

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

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

REPLY TO JOINT OPPOSITION

For inclusion in the record of this proceeding, I respectfully wish to submit this *ex parte* reply to the Joint Opposition¹ filed by XM Satellite Radio Holdings, Inc. (“XM”) and Sirius Satellite Radio, Inc. (“Sirius”).

XM and Sirius claim that Satellite Radio faces ever-intensifying competition from various audio services.² Yet Sirius only recently reported its earnings³ for the second quarter and posted substantial subscriber gains. The accelerated growth of Satellite Radio cannot be denied by either of the DARS licensees regardless of mounting competition from purported competing audio services, particularly when the millions of Ipod’s sold clearly have not diminished demand for Satellite Radio. XM and Sirius claim that they have a very small share of the market compared to terrestrial radio⁴ and

¹ Joint Opposition to Petitions to Deny and Reply Comments of Sirius Satellite Radio, Inc. & XM Satellite Radio Holdings, Inc. dated July 24, 2007.

² See Joint Opposition at 35-38.

³ *Sirius Reports Strong Second Quarter 2007 Results* dated July 31, 2007 – <http://investor.sirius.com/releaseprint.cfm?releaseid=257278>

⁴ Joint Opposition at 47.

therefore a merger would not allow them to exercise monopoly power. But XM and Sirius certainly would have comparatively smaller shares – they have only provided service to the public barely over half a decade; terrestrial radio has existed for generations. XM and Sirius simply cannot have it both ways. They cannot boast significant subscriber growth, claim they are on track for substantial additional growth, yet still claim that a merger would not allow them to exercise harmful market power in the long term. How many millions of subscribers does the merged company need to have before it does cause competitive harm? The demand for Satellite Radio is abundantly clear and has not been diminished by the competitive reactions of terrestrial radio or the increased popularity of alternative audio services that XM and Sirius claim are substitutes.

XM and Sirius also maintain that competition between terrestrial radio and DARS is not one way.⁵ However it is clear that while terrestrial radio has reacted to the presence of Satellite Radio, neither Sirius or XM have reacted to the competitive maneuvers of local radio. Instead it is clear that the DARS licensees compete much more rigorously and directly with each other. XM & Sirius compare local broadcasters to that of a local coffee company and their competition with a national coffee company like Starbucks.⁶ Although this analogy illustrates the differences between some national and local companies, it does not equate to local and national broadcasting. Local radio broadcasters are limited by the number of people they may broadcast to, as well as market demographics and how far their coverage extends; their footprint cannot extend beyond the constraints of their license. A local coffee company, on the other hand, may sell coffee wherever it wants, to whomever it wants and is not limited by transmission

⁵ Joint Opposition at 69.

⁶ *Id.* at 70.

power, licensing constraints, and market ownership limitations. Likewise the constraints of a DARS license allow it to serve all markets everywhere all at once, serving both national and local areas.

It is also claimed by XM and Sirius that this merger will allow them to be a stronger competitor against future audio services such as EVDO and Internet Radio integrated in the automobile.⁷ Yet XM and Sirius *assume* that these competitors will become viable and sustainable competition against Satellite Radio. They have no idea what those audio services will deliver in the future or exactly when, as those services may surely endure setbacks, build-out delays, capital requirements, issues that may take many months or even years to resolve. In the case of Wi-Max or EVDO for instance, it would take a substantial amount of time and capital deploying resources to even come close to reaching the level of ubiquitous signal coverage that XM and Sirius currently provide. XM and Sirius assume that Wi-Max and EVDO will be a practical competitor to Satellite Radio, but Satellite Radio clearly has a strong early advantage over these purported future competitors, particularly in the OEM market segments. XM and Sirius appear to be so worried about becoming a stronger competitor against this expected future competition, but they have nearly a decade of early advantage over those competitors, especially if those competitors face delays in providing service to the public.

The mere fact that XM and Sirius feel it necessary to point out this purported future competition is evidence that XM and Sirius are fully aware of the anti-trust implications of the merger. By detailing the competitors they expect to exist in the future, XM and Sirius disguise the fact that controlling the entire allocated DARS spectrum only serves to prove that this merger would be anti-competitive and would

⁷ See Joint Opposition at 67.

monopolize any form of Satellite-delivered mobile audio entertainment both in the present and the future. Sirius recently reported⁸ excellent growth and subscriber gains; it surely cannot be worried about future audio services that will definitely have to play catch up to match the achievements of Satellite Radio.

XM and Sirius also note other satellite-delivered options similar to DARS that are planning to provide service in the future, such as the new Slacker service.⁹ But these new types of audio distribution services, Slacker in particular, are merely distribution systems for the downloading of cached content. Unlike DARS, they are not live broadcasts, making them inherently different than the services that XM and Sirius provide, such as live, up-to-the-minute news and traffic updates. The DARS licensees hold a unique and national system of live content broadcasting that entirely differentiates itself from local radio and new audio distribution services. Fifteen million people are choosing to pay a subscription fee despite having free access to terrestrial radio; that fact alone proves that the live broadcasts they listen to are distinctly different than what they can receive for free. Subscribers are paying for Satellite Radio for reasons entirely unrelated to the free offerings of terrestrial radio, making DARS unique unto itself. Even the DARS spectrum is characteristically unique, having been internationally allocated exclusively for satellite sound broadcast.

XM and Sirius assert that they have sufficient bandwidth in the DARS spectrum to add new channels and services without degrading service quality.¹⁰ Indeed, both companies have enjoyed tremendous efficiencies through improved codec technology and better modulation techniques in the short time that they have provided service to the

⁸ *See supra* at n. 3.

⁹ Joint Opposition at 66-67.

¹⁰ *Id.* at 88-89.

public. These efficiencies have allowed subscribers to receive at least five times the number of channels originally proposed by the DARS licensees.¹¹ The improvements in technology and infrastructure will certainly continue in the future. However, the mere fact that these efficiencies have led to more channels demonstrates that XM and Sirius already have the inherent ability to compete effectively with the current and prospective audio services that they claim are competitive threats. The future will permit them to add more channels, offer greater value to the public, and be a stronger competitor without the need for a consolidation of the entire allocated band of DARS spectrum.

XM and Sirius further emphasize that subscribers who are truckers or people living in extremely rural areas constitute a very small portion of customers and would therefore minimally impact the number of options that those customers are open to.¹² Yet the original idea behind DARS in the first place was to provide coast to coast, national, seamless coverage which is perfectly ideal for truckers. XM and Sirius simply cannot discount the value of truckers and rural subscribers, especially when those subscribers were the early adopters of Satellite Radio. It makes no sense for XM and Sirius to diminish the significance of that particular segment of subscribers, especially when both companies offer specific programming and whole channels devoted to truckers.

XM and Sirius assert that this merger will allow greater choice for subscribers, yet the content provided for in the “best of both” package for either service will ultimately be chosen by the merged company, not the subscriber. In order to receive *all* programming from both services, the price will remain substantially the same for the subscriber. The essence of choice for the public, even with the a la carte pricing model,¹³ is not enhanced

¹¹ Joint Opposition at 89-90.

¹² *Id.* at 73-75.

¹³ *Id.* at 12.

but essentially diminished because programming considered by the merged company to be redundant will ultimately be consolidated and eliminated in the long term. The individuality of XM and Sirius which is the very heart of these two companies, create a choice for subscribers who may prefer one style of format and content to the other; inevitably that individuality will be changed into a merged type of programming that is lost among subscribers who have chosen either service or one service over the other. Any current subscriber to both services can attest to the differences between programming, play lists, genres and formats of either service. Ultimately the essence of choice for the subscriber after the merger will be based solely on price and not the programming that subscribers can already choose to receive now. The essence of this merger is more about business and not at all about the subscriber. This merger is about seizing more bandwidth and gaining complete control of a portion of spectrum that took the Commission a great deal of work and time to allocate specifically for more than one licensee to occupy.

Accordingly, for the aforementioned reasons I urge the Commission to lend no weight to the “benefits” of this merger for the subscriber as purported by XM and Sirius, and therefore consider that this merger is not in the best interest of the public.

Respectfully submitted,

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