

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)	
)	
Applications for Consent to the Transfer of)	
Control of Licenses from XM Satellite Radio)	MB Docket No. 07-57
Holdings, Inc., Transferor, to Sirius Satellite)	
Radio Inc, Transferee)	
)	
2006 Quadrennial Regulatory Review – Review)	
of the Commission’s Broadcast Ownership Rules)	MB Docket No. 06-121
and Other Rules Adopted Pursuant to Section 202)	
of the Telecommunications Act of 1996)	
)	
2002 Biennial Regulatory Review – Review of)	
the Commission’s Broadcast Ownership Rules)	MB Docket No. 02-277
and Other Rules Adopted Pursuant to Section 202)	
of the Telecommunications Act of 1996)	
)	
Rules and Policies Concerning Multiple)	
Ownership of Radio Broadcast Stations in Local)	MM Docket No. 01-317
Markets)	
)	
Definition of Radio Markets)	MM Docket No. 00-244

To: The Commission

JOINT REPLY COMMENTS

BEASLEY BROADCAST GROUP, INC.
CITADEL BROADCASTING CORPORATION
ENTERCOM COMMUNICATIONS CORP.
GREATER MEDIA, INC.
LINCOLN FINANCIAL MEDIA COMPANY
SAGA COMMUNICATIONS, INC.

JOINT REPLY COMMENTS

Beasley Broadcast Group, Inc., Citadel Broadcasting Corporation, Entercom Communications Corp., Greater Media, Inc., Lincoln Financial Media Company and Saga Communications, Inc. (collectively, the “Joint Broadcast Parties”) hereby submit these reply comments in the above-captioned proceeding. The Joint Broadcast Parties believe that, regardless of whether the 1997 prohibition on common ownership of the two available SDARS licenses (“SDARS Monopoly Prohibition”) is a binding rule or a general policy statement, the Commission’s contemplation of its repeal or modification must take into consideration the larger framework of regulatory limitations on the common ownership of spectrum licenses used to deliver audio entertainment services.

In particular, several initial commenters have noted that the potential elimination of the SDARS Monopoly Prohibition necessarily implicates reconsideration of current restrictions on common ownership of AM and FM radio licenses.¹ The Joint Broadcast Parties agree. The SDARS Monopoly Prohibition cannot be evaluated in isolation. The Commission must instead consider how a change in this policy would intersect with the Commission's regulation of other spectrum-based audio services and how the change would impact the markets in which these other spectrum-based services compete.

¹ See Comments of the Consumer Coalition for Competition in Satellite Radio at 5 (filed August 13, 2007) (“If all types of aural media truly exist in one omnibus market ... then a single entity could own all the FM radio stations, or all the AM radio stations, et cetera.”); Comments of Clear Channel Communications, Inc. at 7 (“There is no rational competition or public policy justification for permitting the merger of the only two satellite radio providers, who offer consumers unique service options not available through any other medium, while at the same time retaining on terrestrial broadcasters stringent ownership caps that are not warranted – even from a purely intramodal standpoint.”)

These Reply Comments do not address *whether* the SDARS Monopoly Prohibition should be modified or repealed.² That issue already has been addressed fully by other parties.³ The primary purpose of these Reply Comments is to highlight the practical impact upon broadcast ownership regulation of any decision to repeal the SDARS Monopoly Prohibition, and the long-term marketplace issues that the Commission must consider as part of its decisionmaking process, which include the development of HD Radio.

I. The Commission Must Consider How Its Decision on the SDARS Monopoly Prohibition Affects Similar Restrictions on Other Spectrum-Based Audio Entertainment Services.

The changes in the entertainment landscape described by XM and Sirius do not have a unique and discrete impact on satellite radio providers. They impact all of the “audio entertainment services” identified by XM and Sirius as competitors for listeners. Accordingly, if there is any justification for the regulatory change urged by XM and Sirius, then this justification must be evaluated with respect to the entire range of spectrum-based service providers at issue, not just in reference to the one multiple ownership restriction that applies to SDARS.

² The Joint Broadcast Parties note, however, that the ultimate decision may only be made in the rulemaking context. XM and Sirius themselves note that “by issuing [the] NPRM,” the Commission “has essentially made moot the question of whether the language is a policy statement or a binding rule.” Comments of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. at 4 (filed August 13, 2007) (“Sirius-XM Comments”). And as others have noted, an adjudicatory waiver of the rule would be improper here, where a decision allowing both SDARS licenses to be held by one entity would swallow whole the prior prohibition on the transfer of both authorizations to a single licensee. *See, e.g., WAIT Radio v. FCC*, 418 F.2d 1153, 1157 & 1159 (D.C. Cir. 1969) (“The very essence of waiver is the assumed validity of the general rule,” [and] the availability of a waiver in appropriate circumstances “does not contemplate that an agency must or should tolerate evisceration of a rule by waivers.”); *see also* Comments of the National Association of Broadcasters at 10-13 (filed August 13, 2007) (“NAB Comments”).

³ *See, e.g.,* NAB Comments at 13-23; Comments of National Public Radio, Inc. at 11-20 (filed August 10, 2007) (“NPR Comments”); Comments of Saga Communications, Inc. at 3-5 (filed August 13, 2007); Sirius-XM Comments at 8-9. The Joint Broadcast Parties note, however, that the decision whether to maintain the SDARS Monopoly Prohibition raises substantial and difficult procedural and substantive issues – *e.g.,* whether creation of a monopoly in the national, mobile, multi-channel audio marketplace is in the public interest, particularly given XM’s and Sirius’s acknowledgement that neither needs the merger to succeed financially.

If limitations on access to spectrum are obsolete for one type of audio entertainment service, they cannot be justified for other audio entertainment services. In this regard, only two of the services that XM and Sirius identify as competitors are subject to FCC-imposed limitations on their ability to compete. Satellite radio licensees are subject to the SDARS Monopoly Prohibition, and broadcast radio licensees are subject to the local radio ownership rule, which limits the number of broadcast radio stations that a single company may operate. The Government imposes no ownership limitations on any other medium for delivery of audio entertainment.

The ownership limitations imposed on satellite and broadcast radio licenses have historically been justified largely on “spectrum scarcity” grounds.⁴ XM and Sirius argue that technological developments have mooted the Commission’s historic concern with spectrum scarcity. According to XM and Sirius, Internet radio and wireless broadband delivery of audio services auger a virtually limitless number of potential outlets for audio information and entertainment programming.

Of course, if the Commission were to find that the multiplicity of outlets competing for listeners now justifies eliminating the SDARS Monopoly Prohibition and assigning the entire 25 MHz SDARS spectrum allotment to a single operator, then it would also be impossible to justify, on grounds of “spectrum scarcity,” any continued regulatory limitation on AM and FM broadcast radio ownership.⁵ Courts have routinely rejected inconsistent FCC treatment of the same market factors for purposes of similar FCC rules.⁶

⁴ See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 400-401 (1969) (limitations on broadcasting rooted, *inter alia*, in “the scarcity of broadcast frequencies ... and the legitimate claims of those unable without government assistance to gain access to these frequencies for expression of their views.”).

⁵ See, e.g., Clear Channel Comments at 7.

⁶ See, e.g., *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 165 (D.C. Cir. 2002) (finding that the Commission had failed to demonstrate a reason for excluding non-broadcast “voices” for purposes of its

“Spectrum scarcity,” of course, is much more of an issue with respect to SDARS than it is with respect to broadcast radio. The Commission recently noted, for example, that the lack of available spectrum poses a “significant barrier to entry into markets for commercial satellite communications services,” noting the statement by one commenter that “satellite spectrum scarcity is the primary barrier to entry by satellite providers.”⁷

XM and Sirius hold the only licenses available for SDARS. In contrast, there are more than 11,000 full-power commercial AM and FM broadcast authorizations currently outstanding, and the Commission regularly creates new allotments for broadcast radio stations and uses the auction process to distribute new licenses to new entrants and others.⁸ In other words, the FCC has not allocated any new spectrum for potential SDARS competitors, while at the same time it regularly awards new licenses to new entrants in the already crowded broadcast radio service.⁹

Even though the FCC has not awarded any new SDARS licenses – and is in this proceeding considering whether to allow a combined XM/Sirius to control all SDARS spectrum – there is already a wide disparity in the spectrum available to the two SDARS providers, on one hand, and to AM/FM radio broadcasters, on the other. Under the Commission’s local radio ownership rule, the greatest number of AM or FM radio stations that a single entity can own in

local television ownership rule while at the same time considering such voices relevant for purposes of its local radio-television cross-ownership rule).

⁷ *Annual Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Communications Services*, 22 FCC Rcd 5954, 5987 (¶106) & n.133 (2007).

⁸ *See, e.g.*, FCC FM Broadcast Auction #70 (Final), dated March 26, 2007, available at http://wireless.fcc.gov/auctions/70/charts/70press_5.pdf (last viewed August 7, 2007) (111 of 120 licenses auctioned).

⁹ One distinction between elimination of the current local radio ownership rules and the proposed repeal of the SDARS Monopoly Prohibition is that any relaxation of the SDARS limit would necessarily eliminate all viable intramodal competition within the SDARS spectrum allotment, with no spectrum remaining available for additional service providers. *Compare EchoStar Communications Corp. et al.*, 17 FCC Rcd 20559, 20662 & 20663 (¶¶ 277 & 281) (2002) (“This Commission has a long history of establishing spectrum-based commercial services with no fewer than two participants per service, with the aim of creating competitive markets for spectrum-based voice, video and data services. The Applicants have cited no example where we have permitted a single commercial spectrum licensee to hold the entire available spectrum allocated to a particular service.”)

even the largest local markets is eight, of which no more than five may be in a single frequency band.¹⁰ The maximum amount of spectrum that a single company can control in the largest of local markets is 1.03 MHz (five 200 kHz FM stations, and three 10 kHz AM stations). In contrast, if the Commission were to repeal the SDARS Monopoly Prohibition, a single SDARS operator would control all 25 MHz of spectrum allocated to that service and have the capability to broadcast more than 300 audio channels into every market in the country. In other words, a single SDARS operator would control almost 25 times the amount of spectrum that a single radio broadcaster is allowed to program. The disparity is even greater in the smallest markets, where AM/FM broadcasters may be limited to common operation of fewer than five stations (and less than 500 kHz of spectrum).¹¹

In this respect, the relationship between a conventional broadcaster and the two existing satellite radio companies is comparable to the relationship between a hypothetical Pop's Hardware and "big box" retailers Home Depot and Lowe's. Pop's 8,000 sq. foot store is dwarfed by the 150,000 sq. foot stores that Home Depot and Lowe's operate. If Home Depot and Lowe's can merge, Pop should be able to combine with other stores of similar size.

In this proceeding, the Commission must, at a minimum, address whether it can reasonably abandon the sole ownership restriction applicable to SDARS without extending similar relief to local radio broadcasters currently constrained by the considerably more stringent restrictions on local radio ownership. The Commission cannot simply repeal the decade-old prohibition on common ownership of the two SDARS licenses without addressing globally all of the ownership restrictions that limit competitors in the broad marketplace that XM and Sirius have defined.

¹⁰ See 47 C.F.R. § 73.3555(a).

¹¹ *Id.*

This is especially so in light of the emphasis placed by XM and Sirius on their enhanced ability, post consolidation, to provide “even more diverse offerings that are not currently available on either company’s system, including expanded non-English language programming, children’s programming, and additional programming aimed at minority and other underserved populations.”¹² This touted capability is not premised on altruistic motives, the combined programming talents of the two companies or the unique economies of scale that would be achieved by the merger, but simply upon the availability of twice the amount of spectrum. AM and FM broadcasters too could provide greater diversity of specialized programming *if they had access to more spectrum.*

II. The Current Listening Share of AM and FM Radio Broadcasters Must Not Be Taken As a Justification for Maintaining Differential Regulatory Treatment of These Licensees.

XM and Sirius have noted in support of their merger application (1) that their current combined listener share (about 3.4%) is quite small in comparison to total audio listenership, and (2) that neither company has yet turned a profit.¹³ These factors, however, should not be viewed as a basis for allowing unfettered common ownership of SDARS licenses while also maintaining much more restrictive limitations on the ownership of AM and FM broadcast licenses.

To the extent that the competitive landscape has changed, all audio entertainment services are involved in the same struggle to attract and maintain listeners.¹⁴ If the Commission determines that this type of competition is the most relevant in determining whether to repeal the

¹² See XM-Sirius Transfer of Control Applications, File Nos. SAT-T/C-20070320-00053 & 00054, at 13.

¹³ See XM-Sirius Transfer of Control Applications, File Nos. SAT-T/C-20070320-00053 & 00054, at 22 & 19.

¹⁴ Competition for listeners impacts the economics of each business, but not all audio technologies are true economic competitors to each other; each one derives revenues from a different mix of customers, subscribers and advertisers. See, e.g., NPR Comments at 15 (“While it is true that audio services compete for the attention of listeners, that simple fact does not define the relevant market”); NAB Comments at 19. Furthermore, local AM and FM broadcasters cannot compete with either the national reach or the multi-channel programming range of the SDARS licensees.

SDARS Monopoly Prohibition, the Commission must consider these same competitive considerations with respect to other audio entertainment outlets. The forces that are atomizing this broad marketplace into smaller niche slices will continue to impact all service providers – not just satellite radio – in the years to come.

Moreover, XM and Sirius have already claimed to have an advantage in this struggle to attract listeners, even without merging. XM and Sirius proclaim “that satellite radio, only ... five years into its launch has experienced faster consumer adoption than either satellite TV or cell phones in the years following their respective launches and still has plenty of headroom.”¹⁵ The two companies trumpet the fact that: “*This is one of the most impressive subscriber growth stories in the history of any technology.*”¹⁶

Given the early stage of development of satellite radio – and the wide disparity between the rapid growth of satellite radio and the declining ratings and revenues of AM and FM radio broadcasters – it is noteworthy that the relationship between these services resembles the relationship between cable television and broadcast television in the 1960s. In 1960, a full decade after the cable industry was born, only about 650,000 households subscribed to cable, or about 1.4 % of all households that owned a television set (87.3% of all households owned a television at that time).¹⁷ Forty years later, about two-thirds of all television households subscribed to cable, which had displaced over-the-air reception as the dominant means of home television viewing.

¹⁵ Sirius Satellite Radio Inc., SEC Filing Pursuant to Rule 425 under the Securities Act of 1933, Commission File No.: 0-27441, at 5 (Transcript of February 29, 2007 Presentation to Wall Street Analysts) (emphasis added).

¹⁶ *Id.*

¹⁷ See “United States: Cable Television,” Museum of Broadcast Communications Online, *citing Television Factbook 1980-81*, available at <http://museum.tv/archives/etv/U/htmlU/unitedstatesc/unitedstatesc.htm> (last viewed 8/22/2007) (number of cable subscribers) and 1960 Census of the United States (number of households with television sets).

Along the same lines, FM radio was introduced in the United States in the current band just after World War II, but it was not until the latter half of 1978 that it surpassed AM radio in terms of overall popularity.¹⁸ The *entire FM band* actually has 20% less spectrum capacity than the SDARS allocation to which a merged XM-Sirius seeks exclusive access (20 MHz v. 25 MHz). The Commission should consider how radio broadcasting might have developed differently had the entire FM spectrum allocation been licensed to a single national operator in the 1950s, when AM radio stations dominated the airwaves

The parallels to the development of these other entertainment distribution outlets preclude a finding at this time that satellite radio is destined to remain a small part of the audio landscape, and that competition between satellite providers can simply be eliminated without careful consideration of the long-term and collateral impacts of this decision. This is particularly so given the present rate of growth in satellite radio, which – as XM and Sirius concede – is one of the most impressive growth rates of any technology ever.

Indeed, given the inherent national reach, multi-channel delivery capability and growth trajectory of satellite radio, it is not unreasonable to hypothesize that the combination of the two satellite radio companies could ultimately create a single multi-channel audio service provider with characteristics resembling cable. But unlike cable, a combined XM/Sirius would be unchecked by any equivalent competitors, at least in the national mobile multi-channel marketplace. If the Commission intends to authorize such an entity, it will need to consider carefully, at the outset, what regulatory protections must be adopted to promote long-term competition and protect consumers.

¹⁸ See, e.g., “FM Share of All Radio Listening: 1973-78 Levels and Trend,” *Broadcasting*, at 33 (January 22, 1979).

As discussed in Section I above, one essential protection would be the elimination of the local radio ownership rules, which would allow AM and FM broadcasters to offer more diverse services to compete with SDARS on the local level. In addition, the Commission could require, in a manner similar to the television All Receivers Act or to cable must-carry, that all satellite radio receivers be capable of receiving SDARS, AM and FM analog and AM and FM HD broadcast radio signals in order to facilitate more direct competition among service providers. This step could enhance the ability of the emerging HD Radio multi-channel audio service to compete with the more established satellite radio service. Such a requirement would maximize consumer choice and spur competition for listeners seeking specialized programming. It is not clear, however, whether these steps would be sufficient to protect consumers.

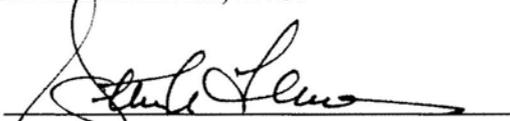
III. Conclusion.

For all of the foregoing reasons, the Joint Broadcast Parties urge the Commission not to alter the SDARS Monopoly Prohibition without also considering revision of the current regulatory limits that apply to other FCC-licensed providers of audio entertainment services. If the Commission concludes that the relevant market includes both SDARS and the AM and FM radio services, then any change in the regulatory treatment of SDARS should not be undertaken without a thorough analysis of the impact of this change on AM/FM broadcasting and on the listening public. Before adopting any change in the SDARS Monopoly Prohibition, the Commission must evaluate how the control of 25 MHz of SDARS spectrum by a single service

provider might skew future competition and adversely affect consumers in the absence of regulatory counterweights.

Respectfully submitted,

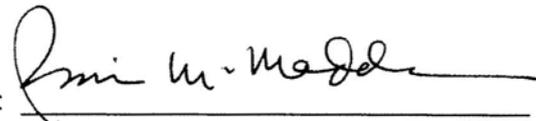
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