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September 18, 2007

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VIA EMAIL AND ELECTRONIC FILING

The Honorable Kevin Martin
The Honorable Michael Copps
The Honorable Jonathan Adelstein
The Honorable Deborah Taylor Tate
The Honorable Robert McDowell
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Consolidated Application for Authority to Transfer Control of XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc. MB Docket No. 07-57

Dear Mr. Chairman and Commissioners:

Attached for your consideration in connection with the above-referenced merger of XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc. please find an article by Jeffrey Yorke recently featured in Radio & Records. This article quotes Parents Television Council President Tim Winter as saying that the a la carte programming that will result from the merger is “a groundbreaking moment for the future of subscription-based entertainment. There is no question that greater control of graphic content, combined with the ability for consumers to have control over packages and pricing, is in the public interest and certainly in the interest of parents and families.”

In accordance with Section 1.1206 of the Commission’s rules, 47 C.F.R. § 1.1206, and the Commission’s Public Notice dated March 29, 2007 (DA 07-1435), a copy of this letter with the attached article is being filed in the docket via ECFS.

Respectfully,

/s/ Robert L. Pettit

Robert L. Pettit

cc (via email): Daniel Gonzalez, Catherine Bohigian, Monica Desai, Roy Stewart, Rosemary Harold, Helen Domenici, Michelle Carey, Erika Olsen, Rick Chessen, Bruce Gottlieb, Barry Ohlson, Rudy Brioché, Chris Moore, Amy Blankenship, Angela E. Giancarlo, Cristina Chou Pauzé

THE URGE TO MERGE

Satcasters' A La Carte Menu Feeds Its Motion For A Merger, But Plenty Of Antagonists Are Ready For A Food Fight

By Jeffrey Yorke ■ Illustration By John Ueland

After investing billions in infrastructure, a decade struggling to build a new audio industry and spending millions of dollars in marketing to differentiate themselves from one another, satellite radio companies Sirius and XM want to merge. ■ Already, they have spent $13 million—$5 million by Sirius, $8 million by XM—trying to convince Washington, D.C., regulators that their union "will bring unprecedented benefits to consumers and significantly enhance, rather than harm, competition," according to the companies. That $13 million may or may not include the $1 million in photocopying costs that Sirius CEO Mel Karmazin has said Sirius has spent to supply the Department of Justice with all the material it's asked for on the proposed merger. ■ For its part, a disclosure that the NAB filed with the Senate Office of Public Records states that broadcasters spent $4.28 million during the first half of 2007 for lobbying against such issues as the Sirius-XM merger, resurrection of the Fairness Doctrine and the RIAA's proposed performance royalties. ■ At the forefront of the two satellite radio companies' pitch to become one entity is a la carte pricing, a programming plan that, if the merger is approved, lowers the satellite radio subscriber entry price from $12.95 per month to $6.99 with a base of 50 channels that the consumer chooses. Other plans feature more options, but freedom of choice also costs more, up to $16.99 per month.

When Karmazin unveiled the plan July 23 during an address at the National Press Club in Washington, he said the new rates would take effect only if the merger was approved.

"The reason we've not offered it in the past is very simple: Last year, Sirius lost $1 billion. Our company has not made a profit in the years since it started," he said. "The idea of offering this a la carte service is made possible by the synergies connected with the merger."

Not surprisingly, persistent satellite radio nemesis the NAB isn't buying it. The organization has called the a la carte menu a sham and says consumers will be hurt because the average price of channels will cost more per month. After completing analysis of the satcasters' new menu offering, NAB senior VP of legal and regulatory affairs Jane Mago led a party of NAB lawyers and "in-the-know" staffers to the FCC to convince commissioners and associates that the satcasters' numbers don't add up.

> 'It seems to me the NAB isn't afraid the merger will foster too little competition. It's afraid it will foster too much.'
>
> —Mel Karmazin

The cry of sham garnered an immediate reaction—but not necessarily from expected parties. The million-member-strong Parents Television Council, a generally conservative, pro-family lobbying group that often tangles with the NAB over sexual and violent programming on TV, took on the broadcasters.

The PTC believes the a la carte pricing plans "will offer more affordable packages, including an option for families to block adult-themed channels and receive a price credit for the unwanted programming." The group decries what it calls the NAB's "self-serving, anti-competitive practices."

PTC director of corporate and government affairs Dan Isett says the NAB "has thrown up a red herring by claiming that prices would rise under an a la carte model. But the FCC, in its January 2007 report about cable television pricing, debunked the suggestion that prices would rise under an a la carte model."

PTC president Tim Winter further praises the XM-Sirius initiative, calling a la carte programming "a groundbreaking moment for the future of subscription-based entertainment. There is no question that greater control of graphic content, combined with the ability for consumers to have control over packages and pricing, is in the public interest and certainly in the interest of parents and families."

The FCC has not officially commented on the merger or the a la carte proposal, but, at a recent briefing with reporters, FCC chairman Kevin Martin said he is "pleased any time companies come forward with proposals that give consumers more control over what they pay for."

A New Circus In Town

The NAB, meanwhile, has matched the satcasters' lobbying efforts with equal force, trying to quash the $13.6 billion, all-stock proposal. It hopes to convince regulators that a merger would create a monopoly that would "inevitably result in increased prices, fewer programming choices, less local programming for radio listeners and other public-interest harms."

Both sides have spent plenty to make their points, hiring high-profile K street law firms and a slew of public relations and public affairs experts. The NAB paid former Attorney General John Ashcroft to write a letter to the FCC asking it to deny the merger, while Sirius hired the Paul Laxalt Group so that former Republican senator Laxalt can say nice things about the merger. Since Feb. 19, when the XM-Sirius pact was first proposed, it has created a Washington circus that has never left town and threatens to become an industry unto its own.

Sirius and XM face enormous obstacles to get their deal cleared. The Department of Justice is reviewing the plan for possible anti-competitive violations, and the FCC, which will wait for the DOJ's decision, will also re-examine its decade-old rule that prevents one operator from holding both satellite licenses.

Ultimately, a decision on the merger could set a precedent in the way federal regulators view the media marketplace. In 2002, when EchoStar's Dish Network and satellite TV competitor DirecTV proposed a similar marriage, the FCC took less than four months—speedy by Washington standards—to reject the plan as anti-competitive and not in the public interest. The decision was seen as the rule by which all other communications deals would be measured.

And while rumors of a merger between Sirius and XM began almost as soon as their birds were flying, chatter in D.C. communications lawyer circles grew louder in spring 2006. Radio wasn't just radio anymore, but a whole new world of audio entertainment. Satellite radio didn't just compete with terrestrial radio, but with every other product and medium that delivered sound to the ears. Satcasters were looking at the big picture and this would be their future argument, according to Irwin, Campbell & Tannenwald VP Peter Tannenwald.

And that is exactly the point the satcasters are making today. In a recent filing with the FCC, they point out: "All available evidence shows that consumers have a variety of reasonable substitutes for satellite radio, including, of course, terrestrial radio, but also HD radio, wireless phones, iPods and other MP3 players—and new technologies are appearing by the day. With all of these alternatives, it is abundantly clear that a combined Sirius and XM would lose subscribers if it attempted to raise prices without providing greater content or quality of service."

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During his Press Club address, Karmazin said, "Yet with all this change and competition, one fact remains pretty much the same. Terrestrial radio is still the 800-pound gorilla in the audio entertainment market with 230 million weekly listeners and radios capable of receiving broadcasts in virtually every home and automobile in America. By contrast, [satellite radio] has 300 channels and accounts for just 3.4% of the national radio audience as measured by Arbitron."

While the NAB rejects the satcasters' claim that both industries compete as part of one big competitive audio landscape, the lobbyist's president David Rehr previously recognized new technology and encouraged members to adapt to a new way of thinking. Ten months before the satcaster merger was proposed, in his April 24, 2006, keynote address at the NAB spring convention in Las Vegas, Rehr said, "There are breathtaking changes taking place in broadcasting and across all electronic media. Broadcasters, cable, satellite and our advertisers are all part of a personal media revolution . . . For the first time in the history of media, the consumer is completely in charge."

But he went on to pooh-pooh competition from satellite radio—not because it is so fierce, but because it is so lame.

"Satellite radio supposedly has 10 million subscribers total, but 260 million people listened to broadcast radio last week alone. Furthermore, satellite radio lost about a billion dollars last year. Its business model is bankrupt," Rehr said.

Going To War

So what changed in this competitive landscape and with satellite radio's "bankrupt business model" that now has the NAB spending millions of dollars to try to block the merger? And if the NAB's theory that a monopolistic satcaster would mean fewer programming choices and higher rates, wouldn't that be a huge benefit to free radio broadcasters? Why is the NAB so against two satellite radio companies becoming one?

NAB executive VP of media relations Dennis Wharton runs down the well-worn list of reasons: "When the FCC authorized satellite radio in 1997, it specifically issued more than one license, citing the fact that competition serves consumers better than a monopoly. Nothing has changed to suggest that consumers would benefit from turning two hotly competitive companies in the finite area of satellite radio into one."

In addition, he says, government should not reward two companies that have made horrendously bad business decisions (i.e., paying Howard Stern \$500 million) with a monopoly. Further, XM and Sirius have "brazenly broken" FCC rules with respect to where they placed terrestrial repeaters and their FM modulator devices "dramatically" exceed FCC interference rules, Wharton says. And, with admissions from Karmazin and XM chairman Gary Parsons that both satcasters are doing fine without a government-sanctioned monopoly, the government should insist upon the benefits of competition, which historically lead to lower prices, better service and technology advancements.

Wharton adds that "the same nonsensical arguments are being made by Karmazin today" that DirecTV and the Dish Network made when the FCC rejected their attempted merger five years ago as anti-consumer and anti-competition. "Monopolists will promise anything to become a monopoly. It's just how they are."

> **'Nothing has changed to suggest that consumers would benefit from turning two hotly competitive companies in the finite area of satellite radio into one.'**
>
> —Dennis Wharton

Karmazin: Too Good For The NAB?

In an Aug. 6 editorial in The Washington Times, Karmazin wrote, "It seems to me the NAB isn't afraid the merger will foster too little competition. It's afraid it will foster too much."

In early July, the NAB filed a petition to deny the merger with the FCC, and it continues to lodge similar briefs every few days with the commission, members of Congress or anyone who will listen. It has also urged the National Assn. of Black-Owned Broadcasters, the Consumer Federation of America, Consumers Union and various state broadcasters' associations to file petitions against the proposal. Even NPR, which supplies channels of news and information programming to Sirius and XM, filed a 21-page petition, stating, "We fear a [satellite radio] monopoly might reduce the amount and quality of public radio programming offered via the [satellite] platform."

Ultimately, it is not the NAB that satcasters have to please. They must first pass muster with the DOJ, then convince the FCC that one group should hold two satellite licenses. As the lawyers at Irwin, Campbell & Tannenwald said in a statement, "The technical question at hand is whether the policy of the FCC 10 years ago can be changed at any time, or has the force of a regulation that requires formal repeal or waiver if the merger is to be approved."

Sirius and XM will also have to convince the FCC that the deal is not anti-competitive, though the commission will likely take that direction from the DOJ.

Perhaps it's understandable that such a flurry of dollars, words and filings has been generated from both sides: A decision from the regulators is expected in just five months, by year's end. R&R