Digital Radio* (Dec. 6, 2005), http://www.hdradio.com/press_room.php?newscontent=16 (last visited July 21, 2007). As one analyst observed, "[f]ear of satellite radio is prompting an unprecedented level of cooperation among broadcasters in their efforts to launch HD Radio and HD2." ABI Research, *HD Radio Could Cure US Broadcasters' Satellite Radio Woes*, May 22, 2006, http://www.abiresearch.com/abiprdisplay.jsp?pressid=651 (last visited July 20, 2007) (quoting Frank Viquez).

136 Some of the genres available on HD Radio reportedly include: "Viva La Voce (opera), Classical Alternative, Traditional Jazz & Blues, Coffee House, Female Talk, Future Country, Extreme Hip Hop, and in-depth news." FMQB, *HD Digital Radio Alliance Launches 264 New Channels*, Jan. 18, 2006, http://fmqb.com/Article.asp?id=165202 (last visited July 21, 2007).

137 Press Release, NAB, *Radio Industry Launches New On-Air Ad Campaign* (Nov. 30, 2005), http://www.nab.org/AM/Template.cfm?Section=Press_Releases1&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=5170 (last visited July 21, 2007).

138 CRA Competitive Effects Analysis at 19 (¶ 32).

- After XM and Sirius introduced traffic and weather programming, the NAB called for satellite radio to be prohibited from broadcasting local weather and traffic.[139]

- Satellite radio has reacted to the increasing prevalence of other audio entertainment options, including MP3 players and Internet radio, by expanding the storage capacity of their receivers, permitting time shifting, allowing users to download songs from their CD collections and other music services, and offering Internet streams of their programming.[140]

The NAB Coalition includes a chart purporting to show the "stark record of quality improvements in satellite radio over the past three years."[141] But by focusing exclusively on competitive responses between XM and Sirius, the NAB Coalition has completely ignored the extensive record of competitive responses among a variety of players. Exhibit E provides a more complete, though by no means comprehensive, timeline of events that have occurred just in the last three years in the audio entertainment marketplace. As the Exhibit shows, satellite radio providers, MP3 manufacturers, terrestrial radio providers, Internet radio providers, and mobile service providers all have introduced new services and products in response to other players in this dynamic and constantly evolving audio entertainment marketplace.

Broadcasters' fierce opposition to the merger—indeed, to the very existence of satellite radio—clearly shows the extent to which terrestrial radio broadcasters recognize and fear competition from satellite radio.[142] The NAB, along with its consultants, constituents, and

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[139] *See, e.g.*, Petition for Declaratory Ruling, NAB, MB Docket No. 04-160 (filed Apr. 14, 2004).

[140] CRA Competitive Effects Analysis at 26-27 (¶ 41).

[141] NAB Coalition at 8.

[142] Many commenters agree. *See* Brief Comments of Patrick Smith (filed June 14, 2007) ("I think the biggest testament that terrestrial radio is such a huge competitor to satellite radio is that they are the ones fighting the merger the hardest."); Brief Comments of John O'Keefe (filed May 18, 2007) ("Unfortunately, the opposition to the proposed merger is not being driven by consumers, nor is its motivation consumer protection. Simply put, the opposition to the Sirius-

surrogates, have collectively filed hundreds of pages of comments and exhibits urging the Commission to reject the merger. Broadcasters have tirelessly lobbied Congress, individual state legislatures, and newspaper editorial boards urging them to oppose the merger.

Why? It is because they realize that the efficiencies created by the merger and their resulting benefits to consumers, including lower prices and greater choices, will make satellite radio a stronger competitor in the audio entertainment market. But, as Judge Richard Posner has written, such opposition is a "telling point" suggesting that a merger is lawful.[143] In fact, if terrestrial broadcasters truly believed that the merger would result in increased prices, decreased programming variety, and reduced innovation, they would logically *support* the merger since those results could only benefit incumbent terrestrial broadcasters.[144]

The NAB and individual broadcasters—in many other contexts—have repeatedly and unequivocally acknowledged that vigorous competition exists between satellite and terrestrial radio.[145] The NAB, despite what it now says, has stated historically that there have been

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XM merger is for no other reason than to stifle and emerging technology that directly challenges 'conventional radio.'"); Brief Comments of Robert Blackman (filed June 19, 2007) ("[T]he strong objections made by the NAB fully make the case for the increased competition in the marketplace, completely debunking the 'monopoly' argument."); Public Knowledge at 15 ("The NAB's aggressive opposition to satellite radio over the last decade is compelling evidence that the two audio entertainment services are, in fact, direct competitors.").

143 *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1391-92 (7th Cir. 1986) ("Hospital Corporation's most telling point is that the impetus for the Commission's complaint came from a competitor."); *see also* CRA Competitive Effects Analysis at 72-73 (¶ 146).

144 As Judge Posner explains in *Hospital Corp.*, a case involving the disputed purchase of a hospital, "[t]he hospital that complained to the Commission must have thought that the acquisitions would lead to lower rather than higher prices—which would benefit consumers, and hence, under contemporary principles of antitrust law, would support the view that the acquisitions were lawful." *Hospital Corp.*, 807 F.2d at 1392.

145 Indeed, when satellite radio service rules were first adopted in 1997, the NAB acknowledged "the potential adverse impact [of satellite radio] on terrestrial broadcasters."

"dramatic increases" in the competition among audio services in recent years.[146] The NAB further has noted that in addition to competition from satellite radio providers, local radio stations "compete for listeners with other forms of audio delivery offering an almost unlimited array of content," including "iPods and other MP3 players, music download services, podcasting and the Internet streaming of U.S. and foreign radio stations."[147]

Similarly, individual broadcasters routinely and in many other contexts acknowledge the competition they face from satellite radio and other audio platforms. For example, according to

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Satellite Radio Authorization Order, 12 FCC Rcd at 5788 (¶ 83). As a number of commenters have pointed out, the broadcast industry has inconsistently argued in the media ownership proceeding currently pending before the FCC that the marketplace for audio services should be defined broadly and is highly diverse and competitive. *See, e.g.*, Common Cause at 11-12; Public Knowledge at 12.

One of the NAB's consultants, Carmel Group, has offered inconsistent views on radio competition as well. The Carmel Group's Jimmy Schaeffler, who claims the instant transaction would be anti-competitive because satellite radio does not compete with terrestrial radio and other audio entertainment options, *see* Jimmy Schaeffler, The Carmel Group, *Higher Prices, Less Content and a Monopoly: Good for the Consumer?* (Apr. 2007), reached the opposite conclusion last year. *See* Jimmy Schaeffler, The Carmel Group, *Growing Another Telecom Pie: Satellite Radio's In-Vehicle Competition*, http://carmelgroup.com/publications/document/growing_another_telecom_pie/ (last visited July 17, 2007) ("[T]oday[,] the U.S. is pitched in a new battle over the same kind of telecom development, where again, the pie grows and numerous competitors thrive, side-by-side. In this case, the new player is satellite radio, with more than seven mil. subscribers, and its competition comes in the form of traditional analog AM & FM radio, as well as burgeoning services like MP3 players, terrestrial radio, and video- and Internet-to-the-vehicle.").

146 Reply Comments of the National Association of Broadcasters, MB Docket No. 06-121, 32 (filed Jan. 16, 2007).

147 Comments of the National Association of Broadcasters, MB Docket No. 06-121, 26 (filed Oct. 23, 2006). The NAB further noted that "[t]he iPod alone—with sales recently passing 50 million units—has revolutionized the portable media market. . . . [T]he iPod is responsible for a remarkable shift in media priorities, as networks, music companies, and independent producers scramble to make their content available for digital download. Sales of the iPod promise to increase with the recent announcement that General Motors and Ford plan to integrate iPods into their new car audio systems, creating another direct competitor to local radio for listeners." *Id.* at 15.

Clear Channel, "[s]atellite radio is . . . [a] substantial . . . competitor to terrestrial radio broadcasting."[148] Clear Channel also noted that "free, over-the-air radio also now faces substantial and ever-increasing competition from a dizzying array of alternative platforms. A decade ago, Congress could not even have imagined the emergence of many of these platforms, several of which were only on the horizon in 2003."[149] Clear Channel further argued that "[t]errestrial radio operators are but one small set of participants in the overall media landscape, which has expanded dramatically in recent years. . . . Within this vast and constantly-expanding media marketplace, terrestrial radio broadcasters are subject to fresh and ever-growing competition from a vast array of new technologies and services that deliver music, entertainment, and news."[150]

Radio One, Inc. has also acknowledged that it competes with satellite radio: "The radio broadcasting industry is highly competitive. Radio One's stations compete for audiences and advertising revenue with other radio stations and with other media such as . . . the Internet [and] satellite radio."[151] The Spanish Broadcasting System stated that "[o]ur broadcasting businesses

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148 Comments of Clear Channel Communications, Inc., MB Docket No. 06-121, 13 (filed Oct. 23, 2006). Clear Channel also noted the substantial competition from MP3 players, Internet radio, subscription-based music services offered via cable, DBS, and IPTV networks. *Id.* at 13, 15, 16-17 ("Recent estimates indicate that 28% of Americans over the age of 12—or nearly sixty-seven million—own MP3 players, more than double the number in 2005 . . . . Internet radio is also a significant competitor to traditional radio broadcasting . . . . Subscription-based music services offered via cable and DBS—and the new 'IPTV' networks being installed by traditional telephone companies—also compete with free, over-the-air radio.").

149 *Id.* at i.

150 *Id.* at 10.

151 Radio One, Inc., 2006 SEC Form 10-K at 12 (filed June 14, 2007). *See also, e.g.*, CBS Corp., 2006 SEC Form 10-K at I-10–I-11(filed Mar. 1, 2007) ("The radio industry is also subject to competition from two satellite-delivered audio programming services, Sirius Satellite Radio and XM Satellite Radio. . . . The Company's radio stations face increasing competition from

face increasing competition from new broadcast technologies, such as broadband wireless and satellite television and radio, and new consumer products, such as portable digital audio players and personal digital video recorders. These new technologies and alternative media platforms compete with our radio and television stations for audience share and advertising revenue."[152]

The terrestrial broadcasters correctly characterize the competitive landscape in their earlier filings and public statements. These views are no less true in this proceeding. The anxiety they express, that a merged satellite radio company will have a "substantial competitive advantage," is compelling evidence that, at a minimum, terrestrial radio belongs in the same

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audio programming delivered via the Internet and from consumer products such as portable digital audio players."); Beasley Broadcast Group, Inc., 2006 SEC Form 10-K at 17 (filed Mar. 12, 2007) ("Competition arising from other technologies or regulatory change may have an adverse effect on the radio broadcasting industry or on our company. Various other audio technologies and services that have been developed and introduced, include: satellite delivered digital audio radio services that offer numerous programming channels and the sound quality of compact disks."); Entercom Communications Corp., 2006 SEC Form 10-K at 13 (filed Feb. 28, 2007) ("There is increased competition for audio distribution. These technologies and services . . . include . . . satellite delivered digital audio radio service, which has resulted in subscriber-based satellite radio services with numerous niche formats . . . personal digital audio services (*e.g.*, audio via WiFi, mobile phones, iPods® and mp3® players); digital radio, which provides multi-channel, multi-format digital radio services in the same bandwidth currently occupied by traditional AM and FM radio services.").

[152] Spanish Broadcasting System Inc., 2006 SEC Form 10-K at 30(filed Mar. 16, 2007). *See also* Entravision Communications Corporation, 2006 SEC Form 10-K at 15 (filed Mar. 15, 2007) ("The radio industry is subject to competition from new media technologies that are being developed or introduced, such as . . . satellite-delivered digital audio services with CD-quality sound—with both commercial-free and lower commercial load channels—which have expanded their subscriber base and recently have introduced dedicated Spanish-language channels (for example, XM Satellite Radio now provides four Spanish-language channels, all commercial-free, and Sirius Satellite Radio provides three Spanish-language channels."); Univision Communications Inc., 2006 SEC Form 10-K at 15 (filed Feb. 9, 2007) ("the radio broadcasting industry is subject to competition from new media technologies that are being developed or introduced such as (1) satellite-delivered digital audio radio service, which has resulted in the introduction of new subscriber based satellite radio services with numerous niche formats").

relevant market as satellite radio.[153] And the effects identified by broadcasters "sound more like the consequences of an aggressive and more efficient satellite radio competitor offering a lower price to attract current AM/FM customers, not like a monopolist restricting its output and raising its subscription price."[154]

In short, the evidence clearly demonstrates that satellite radio competes in a highly competitive audio entertainment market, which includes many robust and substitutable services. This competition is confirmed anecdotally by consumers and objectively by available economic measures. In addition, when it serves their interests, the NAB and its members have consistently identified the larger audio market as the one in which they (quite successfully) compete, demonstrating the presence of a larger audio entertainment market.

B. Satellite Radio Has a Very Small Share of the Market Compared to Terrestrial Radio and Other Audio Entertainment Services.

An evaluation of market share serves as a reasonable initial assessment to determine whether a merger will lead to the exercise of market power. When the market is properly understood to include a range of competitors including terrestrial radio and other audio entertainment services, it becomes clear that XM and Sirius have a very low combined market share—well within the safe harbors provided by the Horizontal Merger Guidelines[155]—and that the proposed merger will not lead to any anticompetitive harm. To the contrary, the facts demonstrate that this merger will be good for consumers.

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153 46 Broadcasters at 5.

154 CRA Competitive Effects Analysis at 74 (¶ 148).

155 *See* Horizontal Merger Guidelines at § 1.51 ("Mergers producing an increase in the HHI of less than 50 points, even in highly concentrated markets post-merger, are unlikely to have adverse competitive consequences and ordinarily require no further analysis.").

CRA explains that "[t]here are a number of reasonable ways to measure the shares of satellite radio and other services in the market for audio entertainment devices," including "(1) total time spent listening by consumers; (2) revenue earned; (3) the number of owners or subscribers; and (4) the number of listeners or users."[156] They find a "strikingly consistent" pattern for "all the measures and estimates": the combined share of Sirius and XM ranges from [[REDACTED]] percent, with a "negligible change in market concentration" as a result of the merger.[157]

Even if the market were erroneously limited to satellite radio and terrestrial radio, CRA concludes that "the merger would not raise competitive concerns" because "the combined market shares of Sirius and XM remain small, ranging from [[REDACTED]], depending on the measure and estimate of shares. . . . All of these shares lead to an estimated change in HHI of less than 50 points."[158] These extremely low market shares demonstrate that the merger of Sirius and XM does not pose competitive concerns. In order to maintain or grow its position in the vigorously competitive market for audio entertainment services, the merged entity will need to continue providing high-quality services and developing new products and services.

Several commenters arrive at much higher market concentration figures for Sirius and XM, either by (1) erroneously excluding terrestrial radio and all other audio entertainment services from the market definition,[159] or (2) calculating market shares based on capacity, *i.e.*,

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156 CRA Competitive Effects Analysis at 50 (¶ 91).

157 *Id.* at 50 (¶ 92) (finding that HHI, a standard measure of market concentration, increases no more than [[REDACTED]]).

158 *Id.* at 50-51 (¶ 93).

159 *See, e.g.*, NAB Coalition at 7; NAB at 23-24.

the number of channels of each participant, rather than one of the methods described above.[160] However, as CRA explains, the use of capacity as a measure of market share is typically limited to "homogenous products, like steel, in which price is the main focus of competition. It is not appropriate for differentiated products like audio entertainment. When products are differentiated, market shares based on revenues or other measures of output are more appropriate than capacity measures."[161]

For over a decade, terrestrial radio broadcasters and their trade association have opposed satellite radio. Indeed, the broadcasters' adamant opposition to this merger is simply the latest installment in a decades-long effort to impede or forestall the growth of competitors such as satellite radio.[162] It is obvious why the broadcasters have adopted this strategy: as the NAB

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160 *See, e.g.*, Sidak Mar. 16 Decl. at 36-41 (¶¶ 61-67). Mr. Sidak appears to have abandoned this approach in his Supplemental Declaration, considering that he makes no mention of it. *See generally* Sidak July 9 Supp. Decl. Nevertheless, other commenters rely upon his approach in opposing the merger. *See, e.g.*, NAB at 26 ("[I]n even the largest urban markets, all of the local radio stations added together do not equal the channel capacity of even one of the two satellite radio systems to be merged."); Common Cause at 29 ("If one conducts the analysis of market structure on the basis of channel capacity because of the differences in technology, this merger is unambiguously anticompetitive.").

161 CRA Competitive Effects Analysis at 51 (¶ 95) (citing Horizontal Merger Guidelines at § 1.41).

162 *See, e.g.*, Response of the National Association of Broadcasters to Digital Satellite Broadcasting Corporation's Opposition to Petitions to Deny and Response to Comments, file Nos. 28-DSS-LA-93, 12/13-DSS-P-93, 3 (filed June 25, 1993) ("NAB Response to DSBC Opposition") (indicating that satellite radio would "siphon" listeners away from terrestrial radio); Reply Comments of the National Association of Broadcasters, IB Docket No. 95-91, 34-35 (filed Oct. 13, 1995) (asserting that "[o]ne way that the Commission can act to minimize the harmful effects of satellite [radio] introduction is to structure it as a subscription-only service" and "[w]hether it is advertising-supported or not, satellite [radio] providers fundamentally will compete with terrestrial broadcasters for listeners"); Reply Comments of the National Association of Broadcasters, MB Docket No. 04-160, 15-16 (filed June 21, 2004) ("What was true in 1995 is still true today—if [satellite radio] is allowed to penetrate the local market, local broadcasting, and the voice of the community it provides, will suffer.").

itself candidly admitted nearly 15 years ago, they fear that satellite radio will "siphon off listeners" from terrestrial radio.[163] But while some "siphoning" of listeners—also known as "competition"—has occurred to some extent since satellite radio was launched in 2001, terrestrial broadcasting continues to dwarf satellite radio and all other forms of audio entertainment.

Despite the NAB's attempt to conceal its request for regulatory protectionism in antitrust clothing, it is well-established that the antitrust laws "were enacted for 'the protection of competition, not competitors.'"[164] As Professor Hazlett explains, "[w]hile the terrestrial radio broadcasters dress their opposition in the rubric of antitrust law, their strategy to prevent this efficient restructuring by obtaining regulatory intervention is an attempt to use antitrust law to subvert competition."[165]

By any reasonable measure, free "over-the-air" AM/FM radio maintains a far greater share of the audio entertainment marketplace in comparison to satellite radio:

- *Time Spent Listening.* According to a recent Arbitron study, satellite radio accounted for *just 3.4 percent of all radio listening*, spread out among the approximately 300 channels that XM and Sirius combined currently offer.[166]
- *Revenue.* As noted in Professor Hazlett's study, "terrestrial broadcasters accounted for over $21 billion in sales in 2006, as compared to just $1.6 billion

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163 NAB Response to DSBC Opposition at 3.

164 *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe*, 370 U.S. at 320).

165 Hazlett at 3.

166 Phil Rosenthal, *Satellite Deal Foes Don't Hear Message*, CHICAGO TRIBUNE, Feb. 28, 2007, http://tinyurl.com/26awbt (last visited July 20, 2007) (summarizing the results of the Arbitron study); *see also* The Katz Radio Group, *Satellite Radio Penetration*, RADIOWAVES, Dec. 2006, http://www.katz-media.com/pubs/RadioWaves/121206/RadioWavesDEC2006.pdf (last visited Mar. 17, 2007) (finding that satellite radio constituted 4.1 percent of the market).

for satellite—less than 7% of overall radio revenues."[167] In light of these revenue figures, it should hardly be surprising that "investors place an enterprise value of about $82 billion on terrestrial stations, as against about $9 billion for satellite radio."[168]

- *Number of Subscribers/Listeners.* XM and Sirius *combined* had approximately 14 million subscribers as of December 31, 2006, and this number is expected to grow to 25 million by the beginning of 2010.[169] By contrast, Internet radio has 72 million monthly listeners,[170] more than 116 million MP3 players have been sold (expected to grow to 341 million by the beginning of 2009),[171] 23.5 million wireless subscribers own phones with integrated music players,[172] and $11.2 billion was spent on compact discs in 2005.[173] All of these numbers do not compare, however, to the *230 million people who listen to AM/FM radio every week.*[174]

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[167] Hazlett at 4.

[168] *Id.*

[169] Bridge Ratings, *Digital Media Growth Projections*, Feb. 19, 2007, http://www.bridgeratings.com/press_021907-digitalprojectionsupd.htm (last visited Mar. 15, 2007). *See also* Credit Suisse, *2007 Satellite Radio Outlook*, Jan. 16, 2007, at 7 (projecting 25.5 million subscribers by the end of 2009 and 28.9 million by the end of 2010); Stifel Nicolaus, *Satellite Radio Merger Attempt Likely, Based on History & Risk/Reward*, Nov. 27, 2006, at 10, 12 (projecting 27.0 million subscribers by the end of 2009 and 31.7 million subscribers by the end of 2010).

[170] *See* Bridge Ratings, *Digital Media Growth Projections.*

[171] *Id.*

[172] This is five times the number of Americans that owned such phones in 2005. Bridge Ratings, *Music on Cell Phones*, Jan. 25, 2007, http://www.bridgeratings.com/press_01.25.2007-MusicCellphones.htm (last visited Mar. 13, 2007).

[173] Jupiter Research, *US Music Forecast, 2006 to 2011*, Jan. 4, 2007 (Executive Summary), http://www.jupiterresearch.com/bin/item.pl/events:jupitertel/jup/id=98643/ (last visited Mar. 13, 2007).

[174] *See* Arbitron, *Radio Today: How America Listens to Radio*, 2006 Edition, at 2, http://www.arbitron.com/downloads/radiotoday06.pdf (last visited Mar. 19, 2007) (estimating that 93 percent of Americans twelve years old and over listen to radio each week); *The 2007 Statistical Abstract*, The National Data Book, U.S. Census Bureau, at Table 11, http://www.census.gov/compendia/statab/population/ (estimating 2005 resident population by age). According to another report, this number is even higher. *See* Bridge Ratings, *Digital Media Growth Projections*, Feb. 19, 2007, *at* http://www.bridgeratings.com/press_021907-

The NAB has, in fact, repeatedly touted terrestrial radio's market dominance. When addressing the NAB Radio Show in September 2006, NAB President and CEO David Rehr announced that

> Many, even in our industry, forget that radio has always experienced change—and challenges—from new competitors. And radio has always come out on top. . . . First it was TV, then LP's, then cassette tapes—then my favorite—eight-tracks—then CD's—now it's I-PODS. But each time, radio has prevailed. And today is no different. In 2006, we have satellite and Internet radio. *And barely a day passes without the introduction of a new competing device or service. But we have news for our competitors: 'We will beat you—as we have beaten those change agents in the past.' . . . And when people ask us are you focused on satellite radio because you're afraid of the competition—we say, 'No.'* Satellite radio says it has at most 10 million subscribers, notwithstanding those 500,000 subscribers in empty car lots. But 260 million people listened to broadcast radio last week alone![175]

As these figures indicate, satellite radio is a relatively small competitor in comparison to terrestrial radio and other audio entertainment services and lacks the ability or incentive to demand prices in excess of those expected from a competitive market.[176] Indeed, many

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digitalprojectionsupd.htm (last visited July 22, 2007) (estimating 282 million weekly radio listeners). Even the NAB acknowledges terrestrial radio's dominance. *See* David Rehr, President and CEO, NAB, Remarks at the National Press Club: The Future of Broadcasting (Oct. 4, 2006), http://www.nab.org/AM/Template.cfm?Section=News_room&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=6937 (last visited Mar. 17, 2007) ("Satellite radio says it has at most 12 million subscribers. By contrast, 260 million people listened to local radio last week. This is week in and week out.").

[175] David K. Rehr, President & CEO, NAB, Speech at the 2006 NAB Radio Show, Sept. 21, 2006, http://www.nab.org/AM/Template.cfm?Section=Press_Releases1&CONTENTID=6802&TEMPLATE=/CM/ContentDisplay.cfm (last visited July 23, 2007) (emphasis added); *see also* NAB, *Media Ownership*, http://www.nab.org/AM/Template.cfm?Section=Resources&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=7889 (last visited July 23, 2007) (relying on "dramatic changes in the media marketplace, including the growth of cable TV, satellite TV and radio, and the Internet").

[176] Application at 20-45.

commenters indicate that if satellite radio gets too expensive or changes its programming in a way that consumers do not like, they will simply cancel their service, returning to terrestrial radio and other forms of audio entertainment.[177]

C. Opponents' Arguments for a Separate and Distinct Satellite Radio Market Are Flawed.

Opponents argue that satellite radio must be considered a distinct market because there are no alternatives that offer all of the attributes of satellite radio in a single package.[178] As CRA correctly states, however, satellite radio, terrestrial radio, iPods and other MP3 players, wireless phones, and Internet radio "are differentiated along various dimensions, but they nonetheless compete."[179] And, in any event, *perfect* substitution is not required for two products to be part of the same market.[180]

For example, some opponents suggest that satellite and terrestrial radio are in different

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[177] *See, e.g.*, Brief Comments of Jeremy Dobson (filed June 15, 2007) ("If they started charging too much, I would simply cancel my subscription and return . . . to the . . . world of broadcasted terrestrial radio."); Brief Comments of David J. Willard (filed May 23, 2007) ("In the unlikely event that we should end up disliking the 'new' satellite radio's service (policies, customer satisfaction and . . . OH, prices!) then we simply cancel service."); Brief Comments of Alan Huntington (filed June 15, 2007) (post-merger the "price will remain low because the majority of people have a strictly limited value which they place on the time gained through not listening to commercials").

[178] *See, e.g.*, Letter from Larry Walke, NAB, to Marlene H. Dortch, FCC, MB Docket No. 07-57 (filed Apr. 24, 2007) (attaching *The XM-Sirius Merger: Monopoly or Competition from New Technologies Before the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Senate Committee on the Judiciary*, 110 Cong. (Mar. 20, 2007) (statement of David A. Balto) ("Balto Testimony")).

[179] CRA Competitive Effects Analysis at 3 (¶ 5).

[180] If this were not the case, Sirius and XM would be considered to belong to separate product markets since there is significant product differentiation between the two companies with regard to programming and distribution. *See id.* at 30-34 (¶¶ 50-58).

markets because one relies on subscriber revenue while the other relies on advertising revenue.[181] Some state that listeners dislike advertising and that satellite radio is virtually commercial-free.[182] Some argue that satellite radio is in a different market from terrestrial radio because satellite radio offers a large number of channels.[183] Some allege that satellite radio is differentiated by higher sound quality.[184] And some say that satellite radio, unlike iPods and other MP3 players, does not require consumer programming.[185]

However, as persuasively shown by CRA, all these arguments and observations are completely unavailing:

- As CRA states, "the use of different 'business models' does not imply the absence of listener substitution between terrestrial radio and satellite radio."[186] Listeners do not sort out available alternatives according to business models, and, as shown above, listeners clearly substitute between terrestrial and satellite radio.

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181 *See, e.g.*, NAB Coalition at 6; Common Cause at 16.

182 *See, e.g.*, NAB Coalition at 5.

183 *See, e.g.*, NAB Coalition at 5; Common Cause at 17.

184 *See, e.g.*, NAB Coalition at 11-12; Blue Skies at 6.

185 *See, e.g.*, Common Cause at 18.

186 CRA Competitive Effects Analysis at 34 (¶ 60). Opponents point to Mr. Sidak's conclusion that there exists a "satellite-only" product market, but Mr. Sidak's statement is flawed. First, his "critical elasticity" test ignores the fact that satellite is still a growing competitor. *See* Hazlett at 32. In order to become profitable over the long run, satellite radio must attract many new subscribers from the great majority of Americans who listen to alternative audio platforms. Second, he improperly indicates that satellite radio is a separate market because it offers adult-themed programming. Satellite radio is not the exclusive source for adult-themed programming. Terrestrial broadcasters have the ability to broadcast adult-themed programming at certain times and, indeed, spend extensive resources exercising their right to do so. In addition, adult-themed programming is widely available on a variety of other platforms, including the Internet. Finally, even if Mr. Sidak's statement that only satellite radio offers adult-themed programming were true, it would not mean that satellite radio constitutes a separate market. Instead, adult-themed programming simply would represent a part of the differentiation among products in any market.

- While the relative lack of advertising may be important to many satellite subscribers,[187] a large majority of radio listeners clearly do not value it enough to pay for satellite radio.[188]

- For some consumers, the availability of a relatively large number of channels is advantageous. [[REDACTED [redacted]]][189]

- As for sound quality, consumers can get sound quality superior to FM and AM from a variety of devices, such as CD players, MP3 players, and wireless phones. And, of course, HD Radio provides higher quality sound than standard terrestrial broadcast radio. [[REDACTED [redacted]]][190]

Opponents also ignore the competitive disadvantages that Sirius and XM face, relative to terrestrial broadcasters. In particular, satellite radio is only available for a monthly subscription fee; terrestrial radio is available for *free*. Satellite radio is only available with specialized equipment and is standard equipment on relatively few vehicle models. But virtually *every* new and existing automobile in the United States is equipped with an AM/FM radio.

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187 Of course, not all satellite radio programming is commercial free, and not all terrestrial radio programming is advertiser supported.

188 CRA Competitive Effects Analysis at 36-37 (¶ 63). In particular, Mr. Sidak expends much effort arguing essentially that terrestrial broadcasting is inferior because listeners pay a "cost" for "enduring" advertisements on commercial AM/FM. Sidak Mar. 16 Decl. at 26 (¶ 43); Sidak July 9 Supp. Decl. at 28-30 (¶¶ 42-44). In fact, Mr. Sidak tries to quantify this broadcast consumer cost by using average wage rates, but this analytic approach leads to illogical results. Taking Mr. Sidak's analysis, for someone earning $10 an hour, the cost of enduring broadcast radio commercials would be about $55 a month. Since satellite radio costs only $12.95 a month, the analysis suggests that rational consumers would opt for "lower cost" satellite radio. Clearly, however, this is not the market reality: about 230 million Americans listen to terrestrial radio each week, and only about 14 million Americans are satellite radio subscribers. *See* CRA Competitive Effects Analysis at 36, n.131 (¶ 63).

189 CRA Competitive Effects Analysis at 38-39 (¶ 67).

190 *Id.* at 37-38 (¶ 65).

Some opponents claim that the Horizontal Merger Guidelines' so-called "SSNIP" test[191] leads to the conclusion that satellite radio is a unique market.[192] As CRA explains, the SSNIP test can sometimes be an effective tool to identify reasonable substitutes that will constrain pricing in the market—particularly in mature, and relatively static, industries.[193] But as many economists have observed, the SSNIP test produces erroneous results when "it is not applied within a consistent economic framework."[194] Opponents offer a cursory application of the SSNIP test and use short-term profitability as the measuring point, but "this approach does not accurately capture the significance of demand substitution for the profitability of a price increase by the merged firm in this case."[195] Satellite radio is a relatively young and growing business, and there are other complex market factors, including the "dynamic demand" spillovers discussed by CRA and summarized above.[196] The traditional short-run SSNIP test and the associated static "critical loss" test, which are commonly used in evaluating mature industries and which the opponents attempt to apply here, simply fail to produce economically meaningful results in these circumstances. If the SSNIP test is to be employed at all, it must "focus on the

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191 *See* Horizontal Merger Guidelines at § 1.11. This is an acronym for a "small but significant and nontransitory increase in price" and attempts to assess whether a hypothetical monopolist that sells a product or group of products could profitably impose a price increase. If the increase would be profitable, then, it is said, the products provided by the hypothetical monopolist make up a distinct product market.

192 *See, e.g.*, Sidak Mar. 16 Decl. at 9-10 (¶ 18).

193 CRA Competitive Effects Analysis at 43-44 (¶ 76).

194 *Id.* at 43-44, n.167 (¶ 76) (listing several recent articles that have raised questions about the usefulness of the SSNIP test).

195 *Id.* at 43-44 (¶ 76).

196 *See supra* Section II.E.

longer-term effects of a higher price on buyer behavior and seller profitability"[197] and must also account for the incentive of Sirius and XM to engage in a penetration pricing strategy. In short, opponents gain nothing by attempting a perfunctory application of the SSNIP test using short-term profitability, without acknowledging the unique attributes that shape this economic landscape.

D. Technology Has Dramatically Changed Audio Entertainment Since Satellite Radio First Was Introduced, and the Market Continues to Change Dramatically.

Some commenters attempt to convince the Commission that the audio entertainment market is essentially the land that time forgot—that it has remained static since the agency first authorized satellite radio services ten years ago.[198] In particular, the NAB Coalition makes much of the fact that terrestrial radio and other services, such as CD players, existed in 1997.[199] In light of the revolutionary changes that have taken place in the audio entertainment industry over the past ten years, these arguments simply do not wash.

It may be that no one ten years ago contemplated the level of competition that has evolved and intensified. Former FCC Chairman Reed Hundt was recently quoted as saying that, when the Commission licensed satellite radio in 1997, "it wasn't clear that satellite radio would compete with local terrestrial radio. . . . But now it is quite clear that satellite radio and terrestrial

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197 CRA Competitive Effects Analysis at 44 (¶ 78).

198 *See, e.g.*, NAB Coalition at 5-6 ("Ten years ago, when the Commission authorized [satellite radio], the marketplace was replete with consumer-electronic options for the enjoyment of audio entertainment. Pre-recorded media on cassettes and CDs was ready available to consumers for use in the home, in cars, and in portable devices.").

199 *Id.*

radio do, in fact, compete."[200] And it is clear, too, as broadcasters have historically acknowledged, that both satellite and terrestrial radio compete with numerous other audio platforms. The evolution that has occurred in the audio entertainment market in recent years has been breathtaking, as the companies demonstrated in their Application.[201] The changes that have occurred even since that filing was submitted just months ago are illustrative of the incredible pace at which this market is advancing. Indeed, it seems that hardly a day goes by without at least one company offering a product that will provide consumers with greater access to audio entertainment. Such product offerings run the gamut from simple tabletop HD radios to iPhones to wireless phones that store as much music (and video) as some conventional multimedia players. Outlined below are just a few of the most recent notable developments:

- *HD Radio*. HD Radio's presence in the marketplace continues to grow rapidly.[202] The HD Digital Radio Alliance has committed $250 million in airtime to promote HD Radio in 2007 alone, and HD side channels increasingly support new and experimental formats.[203] At the end of March, the Commission adopted rules designed to facilitate the expansion and availability of HD Radio as a competitor.[204] The rules establish minimal baseline requirements, giving radio stations broad flexibility to experiment with new digital services. Moreover, since the parties filed the Application, prices on HD Radios also have continued

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200 Joe Nocera, *Talking Business: I Want My Howard Stern and Oprah*, N.Y. TIMES, Jan. 20, 2007, at C1.

201 Application at 21-39.

202 *See, e.g.*, Sam Diaz, *HD Radio Grabs the Ear of Satellite Rivals*, WASHINGTON POST, July 3, 2007, at D04 ("HD [Radio] is gaining ground."). *See also* CRA Competitive Effects Analysis at 19 (¶ 32) (noting that "the approximately 1350 HD Radio stations broadcasting in digital cover 82% of the U.S. population" and that "[o]ver 3,000 HD Radio stations are predicted to be in operation in the next few years and iBiquity forecasts 5700 channels by 2011.").

203 *See, e.g.*, FMQB, *HD Digital Radio Alliance Launches 264 New Channels*, Jan. 18, 2006, http://fmqb.com/Article.asp?id=165202 (last visited July 20, 2007).

204 *Digital Audio Broad. Sys. Order* at ¶ 1.

to fall as an increasing number of manufacturers deploy their radios in stores.[205]

- *Internet Radio.* Underlying much of the technological evolution is the proliferation of wireless Internet access.[206] Today, consumers can access content via the Internet wherever they are, including in cars—and many more truly mobile Internet solutions are right around the corner.[207] To be sure, traditional broadcasters, who have been losing listeners to other audio platforms, are aware of the appeal of Internet radio and its spread to portable devices and are making forays into the medium. In fact, as was reported in June, websites from Clear Channel now account for 20 percent of all online radio listening.[208]

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205 For example, Sony debuted two HD radios in July 2007, both of which are currently available for pre-order. The first, XDR-S3HD, is a tabletop model that will sell for $200. It comes equipped with a remote, alarm clock, and jack for a digital music player. The second, XT-100HD, is an external tuner for compatible Sony car stereos. It will retail for $100. *See* Brian Lam, *Sony's First HD Radio: XDR-S3HD*, GIZMODO.COM, May 28, 2007, http://gizmodo.com/gadgets/a-first/sonys-first-hd-radio-xdr%20s3hd-263953.php (last visited July 16, 2007). Additionally, Radiosophy recently introduced a small tabletop HD radio (HD100) that it has promoted for as little as $59. *See* Gary Krakow, *HD Radios Coming Down in Price*, MSNBC, June 1, 2007, http://krakow.msnbc.msn.com/archive/2007/06/01/210973.aspx (last visited July 16, 2007); Press Release, iBiquity Digital, *"Moms, Dads and Grads" Rebate Offers $40 Savings* (Apr. 25, 2007), http://www.ibiquity.com/press_room/news_releases/2007/1020 (last visited July 20, 2007).

206 *See, e.g.*, Press Release, Sprint Nextel, *Sprint Nextel and Clearwire to Partner to Accelerate and Expand the Deployment of the First Nationwide Mobile Broadband Network Using WiMAX Technology* (July 19, 2007), http://www2.sprint.com/mr/news_dtl.do?id-17520 (last visited July 20, 2007) (announcing that Sprint Nextel and Clearwire "plan to jointly construct the first nationwide mobile broadband network using WiMAX technology, and promote the global development of WiMAX-based services").

207 Autonet Mobile will begin selling a portable router that allows multiple users in a moving car to connect to the Internet. CRA Competitive Effects Analysis at 28-29 (¶ 46). *See also, e.g.*, Press Release, Avis, *Rent from Avis and Get Your Own Mobile Wi-Fi Hotspot*, (May 21, 2007), http://www.autonetmobile.com/wp/wp-content/uploads/2007/05/avis_release_may07.pdf (last visited July 20, 2007); *see also* Dan Tynan, *Cruising the Internet at 70 MPH: Soon You'll Be Able to Surf the Web, Download Music, and Check E-Mail in Your Car*, PC WORLD, Mar. 21, 2007, http://www.pcworld.com/printable/article/id,129779/printable.html (last visited July 20, 2007). According to Tim Westergren, co-founder of Pandora, one of the most popular Internet radio services, "[i]t's just a matter of time before you can get Internet streams wherever you are." Jeff Leeds, *Big Radio Makes a Grab for Internet Listeners*, N.Y. TIMES, June 12, 2007, at B1.

208 Sarah McBride, *Going Wireless: Internet Radio Races to Break Free of the PC*, WSJ, June 18, 2007, at A1. And according to Arbitron Inc. and Edison Media Research, Internet radio

- *Internet Radio Players.* As was announced just days before the Application was filed, Slacker will soon be selling its Slacker Portable device. This product, which will be available to consumers this summer, will receive Slacker's Internet music stream by way of Wi-Fi and satellite service. Users will be able to get streaming Internet radio for free, with the only caveat being that the user only gets to skip six songs per channel per hour. However, an upcoming $7.50 per month plan will allow the listener to expunge the ads and skipping limitations.[209]

- *Digital Music Services.* Additional digital music services also are being deployed. Recognizing the strong and growing consumer demand for online music, Lala.com, a Web site owned by Bain Capital LLC and several Silicon Valley investors, launched a service in June that provides for free the digital catalog of Warner Music Group and hundreds of smaller independent music companies. In return for getting the free music on their PC, consumers pay to buy the songs they want to take with them on their iPods or other digital media players. Prices range from $6.50 to $13.50 per album.[210]

- *Digital Media Players.* As technologies converge and the cost of memory storage drops, technologically advanced digital media players are becoming more ubiquitous. Indeed, car manufacturers are regularly including iPod connections in many new vehicles.[211] In addition, new models, which frequently are appearing

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listenership in the U.S. has risen to 29 million people per week, which is up from 20 million three years ago. *Id. See also* CRA Competitive Effects Analysis at 12 (¶ 19).

209 The Slacker player, which features a 4-inch screen with scrolling touch strip, debuts this summer in varying capacities ranging from 2, 4, and 8GB up to 120GB for between $150 and $350. Slacker's satellite car kit will allow a user access to Slacker content via the Portable while on the move or if the user is out of range of Internet access. *See* Ryan Block, *Slacker: Music Device and Service Via Web, WiFi, and Satellite*, ENGADGET.COM, Mar. 14, 2007, http://www.engadget.com/2007/03/14/slacker-music-device-and-service-via-internet-satellite/ (last visited July 16, 2007); Slacker, http://www.slacker.com/company/products.html#portable (last visited July 16, 2007). *See also* CRA Competitive Effects Analysis at 28 (¶ 45).

210 Music is only sold by the album and not song by song. Lala works through a normal Web browser. Users can create and save playlists, send them to friends and browse virtual collections of other users for free. *See* GIZMODO.COM, *Every Song You Own, Available Online Wherever You Are For Free*, June 4, 2007, http://gizmodo.com/gadgets/downloads/every-song-you-own-available-online-wherever-you-are-for-free-promises-lalacom-265879.php (last visited July 16, 2007); Ethan Smith, *Listen to Music Free, But Pay to Carry*, WSJ, June 5, 2007, at B1. *See also* CRA Competitive Effects Analysis at 11 (¶ 19).

211 *See* Press Release, Apple, *Apple Teams Up With Ford, General Motors & Mazda To Deliver Seamless iPod Integration* (Aug. 3, 2006), http://www.apple.com/pr/library/2006/aug/03ipod.html (last visited July 20, 2007) (stating that more than 70% of 2007-model US automobiles will offer iPod integration). *See also* CRA

in the marketplace, include far more features and storage capacity than models issued just a year ago. As a result, consumers can now enjoy all types of content whenever and wherever they go, especially as Internet access becomes standard. By way of example, in April, SanDisk introduced its newest MP3 player, the Sansa Connect, which is Wi-Fi compatible and offers music, photos, and Internet radio (via a subscription to Yahoo's Music Unlimited To Go). It has 4 GB of storage capacity and currently sells for $250.[212]

- *Wireless Phones/Services/iPhone.* The development of wireless phones and services with music capabilities has exploded over the last several months, making audio entertainment services widely available on consumers' mobile phones today. As of April 2007, at least 7.1 million people on average listened to music on their mobile phones, representing a 25 percent increase over figures from January 2007.[213] And, in addition to Apple's iPhone, which was released at the end of June, other phone manufacturers have recently launched or will soon be launching new iterations of mobile phones that double as multimedia players. For example, Sprint Nextel and Samsung have teamed up to create their version of the iPhone.[214] Several new wireless music services also have been deployed in recent

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Competitive Effects Analysis at 28 (¶ 44) (discussing the new joint Ford-Microsoft product called Sync, which allows music and wireless devices to instantly become integrated with the car).

212 *See* Stephen H. Wildstrom, *SanDisk's Slick Wi-Fi Music Player*, BUSINESS WEEK, Apr. 26, 2007, http://www.businessweek.com/technology/content/apr2007/tc20070426_839204.htm?sub=techmaven (last visited July 21, 2007). SanDisk is not alone. Other new options include: (1) TurboLinux's Wizpy MP3 (*see* Press Release, Turbolinux, Inc., *Content Downloader Tool to Download Video on wizpy* (June 27, 2007), http://www.turbolinux.com/cgi-bin/newsrelease/index.cgi?date2=20070603133613&mode=syosai (last visited July 22, 2007)); (2) Archos' recently debuted new line of portable media players (*see* GEN5, http://www.archos.com/products/gen_5/index.html?country=global&lang=en (last visited July 16, 2007)); and (3) Sony's new version 3.50 firmware update for its PlayStation Portable (*see* Charlie White, *Sony PSP Firmware Update Gives You Remote Play from PS3*, GIZMODO.COM, May 31, 2007, http://gizmodo.com/gadgets/gadgets/sony-psp-firmware-update-gives-you-remote-play-from-ps3-264762.php (last visited July 16, 2007)).

213 Figures are monthly averages for the three-month period ending in April 2007. Jessica Vascellaro, *Air War: A Fight Over What You Can Do on a Cellphone*, WSJ, June 14, 2007, at A1.

214 The UpStage went on sale in April and retails for $100 (with a 2-year contract). Consumers can buy songs via Sprint's proprietary music service for 99 cents (in addition to a $15 month subscription fee). The phone holds approximately 20 songs, but a larger memory capacity card can be purchased for $40. *See* Mark Wilson, *Frankenreview: Sprint/Samsung UpStage*, GIZMODO.COM, Mar. 28, 2007, http://gizmodo.com/gadgets/feature/frankenreview-sprintsamsung-upstage-247653.php (last visited July 22, 2007). Additionally, Pandora, a popular

> months.[215] And, of course, the audio content available on wireless phones includes much more than music alone—for instance, news, talk, and sports are also available.[216]

All of the new technologies that have spurred these recent developments in the audio entertainment marketplace have occurred since the Commission authorized satellite radio in 1997. Since that time, the pace of innovation has accelerated, and no one can deny the disruptive impact of the new players in this market, including wireless Internet providers and high-capacity multimedia devices, or the competitive effect that they and other more traditional players will continue to have. This constant innovation has created a market that bears no resemblance to the market in 1997 and belies the stagnant characterizations offered by the NAB and others.

Internet radio service, will be partnering with Sprint Nextel to deliver its service to users of high-speed data phones for $2.99 month. The phone will play Pandora through a car stereo using an adaptor. Sarah McBride, *Going Wireless: Internet Radio Races to Break Free of the PC.* Similarly, Verizon Wireless has announced that it will be releasing a phone later this summer that will provide this type of service as well. Leslie Cauley, *AT&T Eager to Wield its iWeapon*, USA TODAY, May 21, 2007, http://www.usatoday.com/tech/wireless/2007-05-21-at&t-iphone_N.htm (last visited July 22, 2007) (quoting Verizon Chief Operating Officer Denny Strigl).

215 For example, Melodeo is now offering a free mobile service dubbed NuTsie (an anagram of iTunes) that allows users to stream songs from their iTunes playlists wirelessly to certain mobile phones. It works like customized Internet radio. The user sends Melodeo a copy of his iTunes master playlist and Melodeo matches up songs from its own database. After downloading the NuTsie software to one's phone, the user simply opens the program and begins listening to the songs. Edward C. Baig, *NuTsie May Stream iTunes Songs to Cellphone You Have*, USA TODAY, June 7, 2007, at B3. Similarly, QuickPlay Media, Inc. plans to launch a service this summer that allows BlackBerry users to download video content, such as music videos, to their devices. Jessica Vascellaro, *Air War: A Fight Over What You Can Do on a Cellphone* at A13. *See also* CRA Competitive Effects Analysis at 22-26 (¶ 39).

216 *See* CRA Competitive Effects Analysis at 22-26 (¶ 39) (discussing the range of content available on wireless phones).

IV. CONTRARY TO OPPONENTS' ALLEGATIONS, THE TRANSACTION WILL NOT HARM COMPETITION.

A. Regardless of How the Market is Defined, the Proposed Transaction Cannot and Would Not Be Anti-Competitive.

The proposed transaction will ensure that satellite radio remains a strong competitor in the highly competitive audio entertainment market and will not result in competitive harm or anti-competitive effects. Indeed, even if an evaluation of market shares were to reveal evidence of market concentration, that would mean only that the Commission should proceed with a thorough analysis of the likely competitive effects of the merger.[217] Regardless of the market definition or concentration, this merger is not anti-competitive because the many available alternatives in the marketplace will prevent the combined firm from raising prices or restricting output. Put simply, because of the competition from other products and services, the merged entity would lose subscribers if it raised prices without also increasing the quality of its services.[218]

Certain opponents suggest that other audio entertainment products and services will not constrain pricing because of the lack of substitutability between these products and satellite radio.[219] As discussed previously, CRA disputes this claim by identifying several data points

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217 *See, e.g., United States v. Baker Hughes, Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990).

218 Even if the market definition were artificially confined to satellite radio, it would still be necessary to consider all reasonable substitutes when conducting the competitive effects analysis. As the CRA Competitive Effects Analysis explains, providers of other audio entertainment services "are uncommitted entrants who are defined as 'market participants' and assigned market shares in the evaluation of post-merger concentration, even if the market is described narrowly." CRA Competitive Effects Analysis at 49, n.185 (¶ 91) (citing Horizontal Merger Guidelines at § 1.32).

219 *See, e.g.*, NAB at 14, 17-18.

that confirm the substitutability among audio entertainment services.[220] This data reveals strong substitutability among audio entertainment services, and yet relatively low substitution between the two satellite radio providers. Even the American Antitrust Institute ("AAI") admits that "terrestrial radio and other sources of audio entertainment services are substitutes for satellite radio for some people and some uses—and compete to some extent with satellite radio."[221]

AAI, however, asserts that substitutability is not the sole consideration, arguing that there is no evidence that terrestrial radio or any other sources of audio entertainment constrain the pricing behavior of the satellite radio providers.[222] Even so, AAI acknowledges that "[a] degree of cross elasticity might be shown if the rate of satellite radio subscriptions is higher in markets with fewer terrestrial radio stations. On the other hand, if the rate of satellite subscriptions is geographically uniform throughout the country, this would tend to indicate little cross elasticity."[223]

As discussed above, CRA took up that challenge. It conducted precisely the sort of substitution analysis posited by AAI—and found "a clear, relatively smooth inverse relationship between average satellite radio penetration and the number of AM/FM radio stations received."[224] In other words, "[s]atellite radio penetration [though still quite low] generally is

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220 *See supra* Section III.A. (demonstrating that the proportion of time spent listening to terrestrial radio and other audio entertainment devices dropped dramatically after subscribing to satellite radio and that most former subscribers choose to receive audio entertainment through alternative audio entertainment options, not the alternative satellite radio provider).

221 *See* AAI at 17.

222 *Id.* at 21.

223 *Id.* at 21, n.68.

224 CRA Competitive Effects Analysis at 15 (¶ 27).

higher in geographic areas where there are fewer AM/FM stations," demonstrating that "consumers view AM/FM radio and satellite radio as reasonably close substitutes."[225] As further support for that conclusion, CRA points to evidence that terrestrial radio and other intermodal competitors have "rapidly add[ed] new products and reposition[ed] the products they sell" in response to the competitive pressures that satellite radio and other innovative audio entertainment services have brought to bear.[226]

Several commenters point to the fact that in April 2005, XM raised its subscription prices by 30 percent, "with apparently little diminution in demand," as evidence that demand for satellite radio services is inelastic.[227] But as CRA notes, such arguments are defective because they fail to identify "an objective and appropriate benchmark for growth in the absence of the price increase. . . . Saying that the growth 'continued at a rapid pace' or even comparing the growth rate from the previous year as a benchmark could be misleading because growth rates change naturally over time."[228] CRA also observes that XM introduced Major League Baseball at about the same time and included Opie & Anthony and XM online within the regular subscription, both of which had previously required a premium payment.[229] It is entirely

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225 *Id.* at 15-16 (¶ 27).

226 *Id.* at 16 (¶ 29). For instance, "in response to the success of the commercial-free options available on satellite radio, some AM/FM stations have reduced" the length of their commercials. *Id.* at 17-18 (¶ 31). Terrestrial radio "also has responded to the superior sound and increased variety offered through satellite radio by introducing HD Radio, which involves digital broadcasts." *Id.* at 18 (¶ 31). *See also supra* Section III. The claim of some opponents that rural customers may be harmed by the merger is false, as explained in Section IV.C. In fact, the merger will bring the same benefits to rural consumers as everyone else.

227 AAI at 19; *see also, e.g.*, Sidak Mar. 16 Decl. at 11-13 (¶ 22); NAB at 28.

228 CRA Competitive Effects Analysis at 44-45, n.170 (¶ 78).

229 *Id.*

plausible—indeed, likely—that subscriber growth would have been dramatically higher during that period had XM not raised its rates, which would debunk the claims of inelasticity.

Opponents argue that iPods and other MP3 players impose no constraints on satellite radio subscription prices because these devices do not offer listeners access to pre-programmed material.[230] But, in fact, there are many online content providers that offer unlimited music downloads (many of which are free, such as podcasts), and some services even permit users to download new content at Wi-Fi hotspots.[231] Some of these services permit consumers to sample new music just as they would with preprogrammed content. The new Slacker service goes a step further: It "enables U.S. consumers to customize their own radio stations and listen to them wherever they happen to be."[232] Portable devices that include integrated Wi-Fi are currently available[233] and more are expected later this summer, including "an onboard Slacker DJ."[234] And Slacker Satellite Car Kits are expected by the end of the year that will "receive high-speed

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230 *See, e.g.*, NAB at 16 ("iPods and other MP3 players do not offer the kind of variety of pre-programmed or live material as satellite [radio]."); Common Cause at 33 ("[T]he iPod would 'not have the selection of XM, not the sophistication of the DJ mixes the radio at XM provides, not the new music that XM can introduce to the listener.'") (quoting Balto Testimony at 6).

231 *See* CRA Competitive Effects Analysis at 26 (¶ 41); *see also, e.g.*, iPhoneHacks.com, *SeeqPod brings internet streaming music to iPhone*, http://www.iphonehacks.com/2007/07/iphoneseeqpod.html (last visited July 18, 2007).

232 *See* Press Release, Slacker, *Slacker Introduces Personalized Radio Everywhere* (Mar. 15, 2007), http://www.slacker.com/dwls/031507_slacker_launch.pdf (last visited July 22, 2007).

233 *See supra* at 60-61 (describing the Sandisk Sansa Connect Wi-Fi enabled MP3 player).

234 *See* Slacker, *Slacker Introduces Personalized Radio Everywhere*. *See also* Michael Arrington, *Prototype of Pandora WiFi Device Shown Tonight in San Francisco*, TECHCRUNCH, May 23, 2007, http://www.techcrunch.com/2007/05/23/prototype-of-pandora-wifi-device-shown-tonight-in-san-francisco/ (last visited July 21, 2007) (describing Pandora's upcoming Wi-Fi enabled service that it plans to launch with a Sandisk device).

music feeds from satellites throughout the continental United States."[235] In addition, there are a number of aftermarket solutions already available that allow consumers to integrate music streamed over a phone to a car's stereo system,[236] and OEMs are working to integrate this technology into cars in the near future.[237]

Opponents claim that Internet radio should not be viewed as a competitor to satellite radio because broadband access is unavailable in cars.[238] Again, commenters overlook the range of innovative services that are available today, as well as those that are just around the corner. As Dr. Furchtgott-Roth observed, "[m]obile internet services are increasingly available directly in cars. Businesses such as Unwired Vehicles, KVH, and Autonet Mobile are marketing mobile internet services for automobiles based on EVDO and Wi-Fi technologies."[239] And "[f]aster broadband connections to the car should be available within the next year from businesses such

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235 *See* Slacker, *Slacker Introduces Personalized Radio Everywhere.*

236 *See, e.g.*, Chris Davies, *Parrot's Latest Plug'n'Drive Bluetooth Kit Streams Music Wirelessly*, SLASHGEAR.COM, May 29, 2007, http://www.slashgear.com/parrots-latest-plugndrive-bluetooth-kit-streams-music-wirelessly-295492.php (last visited July 18, 2007); http:///www.automative.com/features/90/auto-news/24244/index.html.

237 *See, e.g.*, Press Release, Parrot, *Parrot and Ford Team Up to Launch New Ford Bluetooth® Music Technology* (Feb. 27, 2007), http://www.parrot.biz/it/stampa/comunicati/070226_parrotford_en_def_italy.pdf (last visited July 18, 2007); Ford Motor Company, Keeping You In Sync, http://www.ford.com/en/innovation/technology/drivingImprovement/keepingYouInSync.htm (last visited July 18, 2007); Kevin Massey, *Ford and Microsoft In Sync for In-Car Infotainment*, CNET.COM, Jan. 7, 2007, http://reviews.cnet.com/8301-12760_7-9672096-5.html (last visited July 22, 2007).

238 *See, e.g.*, Common Cause at 35 (Internet radio has "yet to solve the problem of getting into automobiles, which is the primary market for satellite radio"); NAB at 17, n.54 (quoting Balto Testimony at 3).

239 Furchtgott-Roth at 18 (footnotes omitted). Several wireless carriers have deployed and are in the process of deploying EVDO networks.

as Aeris."[240]

Several broadcasters argue that the merger will harm both their industry and consumers because the combined company would become more attractive to advertisers.[241] As CRA explains, given that it will have a larger audience, the merged firm likely will become more valuable to advertisers.[242] However, any increased advertising revenue resulting from this increased appeal would be a *pro-competitive*, rather than an anti-competitive, outcome of the merger. Specifically, if the merged firm garners more advertising earnings, then it will have a greater ability and incentive to reduce subscriber prices.[243] In this regard, the merger clearly would enhance, not decrease, consumer welfare.

A related claim—that the merged firm necessarily will increase the *amount* of time devoted to advertising on its channels—is entirely unsupported.[244] In fact, the parties that raise

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240 *Id.* at 18-19 (footnotes omitted).

241 *See* Entravision Holdings at 15; 46 Broadcasters at 5-7; Sidak July 9 Supp. Decl. at 34 (¶ 51).

242 CRA Competitive Effects Analysis at 67 (¶ 131).

243 *Id.*

244 Indeed, one commenter goes so far as to suggest that "the proposed merger would rapidly bring an end to the current commercial-free format of nearly all satellite radio channels." 46 Broadcasters at ii; *see also* Sidak July 9 Supp. Decl. at 28. In making this claim, parties point to a quote from Mel Karmazin during a conference call to discuss the merger, *see, e.g.*, Sidak July 9 Supp. Decl. at 28 (¶ 42) (quoting *Final Transcript: SIRI-SIRIUS Satellite Radio & XM Satellite Radio to Combine in Merger of Equals*, THOMSON STREETEVENTS, Feb. 20, 2007, http://online.wsj.com/documents/transcript-xmsr-20070220.pdf) ("*WSJ Interview*")), but nothing in that quote even remotely suggests that the merged entity would increase advertising time. Mr. Karmazin simply observes that the merged entity "will be significantly more attractive to large national advertisers." As with the last time the broadcasters raised this argument, there is no evidence that the combined company could or would compete with broadcasters for local advertising revenue. *See Satellite Radio Authorization Order* at 5765 (¶ 23) ("Local advertising revenue is much more important than national advertising revenue for terrestrial radio's viability and prevalence, and, at this time, we have no evidence that satellite [radio] would be able to

this concern fail to understand the logical conclusion of their arguments. For example, in positing that "it is reasonable to conclude that any increase in advertising time [on satellite radio] would generate significant welfare losses," Mr. Sidak utterly ignores the connection between advertising revenue and subscriber revenue.[245] In fact, the model Mr. Sidak constructs to bolster this claim shows that an increase by five minutes per hour of advertising would cause *a 33% decline in satellite radio subscribers*.[246] Thus, any significant rise in advertising time would cause an enormous loss in revenue—an obvious indication that the combined company will not go this route.

B. <u>Audio Entertainment Is Not Characterized by "One-Way" Competition in Local Markets.</u>

Several merger opponents argue that the market is characterized by "one-way" competition—that although satellite radio competes with terrestrial broadcasters, terrestrial broadcasters do not compete with satellite radio.[247] Their theory appears to be that Sirius and XM belong in their own market because they provide the same content nationwide, whereas terrestrial broadcasters are fundamentally different because they can only reach a local audience. Thus, as Mr. Rehr articulated the argument, terrestrial broadcasters "compete with a nationwide multi-channel audio programming company. . . . However, . . . [broadcasters] do not compete on

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compete for local advertising revenue."). In fact, in the interview cited to prove otherwise, Mr. Karmazin specifically stated that "we're not into the local advertising market." *WSJ Interview* at 12.

245 Sidak July 9 Supp. Decl. at 28-29.

246 *See* CRA Competitive Effects Analysis at 75-76 (¶ 151).

247 *See, e.g.*, NAB at 15; Common Cause at 29.

a nationwide basis. So it's a little complicated, but it's really one-directional competition."[248] On one element, Mr. Rehr is correct. This argument is "complicated" because it is just plain wrong.

This "one-directional competition" claim is no different from arguing that although Starbucks competes with corner coffee shops, these local businesses do not compete with Starbucks because of its nationwide presence. That makes no economic sense—competition manifests itself in each locality, and that process is repeated nationwide.[249] The product is the same—coffee—and if Starbucks charges too much, consumers can always buy coffee around the corner.[250] In the same vein, and as the NAB recognized in 1995, "[t]he primary audiences of local radio and satellite radio are the same: home/office/auto. They will compete directly for local market share."[251] Both local terrestrial radio stations and satellite radio offer the same product (audio entertainment) and compete—along side other forms of audio entertainment, such

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248 *Competition and the Future of Digital Music Before the Committee on the Judiciary Antitrust Task Force*, 110 Cong. (Feb. 28, 2007) (testimony of David Rehr, President and CEO, NAB).

249 *Cf. United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1121 (N.D. Cal. 2004) ("The inability clearly to define a market suggests that strong presumptions based on mere market concentration may be ill-advised in differentiated products unilateral effects cases. As noted by Starek and Stockum, 'it is generally misleading to suggest that a firm "controls" a certain market share in the absence of an analysis beyond market concentration.") (citing Roscoe B. Starek III & Stephen Stockum, *What Makes Mergers Anticompetitive?: "Unilateral Effects," Analysis Under the 1992 Merger Guidelines*, 63 ANTITRUST LJ 801, 804 (1995); Jerry A Hausman & Gregory K Leonard, *Economic Analysis of Differentiated Products Mergers Using Real World Data*, 5 GEO. MASON L. REV. 321, 337-39 (1997)).

250 *See id.* at 1172 ("The court finds that plaintiffs have wholly failed to prove the fundamental aspect of a unilateral effects case—they have failed to show a 'node' or an area of localized competition between Oracle and PeopleSoft.").

251 Reply Comments of the NAB, Gen. Docket No. 90-357, Attachment 1 at 2 (filed Oct. 13, 1995).

as Internet radio and wireless phones—for the same audience. That satellite radio provides the same content nationwide has no bearing on the ability of terrestrial radio to constrain satellite radio prices, or vice-versa.

Mr. Sidak offers what seems to be a more nuanced version of the "one-way competition" argument, but it is subject to the same fallacy: He contends that, in light of the "unique nationwide footprint—and its potential ability to subsidize advertisement rates from subscriber revenues—terrestrial radio broadcasters may be unable to compete effectively" with satellite radio "in the sale of advertisements that achieve nationwide clearance."[252] Mr. Sidak concedes that "[t]here is intermodal competition among media outlets for advertising," but argues that broadcast radio cannot compete with satellite radio "on the *other* side of this two-sided market," namely, the contest for consumers.[253] While it is true that satellite radio providers have two potential revenue streams (subscriptions and advertising), while existing terrestrial radio has only one (advertising), this fact is entirely irrelevant for purposes of evaluating whether the two forms of audio entertainment compete.[254]

The real concern underlying the terrestrial broadcasters' opposition to this merger is that the combined entity will be able to offer a superior product at a lower price, which will appeal more to consumers than the services that terrestrial broadcasters offer. Mr. Rehr acknowledged

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252 Sidak July 9 Supp. Decl. at 34 (¶ 51). *See also* Common Cause at 29 ("Terrestrial radio is a local product. Satellite radio is a national product. They have different business models and different types of output for regulatory and economic reasons.").

253 Sidak July 9 Supp. Decl. at 35 (¶53) (emphasis added).

254 *See* CRA Competitive Effects Analysis at 34 (¶ 60). As CRA observes, recently developed encryption technology may permit terrestrial broadcasters to offer subscription-based programming in the near future. *See id.* at 20 (¶ 34). Thus, even if there were some reason why the different business models of satellite and terrestrial radio should matter, that distinction will likely disappear soon.

as much in his testimony before Congress when he cited as a "harm" to consumers the prospect that the combined entity "will attempt to accelerate the acquisition of new subscribers by offering them a lower-cost point of entry."[255] But that is the hallmark of competition.

Of course, in making this "one-way" competition argument, broadcasters entirely ignore their own competitive advantages in the struggle for consumers that will prevent satellite radio from ever becoming the monopolistic force they fear. To begin with, *terrestrial radio is free.* Second, terrestrial radio stations offer local programming such as news, traffic, weather, and sports; the NAB has vigorously lobbied the Commission and Congress to restrict satellite radio from offering similar content.[256] Despite the many advantages that satellite radio offers, it is simply unfathomable that Sirius and XM will be able to grow their subscriber base (presently at about 14 million subscribers) to the point where it will truly overtake, and even dominate,

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255 *Competition and the Future of Digital Music Before the Committee on the Judiciary Antitrust Task Force*, 110 Cong. 17 (Feb. 28, 2007) (statement of David K. Rehr, President and CEO, NAB).

256 Local terrestrial broadcasters, of course, are obligated under FCC rules to offer this sort of local programming. And the local radio ownership rules are designed in large part to ensure robust and diverse local programming. This merger does not implicate these concerns because neither Sirius nor XM distribute such content locally. Some parties have expressed concern that approving this merger will prejudge the outcome of the Commission's pending media ownership proceeding and ultimately allow further concentration among terrestrial broadcasters. *See* Common Cause at 11; NABOB at 12; Clear Channel at 12-16. These concerns are overstated. While arguments that broadcasters (including the NAB) have made in the media ownership docket concerning the broad and extensive competition in the audio market are analogous to those that have been raised in this proceeding, *see infra* Section III.A., the issues at stake in the media ownership rulemaking are far broader than those in this proceeding. In particular, this merger has no nexus to two fundamental issues at the center of the media ownership proceeding: local viewpoint diversity and localism. *See 2002 Biennial Regulatory Review—Review of the Comm'n's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13,620 (2003). Accordingly, there is no basis for concern that allowing this merger to move forward will preordain the results of the long-pending and highly complex media ownership rulemaking.

broadcast radio (presently at over 230 million listeners every week).

Even with respect to national content, there is no meaningful barrier preventing terrestrial radio and other audio entertainment providers from acquiring and offering national content. In fact, some companies own multiple stations in many markets, with numerous stations overall, and these companies often broadcast much of the same content throughout the country. In addition, many local stations already offer nationally syndicated content, including such popular radio personalities and programs as Sean Hannity, Rush Limbaugh, CBS News, Radio Disney, and ESPN.[257] It is simply untrue that satellite radio is somehow in a different market from broadcast radio because of its national presence.[258]

There remains the suggestion of some merger opponents that satellite radio should be in a distinct market because it is the only service "that is available as the consumer travels anywhere

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257 *See, e.g.*, Press Release, Clear Channel, *Clear Channel Renew Sean Hannity Contract Through 2010* (Sept. 28, 2006), http://www.clearchannel.com/Radio/PressRelease.aspx?PressReleaseID=1768 (last visited July 20, 2007). *See also* American Top 40, About Us, http://www.at40.com/about.html (last visited July 20, 2007) (noting that consumers can listen to American Top 40 on over 400 stations worldwide).

258 *See* Edwin Meese, III at 3 (filed July 9, 2007) ("[W]hile broadcasters transmit signals locally, national programming—through networks and syndication—is commonplace."). In addition, several broadcasters claim that they will be disadvantaged by this merger because the combined company will have an enhanced ability to "lock up exclusive contracts" with programmers, leaving them with a less appealing programming line-up. *See* Entravision Holdings at 15-16; Clear Channel at 11. On the flip side, some of these same commenters insist that the merger would harm content providers themselves because they will have only one choice for satellite radio carriage, which will give programmers less bargaining power in carriage negotiations. *See* Entravision Holdings at 17-18; NPR at 5-6. These apprehensions ignore the fact that programmers will continue to have a variety of distribution options. Indeed, the concerns expressed by broadcasters in this very proceeding show that they will continue to have a strong interest in carrying much of the same content as satellite radio. Of course, audio programmers also can turn to the Internet, wireless carriers, and MP3 options for distribution. In any event, the antitrust laws are designed to promote competition and stimulate innovation, not to protect competitors.

in the country."[259] Mr. Sidak argues that this concern is particularly salient for truckers, who "routinely travel through two or more Arbitron markets on a frequent basis. Those consumers," he insists, "clearly would not perceive terrestrial service to be a reasonable substitute [for satellite radio]."[260] This concern is dramatically overblown. The number of individuals who travel often enough to demand ubiquitous radio coverage is very small in proportion to the overall population—and such individuals make up only a small portion of the subscribers to Sirius and XM.[261] Most consumers choose satellite radio based on one (or several) of its many other benefits, such as better music quality, greater content selection, and fewer commercials.[262] In any event, long-distance travelers have other listening options besides satellite radio—if tuning from one station to the next is too burdensome, they may listen to music on their iPod,

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259 NAB at 12; *see also* Common Cause at 27 ("[S]atellite radio travels with the listeners no matter where they are, operating in a national market. But terrestrial radio is a local product; stations vanish as the listener crosses market boundaries.").

260 Sidak Mar. 16 Decl. at 27 (¶ 45).

261 One public commenter perhaps said it best:

> Most consumers, like me, listen to satellite radio in our local areas, where we work and live. I could just as well listen to my local AM/FM broadcasts, or my local HD radio broadcasts, or an iPod (since I have an iPod jack that was built into the dashboard of both of my cars) or Internet radio while I am at work or at home. I choose to listen to satellite radio—it is my choice. I have plenty of other options if I change my mind.

Brief Comments of Michael Grunhaus (filed Apr. 5, 2007).

262 For instance, as the CRA Competitive Effects Analysis notes, [[REDACTED [redacted]]] CRA Competitive Effects Analysis at 35-36, n.130 [REDACTED [redacted]]] *See id.*

play CDs, or play music through their wireless phones. And Mr. Sidak disregards that the American Trucking Associations ("ATA"), the nation's largest trade association for the trucking industry, supports the merger, noting that it will "expand choices for all consumers" and improve services that are "vital to truckers today, such as traffic and weather."[263]

C. <u>The Transaction Will Not Harm Rural Consumers.</u>

The NAB Coalition and other opponents try to make the case that the merger would have a disproportionately adverse effect on consumers living in rural areas.[264] The concern appears to be that rural consumers already have few terrestrial radio choices, and the proposed merger will leave this segment of the population exposed to potential market abuses by the merged entity. Building on this theme, these parties further attempt to analogize this transaction to concerns raised in the context of the DIRECTV/EchoStar merger. These concerns are wholly unjustified. The merged entity will have neither the incentive nor the ability to treat rural customers differently from its other customers, and rural customers stand to benefit just as much as everyone else.

As explained above, data regarding satellite radio penetration and the findings of internal company surveys regarding subscribers' listening habits demonstrate that there is cross-elasticity among various forms of audio entertainment, and in particular between satellite and terrestrial radio.[265] This means that a merged entity is unlikely to raise prices above competitive levels,

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263 *See* Letter from Richard D. Holcomb, American Trucking Associations, to Marlene Dortch, FCC, MB Docket No. 07-57, at 2 (filed June 21, 2007) ("ATA Letter").

264 For instance, the NAB Coalition claims that "consumers in certain locations throughout the nation will experience the effects of monopoly more severely." NAB Coalition at 21; *see also* MAP at 4 (claiming that if rural communities are "left with one [satellite radio] provider, these communities will have no option with respect to price and content.").

265 *See supra* Section III.

because consumers can always switch to other services if that happens. But it does not follow that the merger is bad for consumers in areas with limited terrestrial radio coverage, as some opponents suggest. Rural consumers will also reap tremendous benefits from the merger, along with all other consumers. And there are a number of reasons why the merged entity will have neither the incentive nor the ability to target consumers in rural areas with higher prices for satellite radio.[266]

First, satellite radio penetration rates are very low in comparison to satellite TV. According to recent data from the GAO, 17.4% of households nationwide subscribe to satellite TV, whereas national satellite radio penetration has reached only approximately 4.5% of the population in 2006.[267] In uncabled areas, *satellite TV penetration rises to nearly 68%*; by contrast, the satellite radio penetration in areas with two or fewer AM/FM stations *was* [[REDACTED [redacted]]] in 2006.[268] These figures illustrate the dramatic differences between this proposed merger and the circumstances surrounding the DIRECTV/EchoStar merger. Perhaps most important, these figures "suggest[] that satellite radio faces more competition or is viewed by consumers as more dispensable than satellite TV or both."[269] These numbers are hardly surprising, in light of the fact that consumers have a range of options besides terrestrial broadcast radio, as has been exhaustively shown in the preceding sections.

Second, as CRA explains, there are far fewer consumers without a meaningful terrestrial

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266 *See generally* CRA Competitive Effects Analysis at 76-82 (¶¶ 153-61).

267 *Id.* at 77-78 (¶ 155) (citing General Accounting Office, *Direct Broadcast Satellite Subscribership Has Grown Rapidly, But Varies Across Different Types Of Markets*, GAO-05-257 (Apr. 2005) at 3, 6).

268 *Id.* at 78 (¶ 155).

269 *Id.* at 77 (¶ 154).

radio option than consumers without access to cable television. Specifically, "[o]nly 0.2% of the population lives in areas receiving two or fewer AM/FM stations, compared to the nearly 9% of U.S. households in uncabled areas."[270] The NAB Coalition offers a "Geographic Impact Study" that arbitrarily labels as "underserved" those communities with 15 or fewer terrestrial radio stations and as "unserved" those with five or fewer such stations.[271] It then argues that "[c]onsumers in these areas will suffer the greatest vulnerability to harm from a satellite radio monopoly,"[272] without making any effort to quantify how many consumers actually live in these areas or whether these consumers are actually likely to prefer satellite radio in greater numbers than the population generally. According to the data compiled by CRA, however, such adverse effects for the consumers in these areas is unlikely. [[REDACTED [redacted]

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[270] *Id.* at 78 (¶ 156). In fact, the "evidence" adduced by the NAB Coalition is not at all comparable to the factual situation in DIRECTV-EchoStar. *Application of EchoStar Comm'cns Corp., (a Nevada Corp.), General Motors Corp., and Hughes Electronics Corp. (Delaware Corps.) (Transferors) and EchoStar Comm'cns Corp. (a Delaware Corp.) (Transferee)*, Hearing Designation Order, 17 FCC Rcd 20,559 (2002) ("*DIRECTV-EchoStar*"). There, the Commission identified *five million* consumers who were unserved by cable television. *Id.* at 20,612 (¶ 123). Here, the NAB Coalition has identified *no one* who is without radio service. And, as indicated above, terrestrial radio is just one of many options available to rural consumers—options that will remain available after the merger.

[271] NAB Coalition at 23; NAB Coalition at Exhibit C – Consumer Vulnerability to a Satellite Radio Monopoly in Rural, Unserved and Underserved Geographic Areas ("Geographic Impact Study").

[272] NAB Coalition at 21.

[273] CRA Competitive Effects Analysis at Table B1.

[redacted]]][274]

The NAB Coalition ignores the fact that price discrimination by a merged entity would be ineffective and unprofitable, in light of the fact that there is such a small portion of the population that could be targeted with increased prices, and with relatively so few of these people subscribing to satellite radio. As CRA indicates, these so-called "unserved" consumers are unlikely to display a greater willingness to pay for satellite radio as compared to the national average—meaning that if a merged entity attempts to charge these customers more for satellite radio, then they would not subscribe but would instead turn to one of the many other alternatives for audio entertainment.[275] The small difference reflected in these numbers "is unlikely to be large enough to support profitable price discrimination, in light of the costs and imperfections inherent in such discrimination."[276]

There are other significant flaws with the NAB Coalition's "Geographic Impact Study." For one thing, it is difficult to know what to make of a study that states on the one hand that satellite and terrestrial radio are not in the same product market and then analyzes them as if they are part of the same product market—concluding that an analysis of the market "reveals the extent of potential harm resulting from this merger in rural areas by identifying areas where satellite radio service may be the only available radio service, or where it is critically important because there are few, if any, free local radio stations."[277] For another, the data that the NAB Coalition relies on is misleading. For example, by its careful focus only on "local" radio station

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274 *Id.*

275 CRA Competitive Effects Analysis at 79 (¶ 158).

276 *Id.*

277 NAB Coalition at 25.

service contours, the study simply ignores the approximately 5,000 FM repeater stations and AM clear channel stations that provide significant radio service in rural areas.[278] Thus, the NAB Coalition significantly understates actual radio service. Moreover, the NAB Coalition's analysis is entirely arbitrary,[279] and its conclusions are wholly speculative. Despite the verbiage and full color maps, the NAB Coalition has not identified *anyone* who is unserved by terrestrial radio. It simply identifies areas where satellite radio service "may be" the only available radio service.

In any event, even assuming that the merged entity would have the incentive to price-discriminate against some consumers, that strategy would be extremely difficult if not impossible to implement, for many different reasons. For example, it would be extraordinarily difficult for the merged entity to price discriminate by charging some consumers more for satellite radio equipment. Many subscribers obtain their equipment by purchasing an automobile, and therefore the merged entity would have to obtain the cooperation of all the automobile manufacturers, which is highly unlikely. And aftermarket equipment is available online, which would make it difficult to target retail distribution in rural areas. As CRA explains, rebates to non-rural subscribers might be an option, but *only in theory*: In order to effect a higher price the company would have to offer rebates [[REDACTED [redacted]

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278 The 59 high-powered AM clear channel stations continue to provide nighttime programming diversity, especially in rural areas. As the Commission has found, "some skywave service is available everywhere in the contiguous 48 states and most of the population can receive four or more skywave signals. Ten or more skywave services of at least the long recognized standard (0.5 mV/m 50% skywave signals) are available in much of the country." *Clear Channel Broadcasting in the AM Broadcast Band*, Further Notice of Proposed Rulemaking, 70 FCC 2d 1077, 1087 (¶ 65) (1979).

279 According to the coalition, areas with *five local radio stations* are *unserved*, and areas with *15 local stations* are *underserved*. NAB Coalition at 23.

[redacted]]] so rebates would not be a practical means of attempting price discrimination.[280]

Besides, many people "do not necessarily drive and listen where they live" (unlike the fixed location DBS model where people primarily watch satellite television at home), so it would be difficult to identify and target the more price-inelastic customer.[281] Thus, even if it were fair to assume that consumers in areas with few terrestrial radio stations have a different demand profile and could therefore be subject to price discrimination, it is extremely unlikely that the merged firm could successfully (*i.e.*, profitably) implement such a strategy.

Finally, despite the NAB's professed concern about their welfare, rural and trucking interests *overwhelmingly support* the merger. For example, the ATA, the nation's largest trade association for the trucking industry, notes that the proposed merger will "expand choices for all consumers," including through improvements to services that are "vital to truckers today, such as traffic and weather."[282] This merger, as the ATA recognizes, will create further opportunities to improve services to the trucking industry and other driving consumers. Likewise, the League of Rural Voters and the Women Involved in Farm Economics both have filed comments or letters in support.[283] As one rural consumer aptly noted "in rural areas we have limited access to

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280 CRA Competitive Effects Analysis at 80 (¶ 159).

281 *Id.* at 79 (¶ 159). *See also id.* for additional reasons why a price discrimination strategy would be unsuccessful.

282 *See* ATA Letter at 2.

283 Press Release, League of Rural Voters, *Sirius/XM Satellite Radio Merger Critical to Growth and Development of Rural Communities* (May 31, 2007) (the merger "would offer listeners in rural communities more programming options at lower prices than those currently available from the two companies separately"); *see also* Women Involved in Farm Economics at 1-2 ("The farms and rural communities we represent have been well served by satellite radio. Approval of the merger between Sirius and XM will ensure that our rural communities continue to receive important informational service via satellite radio and will provide our members and rural neighbors with more programming choices at improved prices.").

diverse radio content. [W]e need the XM-Sirius merger to be successful to ensure that satellite radio can stay competitive and give us another option."[284] These endorsements offer perhaps the most telling indication that the NAB Coalition's concern for others is misplaced and that the merger, in fact, will significantly benefit rural consumers with enhanced choices and improved service offerings.

In addition, the combined company will in the long run be able to improve satellite radio service to rural areas. Sirius and XM transmit their services through high power satellites as well as networks of ground-based repeaters that supplement the satellite service in areas where the satellites provide insufficient coverage. These terrestrial repeaters are predominantly deployed in high-population urban areas where building clutter limits the service available directly from the satellites. Although deployment and operation of these terrestrial networks is very expensive, as CRA notes, the combined company will be able to expand these networks as a result of the economic efficiencies expected from the merger.[285]

While the benefit of an expansion of these terrestrial networks would favor high-population areas in the short term, rural areas would also benefit in the longer term through the optimization of future satellite constellations in a merged company. In the longer term, the combined company would have the resources to improve the satellite service availability to rural

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[284] Brief Comments of John Steiner (filed July 2, 2007). *See also, e.g.*, Brief Comments of Jeanette Owens (filed July 2, 2007) ("I live in an area where we only receive 2 or 3 FM radio channels and they play nothing but commercials. I would be thrilled to have the 2 companies merge."); Brief Comments of Frank M. Konopatski (filed July 2, 2007) ("Truckers, travelers and vacationers, rural communities, and other consumers that have dead-zones from terrestrial radio will benefit from having the combined programming of both companies.").

[285] CRA Competitive Effects Analysis at 63 (¶ 122).

areas by deploying higher power satellites with optimizations that increase the signal directed to rural areas.

While higher power satellites will improve service availability across the continental United States, future satellites will have the ability to direct more power to some broad contours of the coverage area. Coupled with an improvement in the terrestrial repeater networks for the merged company, these signal contours for future satellites can be designed to steer more signal towards rural populations.[286]

D. Entry Into the Market Will Remain Viable Notwithstanding the Transaction.

Claims relating to alleged barriers to entry in the satellite radio market depend entirely on the erroneous view, discussed above, that the relevant market includes only satellite radio.[287] The proper inquiry is not whether is it possible for "a new satellite [radio] licensee" to become operational, as the NAB frames the issue,[288] but whether it is likely that any entity will introduce a service comparable to—and thus, competitive with—the service provided by an existing satellite radio licensee.

1. Entry Into the Audio Entertainment Market Is Already Occurring.

Several developments demonstrate that entry into this market will occur regardless of this merger. As described earlier, new products and services are regularly introduced as a response

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286 The bulk of the rural population resides in belts that parallel the east and west coast population centers and include the mountainous belts of the Appalachians in the East and the Rockies in the West. From the perspective of the satellite, these rural population belts are relatively adjacent to the high-population areas of the East and West coasts.

287 *See supra* Section III.

288 NAB at 24; *see also* Common Cause at 37.

to evolutions in the audio entertainment marketplace.[289] For example, Slacker expects to introduce Satellite Car Kits that will permit users to receive, anywhere in the continental United States, high-quality music through the Ku-band.[290] And there is sure to be intense and growing competition from an array of wireless Internet services that offer many, if not all, the same features as satellite radio. Dr. Furchtgott-Roth observes that "the FCC has taken substantial steps to ensure the deployment of wireless broadband services,"[291] and consumers have barely begun to reap the benefits of the Commission's policy measures. For instance, Sprint is just "beginning to roll out an advanced broadband wireless service this year in the 2.5 GHz band and, as required by the FCC, will serve a large portion of the U.S. population in the next two years."[292] Many other broadband wireless services are expected to follow shortly thereafter.[293]

2. Wireless and Satellite-Based Alternatives Do or Can Support Audio Entertainment Services Akin to Satellite Radio.

As noted above and discussed more fully in the attached report by Dr. Charles Jackson, Exhibit F, services exist (or are coming to market shortly) that, like satellite radio, do or can use spectrum to deliver high-quality audio entertainment services, notwithstanding a satellite radio merger.[294] For example, QUALCOMM, a communications technology firm that also offers

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[289] *See supra* Section III; Exhibit E – Competitive Response Timeline.

[290] Furchtgott-Roth at 22-23.

[291] *Id.* at 28.

[292] *Id.* at 18.

[293] *See, e.g.*, Sprint, *Sprint Nextel and Clearwire to Partner to Accelerate and Expand the Deployment of the First Nationwide Mobile Broadband Network Using WiMAX Technology.*

[294] Charles L. Jackson, Service and Spectrum Alternatives for Audio News and Entertainment Services, Exhibit F at 2 (July 24, 2007) ("Jackson Report") ("Depending on how one counts, there are about a dozen alternate wireless delivery paths for audio services capable of

some wireless services to end users, is using a technology known as MediaFLO to provide service in the lower 700 MHz band.[295] The transmission capacity and high power limits permitted in connection with this and similar services (such as Crown Castle's Modeo and Aloha Networks' Hiwire) permit enhanced coverage and can be used to provide audio, video, and data services.[296] A number of audio entertainment services also are being offered or planned using other terrestrial-based frequency bands capable of two-way, interactive communications (such as cellular, PCS, and AWS),[297] consistent with the FCC's flexible-use spectrum policy.[298] And licensees of Wireless Communications Service ("WCS") spectrum—which represents *one-half* of the 50 MHz of spectrum that is domestically allocated for broadcasting-satellite service (*i.e.*, satellite radio)[299]—already are authorized "to provide a variety or combination of services,"

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supporting hundreds or thousands of channels."). Dr. Jackson describes four broad categories of such services—existing broadcasters (TV and FM), broadband terrestrial service providers, commercial mobile radio service ("CMRS") providers, and satellite services (mobile and fixed)—as well as opportunities to create audio services using existing spectrum and technological options that would permit increased features. *See generally* Jackson Report at 3-29; *see also supra* section III.D. (discussing recent technological innovations, including with respect to wireless services); CRA Competitive Effects Analysis at 61 (¶¶ 115-16) (observing that, besides product repositioning and expansion, *de novo* entry could occur into the audio entertainment market through the use of Mobile Satellite Service ("MSS") frequency bands and Wireless Communication Service ("WCS") spectrum).

[295] *See* Jackson Report at 6-9.

[296] *See id.* at 9-10. For example, as Dr. Jackson notes, MediaFLO provides a terrestrial transmission capacity that is roughly equal to that of XM and Sirius combined. *See id.* at 9.

[297] *See id.* at 13-16; *see also supra* section III.D. (describing the use of mobile phones as music and multimedia players).

[298] *See, e.g.*, *Principles for Reallocation of Spectrum to Encourage the Development of Telecomms. Techns. for the New Millennium*, Policy Statement, 14 FCC Rcd 19,868, 19,870 (¶ 9) (1999).

[299] 47 C.F.R. § 2.106 (Table of Allocations).

including but not limited to satellite radio.[300]

A number of satellite-based bands support the same capability. There is abundant evidence that mobile satellite service ("MSS") systems can be used to provide audio entertainment services. As Dr. Jackson explains, the 2 GHz band (or the S-band) is particularly suitable for audio entertainment services, more so following the Commission's decision to grant MSS operators flexibility to integrate an ancillary terrestrial component ("ATC") into their MSS networks.[301] In particular, New ICO Satellite Services G.P. ("ICO")—which has access to 2 GHz spectrum with properties similar to that used by XM and Sirius—is scheduled to launch a hybrid MSS satellite system later this year and reiterated in this proceeding its plan to offer multimedia subscription services, including audio entertainment, over that system.[302] In fact, several operators are poised to launch their satellites and commence service in the near future, and are not only subject to binding milestones to do so but have made most of the capital expenditures necessary to construct their networks.[303] Fixed Satellite Service ("FSS") bands also

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300 *Amendment of the Comm'n's Rules to Establish Part 27, the Wireless Comm'cns Service ("WCS")*, Report and Order, 12 FCC Rcd 10,785, 10,845 (¶ 116) (1997); *see also* Jackson Report at 20-21.

301 Jackson Report at 19; *see also Flexibility for Delivery of Comm'cns by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands; Review of the Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Service Systems in the 1.6/2.4 GHz Bands*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 1962, 1980 (¶¶ 1, 32) (2003). The L-band, another MSS band, also has the technical capability to support satellite radio, and other countries have allocated the 1452-1492 MHz band (L-band) for satellite radio. *See* Jackson Report at 18, n.38; *Satellite Radio Authorization Order*, 12 FCC Rcd at 5787 (¶ 79). One provider that operates in this band is planning its own launch of a next-generation satellite network with broadband capabilities. *See* Jackson Report at 18.

302 Jackson Report at 18; ICO at 1-2.

303 Jackson Report at 19.

can support audio entertainment services comparable to satellite radio.[304] For example, Slacker, discussed above, uses leased portions of the Ku-band to deliver audio entertainment content.[305]

In addition, there are opportunities to use other spectrum to provide similar services. Slacker has announced that its device will rely in part on Wi-Fi networks using unlicensed spectrum, and Wi-Fi capability is a standard feature of laptops and some mobile devices, such as the Apple iPhone.[306] Dr. Jackson notes that the Commission could license the television white space for use by a multi-channel audio distribution service.[307] And the spectrum allocated to the Broadband Radio Service ("BRS") and Educational Broadband Service ("EBS"), which is substantially larger than the satellite radio band, is technically suited for providing a multi-channel audio service with characteristics similar to those of the terrestrial component of the XM and Sirius systems.[308] Any of these various current and potential options can be used for the delivery of audio services.

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304 *Id.* at 16-17.

305 *Id.* at 17.

306 *Id.* at 24-25.

307 *Id.* at 21-22.

308 *Id.* at 11-13.

V. CONTRARY TO OPPONENTS' ALLEGATIONS, THE TRANSACTION ADVANCES THE COMMISSION'S SPECTRUM POLICIES.

A. Any Spectrum Divestiture Will Harm Consumers and Companies That Have Invested In Either Satellite Platform.

Some parties propose that the combined company be required to divest a portion of their spectrum post-merger or provide carriage for a new entrant on a portion of their spectrum.[309] Conditions like these are unnecessary, would have a harmful impact on consumers, and should be rejected.

As shown above, there is sufficient spectrum available for new competitors to enter the audio entertainment market, including spectrum available for new entrants utilizing satellite technology.[310] Sirius and XM purchased their spectrum at auction for significant sums and have spent billions of dollars deploying equipment that operates in their individual spectrum bands. The Commission should not undermine that massive investment in infrastructure and equipment by requiring spectrum divestiture. Accordingly, any such condition is unnecessary.

More importantly, imposing this condition would have catastrophic effects on consumers and on companies that have invested millions of dollars developing products based on the existing platforms.[311] Requiring one of the companies to divest its spectrum would make

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309 *See* Entravision Holdings at 21; NPR at 21; TAP at 2. Clear Channel notes that the combined entity will have more spectrum than the new 700 MHz Public Safety Broadband Licensee. *See* Clear Channel at 8. However, not all spectrum is created equally. Spectrum at 700 MHz, in particular, is prized for its propagation characteristics, including the ability to cover large areas with a less extensive network infrastructure and its ability to penetrate walls for urban coverage.

310 *See supra* Section IV.D.

311 *See, e.g.*, Garmin at 1 (noting Garmin's investments in connection with GPS-enabled products that use information provided by XM); Toyota at 2 (noting that its "customers expect that their vehicles and associated equipment, including satellite radio, continue to function as intended for the life of that vehicle.").

roughly half of the nearly 14 million satellite radios completely inoperable, as currently deployed radios are not capable of receiving the signals of both systems.[312] Thus, if divestiture were required, either the Commission or the combined company would face the dilemma of deciding which existing subscriber base to shut-off, upsetting customer expectations about the useful life of equipment and rendering that equipment, including equipment installed in millions of vehicles, useless. It is impossible to argue that such a result is in the public interest. Moreover, reducing the spectrum available to the combined company would sharply limit its ability to realize merger-specific efficiencies, including by limiting the potential for expanded programming choices and additional services. Therefore, the Commission should flatly reject this condition.

B. The Companies Have Sufficient Bandwidth to Add Programming Options and Services Without Degrading Service Quality.

Several commenters have suggested that increasing choices would require the combined company to sacrifice audio quality and/or nonduplicative programming.[313] For the most part, these commenters offer no support for such claims, although the NAB previously commissioned

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312 Indeed, it is estimated that if spectrum divestiture is required, well over 10 million cars could be left with a stranded technology.

313 *See, e.g.*, Common Cause at 43 (referencing "significant concerns" that, to make additional programming options available, "the services will have to drop existing channels, including non-duplicative offerings, reducing consumers' choice, or alternatively degrade audio quality"); NAB at 40 ("What channels (including non-duplicative channels) will be dropped, thereby reducing consumer choice? If no channels are dropped, what kind of audio degradation will there be?"); NAB Coalition at 20 ("[E]ach satellite radio system is operating at full-channel-capacity, so in order to cross-sell the content of each satellite radio system on the other system the overall number of channels currently offered on each system must be reduced."); Bert W. King at 16-17 (noting bandwidth issues); TAP at 5; Toyota at 2; *see also* Charles Babington, *Radio Deal Could Face Technical Difficulties; XM, Sirius Systems Already Strained*, WASHINGTON POST, Mar. 19, 2007, at D1.

and submitted into the record a purported "engineering statement" that addresses the subject.[314] The position is unfounded, and the arguments advanced in the NAB's statement are incorrect.

Fundamentally, while capacity is not unlimited, the companies have a measure of capacity flexibility for new channels and services. As further elucidated in the technical reports prepared by Dr. Deepen Sinha[315] and by Neural Audio Corporation,[316] attached as Exhibits G and H, respectively, the companies have sufficient bandwidth to offer the packages discussed above and to introduce new services. XM and Sirius have consistently offered more services and channels by more efficiently using their existing bandwidth, without degrading the quality of existing services or channels.[317] Indeed, Sirius now offers over 130 channels and XM offers

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314 *See* Meintel, Sgrignoli & Wallace, *An Engineering Statement Prepared on Behalf of the National Association of Broadcasters Regarding the Technical Aspects of the SDARS Providers XM and Sirius*, Mar. 16, 2007 ("NAB Engineering Study"), attached to Letter from Larry Walke, NAB, to Marlene H. Dortch, FCC, MB Docket No. 07-57 (filed June 27, 2007).

315 Dr. Deepen Sinha, ATC Labs, A Technical Report Regarding Coding Efficiency and the Sirius-XM Merger, Exhibit G (July 24, 2007) ("Sinha Report").

316 Neural Audio Corp., Statement Regarding Certain Technical Aspects of the XM-Sirius Merger, Exhibit H (July 24, 2007) ("Neural Audio Report").

317 When Sirius originally filed an application to provide satellite radio service, up to 60 channels appeared possible. *Satellite CD Radio, Petition for Amendment of Section 2.106 and Part 25 of the Commission's Rules to Establish a Satellite and Terrestrial CD Quality Broadcasting Service*, Petition for Rulemaking, 1 (filed May 18, 1990). Similarly, XM originally projected it could provide 36 to 44 channels on 12.5 MHz of spectrum, and upon receiving its authorization planned to provide 48 channels using the same amount of spectrum. *Satellite Radio Authorization Order*, 12 FCC Rcd at 5772, n.74 (¶ 42); *American Mobile Radio Corporation, Application for Authority to Construct, Launch, and Operate Two Satellites in the Satellite Digital Audio Radio Service*, Order and Authorization, 13 FCC Rcd 8829, 8830 (¶ 4) (1997) ("*XM Authorization Order*"). In fact, when the Commission first authorized satellite radio as a service, it noted the various applicants' "successful efforts to increase the[ir] spectrum efficiency" and "calculate[d] that, on average, the applicants have increased the number of channels they propose to provide by seven, despite an average decrease in proposed spectrum use of 14 MHz." *Satellite Radio Authorization Order*, 12 FCC Rcd at 5776 (¶ 49). The FCC also presciently "recognize[d] that further technological advances may result in even greater increases in spectrum efficiency." *Id.* at 5776 (¶ 50).

over 170[318]—enormous strides from the time they first sought their licenses, when the Commission noted that each applicant proposed "to provide 20 or more channels nationwide."[319]

These vast increases were made possible by a number of techniques and technologies that the companies will continue to employ to achieve the same goal.[320] The NAB's "engineering statement" fails to show otherwise. That simplistic analysis, as Neural Audio explains, is replete with errors—including a flawed analogy to a technical study concerning a compression technology not used by either company and, remarkably, substantial understatements of how many channels each company offers currently.[321]

C. The Parties' Proposal Otherwise Complies With the Commission's Spectrum Policies.

According to some commenters, a satellite radio merger would violate the Commission's "pro-competitive spectrum policies."[322] The precedent on which these parties rely, however, involved an entirely different competitive dynamic than that presented by satellite radio today. In fact, the cited decisions generally are those in which the Commission first authorized service in a particular frequency band, meaning that its central objective in each was to set forth rules

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318 Dr. Sinha charts the dramatic increase in the number of channels offered by Sirius over its five years of commercial operations. *See* Sinha Report at 5. Neural Audio observes that XM has added several channels in just the few months since the NAB study was released. *See* Neural Audio Report at 4.

319 *Satellite Radio Authorization Order*, 12 FCC Rcd at 5760 (¶ 12).

320 *See* Neural Audio Report at 1-2 (describing developments in compression technology over the last decade); Sinha Report at 1 (explaining that "both of the satellite radio providers have independently developed a rich suite of transmit side technologies the consolidation of which would yield improved coding efficiency for each system without requiring any changes to the communication infrastructure and/or currently deployed receivers").

321 *See* Neural Audio Report at 5-6.

322 *See, e.g.*, NAB at 8.

that would help promote competitive entry in markets that were only just emerging.[323]

In contrast, as discussed at length above, satellite radio is fighting for a place in the broad and vibrant market for audio entertainment services, which includes numerous providers utilizing various types of spectrum to offer services comparable to satellite radio. None of these providers needs satellite spectrum to do so, and market entry will remain viable notwithstanding a satellite radio merger. Thus, consolidating satellite spectrum would not run afoul of the Commission's precedent in this area. To the contrary, approving the merger would advance the goal underlying those earlier decisions: the promotion of competition.[324]

VI. DESPITE CLAIMS TO THE CONTRARY, COMMISSION PRECEDENT DOES NOT BAR THE MERGER.

A. The Commission's 2002 Decision Concerning the Proposed Satellite Television Merger Proposed Has No Bearing on the Commission's Review of This Transaction.

Although some opponents of the satellite radio merger have suggested otherwise,[325] the Commission's review of the proposed merger of DIRECTV and EchoStar in 2002 in no way prejudges its analysis here.[326] The product markets at issue in the two transactions are

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323 *See, e.g.*, *Amendment of the Comm'n's Rules to Establish New Personal Comm'cns Servs.*, Memorandum Opinion and Order, 9 FCC Rcd 4957, 4959 (¶ 3) (1994) (setting forth rules to "*introduce* broadband PCS" and "foster rapid *creation* of a competitive market") (emphasis added).

324 For this very reason, the Commission has previously relaxed its spectrum rules due to competitive developments. *See, e.g.*, *2000 Biennial Regulatory Review; Spectrum Aggregation Limits for Commercial Mobile Radio Servs.*, Report and Order, 16 FCC Rcd 22,668 (2001) (lifting spectrum cap). To the extent the Commission believes that it is bound by spectrum-related policies described in its prior decisions, the administrative law aspects of taking a different course here are addressed in the separate rulemaking proceeding. *See supra* note 3.

325 *See, e.g.*, NAB at 8-9, 42-49; Entravision Holdings at 5-8; NABOB at 5-6.

326 *See, e.g.*, Public Knowledge at 8-11.

fundamentally different. Indeed, "when an industry is changing rapidly, merger cases cannot be decided solely on the basis of historical precedents in that industry—even when the precedents are from the relatively recent past."[327] Instead, it is necessary to take into account the "fundamental changes in the structure of the market."[328]

The Commission must review this merger in light of record evidence demonstrating intense competition in the audio entertainment market. The evidence shows that satellite radio is one of many options and, in fact, one of the least used options that consumers have for accessing audio entertainment today. Thus, even after a satellite radio merger, many competitors would remain, including free over-the-air AM/FM radio, which dominates the market by a substantial margin.

Satellite radio is a growing but relatively minor player in today's audio market. Moreover, its major competitor, AM/FM radio, is ubiquitous throughout the nation and does not depend on satellite radio or any other subscription service for distribution. As such, the competitive market in which satellite radio competes is completely different from the one in which DBS competed in 2002.

In short, the proposed XM-Sirius merger comes at a time of strong and growing competition in audio entertainment. In fact, in contrast to the DBS context, even a merged XM-Sirius would possess a slight market share and be constrained by the multiplicity of other media. Accordingly, conclusions from the DIRECTV and EchoStar decision should not be raised as a

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327 *Federated Department Stores, Inc./The May Department Stores Co.*, Statement of the Comm'n, Fed. Trade Comm'n, FTC File No. 051-0111, 2 (Aug. 30, 2005), http://www.ftc.gov/os/caselist/0510001/050830stmt0510001.pdf.

328 *U.S. v. General Dynamics Corp.*, 415 U.S. 486, 500 (1974).

barrier to the proposed merger.

B. <u>The Commission's Report to Congress on Satellite Competition Does Not Prejudge the Outcome of the Transaction.</u>

In March 2007, the FCC released a report on the status of competition in the satellite industry.[329] Some merger opponents claim that this report reveals the companies' market dominance because it states that Sirius and XM are the only participants in the satellite radio market.[330] However, because the document is specifically a *satellite* report, the FCC limited its review to satellite companies and did not discuss or consider the effect of other sources of audio entertainment on competition. In fact, the FCC specifically "emphasize[d] that the market descriptions included in this Report are intended to facilitate discussion of satellite markets and services . . . and may not reflect the appropriate markets to be considered in other Commission proceedings, *including merger reviews*, rulemakings involving the Commission's ownership rules, or other reports to Congress."[331]

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329 *Annual Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Comm'cns Servs.*, First Report, 22 FCC Rcd 5954 (2007) ("*Satellite Report*").

330 *See* NAB at 23-24; NAB Coalition at 6-7.

331 *Satellite Report* at 5964 (¶ 27) (emphasis added). The Commission further stated that "[a]ny individual proceeding in which the Commission defines relevant product and geographic markets"—including "an application for approval of a license transfer"—might "present facts pointing to narrower or broader markets than any used, suggested, or implied in this report." *Id.* at 5963, n.48 (¶ 24). Moreover, opponents' arguments regarding the market share of satellite radio are without support because the *Satellite Report* acknowledges that the FCC "lack[s] the requisite data to determine specific market shares for" satellite radio. *Id.* at 5978 (¶ 74). The Commission's analysis was only "retrospective," focusing on competition from 2000 through the end of 2006, and did not account for any possible future market developments. *Id.* at 5955 (¶ 1).

VII. ATTACKS ON THE COMPANIES' "CHARACTER" ARE INCORRECT AND IRRELEVANT.

As the companies explained in their application, the Commission has consistently held that XM and Sirius are qualified FCC licensees.[332] The NAB and others, however, seek to cloud the record with several challenges to the companies' "character" that are neither relevant to this proceeding nor correct.

A. Allegations Made by Merger Opponents Do Not Raise "Character" Issues.

XM and Sirius take their obligations and responsibilities as FCC licensees seriously. But, claims by the NAB and others that the companies cannot be relied upon to comply with merger conditions due to alleged rule violations are little more than a rhetorical sideshow.[333] In any event, these allegations do not bear on the general qualifications of XM and Sirius as Commission licensees and do not cast doubt on their willingness to offer the merger-specific benefits discussed above.

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332 Application at 48-49.

333 NAB at 4, 50, 51; NABOB at 3, 8, 13-14; Entravision Holdings at 3, 19-20. The NAB makes these claims without apparent irony, but it should be noted that just in the last several months NAB members have paid tens of millions of dollars to U.S. Treasury to settle claims of FCC rule violations. In fact, one broadcaster, Univision, recently made a record $24 million payment to conclude a Commission investigation into violations of the agency's children's programming rules. *See Shareholders of Univision Comm'cns Inc. (Transferor) and Broad. Media Partners, Inc. (Transferee), For Transfer of Control of Univision Comm'cns, Inc. and Certain Subsidiaries, Licensees of KUVE-TV, Green Valley, Arizona, et al.*, Memorandum Opinion and Order, 22 FCC Rcd 5842, 5859 (¶ 42) (2007). Another group of broadcasters paid $12.5 million to resolve an investigation into alleged violations of the FCC's "payola" rules. Charles Babington, *Big Radio Settles Payola Charges*, WASHINGTON POST, Mar. 6, 2007, at D1; *see also* News Release, *Broadcasters Pay $12.5 Million to Resolve Possible "Payola" Violations* (Apr. 13, 2007). In each of these cases, however, the FCC determined that the violations did not call into question the licensees' qualifications to hold Commission licenses. Presumably, the NAB would agree with that outcome.

1. Interoperability

Opponents continue to suggest that XM and Sirius have violated a Commission mandate to develop, manufacture, or market an interoperable receiver,[334] but that is incorrect.

In its implementing rules for the satellite radio service, the FCC required all satellite radio licensees *to develop designs* for an interoperable radio[335] and to certify that they have done so.[336] Consistent with this requirement, Sirius' license contains a condition that Sirius certify "that its final receiver design is interoperable" with respect to XM's final receiver design,[337] and XM's license contains virtually the same condition.[338]

As the companies explained in the Application, they have fully complied with the Commission's requirement by certifying to the agency that they completed a design for an interoperable radio. In fact, their compliance has now been a matter of public record for over two years.[339]

Opponents' various attempts to obfuscate the requirement or misrepresent the companies'

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334 NAB at 43, 44; Common Cause at 45-46; NAB Coalition at 3; NABOB at 3, 13-14; Entravision Holdings at 18.

335 *See Establishment of Rules and Policies for the Digital Audio Radio Satellite Svc. in the 2310-2360 MHz Frequency Band*, Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5754, 5795-98 (¶¶ 102-07) (1997).

336 47 C.F.R. § 25.144(a)(3)(ii). Common Cause references a similar requirement in the settlement agreement of a patent dispute between the parties, which provided: "XM and Sirius shall each use commercially reasonable efforts to design and develop Interoperable Radios." Common Cause at 45.

337 *Satellite CD Radio, Inc., Application for Authority to Construct, Launch and Operate Two Satellites in the Digital Audio Radio Service*, Order and Authorization, 13 FCC Rcd 7971, 7995 (¶ 57) (1997) ("*Sirius Authorization Order*").

338 *XM Authorization Order*, 13 FCC Rcd at 8851 (¶ 54).

339 Application at 15-16, n.37 (citing certification letters).

interpretation of the requirement are unavailing. The NAB cites no support for the proposition that "receiver interoperability was to occur prior to the initiation of" satellite radio service,[340] and there is none. Likewise, opponents have been unable to point to any Commission requirement that the companies produce, distribute, market or sell interoperable receivers.[341] And, despite the NAB's assertion, neither XM nor Sirius has offered an inconsistent interpretation of the requirement.[342]

2. FM Modulators

Last year, the FCC's Enforcement Bureau issued inquiries to both companies concerning the possibility that some of their receivers were non-compliant with Commission regulations. Sirius and XM each timely responded to these inquiries, and both have cooperated fully with the Enforcement Bureau in its investigation of this matter. All newly produced receivers are fully consistent with applicable regulations. Both companies will continue to work with the Commission until this matter is resolved completely.

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340 NAB at 53. In fact, the Commission stated simply that the companies would "have an opportunity to work among themselves" toward a final design "during the construction of their satellite systems." *Satellite Radio Authorization Order*, 12 FCC Rcd at 5797 (¶ 106).

341 NABOB at 8 ("the failure of Applicants to offer consumers an interoperable receiver undermines their assertion that they will provide diverse programming"); Clear Channel at 7. Parties that wish the rules had included such a requirement resort to invoking the "spirit" of the FCC's interoperability requirement, NAB Coalition at 12; criticizing the companies' interpretation, Common Cause at 45; opining on the Commission's "clear intent," NAB at 54; or when all else fails, simply continuing to misstate the requirement, Entravision Holdings at 18.

342 NAB at 54-55 & n.210. For example, the NAB quotes one sentence from XM's most recent 10-K filing in an apparent effort to show that XM has wavered in its view on its compliance, NAB at 54, but omits the language that precedes it: "The FCC conditioned our license on certification by us that our final receiver design is interoperable with the final receiver design of the other licensee, SIRIUS Radio, which uses a different transmission technology than we use. *We have previously certified and reconfirmed that we comply with this obligation.*" XM Satellite Radio Holdings Inc., 2006 SEC Form 10-K, at 13 (filed Mar. 1, 2007) (emphasis added).

3. Terrestrial Repeaters

Sirius and XM voluntarily brought their terrestrial repeater variances to the FCC's attention after taking unilateral actions to bring many of those variances into compliance. In October 2006, Sirius informed the Commission that eleven of its terrestrial repeaters had been operating at variance from their approved specifications.[343] Sirius has turned off each of the repeaters and filed requests with the agency to reauthorize them.[344] As Sirius explained in its requests, the repeaters were not at risk of causing harmful interference because, among other reasons, all but one of the subject repeaters were operating at or below currently authorized power levels and all but one was operating within 10 miles of its reported location.[345] In addition, to Sirius' knowledge, no party has experienced interference from the subject repeaters.

Similarly, XM voluntarily notified the FCC in October 2006 that its terrestrial repeater network "as built" varied from the authorizations that originally were granted for the construction of the network.[346] At that time, XM took steps to eliminate the largest variances by turning down the power levels of numerous repeaters and turning off the transmitters for others.[347] As XM explained to the Commission in its request to reauthorize its repeaters, the

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343 Sirius Satellite Radio Inc., Request for 30-Day STA, File No. SAT-STA-20061013-00122 (filed Oct. 13, 2006) ("Sirius 30-Day STA Request"); Sirius Satellite Radio Inc., Request for 30-Day STA, File No. SAT-STA-20061013-00121 (filed Oct. 13, 2006) ("Sirius 180-Day STA Request").

344 *Id.*

345 *See id.*

346 XM Radio Inc., Request for 30-Day STA, File No. SAT-STA-20061002-00114 (filed Oct. 2, 2006).

347 XM Radio Inc., Request for 180-Day STA, File No. SAT-STA-20061013-00119, at 4 (filed Oct. 13, 2006).

network as built is far smaller and less powerful than what the Commission initially authorized and thus should be far less troubling to licensees of adjacent spectrum.[348] Moreover, to XM's knowledge, none of the variances has caused interference to any licensed service.

Again, since filing these requests, both Sirius and XM have been working diligently with Commission staff to resolve the issues concerning their existing repeaters and to ensure that their networks will be fully compliant with FCC rules in the future.

B. These Enforcement Matters Are Not Relevant to the Analysis of the Transaction.

The FCC repeatedly has rejected the notion that outstanding allegations of agency rule violations that can be addressed through the normal enforcement procedures have any bearing on a licensee's qualifications. Rather, the agency has made clear that "typically it will *not* consider in merger proceedings matters that are the subject of other proceedings before the Commission."[349] In this regard, the FCC further has noted that parties concerned about potential violations of agency regulations "have other, more appropriate, avenues for obtaining relief regarding [such] non-transaction specific issues.[350]

Ironically, the Commission emphasized these points in the decision that the NAB believes to be binding in every other respect—the 2002 DIRECTV-EchoStar decision.[351] There, several parties alleged that EchoStar had violated certain FCC rules and thus was not qualified to

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348 *Id.* at 1.

349 *SBC/Ameritech Order*, 14 FCC Rcd at 14,950 (¶ 571) (emphasis added) (quoting *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation to SBC Communications, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 21,292, 21,306 (¶ 29) (1998)).

350 *Adelphia/Time Warner Order*, 21 FCC Rcd at 8306 (¶ 240).

351 *See, e.g.*, NAB at 51 (referencing the "closely analogous" DIRECTV/EchoStar decision).

assume control over the licenses at issue.[352] The agency concluded that "[o]utstanding allegations regarding rule violations are best handled in proceedings arising under the affected rule or policy because, in such proceedings, the Commission would have a complete record to review the relevant facts."[353]

As explained above, the NAB's allegations here relate entirely to issues that already have been brought to the Commission's attention. To the extent the agency has found to be appropriate, it is addressing these matters through its traditional enforcement procedures. And as the NAB is well aware, it has the ability to air its grievances to the FCC through these mechanisms, and it has not hesitated to do so.[354] Accordingly, the issues raised by the NAB have no relevance to the Commission's review of the companies' merger.

In short, these issues do not cast any legitimate doubt on the qualifications of either Sirius or XM to serve as an FCC licensee or to merge. Both are in good standing with the Commission and, in fact, have long-time track records of regulatory compliance. Moreover, as demonstrated by their timely and cooperative responses to the terrestrial repeater and FM modulator issues, each company takes its responsibilities as a Commission licensee seriously and will continue to do so post-merger.

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352 *DIRECTV-EchoStar*, 17 FCC Rcd at 20,576-78 (¶¶ 29-31) (2002).

353 *Id.* at 20,579 (¶ 33).

354 *See, e.g.*, Letter from Marsha J. MacBride, NAB, to Hon. Kevin J. Martin, FCC (filed June 22, 2006), http://www.nab.org/xert/corpcomm/pressrel/filings/062206_Part15_study.pdf (last visited July 18, 2007) (attaching engineering study "to assess compliance of various FM modulator 'Part 15' devices with FCC rules").

VIII. THE COMMISSION SHOULD RESIST CALLS TO CONDITION THE MERGER IN WAYS THAT UNDERCUT ITS BENEFITS OR THAT DO NOT RELATE TO THE TRANSACTION AT ALL.

The Commission should not impose conditions in this proceeding that will have the effect of reducing the public interest benefits of the pending transaction or that are completely unrelated to the merger. The record shows that the public interest will be served by approval of this transaction and that consumers will benefit substantially from the combination of XM and Sirius. Unnecessary conditions would undermine these benefits. Specifically, any spectrum divestiture requirement could have substantial negative impacts on millions of existing customers, and on the companies that have invested millions of dollars developing products that rely on the existing platforms. Moreover, other proposed conditions are unnecessary, inappropriate for consideration in the context of this merger, or designed only to advance the business interests of their proponents.

A. The Record In This Proceeding Does Not Support the Imposition of Any Conditions on the Proposed Transaction.

An overwhelming majority of commenters support approval. Parties as diverse as the League of Rural Voters, the National Council of Women's Organizations, the African Methodist Episcopal Church, Free State Foundation, Women in Farm Economics, and the NAACP call on the Commission to approve the merger, citing the significant public interest and consumer benefits. In addition, unsolicited commenters from the general public support the merger by a ratio of more than three to one.

On the other hand, most of the opposition to this merger was generated by one group—the trade association for terrestrial radio broadcasters, state broadcaster associations, and individual broadcasters.[355] The NAB commissioned or funded virtually every "third-party" study opposing the merger.[356] Even the satellite radio "consumer" group opposing the merger is nothing more than an NAB surrogate.[357] The Commission should be wary of arguments from satellite radio's largest and most vocal competitors—parties with well-documented competitive motives—in the face of a mass of contrary supporting evidence.

B. Proposed Conditions are Unnecessary, Unrelated to the Merger, or Designed to Protect the Business Interests of the Proposing Parties.

The conditions proposed by various parties are: (1) unnecessary intrusions into the business plans of the merged company;[358] (2) completely unrelated to alleged merger-specific harms; or (3) attempts to subvert the Commission's authority in order to advance the proponents' business plans. The FCC should reject these proposals.

Some commenters propose conditions on satellite radio to provide leased access and set-asides for informational, local-into-local, and non-commercial educational programming.[359] But these conditions are unnecessary. Satellite radio already provides a tremendous range of public

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355 *See, e.g.*, Entravision Holdings; 46 Broadcasters; NABOB.

356 *See* Sidak Mar. 16 Decl. at 1, n.3.

357 *See supra* note 17.

358 For example, NPR proposes that the Commission adopt regulation of satellite radio that is "akin to telecommunications regulation under Title II of the Communications Act," including by requiring the merged company to essentially submit tariffs for Commission approval. NPR at 21-22. The significant competition faced by satellite radio in the audio entertainment market will be sufficient to ensure that satellite radio's prices remain competitive and there is no legal or policy justification to treat a one-way service such as satellite radio as a "common carrier." Similarly, requirements for the merged company to provide interoperable radios to all customers or include HD Radio capability as a function on all future satellite radio equipment would only harm satellite radio's ability to compete in the audio entertainment market. *See* Entravision Holdings at 21; NPR at 20.

359 Public Knowledge at 5; MAP at 5.

interest and educational content—even absent a government mandate—because such programming is attractive to consumers. This programming includes numerous news channels, public affairs channels, and XM's planned POTUS '08, a channel dedicated to the 2008 Presidential Election. The public interest is also served by Emergency Alert channels (XM 247 and Sirius 184) and channels dedicated to medical professionals (ReachMD), national weather channels, and channels in Spanish, French, Korean, and other niche and educational programming.

Moreover, the FCC should reject requests that the federal government use this proceeding to advantage certain competitors and industries. For example, the Commission should disregard calls for the agency to regulate the composition of the companies' combined board of directors or automobile dashboards.[360] Likewise, the Commission should dismiss the request of the recording industry that the Commission insert itself into the ongoing copyright royalty litigation before the Copyright Royalty Board.[361] And the Commission should reject Rockwell Collins' proposal to require the combined company to maintain two satellite based weather services after

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[360] *See* Slacker at 3 (proposing that the merged company be forced to terminate any exclusive contracts and not be allowed to have any car manufacturers represented on its board of directors). According to CRA, "[t]hese requests for conditions provide direct evidence of the fact that satellite radio faces competition from other technological platforms. There is, however, no need for such conditions. The auto makers have sufficient bargaining leverage with suppliers such as the merged firm, and competitive incentives in the automobile market, to resist demands for dashboard exclusivity." CRA Competitive Effects Analysis at 60 (¶ 114).

[361] RIAA specifically proposes that the Commission condition the merger on Sirius and XM "acknowledg[ing] . . . that the merged company should pay the same rates as other digital music service companies for compulsory copyright licensing." RIAA at 8. Sirius and XM submit that the CRB is fully capable of adjudicating this dispute and of sorting out any relevant information arising from the merger.

the merger and to require the companies to deal with all parties on a non-discriminatory basis.[362] The companies submit that decisions regarding the ancillary services provided by the combined company are best left to the marketplace.

IX. CONCLUSION.

For all these reasons, the proposed merger of XM and Sirius clearly would produce enormous public benefits that could not be achieved without the merger, and should be approved.

Respectfully Submitted,

/s/ Patrick L. Donnelly	*/s/ Dara F. Altman*
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362 *See* Rockwell Collins at 5.