

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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

**COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

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**COMMENTS OF THE  
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The National Association of Broadcasters (“NAB”), by its attorneys, hereby files these comments responding to the Commission’s Notice of Proposed Rulemaking in the above-captioned proceeding.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

This is an unusual case. In most merger proceedings before the Commission, the application details the information the merging parties believe demonstrates that their proposed transaction is consistent with established precedent, policy, and rules. Sirius Satellite Radio Inc. (“Sirius”) and XM Satellite Radio Holdings Inc. (“XM”) (collectively “Applicants”), by contrast,

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<sup>1</sup> *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, MB Docket No. 07-57, Notice of Proposed Rulemaking, FCC 07-119 (rel. June 27, 2007) (“*NPRM*”); *see also* Public Notice, “Media Bureau Announces Comment and Reply Comment Dates for the Notice of Proposed Rule Making Regarding Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee,” DA 07-3241 (MB rel. July 13, 2007) (setting deadlines of August 13, 2007, for comments and August 27, 2007, for reply comments).

filed a merger application that was utterly devoid of such evidence.<sup>2</sup> Further, in response to the numerous petitions to deny filed against the Merger Application, Applicants filed a voluminous opposition but again declined to address their compliance with the relevant legal standards.<sup>3</sup> At bottom, Applicants urge the Commission to (1) ignore controlling Commission and antitrust precedent, (2) disregard long-standing Commission policy against spectrum monopolies, and (3) waive, modify or repeal the Commission's merger prohibition applicable to the Satellite Digital Audio Radio Service ("satellite DARS"). The Commission should not abandon relevant legal standards, rules and important public policies merely to allow this one merger to proceed.

Satellite DARS is a distinct, "continuous nationwide" service that "local radio inherently cannot provide."<sup>4</sup> Sirius and XM each hold a license to provide satellite DARS in the United States and, between them, they control all of the spectrum assigned for such service. Given these circumstances, and consistent with the long-standing Commission policy against spectrum monopolies, the Commission prohibited the two licensees from ever merging, in order to ensure that consumers benefit from competition in the satellite DARS service.<sup>5</sup> Specifically, the

*Satellite DARS Order* states:

Transfer. We note that DARS licensees, like other satellite licensees, will be subject to rule 25.118, which prohibits transfers or assignments of licenses except upon application to the Commission and upon a finding by the Commission that the public

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<sup>2</sup> See Consolidated Application for Authority to Transfer Control (Mar. 20, 2007) ("Merger Application"); see also Petition to Deny of the National Association of Broadcasters ("NAB Petition to Deny") (July 9, 2007).

<sup>3</sup> See Joint Opposition to Petitions to Deny and Reply Comments of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. at 56-57 (July 24, 2007) ("Opposition"); see also National Association of Broadcasters' Response to Comments (July 24, 2007) ("NAB Response to Comments") and other petitions cited therein; National Association of Broadcasters' Reply to Opposition (July 31, 2007) ("NAB Reply to Opposition").

<sup>4</sup> *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd 5754, 5756 ¶ 1, 5760 ¶ 13 (1997) ("*Satellite DARS Order*").

<sup>5</sup> *Satellite DARS Order*, 12 FCC Rcd at 5823 ¶ 170.

interest would be served thereby. *Even after DARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellite DARS license. This prohibition on transfer of control will help assure sufficient continuing competition in the provision of satellite DARS service.*<sup>6</sup>

CD Radio Inc., predecessor-in-interest to Sirius, proposed this anti-merger rule on the grounds that it was necessary to (1) “preserve intra-service competition and overall DARS diversity of programming” and (2) to prevent a “DARS monopoly.”<sup>7</sup>

Despite the Commission’s unambiguous language, Sirius and XM have now filed for Commission authority to transfer their licenses to a single, combined entity owned by the current shareholders of XM and Sirius, which would then control all of the satellite DARS spectrum.<sup>8</sup> Recognizing that the Merger Application conflicts with the express language of the satellite DARS merger prohibition, the Commission issued the *NPRM*, which seeks comment on “whether the language in question constitutes a binding Commission rule and, if so, whether the Commission should waive, modify, or repeal the prohibition in the event that the Commission determines that the proposed merger, on balance, would serve the public interest.”<sup>9</sup>

As discussed below, the specific language and context of the satellite DARS anti-merger prohibition make clear that the Commission intended to impose a binding legal obligation upon the satellite DARS licensees not to merge and the effect of its action was to do so. Moreover, the Commission developed the merger prohibition in a notice and comment rulemaking and

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<sup>6</sup> *Id.* (emphasis added).

<sup>7</sup> Comments of CD Radio Inc., IB Docket No. 95-91 at 18 and n.31 (Sept. 15, 1995) (“1995 Sirius Comments”).

<sup>8</sup> *See* Merger Application.

<sup>9</sup> *NPRM* at ¶ 3.

published it in the Federal Register.<sup>10</sup> As such, the satellite DARS merger prohibition is a substantive rule under the Administrative Procedure Act (“APA”).<sup>11</sup>

It is beyond dispute that the proposed merger of the only two satellite DARS licensees would violate this rule and the Commission therefore would have to waive, modify or repeal the rule in order to grant the Merger Application. Under applicable judicial and Commission precedent, however, the Commission may not waive this rule because waiver would effectively eliminate the rule.

Further, the Commission should not modify or repeal the rule since doing so would violate (1) the long-standing Commission policy against spectrum monopolies that led the Commission to adopt the rule in the first instance, and (2) the pro-competitive vision enshrined in the Telecommunications Act of 1996.<sup>12</sup> The Commission’s policy against spectrum monopolies remains as valid today as it was when the Commission first promulgated the satellite DARS anti-merger rule. Applicants have offered no evidence or rationale sufficient to justify a Commission decision to repudiate this spectrum policy and change the anti-merger rule in order to facilitate the proposed merger.

In addition, the proposed merger would create a monopoly in the national satellite DARS market, which would inevitably result in increased prices, fewer programming choices, less local programming for radio listeners, and other public interest harms. Surprisingly, Applicants have made no effort to confront and resolve these fundamental problems with their proposed merger.

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<sup>10</sup> Digital Audio Radio Service in the 2310-2360 MHZ Frequency Band, 62 Fed. Reg. 11083, 11102 (March 11, 1997).

<sup>11</sup> 5 U.S.C. § 553.

<sup>12</sup> See Preamble, Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (1996) (“An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”).

Instead, Applicants argue that the Commission should ignore long-standing Commission and antitrust precedent and analyze the proposed merger under a novel standard created to suit their allegedly “unique” circumstances. Applicants similarly make no effort to meet their evidentiary burden to demonstrate “extraordinarily large, cognizable, and non-speculative efficiencies” that outweigh the anti-competitive harms associated with the merger.<sup>13</sup> Instead, Applicants present a series of new, non-binding pricing and programming offerings, which they may change at any time and which offer few, if any, true benefits to existing subscribers. Applicants also fail to demonstrate that their promised new offerings flow directly from and are dependent upon the merger, beyond refusing to produce the new offerings (or deploy an interoperable radio) unless they are allowed to merge. In short, there is no basis for the Commission to conclude that the proposed merger would serve the public interest and thus eliminate the satellite DARS anti-merger rule.

In sum, the Commission should not waive, modify or repeal the satellite DARS anti-merger rule in order to facilitate the proposed merger. Instead, the Commission should enforce the rule and dismiss the Merger Application without further deliberation.

## **II. THE COMMISSION’S PROHIBITION ON SATELLITE DARS MERGERS IS A SUBSTANTIVE RULE**

The Commission seeks comment on Applicants’ assertion that the satellite DARS merger prohibition is not a binding substantive rule and is thus no impediment to the proposed merger.<sup>14</sup> In Applicants’ view, the relevant language is not a rule because it was not published in the Code

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<sup>13</sup> See, e.g., *Application of EchoStar Communications Corporation (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations)*, 17 FCC Rcd 20559, 20604 ¶ 102 (2002) (“*EchoStar/DirectTV Merger Order*”).

<sup>14</sup> *NPRM* at ¶ 3.

of Federal Regulations (“CFR”).<sup>15</sup> Applicants assert instead that the language is a “policy statement reflecting the Commission’s view, based on the evidence available in 1997, that two satellite radio licensees were needed to have enough competition in the audio entertainment market.”<sup>16</sup>

Applicants are wrong; the relevant language constitutes a binding rule under the APA.<sup>17</sup> Indeed, Applicants’ interpretation of the satellite DARS merger prohibition hinges on their mischaracterization of both the relevant law and the Commission’s expressed intent underlying the merger prohibition.

The D.C. Circuit distinguishes between a binding rule and a non-binding policy statement in this way:

In determining whether an agency has issued a binding norm or merely a statement of policy, we are guided by two lines of inquiry. One line of analysis focuses on *the effects of agency action*, asking whether the agency has (1) imposed any rights and obligations, or (2) genuinely left the agency and its decisionmakers free to exercise discretion. . . . The language used by the agency is often central to making such determinations. . . . The second line of analysis focuses on *the agency’s expressed intentions*. The analysis under this line of cases looks to three factors: (1) the agency’s own characterization of the action; (2) whether the action was published in the Federal Register *or* the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency.<sup>18</sup>

The satellite DARS merger prohibition constitutes a binding substantive rule under each of these similar, multi-faceted tests.<sup>19</sup>

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<sup>15</sup> Merger Application at 50.

<sup>16</sup> *Id.*

<sup>17</sup> 5 U.S.C. § 553.

<sup>18</sup> *The Wilderness Society v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006) (internal citations and quotation marks omitted; emphasis added) (agency “Management Policies” not a rule).

<sup>19</sup> Similarly, the prohibition on one entity obtaining both satellite DARS licenses in the auction, published

With respect to the court’s first line of analysis, the Commission’s use of command and obligation language such as “not permitted” and “prohibited” has the effect of imposing a legal obligation on the two DARS licensees – the obligation not to merge. This strong language also belies any suggestion that the Commission left the possibility of a satellite DARS merger within its discretion. Had the Commission intended to leave itself discretion in this matter, it would have included only the first sentence of the relevant language, which states that satellite DARS licensees are “subject to rule 25.118, which prohibits transfers or assignments of licenses except upon application to the Commission and upon a finding by the Commission that the public interest would be served thereby.”<sup>20</sup> The Commission did not stop there, however, but added the additional language: “Even after DARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellite DARS license. This prohibition on transfer of control will help assure sufficient continuing competition in the provision of satellite DARS service.”<sup>21</sup> These final two sentences, juxtaposed with the first sentence, demonstrate that the agency’s action imposed a legally binding limitation on its general discretion under section 25.118 in the case of a merger between the two satellite DARS licensees.<sup>22</sup>

With respect to the court’s second line of analysis, the Commission’s decision to use the words “not permitted” and “prohibited” also demonstrates the agency’s intent that the anti-merger language be a legally binding rule. The Commission’s intent in this regard is further demonstrated by the facts that (1) the Commission adopted this provision in a report and order

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in the Federal Register and described as a “service rule,” *Satellite DARS Order*, 12 FCC Rcd at 5818 ¶ 158, but not codified in the rules, is properly viewed as a rule and not, as would be the case under the Applicants’ analysis, a non-binding policy statement.

<sup>20</sup> *Id.* at 5823 ¶ 170.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

issued after a notice and comment rulemaking proceeding (in response to the specific request of Sirius),<sup>23</sup> (2) the prohibition was contained in a section of the report and order whose first word is “Rules,”<sup>24</sup> and, (3) as noted above, the Commission published the merger prohibition in the Federal Register as required.<sup>25</sup>

In light of these circumstances, and applying the relevant standard, it is beyond dispute that the Commission’s anti-merger prohibition is a binding, substantive rule. The Applicants’ argument that the prohibition cannot be binding because it was not published in the CFR is without merit. The only legal citations Applicants offer in support of this proposition are wholly inapposite.<sup>26</sup> For example, Applicants cite language from *Wilderness Soc’y v. Norton* to suggest that publication in the CFR represents the dividing line between legislative rules and non-binding policy statements.<sup>27</sup> In fact, the court’s ruling that the agency’s “Management Policies” document was not a binding rule did not turn exclusively on lack of publication in the CFR. Rather, the lack of CFR publication was one among several factors the court considered, including (1) the fact that “the document as a whole does not read as a set of rules”; (2) the “particularly noteworthy” fact that the policies were not issued through notice and comment rulemaking; (3) the fact that the agency never published the policies in the Federal Register; and

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<sup>23</sup> 1995 Sirius Comments at 17-20.

<sup>24</sup> See *Satellite DARS Order*, 12 FCC Rcd at 5755 (Table of Contents) (“G. Rules for Auctioning Satellite DARS Licenses”); 5812 (same).

<sup>25</sup> See 47 U.S.C. § 553(b). Nevertheless, even had the Commission not published the merger prohibition in the Federal Register, it would still be binding on XM and Sirius because they had actual notice of the rule. See 5 U.S.C. § 552(a)(1) (“Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.”); *Appalachian Power Co. v. Train*, 566 F.2d 451, 456 (4<sup>th</sup> Cir. 1977) (“Section 552(a)(1) contemplates that actual notice may at times supercede constructive notice through publication”).

<sup>26</sup> See Merger Application at 50.

<sup>27</sup> *Id* at n.153 citing *Wilderness Soc’y v. Norton*, 434 F.3d 584, 596 (D.C. Cir. 2006).

(4) the fact that the introduction to the policies “makes it clear that the agency has retained unfettered discretion to act as it sees fit. . . .”<sup>28</sup>

Thus, while publication in the CFR is evidence that a particular agency action was intended to be a binding rule, lack of CFR publication is not dispositive on this point, as Applicants suggest. Indeed, the Commission itself has long recognized that many of its substantive rules are “uncodified,” *i.e.*, do not appear in the CFR.<sup>29</sup> Consequently, if the Commission were to decide now that only requirements and prohibitions published in the CFR are binding enforceable rules, many existing Commission rules and requirements would be rendered unenforceable, potentially wreaking havoc on the Commission’s regulatory scheme.

Examples include:

- The requirement for the ubiquitous deployment of the 811 abbreviated dialing code for access to state One Call Centers.<sup>30</sup>

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<sup>28</sup> *Wilderness*, 434 F.2d at 595-96. The other two D.C. Circuit cases cited by Applicants include similar analyses. See *Florida Power & Light Co. v. EPA*, 145 F.3d 1414, 1418-1420 (D.C. Cir. 1998) (preamble to a *proposed* rule not a rule); *American Portland Cement Alliance v. EPA*, 101 F.3d 772, 776-778 (EPA “determination,” published without a Regulatory Flexibility Act Analysis because, in the agency’s contemporaneous words, the determination “does not establish new regulatory controls,” is not a rule) (D.C. Cir. 1996). See also *Christopher T. Erringer v. HHS*, 371 F.3d 625, 632 n. 13 (9<sup>th</sup> Cir. 2004) (“lack of publication in the CFR in and of itself is insufficient to find a rule interpretive” as opposed to a binding substantive rule).

<sup>29</sup> See, e.g., *Saint Maarten International Communications Services, Inc.*, 20 FCC Rcd 18732, 18741 ¶ 20 and n.65 (2005) (referring to “uncodified prohibition on exclusive arrangements”); *Amendment of the Television Table of Allotments (Holbrook, Arizona)*, 20 FCC Rcd 16854, 16864 ¶ 27 (2005) (“uncodified rule requiring opening of de-reserved channels for competing applications”); *Amendment of the Television Table of Allotments*, 17 FCC Rcd 14038, 14055 ¶ 46 (2002) (waiving the Commission’s “uncodified rule requiring that newly de-reserved channels be made available for competing applications”); *Tariff Filing Requirements for Interstate Common Carriers*, 7 FCC Rcd 804 ¶ 3 (1992) (subsequent history omitted) (“uncodified forbearance rules” for certain resellers); *Cellnet Communications, Inc. v. Detroit SMSA, L.P.*, 9 FCC Rcd 3341, 3343 ¶ 13 (CCB 1994) (cellular resale requirement “is a binding, uncodified substantive rule adopted through notice and comment rulemaking.”).

<sup>30</sup> *The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, 20 FCC Rcd 5539 (2005). The same holds true for the ubiquitous deployment of several other N11 codes promulgated by the Commission, e.g., 511(traffic information) and 211(community service information). See *The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, 15 FCC Rcd 16753 (2000).

- The requirement that mobile handset manufacturers and wireless carriers periodically file hearing aid-compatibility status reports.<sup>31</sup>
- The requirement that cellular licensees file a minor modification notification with the Commission when extending service area boundary contours into adjacent unserved areas of less than 50 square miles pursuant to secondary operating authority.<sup>32</sup>
- The requirement that nationwide wireless carriers file analog service status reports.<sup>33</sup>

In sum, the satellite DARS anti-merger prohibition constitutes an uncodified binding Commission rule and the proposed merger of the only two satellite DARS licensees would violate this rule. The Commission should therefore dismiss the Merger Application without further consideration of other issues.<sup>34</sup>

### **III. THE COMMISSION MAY NOT WAIVE THE SATELLITE DARS ANTI-MERGER RULE**

The Commission also seeks comment on “Applicants’ contention that the Commission should waive, modify, or otherwise alter the prohibition to the extent necessary to permit the

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<sup>31</sup> *Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones*, 18 FCC Rcd 16753 ¶ 88 (2003).

<sup>32</sup> *Year 2000 Biennial Regulatory Review – Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services*, 19 FCC Rcd 3239, 3256 ¶ 41 (2004).

<sup>33</sup> *See Year 2000 Biennial Review – Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and Other Commercial Mobile Radio Services*, 17 FCC Rcd 18401, 18419 ¶¶ 31-32 (2002), *Order on Reconsideration*, 19 FCC Rcd 3239 (2004).

<sup>34</sup> The Commission may dismiss or deny without a hearing any license transfer or assignment application that violates a threshold Commission eligibility rule. *See, e.g., Mobile Oil Exploration & Producing Southeast, Inc. v. United Distrib. Cos.*, 498 U.S. 211 (1991); *Heckler v. Campbell*, 461 U.S. 458 (1983); *United States v. Storer Broadcasting, Co.*, 351 U.S. 192 (1956); *Nuclear Inf. Res. Serv. v. NRC*, 969 F.2d 1169 (D.C. Cir. 1992); *Altamont Gas Transmission Co. v. FERC*, 965 F.2d 1098 (D.C. Cir. 1992); *Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405 (D.C. Cir. 1991); *Public Utilities Comm'n of California v. FERC*, 900 F. 2d 269 (D.C. Cir. 1990); *Hispanic Info. & Telecomm. Network, Inc. v. FCC*, 865 F.2d 1289 (D.C. Cir. 1989).

merger because the proposed merger, on balance, would serve the public interest.”<sup>35</sup> With regard to waiver, well-established D.C. Circuit and Commission precedent holds that the Commission may not waive a rule where waiver would effectively “eviscerate” the rule.<sup>36</sup> A Commission waiver of the rule prohibiting the only two satellite DARS licensees from merging in order to facilitate such a merger would, by definition, “eviscerate” the rule and would constitute reversible error.

It is black-letter law that an “applicant for waiver faces a high hurdle even at the starting gate.”<sup>37</sup> Applicants’ terse explanation of why the rule should be waived, however, does not come even remotely close to clearing that high hurdle.<sup>38</sup> Applicants are wholly unable to make the threshold demonstration that waiver “will not undermine the policy served by the rule, which has been adjudged in the public interest.”<sup>39</sup>

The anti-merger rule is intended to “assure sufficient continuing competition *in the provision of satellite DARS service.*”<sup>40</sup> Sirius – the rule’s original proponent – put it even more pointedly, arguing that the rule was needed to “preserve *intra-service* competition and overall DARS diversity of programming,” and “to avoid a *DARS monopoly*. . . .”<sup>41</sup> It follows then that, permitting a merger of the only two satellite DARS licensees will *not* further the goal of competition in the satellite DARS service and avoidance of a DARS monopoly.

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<sup>35</sup> *NPRM* at ¶ 3.

<sup>36</sup> *See, e.g., WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

<sup>37</sup> *Id.* at 1157.

<sup>38</sup> *See* Merger Application at 51-52.

<sup>39</sup> *WAIT Radio*, 418 F.2d at 1157.

<sup>40</sup> *Satellite DARS Order*, 12 FCC Rcd at 5823 ¶ 170 (emphasis added).

<sup>41</sup> 1995 Sirius Comments at 18 and n.31 (emphasis added).

Unable to counter the force of this logic, Applicants choose to obfuscate and mischaracterize. Applicants misquote the underlying purpose of the rule by eliminating the reference to satellite DARS service to make it appear that the rule was intended to promote competition generally, instead of promoting competition among satellite DARS providers.<sup>42</sup> They then rely on their own misquote to argue that their proposed merger would further the rule’s purpose by increasing competition in the broad “modern market for audio entertainment services . . . .”<sup>43</sup> Such rhetorical gymnastics cannot justify a waiver. Indeed, separate and apart from the waiver issue, Applicants’ apparent willingness to distort the purpose of the rule as part of their advocacy underscores the degree to which the Commission cannot have sufficient confidence to rely on any promises by, or conditions imposed on, Applicants.<sup>44</sup>

The bottom line is that a waiver of the anti-merger rule would undermine in totality the policy of the rule – assuring continuing competition in the satellite DARS service. Both the D.C. Circuit<sup>45</sup> and the Commission<sup>46</sup> have made clear that it is not lawful to waive a rule in

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<sup>42</sup> The Applicants misquote the Commission as stating that the purpose was to “help assure continuing competition” with no reference to the “in the provision of satellite DARS service” language. Merger Application at 51. *See also id.* at 50 (characterizing the Commission’s view as being that “two satellite radio licenses were needed to have enough competition in the audio radio market.”). Their deletion of the word “satellite” before “audio radio market” results in them “miss[ing] the point of the rule. . . .” *See* Comments of the American Antitrust Institute in Opposition to Transfer Application at 9 n.22 (June 5, 2007).

<sup>43</sup> Merger Application at 51-52.

<sup>44</sup> *See infra* at 22.

<sup>45</sup> *See WAIT Radio*, 418 F.2d at 1159 (“The court’s insistence on the agency’s observance of its obligation to give meaningful consideration to waiver applications emphatically does not contemplate that an agency must or should tolerate evisceration of a rule by waivers.”). *See also BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1182 (D.C. Cir. 2003) (waiver denial upheld where the company’s behavior “is exactly the kind of conduct” the rule was designed to deter); *WITN-TV, Inc. v. FCC*, 849 F.2d 1521, 1525 (D.C. Cir. 1988) (internal quotation marks omitted) (waiver denial upheld where the waiver “would directly conflict” with the policy the FCC “adjudged in the public interest”).

<sup>46</sup> *See, e.g., Omnitronics, LLC*, 15 FCC Rcd 20769, 20783 ¶ 28 (1999) (the Commission “should not tolerate evisceration of a rule by waivers.”); *Applications for Authority to Construct and Operate an Automated Maritime Telecommunications System*, 3 FCC Rcd 4690, 4692 ¶ 12 (1988) (an agency “must

circumstances where the waiver will “eviscerate” the relevant rule. Consistent with that precedent, the Commission must deny the Applicants’ waiver request.

#### **IV. THE COMMISSION SHOULD NOT MODIFY OR REPEAL THE SATELLITE DARS ANTI-MERGER RULE**

##### **A. The Satellite DARS Anti-Merger Rule Serves the Long-Standing Commission Policy Prohibiting Monopolies in Spectrum Assigned to Particular Services**

The Commission has long recognized that, “from the perspective of spectrum policy, the public interest is better served by the existence of a diversity of service providers wherever possible.”<sup>47</sup> To that end, the satellite DARS anti-merger rule is designed to preserve “continuing competition *in the provision of satellite DARS service.*”<sup>48</sup> As Sirius itself advocated, such a rule

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not eviscerate a rule by waiver”); *Waiver Requests by Clarity Media Systems, LLC*, 2007 FCC LEXIS 3605 \*9-\*11 ¶¶ 8, 9 (MB rel. May 3, 2007) (Commission does not “tolerate evisceration of a rule by waivers”; waiver denied because “underlying purpose” of rules would not be served through waiver of rules that “form the foundation” of the relevant “regulatory framework.”); *Galaxy Communications, L.P.*, 21 FCC Rcd 2994, 2996 (MB 2006) (waiver denied where grant would “eviscerate the plain language” of the rule and “would be tantamount to amending the rule adopted by the Commission without notice and comment as required by the Administrative Procedure Act”); *Iowa Rural TV, Inc.*, 20 FCC Rcd 1377, 1381 ¶ 9 (WTB 2005) (waiver denied where waiver would “eviscerate” the rule); *Grand Telephone Company, Inc.*, 19 FCC Rcd 19688, 19691 ¶ 11 (WTB 2004) (waiver denied where grant would “eviscerate” the rule); *North Pacific International Television, Inc., v. DIRECTV, Inc.*, 19 FCC Rcd 4788, 4791 ¶ 9 (MB 2004) (waiver denied where waiver “would essentially be eliminating the rule”); *Family Stations, Inc., v. DirecTV, Inc.*, 17 FCC Rcd 25333, 25336 ¶ 8 (MB 2002) (waiver denied where waiver would “essentially be eliminating the rule”); *Illinois Cooperative Association, Inc.*, 17 FCC Rcd 93, 96 ¶ 9 (WTB 2001) (internal quotation marks omitted) (“It is axiomatic that the Commission must not eviscerate a rule by waiver.”); *Nextel Communications, Inc.*, 14 FCC Rcd 11678, 11691 ¶ 31 (WTB 1998) (internal quotation marks omitted) (“It is axiomatic that the Commission must not eviscerate a rule by waiver”); *Time Warner, Inc.*, 12 FCC Rcd 15300, 15306 ¶ 17 (CSB 1997) (waiver denied where waiver would “effectively abolish the rule”); *National Exchange Carrier Association, Inc.*, 3 FCC Rcd 6042, 6043 ¶ 8 (CCB 1988) (waiver denied where waiver “would effectively undermine the validity of the rule”).

<sup>47</sup> *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20603 ¶ 96. See also NAB Petition to Deny at 4-5; NAB Response to Comments at 4-6, citing Comments of Clear Channel Communications (“Clear Channel”) at 4-5, 9-10 (July 9, 2007); Petition to Deny of the National Association of Black Owned Broadcasters, Inc. at 5 (July 9, 2007); Petition to Deny of National Public Radio, Inc. (“NPR Petition to Deny”) at 4 (July 9, 2007); Petition of Primosphere Limited Partnership at 3 (July 9, 2007); Informal Objection of Prometheus Radio Project and U.S. Public Interest Research Group, Media Access Project at 5 (July 9, 2007); Petition to Deny of American Women in Radio and Television, Inc. at 4 (July 9, 2007).

<sup>48</sup> *Satellite DARS Order*, 12 FCC Rcd at 5823 ¶ 170 (emphasis added).

would “preserve *intra-service* competition and overall DARS diversity of programming,” and “avoid a *DARS monopoly*. . . .”<sup>49</sup> For the Commission to modify or repeal the rule now, it would have to conclude that its long-standing policy of promoting spectrum competition and prohibiting spectrum monopolies is no longer in the public interest.

The Commission’s policy against spectrum monopolies pre-dates its promulgation of the satellite DARS anti-merger rule. In 1981, for example, the Commission provided for two cellular radio licenses for every service area, finding that competition would “foster important public benefits of diversity in technology, service and price, which should not be sacrificed absent some compelling reason.”<sup>50</sup> In doing so, the Commission considered and rejected a proposal by Motorola in favor of a monopoly cellular licensee in each market specifically because such a proposal “would eliminate the opportunity for facilities-based competition.”<sup>51</sup>

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<sup>49</sup> 1995 Sirius Comments at 18 and n.31 (emphasis added).

<sup>50</sup> *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission’s Rules Relative to Cellular Communications Systems*, 86 FCC 2d 469, 476 ¶ 15, 478 ¶ 19 (1981) (“*Cellular Order*”). The Commission also established service rules for the Personal Communications Services (“PCS”) to promote the “competitive delivery” of services and to ensure that PCS licenses were “disseminated to a wide variety of applicants.” *Amendment of the Commission’s Rules to Establish New Personal Communications Services*, 9 FCC Rcd 4957, 4959-60 ¶ 4 (1994). The Commission intended to “enable PCS providers to compete effectively with each other and with other wireless providers so that the American Public can enjoy the greatest benefits from the delivery of these new services.” *Id.* at 4960 ¶ 5; *see also id.* at 4983 ¶ 67 (“One of our goals in this proceeding is to promote competitive delivery of wireless services.”). The Commission also capped at 45 MHz the total amount of combined broadband PCS, cellular, and Specialized Mobile Radio spectrum in which an entity may have an attributable interest in any geographic area. *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Third Report and Order*, 9 FCC Rcd 7988, 8100 ¶ 238, 8104 ¶ 248 (1994) (“If firms were to aggregate sufficient amounts of spectrum, it is possible that they could unilaterally or in combination exclude efficient competitors, reduce the quantity of service available to the public, and increase prices to the detriment of consumers.”). Although the Commission ultimately allowed the spectrum cap to sunset, it nevertheless confirmed that “[w]ith or without the spectrum cap rule, we have an obligation to ensure that acquisitions of CMRS spectrum do not have anticompetitive effects that render them contrary to the public interest.” *See 2000 Biennial Regulatory Review; Spectrum Aggregation Limits for Commercial Mobile Radio Services*, 16 FCC Rcd 22668, 22696 (2002).

<sup>51</sup> *Cellular Order*, 86 FCC 2d at 478 ¶ 19.

The Commission has also confirmed the continued importance of its pro-competitive spectrum policy in the years following its promulgation of the satellite DARS anti-merger rule. For example, the Commission's anti-spectrum monopoly policy was an important basis for the Commission's decision not to approve the proposed EchoStar/DirecTV merger.

[T]he proposed transaction is not consistent with this Commission's long-standing spectrum policies, the bulk of which have been aimed at creating competitive spectrum-based communications services within and among the voice, video and data services markets. We have consistently found that from the perspective of spectrum policy, the public interest is better served by the existence of a diversity of service providers wherever possible. Today we have such diversity in the DBS service, and Applicants have presented no compelling reason, from a spectrum policy standpoint, why we should approve license transfers that would effectively replace facilities-based intramodal DBS competition with a monopoly. . . .<sup>52</sup>

The Commission also emphasized that the applicants in that case had "cited no example where we have permitted a single commercial spectrum licensee to hold the entire available spectrum allocated to a particular service."<sup>53</sup> Here, Applicants have similarly cited no such instance.<sup>54</sup>

It is undisputable that the proposed merger would give the combined entity control of 100 percent of all available satellite DARS spectrum in direct conflict with the Commission's pro-competitive spectrum policy. As a consequence, the Commission faces a particularly high threshold before it can modify or repeal the satellite DARS anti-merger rule to facilitate the merger. As the Supreme Court has stated:

[T]he revocation of an extant regulation . . . constitutes a reversal of the agency's former views as to the proper course. A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress." There is, then, at least a presumption that those

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<sup>52</sup> *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20603 ¶ 96.

<sup>53</sup> *Id.* at 20662 ¶ 277.

<sup>54</sup> *See* NAB Reply to Opposition at 3-4.

policies will be carried out best if the settled rule is adhered to. . . . Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.<sup>55</sup>

Permitting the only two satellite DARS licensees to merge would be an unprecedented departure from the Commission's core pro-competitive spectrum policy and would be indefensible under the *State Farm* standard.<sup>56</sup> Applicants offer no rationale to support a conclusion that repeal of the rule will in fact promote competition in the satellite DARS spectrum.<sup>57</sup> Instead, Applicants assert, in a single paragraph buried near the end of its Opposition, that the Commission's long-standing policy against spectrum monopolies is not relevant. In effect, Applicants argue that the Commission's pro-competitive spectrum policy applies only when the Commission "first authorizes a service in a frequency band" and does not apply to mergers or other actions that may come after the initial authorization.<sup>58</sup> This is demonstrably false; indeed, as noted above, the Commission applied this policy to the EchoStar/DirecTV merger long after the companies had received their initial licenses.<sup>59</sup>

In sum, modification or repeal of the satellite DARS anti-merger rule would be wholly inappropriate here. This conclusion holds true separate and apart from any analysis of the anti-competitive effects of undue concentration in the satellite DARS product market. The proposed merger would be in direct conflict with the long-standing and still-valid Commission pro-

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<sup>55</sup> *Motor Vehicle Mfrs Ass'n v. State Farm Mut.*, 463 U.S. 28, 41-42 (1982) (citations omitted).

<sup>56</sup> See NAB Petition to Deny at 8-10; NAB Response to Comments at 4-6; NAB Reply to Opposition at 3.

<sup>57</sup> Applicants are in fact striving to eliminate competition in the satellite DARS market by keeping Primosphere from pursuing a claim upon one of the satellite DARS licenses should the Commission permit XM and Sirius to merge. See Joint XM and Sirius Opposition to Primosphere's Motion to Consolidate (July 18, 2007).

<sup>58</sup> See Opposition at 90-91.

<sup>59</sup> See *supra* text at 15.

competitive spectrum policy because it would grant a single entity control of all satellite DARS spectrum. Moreover, in the closely analogous *EchoStar/DirectTV Merger Order*, the Commission held that it could not approve a merger that conflicts with its spectrum policy.<sup>60</sup> For the Commission now to change course radically and repudiate its anti-spectrum policy would almost certainly lead to reversal in court.

**B. The Proposed Merger Would Be Inconsistent With Long-Standing Commission and Antitrust Precedent**

The satellite DARS anti-merger rules should also not be eliminated in order to facilitate the proposed merger because such a merger would not serve the public interest under existing precedent. Long-standing Commission and antitrust precedent confirms that, for purposes of the Commission's merger review, the relevant product market is national satellite DARS.<sup>61</sup> As NPR, an important content producer for both satellite DARS and local radio stations, has indicated: “[T]he SDARS platform [i]s a different product market with a different audience.”<sup>62</sup> To that end, NPR has embraced a strategy “of developing new services for satellite radio” and has been able to “program 24-hour streams of programming in ways that it believes best serve the SDARS

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<sup>60</sup> *EchoStar/DirectTV Merger Order*, 17 FCC Rcd at 20603 ¶ 96.

<sup>61</sup> See, NAB's Response to Comments at 6-8, citing NPR Petition to Deny at 9; Petition to Deny of Common Cause, Consumer Federation of America, Consumers Union and Free Press (“Consumer Groups”) at 1-2 (July 9, 2007); Comments of John Smith at 3 (July 8, 2007); Joint Petition to Deny of Forty-Six Broadcasting Organizations at 2 (July 9, 2007); Comments of Bert W. King at ¶ 2 (July 9, 2007); Petition to Deny of the Consumers Coalition for Competition in Satellite Radio (“C3SR”) at 4 (July 9, 2007); *id.*, Exhibit B, Supplemental Declaration of J. Gregory Sidak (“Sidak Supplemental Decl.”) at 18 ¶ 24.

<sup>62</sup> NPR Petition to Deny at 14.

audience.”<sup>63</sup> Consumer Groups similarly point out that satellite radio possesses “a unique bundle of characteristics that clearly distinguishes [it] from other audio entertainment products.”<sup>64</sup>

The merger of the only two satellite DARS providers would produce a monopoly in the national satellite DARS market. Consequently, the proposed merger would necessarily result in higher prices and fewer programming choices for consumers.<sup>65</sup> In sum, the proposed merger would *not* serve the public interest and therefore the Commission should not modify or repeal the satellite DARS anti-merger rule to facilitate the merger.

Applicants’ Merger Application and Joint Opposition are remarkable in that they do not take issue with any of these fundamental conclusions regarding treatment of the merger under existing precedent. Rather, Applicants assert that the Commission should disregard Commission and antitrust precedent and ignore the impact of the proposed merger on the national satellite DARS market.<sup>66</sup> Applicants argue the Commission should instead apply a newly-created standard specifically tailored to their allegedly “unique” circumstances.<sup>67</sup> Specifically, Applicants urge the Commission to evaluate the proposed merger in the context of a previously-unrecognized “audio entertainment” market that is broader than satellite DARS alone and

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<sup>63</sup> *Id.*, Declaration of Ken Stern at 3-4. By way of contrast, it is the local non-commercial educational stations themselves “that determine what [NPR programming] to broadcast, and programming decisions vary from station-to-station.” *Id.* at 4.

<sup>64</sup> *See* Consumer Groups Petition to Deny at 1-2; *see also id.* at 14-25.

<sup>65</sup> *See, e.g.*, NAB Response to Comments at 17-20, citing Consumer Groups Petition to Deny at 42, 44-45; Independent Spanish Broadcasters Ass’n (“ISBA”) Board Letter on XM and Sirius Merger at 1-2 (dated July 6, 2007, filed July 9, 2007); NPR Petition to Deny at 5; C3SR Petition to Deny at 19; Comments of Bert W. King at ¶¶ 56-66; Petition to Deny of the Telecommunications Advocacy Project at 3-6 (July 9, 2007); Comments of Clear Channel Communications Inc. at 5-8 (July 9, 2007). In addition, NAB submitted substantial evidence demonstrating that the proposed merger would pose a significant threat to the important public interests served by localism. *See* NAB Response to Comments at 20-22 and Exhibit A, Declaration of Steven S. Wildman.

<sup>66</sup> *See generally* Opposition at 56-57; *see also* NAB Reply to Opposition at 5-6.

<sup>67</sup> *See* Opposition at 56-57.

includes numerous other audio sources such as local radio, HD radio, IP radio, CD players, cellphones, and iPods.<sup>68</sup> Applicants' arguments in this regard are unsupported by Commission precedent and are without merit.

Put simply, the fact that consumers can listen to music and a variety of other audio content through satellite radio and numerous other audio devices says nothing about whether all of these devices constitute the relevant product market for purposes of the Commission's merger analysis, as Applicants suggest. Alternative audio sources such as local radio, HD radio, iPods, MP3 players, CD players, *etc.*, should be considered part of the relevant product market only if they constrain satellite DARS pricing.<sup>69</sup> These other audio products and services, however, *do not* price constrain satellite DARS, which is the relevant test under the *DOJ/FTC Merger Guidelines*.<sup>70</sup> Indeed, simple common sense dictates that no one would be willing to pay for satellite radio if that service were roughly the same thing as free, local radio, or audio devices such as iPods and MP3 players. As such, there is no basis for the Commission to expand the relevant product market beyond the market for national satellite DARS defined by the Commission earlier this year.<sup>71</sup>

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<sup>68</sup> See, e.g., Merger Application at iii; Thomas W. Hazlett, *The Economics of the Satellite Radio Merger* at 4 (June 14, 2007); Harold Furchtgott-Roth, *An Economic Review of the Proposed Merger of XM and Sirius* at 1 (June 27, 2007); Opposition at 35-52.

<sup>69</sup> Sidak Supplemental Decl. at 11 ¶ 14.

<sup>70</sup> See Horizontal Merger Guidelines, issued by the U.S. Department of Justice and the Federal Trade Commission §§ 1.11, 1.12 (Apr. 2, 1992, revised Apr. 8, 1997) ("*DOJ/FTC Merger Guidelines*"); see also NAB Response to Comments at 11-12, citing Sidak Supplemental Decl. at 8-14 ¶¶ 17-24; Consumer Groups Petition to Deny at 36; Comments of Entravision Holdings, LLC ("*Entravision*") at 10-11 (July 9, 2007); NPR Petition to Deny at 9-10; Bert King Comments at ¶ 19.

<sup>71</sup> See *Annual Report and Analysis of Competitive Market Conditions with Respect to Domestic and Int'l Satellite Communications Services*, 22 FCC Rcd 5954, 5973 ¶ 55 (2007) (Describing the relevant product market as "satellite audio programming provided to persons within the United States for a fee."); see also *id.* at 5973 ¶ 56 ("We find the geographic aspects of this market to be national. Individual customers face the same nationwide-licensed choices throughout the 48 contiguous states. Although each user is in one locality, the major participants in the market serve the entire country with mostly the same content.").

Disregarding the price constraint test for purposes of this merger, as urged by Applicants,<sup>72</sup> would require the Commission to ignore more than a decade of precedent applying the price constraint test in merger proceedings.<sup>73</sup> Discarding precedent as Applicants suggest would also make it difficult for any merger grant here to be sustained in court.<sup>74</sup>

Applicants also make virtually no effort to justify their proposed merger-to-monopoly with “extraordinarily large, cognizable, and non-speculative efficiencies” that would outweigh the anti-competitive harms that would result from the merger.<sup>75</sup> The core of Applicants’ defense in this regard is that the merged entity will offer new programming bundles with prices ranging from \$6.99 to \$16.99.<sup>76</sup> Applicants, however, have refused to bind themselves to these new service offerings and new rates, reserving the discretion to change them at any time.<sup>77</sup>

Applicants also have made no effort to demonstrate that any of these new service offerings and pricing plans could not be accomplished absent the merger. Rather, Applicants make clear that they will not to provide the new offerings unless they are allowed to merge.<sup>78</sup> Similarly, Sirius recently declared that it will not even begin to develop a consumer-friendly, interoperable radio

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<sup>72</sup> Opposition at 56-57.

<sup>73</sup> See, NAB Reply to Opposition at 5-6, citing *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, 22 FCC Rcd 5662, 5676 nn.85 and 86 (2007); *DOJ/FTC Merger Guidelines* at §§ 1.11, 1.12 ; *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20605-6 ¶ 106.

<sup>74</sup> See NAB Reply to Opposition at 6.

<sup>75</sup> See, e.g., *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20604 ¶ 102.

<sup>76</sup> Opposition at Exhibits B and C.

<sup>77</sup> *Id.* at 13-14 n.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. . . . [O]ver time, programming and other costs likely will increase and these factors might impact future pricing decisions.”).

<sup>78</sup> See “Sirius-XM Merger Will Harm Public Radio Programmers, Says NPR,” PUBLIC BROADCASTING REPORT (August 3, 2007) (“Sirius said it won't offer channels a la carte to subscribers if the merger isn't approved. ‘If the merger was not going to happen, we would have no plans to offer a la carte,’ Sirius CEO Mel Karmazin said.”).

unless Sirius and XM are permitted to merge, despite the Commission's decade-old requirement that the satellite radio providers produce such a device.<sup>79</sup>

Moreover, it is not clear that new service offerings and pricing plans provide any real benefits to existing customers.<sup>80</sup> For example, Applicants' much-publicized "à la carte" packages will require subscribers to pay a premium while giving up channels that are available in the base subscription.<sup>81</sup> À La Carte I, for example, theoretically offers a lower entry point of \$6.99. This "benefit," however, is illusory because it is limited to 50 channels from either service (but not both) and customers cannot choose sports play-by-play or premium talk stations without paying additional premiums and customers can only have access to this lower point of entry if, at an unstated cost, they buy a "next generation receiver" that has not even been developed.<sup>82</sup> Similarly, À La Carte II is limited to 100 channels from either service (with an option to choose from 11 company-selected channels on the other service).<sup>83</sup> Also, the à la carte packages will not even be available to the 14 million existing subscribers, unless the subscribers purchase new "next generation receivers" that will not be available for up to a year after any merger is consummated, presumably to permit the development of such "next generation"

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<sup>79</sup> See "XM-Sirius A La Carte Would Start By 2008 Holiday Season, Karmazin Says," SATELLITE WEEK (Aug. 6, 2007) ("That said, if the merger goes through, I'm very positive that we will very, very aggressively go after an integrated chipset' that would at long last make possible the first interoperable XM-Sirius receivers, Meyer said. It would take one to 2-1/2 years after the merger to develop such a chipset, depending on 'what features we decided to put in it,' he said. 'We won't be able to begin that work until it's clear that the merger's approved.'").

<sup>80</sup> See Letter from Larry Walke, National Association of Broadcasters to Marlene H. Dortch, Secretary, Federal Communications Commission (August 8, 2007) ("August 8 *Ex Parte* Notice"), Attachment 2, "Where's the Deal? XM/Sirius À La Carte = À La Sham for Consumers."

<sup>81</sup> See *id.*; see also NAB Reply to Opposition at 8-9, citing Opposition at Exhibits B and C.

<sup>82</sup> August 8 *Ex Parte* Notice, Attachment 2; Opposition at Exhibits B and C.

<sup>83</sup> August 8 *Ex Parte* Notice, Attachment 2; Opposition at Exhibits B and C.

receivers.<sup>84</sup> In short, Applicants' proposed new service offerings are illusory at best. The new service offerings will require subscribers to pay more on a per-channel basis for fewer channels in order to exercise limited à la carte options or to access high-value, mass-market programming from both XM and Sirius.

It is hard to understand how consumers benefit from being able to buy significantly fewer channels for more money per channel. In addition, by reducing the number of channels available in order to promote these premium tier service offerings, Applicants' plans would effectively diminish the availability of niche programming. As the Independent Spanish Broadcasters Association ("ISBA") pointed out, both "XM and Sirius are heavily invested in mass-appeal specialized programming . . . [and] this programming will surely be given priority over any additional opportunities for Latino programming, after the merger. . . . [S]pace will be made by eliminating niche programming, which will probably include channels dedicated to the Latino community."<sup>85</sup>

Finally, neither these promises offered by the Applicants nor any other proposed conditions aimed at eliminating the anti-competitive harms associated with the proposed merger would be sufficient to protect against such harms. Given their history of pervasive violations of Commission rules and authorizations, Applicants simply cannot be relied on to keep their promises and comply with any regulatory conditions that might be imposed.<sup>86</sup> As a result of this fact, along with the vast array of substantial and material questions of fact regarding the anti-competitive consequences of the proposed merger and the lack of offsetting public interest

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<sup>84</sup> See Opposition at 14.

<sup>85</sup> ISBA Board Letter on XM and Sirius Merger at 1-2 (dated July 6, 2007, filed July 9, 2007).

<sup>86</sup> See NAB Petition to Deny at 50-58, NAB Response to Comments at 26-27, citing Entravision Comments at 19-20; NABOB Petition to Deny at 8; NAB Reply to Opposition at 10-11.

benefits, as well as the merger's inconsistency with Commission spectrum policy, the Commission should, at a minimum, designate the application for hearing before an administrative law judge.

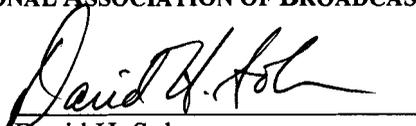
## V. CONCLUSION

For the reasons set forth above, the satellite DARS merger prohibition is a binding substantive rule barring the proposed merger. Further, the Commission may not waive the rule because waiver would effectively eviscerate the rule. Finally, the Commission should not modify or repeal the rule to facilitate the merger. Instead, NAB urges the Commission to dismiss the Merger Application for violation of the Commission's anti-satellite DARS merger rule. At the very least, the Commission must designate the Merger Application for hearing in light of the substantial and material questions of fact regarding whether the proposed merger would serve the public interest.

Respectfully submitted,

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August 13, 2007

## CERTIFICATE OF SERVICE

I, Sarah D. Gutschow, hereby certify that, on this 13<sup>th</sup> day of August, 2007, copies of the forgoing Comments of the National Association of Broadcasters were delivered via United States mail, first class postage prepaid, to the following:

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