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

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

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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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In the Matter of 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

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

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.

- <u>Competition works both ways</u>. 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. The Merger Will Facilitate Greater Choice and Convenience for Consumers, at Lower Prices.

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:

- An a la carte package of 50 channels for $6.99 per month. 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).