

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

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

**COMMENTS OF THE CONSUMER COALITION FOR
COMPETITION IN SATELLITE RADIO**

The Consumer Coalition for Competition in Satellite Radio (“C3SR”), by its attorneys, hereby submits its comments in response to the Notice of Proposed Rule Making (“Notice”) in the above-captioned proceeding.¹ For the reasons set forth in all of the C3SR submissions in this proceeding, including C3SR’s Petition to Deny,² a waiver, modification or repeal of the rule barring the proposed merger of Sirius Satellite Radio Inc. (“Sirius”) and XM Satellite Radio Holdings Inc. (“XM”) would not be in the public interest. The benefits of continued competition in satellite radio far outweigh any of the promises of XM and Sirius (the “Aspiring Monopolists”). Moreover, serious harm to satellite radio subscribers and to

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, FCC 07-119 (rel. June 27, 2007) (“*SDARS NPRM*”).

² *See* Petition to Deny of the Consumer Coalition for Competition in Satellite Radio (“C3SR Petition”). *See also* Response of the Consumer Coalition for Competition in Satellite Radio; The Consumer Coalition for Competition in Satellite Radio Reply to Joint Opposition (“C3SR Reply”); Expert Declaration of J. Gregory Sidak Concerning the Competitive Consequences of the Proposed Merger of Sirius Satellite Radio, Inc. and XM Satellite Radio, Inc. (Mar. 16, 2007) (“*Sidak Declaration*”).

consumers-at-large, especially those in rural areas, would result from a merger to monopoly, and, therefore, the merger should not be permitted.

C3SR has opposed the grant of the Consolidated Applications,³ and, for the same reasons, C3SR opposes the proposal to waive, modify or repeal the Commission's rules to permit this merger. In 1997, the Commission clearly stated that "[e]ven 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."⁴ Hence, neither satellite radio licensee is permitted to acquire control of the other licensee (hereinafter, the "Transfer Rule"). The Transfer Rule constitutes a binding, uncodified Commission rule, which prohibits the proposed transaction and should not be waived, modified or repealed at this time.⁵

CD Radio Inc. ("CD Radio"), the predecessor to Sirius, advocated the adoption of the Transfer Rule.⁶ According to CD Radio, if one satellite radio licensee was able to acquire spectrum from the other, an "[SDARS] monopoly would loom on the horizon."⁷ Nevertheless, on February 21, 2007, the Aspiring Monopolists entered into a merger agreement that would

³ Applications of XM Satellite Radio Holdings Inc., Transferor, and Sirius Satellite Radio Inc., Transferee, For Consent to Transfer Control (filed Mar. 20, 2007) ("Consolidated Application").

⁴ *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Bands, Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 5754, para. 170 (1997) ("*SDARS Order*"). This statement by the FCC provides an instructive example of the difference between a rule and a policy. The prohibition against a single SDARS entity acquiring control of both SDARS licenses is a rule. The desire to foster intramodal competition in SDARS is a policy.

⁵ The *SDARS Order* containing the Transfer Rule was published in the Federal Register, and the Transfer Rule contains a clear statement of the substance of the Transfer Rule: neither SDARS licensee will be permitted to acquire control of the remaining SDARS license. The Aspiring Monopolists cannot claim that there was insufficient notice of the Transfer Rule, or any ambiguity as to its meaning. Furthermore, the Transfer Rule cannot be considered a general policy statement, as it does not leave the FCC any discretion in the Transfer Rule's application.

⁶ See Comments of CD Radio, IB Docket No. 95-91, 18 (Sept. 15, 1995) ("CD Radio Comments").

⁷ *Id.* at 18.

eliminate all competition in SDARS in clear violation of the Transfer Rule and the antitrust laws.⁸ The Aspiring Monopolists seek a waiver of the Transfer Rule, claiming that the Transfer Rule is no longer needed to “help assure sufficient continuing competition.”⁹

The Commission may only grant the waiver “if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”¹⁰ More specifically, a waiver is only appropriate where “the relief requested would not undermine the policy objective of the rule in question and would otherwise serve the public interest.”¹¹ Central to a ruling on a waiver request is a determination of the policy objective advanced by the rule. The Commission “may not act out of unbridled discretion or whim in granting waivers,” and the FCC’s waiver policy reflects the high bar placed both on a petitioner and the FCC.

The Aspiring Monopolists have failed to establish that waiver, modification or repeal of the Transfer Rule is justified and in the public interest. In fact, the combination of Sirius and XM will undermine the underlying policy objective of the Transfer Rule.¹² In the Consolidated Application, the Aspiring Monopolists incorrectly characterize the underlying purpose of the Transfer Rule as the preservation of competition in the pseudo-audio-

⁸ See, e.g., 15 U.S.C. § 18 (Section 7 of the Clayton Act).

⁹ The Aspiring Monopolists conveniently failed to further define the market in which competition must be protected. The *SDARS Order* specifically stated that the Transfer Rule was designed to ensure competition “in the provision of satellite DARS service.” See *SDARS Order*, *supra* note 4, at para. 170.

¹⁰ *Northeast Cellular Telephone Company v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990). See also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

¹¹ *Intelsat North America, LLC*, Order, DA 07-3055, para. 6 (rel. July 6, 2007) (citing *WAIT Radio*, 418 F.2d at 1157).

¹² Since waiver of the Transfer Rule is not permissible because the proposed transaction is contrary to the policy objective underlying the Transfer Rule, it is not necessary to discuss whether waiver of the Transfer Rule would be in the public interest. C3SR has, however, placed substantial evidence in the record in its Petition to Deny and related filings, demonstrating that the proposed transaction is not in the public interest; therefore, waiving the Transfer Rule to permit the merger would not be in the public interest.

entertainment market.¹³ The true policy at the heart of the Transfer Rule is the prevention of a satellite radio monopoly.¹⁴

Satellite radio service is a unique product market for antitrust analysis.¹⁵ C3SR has proven that satellite radio remains a unique product market, and the Aspiring Monopolists have not proven otherwise.¹⁶ The Commission did not abandon this view of the market in its most recent assessment of competition in satellite services by applying the Horizontal Merger Guidelines.¹⁷ Nothing in the record supports a contrary view. The Aspiring Monopolists have failed to prove that any of the elements of their expansive pseudo-market will constrain the price of satellite radio service post merger,¹⁸ and, therefore, they have failed to prove the validity of their market definition.

C3SR has also refuted the assertion that the proposed pseudo-audio-entertainment market is a national market.¹⁹ There are very substantial regional and local variations in the availability of key elements in the pseudo market, *e.g.*, local radio service.²⁰ Indeed, local radio signals are not uniformly available through out the U.S.²¹ On average, there are 30 local radio

¹³ Consolidated Application, *supra* note 3, at 50-52.

¹⁴ See *SDARS Order*, *supra* note 4, at para. 170.

¹⁵ See *Sidak Declaration*, *supra* note 2; *Hearing of the House Judiciary Committee Antitrust Task Force Hearing on the Competition and the Future of Digital Music*, Feb. 28, 2007 (statement of Dr. Mark N. Cooper, Director of Research, Consumer Federation of America); Comments of the American Antitrust Institute in Opposition to Transfer Application.

¹⁶ See generally *Sidak Declaration*, *supra* note 2.

¹⁷ See *Annual Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Communications Services*, First Report, 22 FCC Rcd 5954 (2007)

¹⁸ See C3SR Reply, *supra* note 2, at 4-5.

¹⁹ *Id.* at 8-11.

²⁰ See C3SR Petition, *supra* note 2, at Exhibit C (pages 2-3).

²¹ *Id.*

signals in urban areas.²² However, substantial portions of the United States have few, if any, local radio signals. For example, 2.3 million residents in the U.S. are located in areas served by five or fewer local radio signals.²³ Furthermore, 45 million residents in the U.S. are located in areas served by only six to fifteen local radio signals.²⁴ Combined, over 47 million US residents are in areas served by fewer than 15 local radio signals – half of the average number of local radio signals in urban areas. The impact of certain states in particular is extreme.²⁵

In addition to the harm to consumers, waiver, modification, or repeal of the Transfer Rule would have a significant adverse impact on the Commission's media ownership policy and the Commission's spectrum policy. Not only will the merger create the first FCC-sanctioned spectrum monopoly, it will lead to requests for increased concentration in other media. If all types of aural media truly exist in one omnibus market, as argued by the Aspiring Monopolists, then a single entity could own all the FM radio stations, or all the AM radio stations, et cetera. Similar arguments will be made in the context of video marketplace. Diversity and consumer choice will be sacrificed in favor of consolidation and monopoly power.

²² See C3SR Petition, *supra* note 2, at Exhibit C.

²³ *Id.*

²⁴ *Id.*

²⁵ For example, a large number of residents in Arizona (over 235,000 residents), Montana (over 110,000 residents), and Texas (over 167,000 residents) are located in areas with 0-5 local radio signals. *Id.* at Exhibit C (Table 3).

For these reasons, the Transfer Rule should be retained without modification, and the waiver request should be denied.

Respectfully submitted,

**CONSUMER COALITION FOR
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