

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

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

COMMENTS OF CLEAR CHANNEL COMMUNICATIONS, INC.

Clear Channel Communications, Inc. (“Clear Channel”)¹ respectfully submits these comments in response to the *Notice of Proposed Rule Making*, FCC 07-119, released June 27, 2007 (the “*NPRM*”)² in the above-captioned proceeding. This *NPRM* directly relates to the above-referenced Applications of XM Satellite Radio Holdings Inc. (“XM”), Transferor, and Sirius Satellite Radio Inc. (“Sirius”), Transferee (collectively, the “Applicants” and the “Application”), seeking consent to transfer control of Commission licenses and authorizations held by Sirius, XM, and their subsidiaries pursuant to Section 310(d) of the Communications Act

¹ Clear Channel Communications, Inc. is a global media and entertainment company specializing in "gone-from-home" entertainment and information services for local communities. Clear Channel owns 1,168 local radio stations and a leading national radio network operating in the United States that produces or distributes more than 70 syndicated radio programs and services for more than 5,000 radio station affiliations.

² See *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, MB Docket No. 07-57, FCC 07-119 (rel. June 27, 2007) (“*NPRM*”), 72 FR 38055 (July 12, 2007).

of 1934, as amended.³ The Commission should determine that allowing a merger between XM and Sirius would violate its binding rule of prohibiting one licensee from acquiring control of all satellite digital audio radio service (“SDARS”) licenses. In addition, the Commission should decline to allow a waiver of this binding rule, as such a waiver would not be in the public interest.

I. THE COMMISSION’S PROHIBITION AGAINST ONE LICENSEE ACQUIRING CONTROL OF ALL SDARS LICENSES HAS THE FORCE AND EFFECT OF LAW. ITS ENFORCEMENT COMPELS DISAPPROVAL OF THE APPLICATION

The Commission seeks comment on the Applicants’ contention that the Commission rule prohibiting one licensee from acquiring control of all SDARS licenses is merely a “policy statement under the Administrative Procedure Act (“APA”) rather than a binding Commission rule because it was not codified in the Code of Federal Regulations.”⁴ Applicants’ contention is wrong as a matter of law. As noted previously by Clear Channel, pursuant to Section 310(d) of the Communications Act, the first prong of the Commission’s test for approving the transfer of licenses necessary for a merger of XM and Sirius as being in “the public interest, convenience and necessity”⁵ is to determine “whether the proposed transaction complies with the specific provisions of the [Communications] Act, other applicable statutes and the Commission’s rules.”⁶

³ See 47 U.S.C. § 310(d); Applications of XM Satellite Radio Holdings Inc., Transferor, and Sirius Satellite Radio Inc., Transferee, For Consent to Transfer Control, DA-2417, MB Docket No. 07-57 (June 8, 2007). Clear Channel hereby incorporates by reference its Comments filed in this proceeding.

⁴ *NPRM* at para. 3.

⁵ 47 U.S.C. § 310(d).

⁶ See AT&T Corp. Applications for Approval of Transfer of Control, 20 FCC Rcd 18290, 18300 ¶ 16 (2005); *Application of EchoStar Communications Corporation (A Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations)*, 17 FCC Rcd 20559, 20574 ¶ 25 (2002) (“*Echostar/DirecTV Merger Order*”).

Indeed, the Commission may dismiss or deny without a hearing any license transfer or assignment application that violates a threshold eligibility rule.⁷

Applicants rely on the fact that the SDARS ownership prohibition was not codified in the Code of Federal Regulations to support their assertion that the rule is not binding. Codification in the Code of Federal Regulations is not a requirement for a rule to become binding. The Commission contemporaneously published this rule in the Federal Register, which gives it binding legal effect as an “uncodified” substantive rule.⁸ Indeed, in other situations the Commission has promulgated rules in Report and Orders, and even considered waivers of such uncodified rules.⁹ For example, the Commission confirmed that the general rule regarding BOCs providing interLATA service, like other conclusions in its Non-Accounting Safeguards Order and in the First Order on Consideration, “is binding regardless of whether it is codified in the C.F.R.”¹⁰ In addition, the Common Carrier Bureau of the Commission, in a Memorandum Opinion and Order, noted that its cellular resale rule was “a binding, uncodified substantive rule adopted through notice and comment rulemaking” and the requirement was adopted “using

⁷ See *Mobile Oil Exploration & Producing Southeast, Inc. v. United Distrib. Cos.*, 498 U.S. 211 (1991); *Heckler v. Campbell*, 461 U.S. 458 (1983); *Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405 (D.C. Cir. 1991); *Hispanic Info. & Telecom Network, Inc. v. FCC*, 865 F.2d 1289 (D.C. Cir. 1989).

⁸ See *Appalachian Power Co. v. Train*, 566 F.2d 451, 455 (4th Cir. 1997) (“an agency regulation imposing specific obligations upon outside interests in mandatory terms . . . is required to be published in the Federal Register in its entirety”).

⁹ See *In the Matter of Amendment of the Television Table of Allotments to Delete Noncommercial Reservation of Channel 39, 620-626 MHz, Phoenix, Arizona, and to Add Noncommercial Reservation on Channel 11, 198-204 MHz, Holbrook, Arizona*, Memorandum Opinion and Order, 20 FCC Rcd 16854 (rel. Oct. 13, 2005) (Commission considered a request for waiver of the Commission’s policy disfavoring dereservation of reserved noncommercial educational channels and the uncodified rule requiring opening of dereserved channels for competing applications); see also *In the Matter of Amendment of the Television Table of Allotments to Delete Noncommercial Reservation of Channel 16, 482-488 MHz, Pittsburgh, Pennsylvania*, Report and Order, 17 FCC Rcd 14038 (rel. Jul. 18, 2002) (Commission considered a request for waiver of the uncodified rule that newly dereserved channels be made available for competing applications).

¹⁰ See *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, Third Order on Reconsideration, 1999 WL 781649 (rel Oct. 1, 1999); see also *Iowa utilities Bd. v. FCC*, 120 F.3d 753, 803 (8th Cir. 1997) (stating that the provisions of an FCC order, and the rules adopted therein, are equally enforceable), *rev'd in part and aff'd in part, AT&T Corp., et al. v. Iowa Utils. Bd. et al.*, 525 U.S. 366 (1999),

clearly mandatory terms” (including “prohibit,” “must,” and “requirement”).¹¹ Indeed, the United States Court of Appeals for the D.C. Circuit has noted that in a determination of whether a statement is an agency rule or a policy statement that “courts are to give far greater weight to the language actually used by the agency; we have, for example, found decisive the choice between the words “will” and “may.”¹² Even more significantly, the cellular resale rule was not in the Code of Federal Regulations, but was clearly intended and interpreted by the Commission to be a binding rule. Additionally, the Common Carrier Bureau noted that the D.C. Circuit Court of Appeals affirmed the Commission’s cellular resale rules “in terms that support the proposition that the requirement is a binding (albeit uncodified) rule.”¹³

In this case, the Commission’s prohibition on a single licensee acquiring control of all SDARS licenses is clearly a binding rule, not a policy statement. This prohibition was published in a Commission Memorandum Opinion and Order — a notice and comment proceeding which was subject to extensive comment – and was further published, in its entirety, in the Federal Register. In addition, the Commission also clearly intended this rule to be binding on SDARS providers, as it used mandatory language to describe this intention. These mandatory terms were similar to the aforementioned Memorandum Opinion and Order regarding cellular resale to express its intention for the rule to be binding (“will not be permitted,” and “prohibition”). It is clear that the Commission intended this rule to be a substantive rule which would impose a legal obligation on SDARS licensees not to merge and a legal obligation on the

¹¹ See *Cellnet Communications, Inc. v. Detroit Limited Partnership*, Memorandum Opinion and Order, 9 FCC Rcd 3341, para 13 (rel. July 8, 1994); see also Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, to Mr. Edward P. Cunningham, Northside Community Council, 20 FCC Rcd 12001 (Jul. 7, 2005) (The Commission made clear that the rule changes adopted in the Commission’s Report and Order were to apply to pending applications. The fact that the rule was not yet codified in the Code of Federal Regulations did not affect the decision, and the decision was published in the Federal Register, giving the licensee proper notice).

¹² See *Community Nutrition Institute v. Young*, 818 F.2d 943, 947, ft. nt. 8 (D.C. Cir. 1987).

¹³ See *Cellnet Communications, Inc. v. Detroit Limited Partnership*, Memorandum Opinion and Order, 9 FCC Rcd 3341, para. 13. (rel. July 8, 1994).

Commission not to approve any such merger. In particular, in the *Satellite DARS Order*, the Commission noted that “[I]icensing at least two service providers will help ensure that subscription rates are competitive as well as provide for a diversity of program voices”¹⁴ This determination was reflected in this ownership prohibition.

Moreover, the Applicants had clear notice and understanding of this rule. The rule was published in a Report and Order by the Commission, as well as was published in the Federal Register – with the exact same language as was used in the Report and Order. Applicants have had full knowledge of this binding requirement for ten years, and the language used by the Commission in the *Satellite DARS Order* made clear that the rule would be applied going forward and would be binding.

Thus, it is readily apparent that the Commission’s SDARS ownership prohibition is a binding rule, and should preclude any further consideration of the Sirius/XM transaction absent a waiver or modification of that rule.

II. ASSUMING ARGUENDO THAT THE COMMISSION DETERMINES THAT THE COMMISSION’S SDARS OWNERSHIP PROHIBITION IS ONLY A POLICY STATEMENT, THE APPLICANTS STILL MUST MEET THE HEAVY BURDEN OF OBTAINING A WAIVER FROM THE COMMISSION

Assuming arguendo that the Commission determines that its prohibition against one SDARS licensee acquiring all SDARS licenses is a policy statement, rather than a binding rule, Applicants still must meet the heavy burden needed to obtain a waiver from the Commission. Indeed, the Commission has noted that “[w]hen analyzing a request for waiver of Commission rules or policies . . . an applicant for waiver faces a high hurdle even at the starting gate.”¹⁵ The Commission’s prohibition against allowing one licensee to acquire control of all remaining

¹⁴ *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd 5754, 5823, para. 78. (1997) (“*Satellite DARS Order*”).

¹⁵ See *supra* note 9 at para. 16.

SDARS licenses was established in clear terms by the Commission, and the bar for a waiver is high regardless of whether the prohibition is considered a rule or a policy statement.¹⁶ Indeed, a policy statement reflects the Commission's determination of what is in the public interest – and thus the Commission would have to make a new significant finding – contrary to its past precedent – that reversing the policy statement is now in the public interest. The Commission clearly intended for this prohibition to be carried out on a going forward basis, and thus a significant reversal of the Commission's past practices and precedent would be necessary to overturn the prohibition – whether the prohibition is considered a rule or a policy statement.

III. APPLICANTS DO NOT MEET THE HEAVY BURDEN FOR A WAIVER OF THE COMMISSION'S SDARS OWNERSHIP PROHIBITION

The record in this proceeding demonstrates that the Applicants would not meet the high threshold necessary for a waiver of the Commission's SDARS ownership prohibition. In particular, Clear Channel notes that a waiver of this prohibition would be inconsistent with the Commission's long settled policy of promoting intramodal competition. Indeed, the rule prohibiting one licensee from acquiring control of the remaining SDARS license specifically reflects the Commission's determination that intramodal competition is critical. The *Satellite DARS Order* stated that the ownership prohibition rule was intended to “assure sufficient continuing competition in the provision of SDARS service.”¹⁷ Approval of the proposed merger and the creation of an intramodal SDARS monopoly would be inconsistent with the purposes behind the SDARS ownership prohibition, as well as contrary to long-standing Commission

¹⁶ Under Section 1.3 of the Commission's rules, the Commission is given the power to suspend, revoke, amend or waive its rules, either on its own motion or by petition upon a showing of good cause. The Commission may waive its rules if a party can demonstrate that in the public interest, the rule should be waived. A waiver is appropriate if (1) special circumstances warrant a deviation from the general rule; and, (2) such deviation from the rule would better serve the public interest than would strict adherence to the general rule. *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990). The Application does not meet this heavy burden.

¹⁷ See *Satellite DARS Order* at para. 170.

precedent and congressional policy favoring intramodal competition. This policy spans multiple services – including cellular, PCS, CMRS, and DBS.¹⁸ As AAI has stated, “Applicants have the burden of persuading the Commission to . . . abandon its ‘long-standing policy of promoting competition in the delivery of spectrum based communications service’ (intramodal competition).”¹⁹ This point was noted by the Commission in the *Echostar/DirectTV Merger Order* -- “the combination of Echostar and DirectTV would eliminate the viable facilities-based intramodal competition that exists in a market with high barriers to entry.”²⁰ This same concern exists with respect to the SDARS service today. Applicants have provided no reasonable or credible justification for removing such a cornerstone of decades old Commission policy and precedent.

Further, granting a waiver in this case would be wholly inconsistent with the local ownership restrictions currently imposed on terrestrial radio broadcasters. There is no rational competition or public policy justification for permitting the merger of the only two satellite radio providers, who offer consumers unique service options not available through any other medium, while at the same time retaining on terrestrial broadcasters stringent ownership caps that are not warranted – even from a purely intramodal standpoint. Indeed, if intermodal competition were to underlie any Commission decision to grant a waiver in this case, there could be no competition policy basis to continue to impose any local radio ownership limits on terrestrial broadcasters. If the Commission were to waive the SDARS ownership prohibition rule, it would be compelled to reconsider other rules that it currently has in place regarding ownership restrictions on local radio intramodal competition and eliminate them. Any decision by the Commission to waive or

¹⁸ Comments of Clear Channel at 3-4.

¹⁹ See Ex parte of Richard M. Brunell, American Antitrust Institute (“AAI”), MB Docket No. 07-57 (June 5, 2007) at 4 (citing *Echostar/DirectTV Merger Order*, 17 FCC Rcd at 20559, 20598, para. 88).

²⁰ See *Echostar/DirectTV Merger Order* at para. 281.

modify the SDARS ownership prohibition, without a corresponding removal of the local radio ownership rules, could not be justified under any rational competition or public policy grounds, and would amount to unfair and inequitable regulation

For these reasons, the Commission should hold that the prohibition against a single entity holding all of the SDARS licenses is a binding rule, and should further determine that a waiver of that rule is not warranted, and is certainly not in the public interest.

Respectfully Submitted,



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August 13, 2007