

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

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

**CONSOLIDATED COMMENTS OF SIRIUS SATELLITE RADIO INC.
AND XM SATELLITE RADIO HOLDINGS INC.**

Sirius Satellite Radio Inc. (“Sirius”) and XM Satellite Radio Holdings Inc. (“XM,” and with Sirius, the “Applicants”) respectfully submit these comments in response to the Commission’s Notice of Proposed Rulemaking (“NPRM”), issued in connection with the Applicants’ pending merger.¹ The NPRM addresses a statement made by the FCC over ten years ago when it first authorized satellite radio as a service, which noted a possible limitation on the transfer of satellite radio licenses.² In particular, the NPRM asks whether this statement is a

¹ *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 (rel. June 27, 2007), 72 Fed. Reg. 38055 (July 12, 2007) (“NPRM”).

² *Id.* ¶ 2 (citing *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Report and Order, Mem. Op. and Order and

binding Commission rule that prohibits the merger and, if so, whether the agency should waive, modify, or repeal it.³ The Applicants respectfully submit that, although they believe no rule prohibits the merger, the FCC has full authority and discretion in these proceedings to waive, modify, or repeal any possible transfer restriction, even if it were a binding rule. Because the merger is in the public interest, it follows that the agency should do so.

BACKGROUND AND SUMMARY

In March 1997, the FCC authorized licensees to provide satellite radio.⁴ In doing so, the Commission promulgated various rules to govern this new service, which it appended to its order and later published in the Code of Federal Regulations.⁵ In addition, the agency observed that satellite radio “licensees, like other satellite licensees, will be subject to rule 25.118.”⁶ That rule, now Section 25.119, implements the statutory requirement that the Commission grant transfer applications if doing so is in the public interest,⁷ and sets forth the basic procedures for filing an application.⁸ The FCC further stated, “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.”⁹ This statement, however, was not included or otherwise

Further Notice of Proposed Rulemaking, 12 FCC Rcd 5754, 5823 (¶ 170) (1997) (“*Satellite Radio Authorization Order*”).

³ *Id.* ¶ 1.

⁴ *See generally* *Satellite Radio Authorization Order*.

⁵ *See id.* Appendix A.

⁶ *Id.* at 5823 ¶ 170.

⁷ 47 U.S.C. § 310(d).

⁸ *See* 47 C.F.R. § 25.119.

⁹ *Satellite Radio Authorization Order* at 5823 ¶ 170.

embodied in the rules promulgated by the Commission and thus not codified in the Code of Federal Regulations.

The core inquiry in the NPRM is whether this quoted language, though uncodified in the Commission's rules, nevertheless bars the license transfers that the Applicants propose. As explained below and in the Applicants' prior filings in this docket, it does not. In fact, while Sirius and XM believe that the language in question is a policy statement reflecting the FCC's understanding of competition in 1997, not a rule adopted to bind the Commission's broad discretion to promote the public interest in 2007, the question is academic: by issuing the NPRM, the Commission has full rulemaking authority to repeal or appropriately modify this uncodified "rule," and the record compiled in this docket provides compelling justification to do so. Because the agency's consideration of the pending merger and the 1997 transfer language both involve application of the *same* public interest standard to the *same* set of facts, a conclusion with respect to the Consolidated Application that the pending merger promotes the public interest logically and legally compels repeal or appropriate modification of the transfer language.

DISCUSSION

I. WHETHER THE 1997 LANGUAGE IS CONSIDERED A POLICY STATEMENT OR AN UNCODIFIED RULE, THE COMMISSION MAY WAIVE, MODIFY, OR REPEAL IT.

For the reasons detailed in their Consolidated Application,¹⁰ Sirius and XM continue to urge that the best interpretation of the decade-old transfer limitation is that it was a non-binding general statement of policy. As Sirius and XM explained, the most telling indication of the Commission's intent was its failure to publish the limitation in the Code of Federal

¹⁰ See Consolidated Application for Authority to Transfer Control, MB Docket 07-57, at 50 (filed Mar. 20, 2007) ("Consolidated Application"), which the Applicants incorporate by reference.

Regulations—in specific contrast to the Commission’s adoption of a published rule governing transfers of satellite radio licenses.¹¹ This codified rule, 47 C.F.R. § 25.119, explicitly preserves the FCC’s discretion,¹² allowing the agency to allow a license transfer if it concludes that doing so is “in the public interest.”¹³

For these reasons, and as set forth in more detail in the Consolidated Application, the companies believe that the uncodified 1997 language does not control the outcome of the pending merger, and that the FCC retains full discretion to grant the companies’ transfer applications.¹⁴ However, as a matter of administrative procedure, the Commission by issuing this NPRM has essentially made moot the question of whether the language is a policy statement or a binding rule. Even if the agency determines that the 1997 language is an uncodified rule, the Commission may now clearly modify or delete the rule through the rulemaking process¹⁵—an ability that even opponents of the merger acknowledge.¹⁶

¹¹ 47 C.F.R. § 25.119. *See, e.g., Wilderness Soc’y v. Norton*, 434 F.3d 584, 596 (D.C. Cir. 2006) (“The real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations, which the [Administrative Procedure Act] authorizes to contain only documents ‘having general applicability *and legal effect*,’ and which the governing regulations provide shall contain only ‘each Federal *regulation* of general applicability and current or future effect.’”); *Fla. Power & Light Co. v. EPA*, 145 F.3d 1414, 1418 (D.C. Cir. 1998) (statement published in the Federal Register, but not C.F.R., was not a rule); *Am. Portland Cement Alliance v. EPA*, 101 F.3d 772, 776 (D.C. Cir. 1996).

¹² *See Wilderness Soc’y v. Norton*, 434 F.3d at 596 (a defining characteristic of a rule is the “intent on the part of the agency to limit its discretion”).

¹³ 47 C.F.R. § 25.119. *See also FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) (public interest standard “a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy”).

¹⁴ *See Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (agency reserves discretion and authority to revise non-binding policy statements, “even abruptly”).

¹⁵ The Commission has now issued a sufficient “[g]eneral notice of proposed rule making” in the Federal Register and is giving “interested persons an opportunity to participate in the rule making.” 5 U.S.C. § 553(b), (c). After these notice and comment proceedings, the Commission would then issue and publish the consequent rule. *Id.* § 553(c), (d). *Accord* 47 C.F.R. §§ 1.412–

II. THE COMMISSION SHOULD DETERMINE THAT THE PROPOSED TRANSACTION SERVES THE PUBLIC INTEREST, NOTWITHSTANDING THE 1997 TRANSFER LANGUAGE.

Whether or not the FCC views the 1997 language as a policy statement or an uncodified rule, the Commission should determine that the pending transaction serves the public interest, a conclusion that would override the 1997 statement. The agency's inquiries with respect to the Consolidated Application and the rulemaking are substantively the same. As the Commission recognizes,¹⁷ the Consolidated Application and the proposed rulemaking involve the same facts viewed through the same standard—namely, whether allowing one entity to hold two licenses promotes the public interest.¹⁸ Further, the Commission's general rules about licensing and its decisions about particular license applications are also subject to the same standard of judicial review—namely, whether the Commission's determination of the public interest is arbitrary and capricious.¹⁹ Thus, a finding that the merger would serve the public interest necessarily leads to the conclusion that the 1997 transfer language does not bar the merger.

1.419 (same). No other procedures are required to satisfy the Administrative Procedure Act. *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978). The NPRM also properly certifies pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 506(b), that the rulemaking will not have a significant economic impact on small entities, since only large business operators will be subject to any ensuing rule. NPRM ¶ 5. *See Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001).

¹⁶ *See* Comments of Clear Channel Communications, MB Docket No. 07-57, at 4 (filed July 9, 2007) (“While the Commission could revise or waive the SDARS anti-merger rule . . .”).

¹⁷ NPRM ¶ 3.

¹⁸ *See* 47 U.S.C. § 309(a) (application granted if it serves “the public interest, convenience and necessity”); *id.* § 310(d) (transfer allowed if it serves “the public interest, convenience, and necessity”); and 47 C.F.R. § 25.119 (transfer application granted if doing so “serve the public interest, convenience and necessity”). Although a waiver is no longer required in light of the NPRM, the Commission's rules also provide that waiver of a rule is appropriate if doing so is in the public interest. *See* 47 C.F.R. § 1.925(b)(3).

¹⁹ *Compare, e.g., GTE Service Corp. v. FCC*, 782 F.2d 263, 268–69 (D.C. Cir. 1986) (change in licensing transfer decision not arbitrary and capricious), *with Black Citizens for a Fair*

Arguments to the contrary effectively require the FCC to ignore the market realities and all of the competitive and technological developments that exist today, and to consider only the evidence that existed ten years ago. That is untenable. “An agency is not required to ‘establish rules of conduct to last forever,’ but rather ‘must be given ample latitude to adapt [its] rules and policies to the demands of changing circumstances.’”²⁰ Indeed, the Commission’s “view of what is in the public interest may change, either with or without a change in circumstances.”²¹ Accordingly, there is no expectation that the FCC “adhere blindly to regulations that are cast in doubt by new developments or better understanding of the relevant facts.”²² The Commission “is not bound to rigid adherence to precedent. It may switch rather than fight the lessons of experience,”²³ a prerogative the agency has recognized on numerous occasions.²⁴ These considerations have particular force when, as here, the Commission invokes the broad discretion

Media v. FCC, 719 F.2d 407, 417–18 (D.C. Cir. 1983) (change in licensing rules not arbitrary and capricious).

²⁰ *Rust v. Sullivan*, 500 U.S. 173, 186–87 (1991) (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42 (1983) (“*State Farm*”)). See also *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968) (agencies must be given ample latitude to “adapt their rules and policies to the demands of changing circumstances”); *Am. Trucking Assns v. Atchison, T. & S. F. R. Co.*, 387 U.S. 397, 416 (1967) (“the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice”).

²¹ *State Farm*, 463 U.S. at 57.

²² *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1565 (D.C. Cir. 1987).

²³ *Office of Communication of the United Church of Christ v. FCC*, 590 F.2d 1062, 1069 n. 26 (D.C. Cir. 1978).

²⁴ See, e.g., *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Second Report & Order, 19 FCC Rcd 13494, 13499–13500 (¶ 8) (2004); *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band*, Second Order on Reconsideration, 12 FCC Rcd 15082, 15092 (¶ 12) (1997); *Access Charge Reform*, Order, 12 FCC Rcd 10175, 10185 (¶ 23) (1997); *Amendment of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Mem. Op. and Order, 4 FCC Rcd 2711, 2715 (¶ 24) (1989).

it possesses in determining the “the public interest.”²⁵ Thus, “[i]t is now a commonplace that the reevaluation of extant policy is not, standing alone, an indicator of arbitrariness and caprice; to the contrary, it can evidence reasoned decisionmaking.”²⁶ Consequently, initial agency action and changes of rules are both tested under the same arbitrary-and-capricious review.²⁷ Under that standard, the Commission can repeal or modify the transfer language so long as it provides a “reasoned analysis” explaining its change in course,²⁸ thus showing “that prior policies and standards are being deliberately changed, not casually ignored.”²⁹ The extensive record being compiled in this docket provides more than sufficient evidence to support a reasoned rejection of the 1997 transfer language, which no longer serves its purpose.

The FCC’s authority to modify or repeal the transfer language in this proceeding is clear.³⁰ The Applicants have demonstrated at length in their Consolidated Application and subsequent filings in this docket that the transaction will serve the public interest by allowing the combined company to offer lower prices and increased choice, without harming competition in

²⁵ See *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) (Commission’s determination that the public interest was best served by a change in licensing policy receives “substantial judicial deference”); *Black Citizens for a Fair Media*, 719 F.2d at 411 (“the FCC is entitled to reconsider and revise its views as to the public interest and the means needed to protect that interest”); *id.* at 413 (“[t]here can be little question that the FCC is free under the Communications Act to alter” licensing requirements).

²⁶ *Western Union Int’l, Inc. v. FCC*, 804 F.2d 1280, 1291 (D.C. Cir. 1986).

²⁷ See, e.g., *Community Nutrition Inst. v. Block*, 749 F.2d 50, 54 (D.C. Cir. 1984) (Scalia, J) (“This standard of review is not altered by the fact that the rules here under challenge revise preexisting rules.”). *Accord Rust*, 500 U.S. at 186 (rejecting “the argument that an agency’s interpretation ‘is not entitled to deference because it represents a sharp break with prior interpretations’ of the statute in question”).

²⁸ *Rust*, 500 U.S. at 187. *Accord State Farm*, 463 U.S. at 42; *Communications Vending Corp. of Arizona, Inc. v. FCC*, 365 F.3d 1064, 1070 (D.C. Cir. 2004); *Black Citizens for a Fair Media*, 719 F.2d at 417.

²⁹ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

³⁰ See NPRM ¶ 3 n.16 (citing 47 U.S.C. §§ 151, 154(i), 303(r), and 310(d)).

the market for audio entertainment services. The Commission should grant the Consolidated Application and, to the extent necessary, repeal or appropriately modify the 1997 transfer language.

III. THE RECORD IN THIS DOCKET AMPLY DEMONSTRATES THAT THE PROPOSED MERGER IS IN THE PUBLIC INTEREST.

As the Applicants have explained at length in this docket, their proposed merger will bring consumers numerous public benefits that would not otherwise be possible.³¹ In particular, the merger will generate substantial efficiencies that will enable the combined company to:

- provide a la carte programming and a variety of other programming packages, at lower prices, including two “family friendly” packages that exclude adult-themed content as well as provide the ability to block such programming and receive a credit for doing so;
- improve upon existing products and introduce new advanced services more rapidly and with greater capabilities through a combined research and development effort;
- offer content providers increased opportunities to reach a wider audience, and, in the long run, permit more diverse offerings than are currently available on either company’s system; and
- achieve substantial cost savings that can be passed on to consumers in the form of lower prices and enhanced offerings, and safeguard the future of satellite radio.

These benefits—applauded by numerous independent groups and thousands of individual consumers who have filed comments in this docket so far³²—are precisely the type that the Commission has identified as serving the public interest.³³

³¹ The Commission uses the same docket number in connection with the Application and this rulemaking—MB Docket No. 07-57. Thus, there appears to be no legal requirement to incorporate the filings and evidence relating to the Consolidated Application into the rulemaking. However, in the event the Commission believes it necessary or useful to do so, the Applicants hereby request such incorporation by reference.

³² See, e.g., Joint Opposition to Petitions to Deny and Reply Comments of Sirius Satellite Radio Inc. & XM Satellite Radio Holdings Inc., MB Docket No. 07-57, at 3–6 (filed July 24, 2007) (“Joint Opposition”) (citing illustrative comments).

³³ See *id.* at 14–15 & n.33 (citing cases).

The combined company is committed to providing these public benefits and has every incentive to do so given the wide variety of other audio entertainment providers with which it competes. Moreover, the Applicants have provided substantial evidence—including extensive economic analyses—showing that their merger will significantly enhance, and not harm, competition in the robust marketplace for audio entertainment services.³⁴

The merit of these arguments has been underscored by the continued scorched-earth opposition of the National Association of Broadcasters and its surrogates, who have maintained a flurry of filings and press releases rehashing their prior arguments and purporting to respond to the Applicants' submissions.³⁵ As the Applicants have noted, such tactics lend further support to the inescapable conclusion that satellite radio competes in a broad market and thus that a combined provider will be unable to raise prices or restrict output without losing customers.³⁶ To the contrary, the merger will enable the combined firm to offer consumers enhanced choice and lower prices. That same evidence provides the justification to repeal or modify any language

³⁴ See generally *id.*, sections III-IV; see also *id.*, Exhibit A, Charles River Associates International, *Economic Analysis of the Competitive Effects of the Sirius - XM Merger* (July 24, 2007).

³⁵ For example, on the day that reply comments were due on the Consolidated Application, the National Association of Broadcasters (“NAB”) complained that the Applicants had not yet responded to the opening comments—something which they did later that day, as required. See National Association of Broadcasters’ Reply to Comments, MB Docket No. 07-57, at 2 (filed July 24, 2007) (“Neither the Applicants nor any party supporting the merger have provided evidence to refute [arguments against the proposed merger].”). Later, in its third substantive filing within that same week, the NAB lamented that the Applicants had provided too much evidence in their reply comments. See National Association of Broadcasters’ Reply to Opposition, MB Docket No. 07-57, at 2 (filed July 31, 2007) (“Applicants are now, at this late date, attempting to bolster their arguments with a voluminous Opposition containing multiple exhibits . . .”).

³⁶ See Joint Opposition at 7 (“terrestrial broadcasters’ scorched-earth opposition to the merger—not to mention the industry’s reflexive opposition to the very existence of satellite radio—is itself powerful evidence of the competition that so obviously exists”) (citations omitted).

in the Commission's 1997 authorization order that could be construed to prohibit a satellite radio merger today.

CONCLUSION

The exhaustive administrative record generated in this docket amply supports a thorough, reasoned determination that the merger will result in numerous public interest benefits that would not otherwise be possible, and therefore that the application of the agency's 1997 statements to prevent this beneficial merger cannot be justified. For the foregoing reasons, the FCC should clarify that the decade-old language concerning certain satellite radio license transfers reflects a general statement of policy that is not viable given current competitive and technological conditions. In the alternative, if the Commission views the 1997 transfer language as an uncodified rule, it can and should use its rulemaking authority to repeal or appropriately modify that language to permit the Applicants' pending merger.

Respectfully submitted,

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