

the exact transaction contemplated by the above-captioned transfer of control proceeding ("Consolidated Application") proposing the merger of Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM") (collectively, the "Applicants"). In the *NPRM*, the Commission asks whether the merger ban constitutes a binding rule, and, if so, whether the Commission should waive, modify, or repeal the ban in the event the Commission concludes that the proposed merger would serve the public interest. Entravision submits that the prohibition constitutes a binding rule, and that waiver, modification or repeal of the rule would be contrary to the public interest. In support thereof, Entravision states as follows.

I. THE MERGER BAN CONSTITUTES A BINDING RULE

In the Consolidated Application, Applicants claim that the merger ban is a dispensable policy statement rather a binding rule.⁴ Applicants rely on the fact that the merger ban was never codified in the Code of Federal Regulations as the basis for characterizing the ban as "merely a policy statement" rather than enforceable regulation.⁵ However, Applicants' claims completely ignore the analyses actually undertaken by courts in distinguishing binding rules from non-binding policy statements.

Courts generally consider the effects of regulation as well the intent of the regulating agency in determining the binding status of regulation:

"We note that DARS licensees, like other satellite licensees, will be subject to rule 25.118, which prohibits transfers or assignment of licenses except upon application to the Commission and upon a finding by the Commission that the public interest would be served thereby. Even after DARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellited DARS license. This prohibition on transfer of control will help assure sufficient continuing competition in the provision of satellite services."

Id. This prohibition is referred to hereafter as the "merger ban."

⁴ See Consolidated Application at 50.

⁵ See *id.*

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 the 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 actually 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 the agency.⁶

First, under the effects prong of this analysis, the plain language of the merger ban clearly imposes obligations on SDARS licensees and restricts Commission discretion with respect to decisions in the SDARS-merger context. For example, SDARS licensees "*will* be subject to rule 25.118," "*will not* be permitted to acquire control of the other" SDARS license, and the merger ban itself "*will* help assure sufficient continuing competition in the provision of satellite services."⁷ The use of "*will*" rather than "*may*" in the merger ban evidences the binding nature of the ban, the unequivocal limitation on the SDARS licensees' rights to transfer their licenses, and the firmness of the Commission's decision to adopt a competitive market structure in the SDARS industry.

Second, the intent prong of the above-quoted analysis similarly confirms that the merger ban constitutes a binding rule. The Commission has consistently characterized the merger ban as a rule. In the *SDARS Order*, the Commission included the ban in a section entitled "Rules for Auctioning DARS Licenses."⁸ In announcing the auction of SDARS spectrum, the Commission explicitly characterized the rules contained in the *SDARS Order* as binding rules: "the rules

⁶ *Wilderness Society v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006) (*internal citations omitted*).

⁷ *SDARS Order*, 12 FCC Rcd at 5823.

⁸ *Id.* at 5812, 5823.

contained in the [*SDARS Order*] are not negotiable."⁹ Further, while Applicants make much of the fact that the merger ban was not published in the Code of Federal Regulations, it was published in the Federal Register.¹⁰ As case law makes plain, publication in the Code of Federal Regulations is simply a single, non-dispositive factor in distinguishing between policy statements and binding rules; publication in the Federal Register together with an agency's treatment of a rule as binding is enough to make it so.¹¹

As the above analysis plainly demonstrates, the merger ban constitutes a binding rule. In order for the Applicants to proceed with their merger, the Commission would have to waive, modify or repeal the ban. Entravision submits that the Commission should not waive, modify or repeal the merger ban as the proposed merger is contrary to the public interest.

II. THE PROPOSED MERGER IS CONTRARY TO THE PUBLIC INTEREST

In Comments submitted in the recent Consolidated Application proceeding,¹² Entravision described at length the serious competitive harms that would attend the combination of Sirius and XM into a single firm and the corresponding replacement of competition with monopoly as the engine of the SDARS industry. Rather than repeat all of those arguments here, Entravision incorporates its Consolidated Application Comments herein by reference. Suffice it to say, there

⁹ *FCC Announces Auction of Satellite Digital Audio Radio Service Auction Notice and Filing Requirements for 2 DARS Licenses Scheduled for April 1, 1997*, Report No. AUC 97-01, Auction No. 15, DA 97-477 (March 6, 1997), at 3.

¹⁰ *See Digital Audio Radio Service in the 2310-2360 MHz Frequency Band*, 62 Fed. Reg. 11083, 11102 (March 11, 1997).

¹¹ *See Wilderness Society*, 434 F.3d at 595. The characterization and publication criteria of the intent prong "serve to illuminate" the final criterion, as that criterion asks the overarching question, whether the regulation "has the force of law." *General Electric Co. v. EPA*, 290 F.3d 377, 382 (DC Cir. 2002).

¹² *See XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc. Consolidated Application for Transfer of Control*, MB Docket No. 07-57, Comments of Entravision (filed July 9, 2007) ("Entravision Consolidated Application Comments").

is no evidence on the record that SDARS does not stand by itself as a unique entertainment market. As far as Entravision is concerning, the Applicants are not its competitors as the Applicants are entities whose business model is based on subscriptions and whose customers choose it for the variety of entertainment programming that is generally offered without advertising interruptions. Entravision, like other terrestrial broadcasters, has a model that is advertiser supported and is geared to listeners who seek specific formats and are prepared to accept advertising in return for a free entertainment product.

III. THE APPLICANTS HAVE NOT MADE A CASE FOR A WAIVER

Assuming that the ban applies to the Applicants, the Applicants respond that the Commission should exercise its discretion to waive, modify, or otherwise alter the ban and, as a result, consent to the proposed transfer of control. The Courts teach us that a waiver is not to be handed out liberally, but represents a "high hurdle" that is not easily overcome by an applicant. *WAIT Radio v. FCC*, 418 F. 2d 1153 (D.C. Cir. 1969). In this instance, the Applicants have not come close to meeting this and their request must be denied.

As is obvious from the Applicants' request, the Commission is faced with more than a waiver. What is sought by the Applicants is the repeal of the ban. For, if the ban is waived, there is no longer any basis for competition among the SDARS providers. In effect, there will only be one SDARS provider and no further need for the ban.

Any waiver must be predicated on sufficient facts to establish that the public interest will be benefited by the waiver. The Commission is required to explain "why deviation better serves the public interest and [to] articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation." *Northeast*

Cellular Telephone Company, L.P. v. FCC, 897 F. 2d 1164, 1166 (D.C. Cir. 1990). Instead of speaking to the public interest, the Applicants argue that changes in the manner and delivery of programming, involving broadcast spectrum and non-broadcast entertainment devices, represents such a change in the media marketplace that competition would not be harmed by the merger.

Entravision disagrees with this contention. While we have witnessed the growth of new technologies, there is little evidence that they are interchangeable. The fact is that SDARS is its own market. As its advertising proclaims, SDARS provides the customer with a vast panoply of audio content that is often advertising free and not subject to the regulatory constraints of terrestrial radio. More importantly, the furious competition between the two SDARS licensees has resulted in each establishing a unique presence and offering services involving specialized music, performance, sports, news and other services. One could well conclude that the competition between the two providers is what has enabled them to develop into two unique services meeting the needs of their listening public. If the competition between XM and Sirius is removed, Entravision submits that the service to the public will no longer be as robust as it is now and the SDARS customers will be harmed as a result.

IV. IF THERE IS A WAIVER, CONDITIONS MUST BE IMPOSED

Assuming, *arguendo*, that a waiver is granted to the Applicants, such a waiver should only be to permit these two parties to consummate a merger. It should not result in a single provider occupying all of the available SDARS spectrum. On the contrary, the Commission should require that the Applicants, after a short period of time, involving no more than a year, relinquish their spectrum so that competition can be renewed.

Entravision submits that the Commission should adopt a plan for the resumption of

competition at the earliest possible time. Entravision is prepared to lead a consortium of as many terrestrial licensees as wish to join in providing such a competitor. These terrestrial licensees would be invited to offer programming based on their particular programming qualifications. This is necessary in order for the consortium to have the programming base upon which to compete with Applicants. Entravision, for instance, as a Spanish-language broadcaster, is prepared to offer the consortium its Spanish-language entertainment programming.

In order to expedite the resumption of competition, Entravision requests that the Commission order the Applicants to make available to the terrestrial licensee consortium the satellites, equipment, and facilities of one of the SDARS licensees, such that the consortium could resume operations as a true competitor. The consortium would be required to reimburse the Applicants for the depreciated value of these assets over a reasonable term. This would enable the new consortium to undertake operations and not burden the consortium with expenses that would otherwise prevent it from coming together, developing an infrastructure, and engaging in competition. All of this is intended to promote competition and not protect the Applicants who will have the facilities, know how, subscriber base and resources to otherwise prevent a new competitor from gaining traction in the satellite radio market.

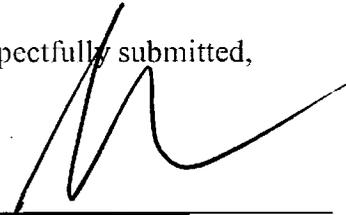
V. CONCLUSION

In order to secure repeal of the merger ban and approval to proceed with an unprecedented merger to monopoly, the Applicants have been obligated to demonstrate that unprecedented conditions require the Commission and the Department of Justice to redefine the public interest and to abandon traditional yardsticks used in antitrust analysis. The Applicants fail to provide such a showing. Entravision submits that continued competition in the SDARS

industry will better serve the public interest than formation of a SDARS monopoly.

Competition, not monopoly, is the best means of ensuring that satellite radio service provides optimal benefits and minimal costs to consumers. For these reasons, the merger ban should be retained as a binding rule and the proposed merger of Sirius and XM should be denied. Alternatively, if the Commission takes an expansive view to what is the market, or determines that a waiver of the ban is justified, the Commission should adopt Entravision's proposal to allow existing terrestrial licensees to form a consortium and proceed to establish and operate a qualified competitor for the Applicants at the earliest possible time.

Respectfully submitted,



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