

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 REGARDING SAFEGAURD RULE PROHIBITING
TRANSFER OF CONTROL**

In response to the Commission’s Notice of Proposed Rulemaking¹ seeking comment on the 1997 SDARS Order² prohibiting transfer of control of one licensee to another (“Rule”), I respectfully submit comments pursuant to 47 C.F.R. § 1.415.

The proposed merger and its supposed benefits are not sufficient reason to repeal the rule. The Commission carefully analyzed and studied the competitive impact of Satellite Radio for years before it even auctioned the licenses, making this Rule significant to the DARS proceeding 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 (MB Docket No. 07-57), FCC 07-119, rel. June 27, 2007.

² Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking (“SDARS Order”) (IB Docket No. 95-91), rel. March 3, 1997.

consumers. A proceeding that went under such careful scrutiny absolutely cannot be changed made without due consideration. It would seem irrational to allow a merger after the companies have provided service to the public in less time than the Commission took to consider the rules governing the licenses required for them to do business. This Rule is bound by the precedent of protecting consumers and the idea of competition. Repealing the rule would undoubtedly reduce the standards held in place that ensure competition and diverse control of spectrum. Moreover, the very existence of the Rule demonstrates that the Commission was fully aware of the significance of DARS, the value of the DARS spectrum, and the unique characteristics of Satellite Radio. The Commission further understood the value of competition on the national level that DARS provides and foresaw the need to have such a Rule in place, regardless of its codification status.

As the DARS licensees and the Commission are aware, the allocation of DARS spectrum took several years of international coordination and planning through the International Telecommunications Union to ensure protection of interference with adjacent countries. Moreover, allocating spectrum in an appropriate band is vital for providing mobility and service quality. The allocation of new DARS spectrum would be an extremely difficult and time consuming process, making DARS a very limited resource with little ability for new entry into the market as a bona fide DARS licensee. Under the proposed merger, valuable DARS spectrum will not only be under

the control of a single company, but few changes can be made as both services are operated independently for the next ten years or so. The only short term changes, such as adding certain “best of” content, will be determined by the merged company, not the subscriber, and will be squeezed into the current systems that may already be at capacity. While the individuality of each service will be lost by consolidating the programming considered redundant in the long term, the short term will not allow the subscriber substantially more choices or diversity that is not already available now. The public interest cannot be best served by the proposed merger in either the short term or the long term. Subscribers will inevitably find themselves disappointed by channels being removed, formats and genres reduced and consolidated, and the need for all new hardware to fully take advantage of the merger’s offerings. The proposed merger is therefore not about the subscriber and not about the interests of the public; it is simply about gaining more of the extremely valuable DARS spectrum.

XM and Sirius have both made attempts in the past at securing more bandwidth for their respective systems.³ However, they also assert that greater efficiencies in compression, modulation, and audio encoding techniques have led to creating more channels for the subscriber.⁴ A benefit

³ See Comments of Sirius Satellite Radio Inc., IB Docket No. 05-221 (July 29, 2005). Sirius specifically states that its system is “fully loaded” and requires more spectrum. See also *Public Notice for Application for Transfer of Control of WCS Wireless License to XM Satellite Radio*, WTB Docket No. 05-256 (August 11, 2005).

⁴ Joint Opposition to Petitions to Deny and Reply Comments of Sirius Satellite Radio, Inc. & XM Satellite Radio Holdings, Inc. (“Joint Opposition”) (July 24, 2007) at 88-89.

of this nature will certainly continue in the future. A merger should be entirely unnecessary then for either of the companies, especially in the long term. Instead of allowing efficient compression technology to catch up to their desire to provide more channels and services, the proposed merger allows them to instantly double their bandwidth. Consequently, there is no impeding necessity for this merger and no necessity behind repealing a rule set forth by the wisdom and forethought of the Commission. It was the Commission's guidance and direction that decided on the amount of spectrum each provider could utilize in the first place.

The Commission is fully aware that satellite systems are a collection of technical trade-offs between various limitations such as satellite power, bandwidth, link margin, and data rate. The amount of bandwidth given to a licensee must be carefully determined in order for that licensee to establish an economically viable and feasible system. In the years of work to provide for the very existence of DARS, the Commission carefully analyzed the technical trade-offs and proposed system designs of the Satellite Radio applicants. The Commission determined⁵ that a trade-off of dividing the available 25 MHz in half would allow for an economically feasible system while still ensuring equal intra-service competition exists in Satellite Radio. The Commission's work⁶ in providing for the public interest and promoting

⁵ See *supra* at n. 3, *SDARS Order* at 18 (¶ 41) and at 31 (¶ 73).

⁶ *Id.* at 33 (¶ 78). In discussing the fact that other audio delivery media are not perfect substitutes for SDARS, the Commission agreed with commenters that to serve the public interest, "there should be more than one license awarded."

competition while successfully compromising the trade-offs of satellite spectrum must not be undervalued in this proceeding. It has long been the goal of the Commission to maintain competition; ensuring intra-service competition exists in Satellite Radio by creating the Safeguard Rule maintains and preserves that objective.

A merger would inescapably dampen the vigor of competition our country's free enterprise system is built upon and would limit variety and choice available to the public. Consolidating programming from the two separate companies pulls choice away from the hands of the public and into the hands of a single provider; benefits for the subscriber are therefore artificial. While consumers may benefit from a la carte pricing when it is made available nearly a year after the merger,⁷ the merged company's prices will not be disciplined in the long term without a head to head competitor. In spite of simultaneously competing with and complementing terrestrial radio, the unique aspects of Satellite Radio currently already benefiting the public will not prevent pricing abuse in the future.

XM and Sirius have long recognized the distinct differences between what they provide nationally and what terrestrial radio provides locally. The DARS licensees have been opposed to offering localized programming from the beginning of their application process. Indeed, despite the NAB's fears that DARS repeaters could be used to broadcast local content, XM and Sirius

⁷ See Joint Opposition at 14.

have always been adamant about having no interest in transmitting any kind of local content via satellite or repeater networks.⁸ As such, having two national services like XM and Sirius serve to complement and promote the idea of local radio rather than compete against it. Local radio has the incentive and ability to prosper since Satellite Radio cannot possibly serve the requirements of every local broadcast area and has no desire to do so. Even XM maintained this position during the DARS proceeding when the NAB raised concerns about the adverse affect of Satellite Radio on terrestrial radio. XM asserted⁹ that if a broadcaster possibly loses its audience to Satellite Radio, the broadcaster has the incentive to provide more local programming that Satellite Radio cannot provide; this idea reaffirms the national scope of Satellite Radio. Having two DARS licensees protects the balance of competition for broadcasting of live content on a national level and provides intra-service competition between Satellite Radio providers.

Accordingly, XM and Sirius have not satisfied their obligation in justifying the need for repealing or waiving the Rule. The Commission's longstanding policy of promoting and serving the public interest through competition outweighs any purported benefits of the proposed merger. I urge the Commission to agree that the Rule in place as a safeguard for SDARS is

⁸ See Reply Comments of Sirius Satellite Radio, Inc., IB Docket No. 95-91 (March 8, 2000) at 3; Comments of Sirius, IB Docket No. 95-91 (December 14, 2001) at 27; Reply Comments of American Mobile Radio, IB Docket No. 95-91 (January 22, 1998) at 2-3; Letter from Lon Levin of XM Radio to Marlene Dortch, IB Docket No. 95-91 (October 14, 2003)

⁹ Reply Comments of AMRC, IB Docket No. 95-91 (October 13, 1995) at 5-7.

fundamental, on balance, to the competitive structure for Satellite Radio and constitutes a necessary and binding rule that must not be repealed or waived.

Respectfully submitted,

John Smith

9529 Inglewood Cv.
Germantown, TN 38139
John@dars.com

*Subscriber to both DARS
licensees and
independent DARS
analyst*

August 13, 2007