

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

In the Matter of )  
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Applications for Consent to the Transfer ) MB Docket No. 07-57  
Of Control of License, XM Satellite )  
Radio Holdings, Inc., Transferor, )  
to Sirius Satellite Radio, Inc., Transferee )  
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To: The Commission  
**ELECTRONICALLY SUBMITTED**

**COMMENTS OF**  
**SAGA COMMUNICATIONS, INC.**  
**OPPOSING WAIVER, MODIFICATION OR REPEAL OF MERGER**  
**PROHIBITION**

Saga Communications, Inc. (“Saga”)<sup>1</sup>, respectfully files these comments on the Notice of Proposed Rule Making (“NPRM”), *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings, Inc., Transferor, to Sirius Satellite Radio, Inc., Transferee*, 72 Fed. Reg. 38055, published July 12, 2007.<sup>2</sup>

XM Satellite Radio Holdings, Inc. (“XM”), and Sirius Satellite Radio, Inc. (“Sirius”), are Digital Audio Radio Satellite Service (“DARS”) companies

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<sup>1</sup> Saga Communications, Inc. is a broadcasting company whose business is devoted to acquiring, developing and operating broadcast properties. The company owns or operates broadcast properties in 26 markets, including 59 FM and 30 AM radio stations, state radio networks, farm radio networks, television stations and low-power television stations.

<sup>2</sup> Pursuant to the NPRM, interested parties may file comments on or before August 13, 2007, so these comments are timely filed.

that provide satellite-delivered programs to listeners who pay a subscription fee. As set forth in the NPRM, the proposed transfer of control of XM to Sirius conflicts with language which prohibits the combination of the licenses and authorizations held by XM and Sirius into a single entity. The precise question posed by the NPRM is “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.” Without question, the rule is a binding one, and should not be waived, modified or repealed.

In *Digital Audio Radio Satellite Service*, 12 FCC Rcd 5754 (1997) (“*DARS Order*”), at ¶ 77, the Commission, creating DARS, expressed concern that, “Although spectrum constraints limit us to licensing just two satellite DARS systems at this time, our licensing approach nonetheless provides the opportunity for a competitive DARS service. Our goal is to create as competitive a market structure as possible, while permitting each DARS provider to offer sufficient channels for a viable service.” The rationale was that in establishing two competitive services, subscription rates would be competitive and the competing services would provide for diversity of program voices.

To ensure this healthy competition, the FCC, without equivocation, prohibited any future merger of the DARS licensees:

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>3</sup>

That language was published in the Federal Register at 62 Fed. Reg. 11083, 11102, published March 11, 1997, giving the prohibition binding legal effect. That fact easily answers the Commission's question posed in the NPRM. The prohibition **is a binding one**.

To answer the Commission's corollary question, i.e., whether the Commission should waive, modify or repeal the prohibition, there is absolutely no reason to do so. XM and Sirius went into the DARS business with eyes wide open. They knew that the Commission required competition and that they would not be permitted to merge in the future. Ironically, in 1995, the predecessor to Sirius, then called CD Radio Inc. ("CDR"), proposed this anti-merger prohibition:

Rules and policies that allow aggregation would encourage an evolution toward a smaller number of satellite DARS systems than the available spectrum will support, *i.e.*, four, as shown above. Such a development would have serious anticompetitive repercussions. A single combination of two DARS systems would give one licensee control of half of the spectrum and automatically put the other two licensees at a serious competitive disadvantage. As a result, the two systems would have no practical choice but to combine themselves. The remaining duopoly would mean not only a fifty percent reduction in the diversity of programming sources but potentially a lessening of price competition. [fn 31] [fn 31: "In addition, the prospects for a DARS monopoly would loom on the horizon."].<sup>4</sup>

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<sup>3</sup> *DARS Order* at ¶ 170.

<sup>4</sup> *See* Comments of CDR filed September 15, 1995, in IB Docket No. 95-91 at p. 18 and footnote 31.

CDR went on to state:

In sum, the Commission should license the four applicants, if qualified, and preserve the possibility of four satellite DARS systems – a number sufficient to ensure competition and diversity of programming [footnote 36].<sup>5</sup>

Saga fully agrees with this line of reasoning put forth in 1995 and sees no reason why Sirius should be permitted to retreat from it in 2007. When it seemed important to persuade the Commission to approve DARS, CDR argued for the prohibition 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. Now, seeking support for their hoped-for merger, XM and Sirius would like to take back those words, but may not do so.

Permitting XM and Sirius to merge as proposed would violate the DARS anti-merger prohibition and would be inconsistent with the whole body of anti-trust law favoring competition over monopoly. Waiver, modification or repeal of the rule would also run contra to previous Commission decisions. In *EchoStar Communications Corp.*, 17 FCC Rcd 20559, at ¶ 25 (2002) (“*EchoStar*”), the Commission refused to permit the merger of the only two nationwide direct broadcast television service (“DBS”) licensees because of

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<sup>5</sup> In footnote 36, referenced above, CDR provided a draft proposed revised Section 25.214(b)(6) of the FCC’s rules, which would provide: “No satellite DARS licensee may combine spectrum or services with another satellite DARS licensee where the effect of such action would be to aggregate the frequencies available to each.” The Commission declined to adopt the suggested revised rule section.

the Commission's concern that such a merger could undermine the Commission's goals of increased and fair competition in the provision of DBS service. The Commission was also concerned that the "claimed benefits of efficient and expeditious use of spectrum are outweighed by the potential harms associated with the concentration of ownership of key DBS spectrum licenses in a single licensee."<sup>6</sup> The same reasoning must be applied to reject the XM/Sirius proposal.

For the above reasons, Saga respectfully urges the Commission not to disturb the prohibition on a merger of the two DARS licensees.

Respectfully submitted,

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Its Attorney

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<sup>6</sup> *Echostar*, 17 FCC Rcd at 20562 ¶ 3.

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August 13, 2007