

FCC Proceeding 07-57  
Patrick Sharpless  
Citizen and Consumer  
Reply Comments, Electronically filed using ECFS on August 27, 2007

The Honorable Kevin J. Martin  
Chairman, Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: Reply Comments Regarding the Notice of Proposed Rule Making Adopted  
June 25, 2007, Released June 27, 2007, MB Docket No. 07-57, FCC 07-119.

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Dear Chairman Martin and Fellow Commissioners:

As a concerned citizen and consumer following the proposed satellite radio merger between Sirius Satellite Radio and XM Satellite Radio, I hereby submit these reply comments in response to comments filed by Entravision Holdings, LLC, and others making similar arguments regarding the Notice of Proposed Rulemaking.

Please submit my attached reply comments into the public record.

Respectfully submitted,

Patrick Sharpless  
Citizen and Consumer

*Reply Comments in Response to Comments Filed by Entravision Regarding the Notice of Proposed Rulemaking*

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**Comments by Entravision Holdings, LLC**

On August 13, 2007, Entravision filed comments claiming, "THE MERGER BAN CONSTITUTES A BINDING RULE", and qualifies this claim based on the premise that courts generally consider the effects of regulation as well as the intent of the regulating agency in determining the binding status of regulation. Entravision insists the 1997 SDARS Report & Order imposes obligations on SDARS licensees and restricts Commission discretion with respect to decisions in the SDARS merger context. Relying on the language from the 'Transfer' section of the 1997 SDARS Report & Order, Entravision claims, "The use of 'will' rather than 'may' in the merger ban, evidences the binding nature of the ban, the unequivocal limitations of 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."

According to Entravision, the use of "will" in the 'Transfer' language section of the 1997 SDARS Report & Order restricts Commission discretion with respect to decisions in the SDARS merger context. If this were true, the Commission would be restricted from exercising discretion while conducting their review of the Consolidated Application and would be bound to the provisions of rule 25.118 which identifies the exception allowing a transfer to be authorized and completed. Yes, in fact, the 1997 SDARS Report & Order states:

We note that DARS licensees, like other satellite licensees, **will be** subject to rule 25.118, which prohibits transfers or assignments of licenses **except upon application** to the Commission and upon a **finding** by the Commission that the public interest would be served thereby.

Accordingly, if Entravision's claims were true, the Commission would be required to recognize the controlling authority of the 'Transfer' language above, and refrain from exercising discretion when interpreting this rule. Entravision's interpretation would put an end to the debate, and the Commission could proceed with their review process without allowing opponents to engage in unwarranted attempts to delay, obstruct or prevent this Consolidated Application from moving forward based on the false premise that the 'rules' prohibit a transfer.

Alternatively, the Commission included additional language in their 1997 SDARS Report & Order which introduced inescapable ambiguity. Specifically, the 'Transfer' section includes the following supplemental language:

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.

As previously stated in comments filed with the FCC on August 13, 2007, ambiguous Commission rules cannot be binding. Application of rule 25.118 permits an authorized transfer upon application and a Commission finding that the public interest is served, but this supplemental language above is in conflict with rule 25.118. Therefore, the applicable 'Transfer' language is internally conflicted and ambiguous.

The Commission needs to ask the following questions:

- 1) Does the application of rule 25.118 serve a controlling capacity over the entire 'Transfer' language section of the 1997 SDARS Report & Order?

It appears so, and the supplemental language is subordinate. If the application of rule 25.118 is determined to be controlling, the supplemental language in the 'Transfer' section is subordinate to rule 25.118 and the Commission should review the Consolidated Application on the merits of public interest.

- 2) Alternatively, does the internally conflicted and ambiguous language in the 'Transfer' section of the 1997 SDARS Report & Order render the entire section internally conflicted and ambiguous, and therefore, non-binding?

If the 'Transfer' section language is determined to be internally conflicted and ambiguous, with no one portion of the 'Transfer' section having controlling authority over another, then it would be improper for this ambiguous rule to apply in such a way as to delay, obstruct or prevent this Consolidated Application process from proceeding.

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## CONCLUSION

Many opponents to the proposed satellite radio merger are making similar arguments about the 'Transfer' language as those arguments being presented by Entravision. None of these arguments possess sufficient credibility to legitimize

delaying, obstructing or preventing the Consolidated Application from being allowed to proceed; particularly when those arguments are based on the internally conflicted and ambiguous language in the 'Transfer' section of the 1997 SDARS Report & Order. Even worse, these arguments fail to recognize the controlling authority of rule 25.118 over the remaining supplemental language in this applicable section.

The taxpayer paying for these proceedings and the public interest benefits from a consummated merger, are being delayed by those making invalid arguments in what is largely viewed as a campaign to prevent the Consolidated Application from being allowed to proceed. We simply don't need ambiguous and overly restrictive Commission rules which serve to provide unfair competitive advantage to terrestrial radio and others, at the expense of satellite radio. Sadly, the satellite radio companies aren't the only one's being harmed; the self serving methods employed by the opposition--using invalid arguments to delay, obstruct and prevent the Consolidated Application from being allowed to proceed—also brings harm to the consumer who stands to benefit from the consummated merger.

It is critical the Commission properly resolve this internally conflicted and ambiguous rule issue as we continue moving forward. The public interest should not be held hostage to the self serving interests of terrestrial radio and others who seek competitive advantage through internally conflicted and ambiguous regulatory rulemaking, and continuous delay in getting along with the people's business.