Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Applications for Consent to the Transfer of Control of Licenses	)	
XM Satellite Radio Holdings Inc., Transferor	)	MB Docket No. 07-57
to	)	
Sirius Satellite Radio Inc., Transferee	)	

COMMENTS OF NATIONAL PUBLIC RADIO, INC.

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Summary

Federal communications policy has long favored competition in communications markets as a means of fostering viewpoint diversity, among other consumer benefits. In authorizing the Satellite Digital Audio Radio Services ("SDARS"), the Commission grappled with how many competing providers to authorize given spectrum constraints, and it ultimately decided that authorizing two SDARS providers will assure their economic viability while advancing the public interest. To preserve a competitive SDARS market and protect the public interest, the Commission imposed two conditions on SDARS license transfers: (1) as in the case of spectrum authorizations generally, the Applicants were required to obtain prior Commission approval and (2) the Commission adopted a market "safeguard" barring the Applicants from transferring their authorizations to each other or to a common third party.

In seeking to eliminate the market safeguard, the Applicants have offered a combination of procedural and substantive challenges. They claim that the market safeguard is a mere policy statement rather than a binding rule, such that the Commission may simply cast it aside. Further, the Applicants argue that, if the market safeguard constitutes a rule, the Commission should waive, modify or otherwise alter it, citing changed circumstances affecting audio entertainment programming generally.

Based on prevailing case law, there is little question but that the SDARS market safeguard constitutes a rule. The Commission viewed the safeguard as a rule, it was published in the Federal Register, and, most importantly, it bound both the Commission and the Applicants from the moment the SDARS authorizations were issued and in an undeniably specific and material way.

While the Commission possesses the authority to waive its rules, we do not think it can or should do so here. A waiver is appropriate in particular circumstances when application of the rule would produce harsh results. Granting a waiver is not purely discretionary, moreover, and the Commission is required to devise a waiver standard to govern future cases so as to avoid discriminatory application. In this case, the market safeguard only applies to the Applicants, it was intended to address the specific situation presented here, and, if waived, it would have no future applicability.

What the Applicants really seek is repeal of the market safeguard, not a waiver, but we do not believe the Commission can justify the abrupt elimination of SDARS competition in the circumstances presented. The Applicants point to "changed circumstances" in how audio programming is offered and received, but those changes reflect a continued evolution of consumer electronics and communications and not a fundamental marketplace shift. Future technology may eventually produce such a shift, but the mere promise of technology is not enough to justify the abrupt change requested here.

Ultimately, repealing the market safeguard can be justified, if at all, based on an analysis of the costs and benefits of intramodal SDARS competition itself. We believe that analysis only underscores the wisdom of requiring competing SDARS providers. By any objective measure, the Applicants have achieved substantial success in the 6 years since the launch of SDARS, far surpassing the Commission's expectations when it authorized SDARS 10 years ago. That success is directly attributable to competition between the Applicants, which has resulted in a significant expansion of SDARS channel capacity, an incomparable array of program offerings, and an impressive consumer response.

Significantly, the Applicants do not argue that intramodal SDARS competition has produced adverse results. Rather, they claim that combining the SDARS authorizations in a single entity will produce substantial additional consumer benefits. Examining the promised programming packages reveals, however, that consumers will tend to pay higher subscription fees for fewer channels, and the Applicants are unwilling to make *any* commitment regarding the content or pricing of these packages. More fundamentally, we submit that eliminating competition between the only two SDARS providers based on mere promises is a bargain the Commission should rightly reject.

For these reasons, and as established more fully herein, we respectfully urge the Commission to find that the competition preserving market safeguard constitutes a rule and that it should neither be waived nor repealed in this case.

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COMMENTS
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Introduction

Pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, National Public Radio, Inc. ("NPR") hereby submits its Comments in response to the Commission's Notice of Proposed Rulemaking regarding the Satellite Digital Audio Radio Services ("SDARS") transfer of control applications (collectively, the "Consolidated Application") in the above-captioned proceeding and, specifically, the regulatory prohibition against the proposed merger.[1]

[1] In the Matter of 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 Rulemaking, MM Docket 07-57, rel. June 27, 2007 [hereinafter "NPRM "].

As described in NPR's Petition to Deny the Consolidated Application, NPR is a non-profit membership organization comprising more than 800 full-service noncommercial educational radio stations nationwide.[2] In addition to producing and distributing such noncommercial educational programming as *All Things Considered*, *Morning Edition*, and *Talk Of The Nation*, NPR programs two channels on the Sirius SDARS platform.[3] NPR's member stations are, themselves, both producers of noncommercial educational programming and suppliers of programming to the SDARS market.[4] NPR also operates the Public Radio Satellite System ("PRSS") and provides representation and other services to its Member stations.[5]

I. The Commission's Rules Require Intramodal SDARS Competition, and the Applicants Cannot Justify A Waiver That Would Permit The Proposed Merger

With viewpoint diversity as a bedrock objective of communication policy, the Commission has long recognized that the best means of achieving that objective is by promoting competition in the delivery of spectrum-based communications services.[6] Although limited to licensing just two SDARS providers because of spectrum constraints, the Commission's

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[2] Petition to Deny of National Public Radio, Inc., In the Matter of Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings, Inc., Transferor, to Sirius Satellite Radio, Inc., Transferee, MM Docket No. 07-57 (filed July 9, 2007) [hereinafter "NPR Petition"].

[3] Id. at 2.

[4] Id. at 2 & n.3.

[5] Id. at 2.

[6] In the Matter of Application of EchoStar Communications Corporation, (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations); (Transferors) and EchoStar Communications Corporation (a Delaware Corporation); (Transferee), 17 FCC Rcd 20559, 20575 (2002) [hereinafter "Echostar/DirectTV Hearing Designation Order"]. See also id. at 20598-99 (citing the SDARS, cellular, PCS, CMRS, and DBS markets).

"licensing approach nonetheless provide[d] the opportunity for a competitive DARS service" in furtherance of this diversity principle,[7] with the specific goal of creating "as competitive a market structure as possible."[8]

To ensure the SDARS market remained competitive, the Commission adopted a market "safeguard" flatly prohibiting any single entity from acquiring both SDARS licenses.[9] Thus, the Commission held that, "[e]ven after DARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellite DARS license."[10] This market safeguard was based on a simple fact: an intramodal, facilities-based competitive market structure requires at least two competing SDARS providers.

In the face of this market safeguard, XM and Sirius have sought to downplay its significance by characterizing the safeguard as a mere policy statement rather than a rule.[11] Furthermore, the merger applicants contend that, even if viewed as a rule, the Commission may waive any of its rules and that it should do so in this case on the grounds that changed market

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[7] In the Matter of Establishment of Rules and Policies for the Digital audio Radio Satellite Service in the 2310 MHz Frequency Band, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5754, 5786 (1997) ("Licensing at least two service providers will help ensure that subscription rates are competitive as well as provide for a diversity of programming voices.") [hereinafter "SDARS Report and Order"].

[8] Id. at 5786. Cf. Echostar/DirectTV Hearing Designation Order, 17 FCC Rcd. at 20603 ("We have consistently found that from the perspective of spectrum policy, the public interest is better served by the existence of a diversity of service providers wherever possible.")

[9] The prohibition literally appears in a section of the SDARS Report and Order entitled "Safeguards." SDARS Report and Order, 12 FCC Rcd. at 5823.

[10] Id. at 5823.

[11] Consolidated Application at 50.

conditions obviate the need for "strict application" of the "rule."[12] As demonstrated below, the Applicants have mischaracterized the standard for determining whether the safeguard at issue constitutes a rule or a policy, and proper application of the relevant standard leads inescapably to the conclusion that the safeguard is a rule. Furthermore, we do not believe the Applicants can satisfy their burden of justifying a waiver of the rule.

A. The Prohibition Against Combining The SDARS Licenses In A Single Entity Constitutes A Rule That Is Essential To Preserving Intramodal SDARS Competition

In describing the market safeguard as "merely a policy statement" to be casually ignored,[13] the Applicants misperceive its foundational significance. The issue is whether, consistent with longstanding spectrum policy, the Commission should continue requiring competition in the offering of SDARS or do circumstances now justify authorizing an exclusive SDARS provider. At stake is the very structure of the SDARS market.

In characterizing the safeguard as a mere policy statement, the Applicants contend that, because "this language was not codified in the Code of Federal Regulations," it "is not a binding FCC regulation."[14] That, however, is not the test for determining whether an agency has adopted a binding rule or a statement of policy. To the contrary, courts generally undertake two lines of inquiry. The first focuses on the *effects* of the purported regulation and requires consideration whether the agency action (1) imposes any rights or obligations or (2) genuinely leaves the agency and its decisionmakers free to exercise discretion.[15] The second test concerns the

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12 Id. at 51-52.

13 Id. at 50.

14 Id. at 50.

15 Wilderness Society v. Norton, 434 F.3d 584, at 595 (D.C. Cir. 2006).

expressed *intent* of the agency and looks to (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 on the agency.[16] Application of these tests is a fact-based inquiry, requiring attention to the "language, context, and application" of the agency action.[17]

In applying the "effects test," the D.C. Circuit has held that the first criterion turns on whether the agency pronouncement "acts prospectively," as a statement of policy "may not have a present effect."[18] The court has further clarified:

> If a statement has a present-day binding effect, it is legislative. Mere pronouncements of what the agency intends, whether for the present or for the future, which do not have a binding effect, are properly classified as interpretative rules. Thus, it is the binding effect, not the timing, which is the essence of criterion one.[19]

The language actually used by the agency, moreover, is central to determining whether the agency action achieves this binding effect.[20] In this connection, the D.C. Circuit has found often "decisive" the choice between the words "will and may."[21] More recent cases have held, furthermore, that "an agency pronouncement will be considered binding as a practical matter if it

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[16] Id. at 595.

[17] Vietnam Veterans of America v. Secretary of the Navy, 843 F.2d 528, 539 (D.C. Cir. 1988).

[18] Community Nutrition Institute v. Young, 818 F. 2d 943, 946 (D.C. Cir. 1987); American Bus Ass'n v. U.S., 627 F.2d 525, 529 (D.C. Cir. 1980).

[19] American Bus Ass'n, 627 F.2d at 529.

[20] Wilderness Society, 434 F.3d at 595.

[21] Community Nutrition, 818 F.2d at 946; Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 538 (D.C. Cir. 1986).

either appears on its face to be binding or is applied by the agency in a way that indicates it is binding."[22]

Applying the effects test, one can only conclude that the safeguard is a rule. The SDARS Report and Order flatly commands that "[e]ven after DARS licenses are granted, one licensee *will not* be permitted to acquire control of the other remaining satellite DARS license."[23] This sentence follows language invoking the preexisting Commission rule against license transfers without prior Commission approval,[24] thereby imposing a further restraint on the Applicants' ability to transfer their respective SDARS licenses from the moment they first received them.[25]

Nor is this a case in which the Commission is genuinely left free to exercise discretion and approve an SDARS license transfer that would leave one entity in control of all SDARS licenses. To the contrary, based on the plain language of the safeguard, the Commission reserved itself no discretion.[26]

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[22] Croplife America v. EPA, 329 F.3d 876, 881 (D.C. Cir. 2003) (*quoting* General Electric Co. v. EPA, 290 F.3d 377, 383 (D.C. Cir. 2002)). While the Commission heretofore has not had an opportunity to apply the market safeguard, initiating the instant rulemaking proceeding indicates the Commission views the safeguard as having a substantive effect. See Community Nutrition, 818 F.2d at 949.

[23] SDARS Report and Order, 12 FCC Rcd. at 5823 (*emphasis added*).

[24] Id. at 5823 ("DARS licenses, like other satellite licenses, 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.").

[25] Accordingly, this is not a case involving a statement containing neither "precision in its directives" nor any "indication of how the enunciated policies are to be prioritized." Wilderness Society, 434 F.3d at 595. Compare also Chiton Corp. and Perspective Biosystems, Inc. v. National Transportation Safety Board, 198 F.3d 935, 943 (D.C. Cir. 1999) (finding an unpublished "hand-out" stating that "all developments of the investigation made known to the [Investigator in Charge] will be passed to each party spokesman" was not a rule).

[26] Compare Guardian Federal Savings & Loan v. Federal Savings & Loan, 589 F.2d 658, 666-667 (D.C. Cir. 1978) ("If it appears that a so-called policy statement is in purpose or likely

The "intent test," as noted above, considers the expressed intent of the agency and requires examination of 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 on the agency.[27] The "first two criteria serve to illuminate the third, for the fundamental inquiry is whether the agency action partakes of the fundamental characteristic of a regulation, *i.e.*, has the force of law."[28]

In this case, the Commission has characterized the safeguard as a "rule." The section of the SDARS Report and Order in which the safeguard is found is entitled "*Rules* for Auctioning DARS Licenses."[29] In its SDARS license auction announcement, the Commission cautioned all prospective bidders that "[t]he *rules* contained in [the SDARS Report and Order] are *not negotiable"* and that they "should review these auction documents thoroughly prior to the auction to make certain that they understand all of the provisions and *are willing to be bound by all of the terms* before participating in the auction."[30] The Commission also specifically advised

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effect one that *narrowly limits administrative discretion* it will be taken for what it is—a binding rule of substantive law.") with Wilderness Society, 434 F.3d at 596 (because "the agency's top administrators clearly reserved for themselves unlimited discretion to order and reorder all management priorities," the Management Policies at issue could not be said to limit agency discretion and create enforceable rights).

[27] Wilderness Society, 434 F.3d at 595.

[28] General Electric, 290 F.3d at 382; General Motors Corp. v. EPA, 363 F.3d 442, 448 (D.C. Cir. 2004); Molycorp, Inc. v. EPA, 197 F.3d 543, 545 (D.C. Cir. 1999).

[29] SDARS Report and Order, 12 FCC Rcd. at 5812 ,5823 (*emphasis added*).

[30] 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, at 3 (March 6, 1997) reprinted at http://wireless.fcc.gov/auctions/15/releases/da970477.pdf (*emphasis added*) [hereinafter "DARS Auction Notice"]. Compare Wilderness Society, 434 F.3d at 596 (noting that, in publishing the proposed Management Policies for public comment, the agency explained that "[p]ark superintendents, planners, and

all prospective bidders that "[b]idders may win only one license, and as such will be permitted to be active on only one license at a time."[31]

Although the market safeguard was not published in the Code of Federal Regulations ("CFR"), it was published in the Federal Register.[32] Publication in the CFR is but a factor in the analysis of whether the agency intended the statement to have the force and effect of a rule.[33] While publication in the CFR is essential to the adoption of a rule having general applicability, the absence of publication does not signify the reverse. Indeed, such a standard would have the perverse consequence of enabling agencies to avoid complying with the Administrative Procedures Act by adopting substantive rules under the guise of interpretative policy statements so long as they did not publish them in the CFR.[34]

Finally, the plain language of the market safeguard binds both the Applicants and the Commission.[35] When the Applicants bid for and obtained their respective SDARS licenses, they understood that their ability to transfer or assign the licenses was conditional. As with satellite

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other NPS employees use management policies as a reference source when making decisions that will affect units of the national park system.")

[31] DARS Auction Notice at 3-4.

[32] Digital Audio Radio Service in the 2310-2360 MHz Frequency Band, 62 Fed. Reg. 11083, 11102 (Mar. 11, 1997).

[33] Wilderness Society, 434 F.3d at 595.

[34] See, e.g., Croplife America v. EPA, 329 F.3d at 883-85 (EPA adopted a substantive rule notwithstanding the failure to conduct notice and comment rulemaking or to publish the rule in the CFR); General Electric Corp. v. EPA, 290 F.3d at 382-385 (an EPA Guidance Document constituted a set of rules even though not published in the CFR or otherwise for public comment).

[35] See General Electric, 290 F.3d at 384.

licenses generally, prior Commission approval was required and the Commission would approve a proposed transfer only if it would serve the public interest, convenience, and necessity.[36]

In addition, the Applicants could transfer their license to anyone so long as one entity would not control both licenses. Since a transfer resulting in exclusive control of all SDARS licenses would likely command the greatest purchase price, it is folly to suggest that the market safeguard did not bind the Applicants in a specific and material way. Likewise, the market safeguard established a supervening limitation on the Commission's authority to approve transfers in the public interest: absent waiver or repeal of the rule, the Commission is powerless to approve a transfer that would produce an exclusive SDARS provider.

B. The Applicants Cannot Justify The Granting Of A Waiver Of The Market Safeguard

The Applicants request that, if the market safeguard is determined to be a rule, the Commission waive the rule on the grounds that the underlying purpose of the rule would be frustrated and a waiver would be in the public interest.[37] While the Commission has general authority to waive its rules based on a showing of "good cause,"[38] the market safeguard only applies to the Applicants, it addresses the specific situation presented here, and, if "waived," it would have no future applicability. As a result, we submit, the circumstances of this matter do not permit a waiver of the market safeguard.

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36 SDARS Report and Order, 12 FCC Rcd. at 5823.

37 Consolidated Application at 51.

38 47 C.F.R. § 1.3.

It is well settled that the Commission may exercise its waiver authority where particular facts would make strict compliance inconsistent with the public interest,[39] but it may do so "only pursuant to a relevant standard . . . . [which is] best expressed in a rule that obviates discriminatory approaches."[40]. In this case, the market safeguard *only* applies to an attempted transfer of the SDARS licenses by the Applicants to each other or to a common third party. Thus, this is not a case of "strict compliance"; it is simply the application of a rule to the specific circumstances it was intended to address.[41] Nor can the Commission grant a waiver according to "a relevant standard" which itself is expressed in a rule so as to avoid discriminatory application of the waiver in the future. If the Commission were to grant the Consolidated Application, there could be no further application of the market safeguard because the result it was intended to prevent -- an exclusive SDARS provider -- would be the direct and immediate consequence of allowing the Applicants to merge.

In reality, what the Applicants seek is not a waiver of the market safeguard, but its repeal. They argue that, because of changes in the manner of delivery and reception of audio programming, there is no longer a need to preserve competition between SDARS providers. As demonstrated below, we do not believe the Applicants have demonstrated sufficiently changed circumstances to warrant repeal of the market safeguard at this time. In any event, they have not shown the special circumstances necessary to justify a waiver.

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[39] WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C.Cir. 1969)

[40] Id.

[41] See In the Matter of Communications Satellite Corporation, Request for Waiver of Section 25.131(j) (1) of the Commission's Rules As It Applies to Services Provided via the Intelsat K Satellite, 7 FCC Rcd 4602, 4602-03 (Com. Car. Bur. 1992) ("Comsat's waiver request is not based on special circumstances; rather it raises broad legal and policy questions . . . . which are properly addressed in a notice-and-comment rule making context.").

II. The Commission Should Retain The Market Safeguard To Preserve Competition Between SDARS Providers

In seeking to "waive, modify, or otherwise alter" the market safeguard, the Applicants cite "changed circumstances" such that the SDARS market is now subsumed within an "audio entertainment market" and a competitive SDARS market is no longer necessary.[42] This claim is based on what it calls an "extremely competitive" market for audio entertainment services, consisting of AM and FM radio, HD radio, stand-alone MP3 players and mobile phones with MP3 player functionality, online music subscription services and podcasting, and internet radio.[43] NPR's Petition to Deny the Consolidated Applications largely addressed this argument, demonstrating that, notwithstanding recent or future changes in technology or the marketplace, the relevant market is currently, and for the foreseeable future likely to remain, a national SDARS market.[44]

In evaluating the claim that SDARS operates in a very different world than when it was first authorized, it is important to consider the Commission's expectations when it authorized SDARS. At that time, the Commission recognized that "satellite DARS will face competition

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[42] Consolidated Application at 51. While the Applicants ask the Commission to "modify[] or otherwise alter" the market safeguard, we cannot conceive of a change short of repeal that would preserve the essence of the market safeguard, while allowing the Applicants to consolidate all the SDARS authorizations in a single entity. That is not to say the Commission could not repeal the market safeguard but require the Applicants to relinquish sufficient spectrum to permit a new SDARS entrant, as NPR has suggested, NPR Petition to Deny at 21, but the Applicants have opposed such a condition. . Joint Opposition to Petitions to Deny and Reply Comments of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc., In the Matter of Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings, Inc., Transferor, to Sirius Satellite Radio, Inc., Transferee, MM Docket No. 07-57 at 100 (filed July 24, 2007) [hereinafter "Joint Opposition"].

[43] Consolidated Application at 41-42. See also Joint Opposition at 57-62.

[44] NPR Petition for at 8-17.

from terrestrial radio services, CD players in automobiles and homes, and audio services delivered as part of cable and satellite services."[45] Some of the means of distributing and performing audio entertainment have changed since then. Thus, in recent years, MP3 players, computers, and cell phones have increasingly replaced cassette, CD player, and portable radios as common means to access audio programming.

Nonetheless, the basic *functionality* for receiving audio content has largely stayed the same. In 1997, as now, individuals could listen to sound recordings, whether music or other recorded audio news, information, or entertainment (then, CD and cassette players; now, CD and MP3 players). Then, as now, individuals could listen to hosted audio programming services in a mobile environment (then, analog terrestrial radio; now, analog terrestrial radio and SDARS). Then, as now, individuals could listen to hosted audio programming services at home (then, analog terrestrial radio, cable and DBS; now, analog terrestrial radio, cable, DBS, and SDARS). On balance, then, while circumstances have changed to some degree since the initiation of SDARS, those changes reflect the continuing evolution of communications and consumer electronics rather than a fundamental marketplace shift.

The Applicants place great stock in the promise of technology to produce new audio programming options, including a number of wireless spectrum-based SDARS alternatives.[46] Many of these, however, are still on the drawing board, and it is uncertain which, if any, will overcome technical hurdles and achieve broad market acceptance. The Applicants cite the

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[45] SDARS Report and Order, 12 FCC Rcd at 5786 (quoting Establishment of Rules and Policies for the Digital audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, Notice of Proposed Rulemaking, 11 FCC Rcd 1, at ¶ 38 (1995)).

[46] See Joint Opposition, Appendix F, at 6-30.

possible use of the television "white space," for instance, but early testing indicates there is substantial cause for interference concerns.[47] Even in the case of relatively proven technology, such as HD Radio, market penetration and consumer acceptance may not occur for many years, if at all. Indeed, in the case of HD Radio, the Commission has indefinitely deferred consideration of when terrestrial broadcasters might cease offering analog services and the rules that should govern all-digital operation.[48]

The Applicants also claim there is substantial consumer substitution between SDARS and other media options.[49] Much of the purported basis for this claim is dubious. The Applicant's expert notes that the Applicants collectively serve approximately 14 million subscribers and simply assumes that these subscribers listen to SDARS *in lieu of* terrestrial broadcasting.[50] As Arbitron and other research demonstrates, however, SDARS subscribers largely listen to SDARS *in addition to* terrestrial broadcasting.[51]

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[47] Technical Research Branch, Laboratory Division, Office of Engineering and Technology Federal Communications Commission, Initial Evaluation of the Performance of Prototype TV-Band White Space Devices, at x (July 31, 2007) (concluding that "the sample prototype White Space Devices submitted to the Commission for initial evaluation do not consistently sense or detect TV broadcast or wireless microphone signals").

[48] In the Matter of Digital Audio Broadcasting Systems And Their Impact on the Terrestrial Radio Broadcast Service, Second Report And Order; First Order On Reconsideration And Second Further Notice Of Proposed Rulemaking MM Docket No. 99-325, 2007 FCC LEXIS 4087, *27 (rel. May 31, 2007) ("When DAB receiver penetration has reached a critical mass and most, if not all, radio stations broadcast in a hybrid digital format, we will begin to explore the technical and policy issues germane to an all-digital terrestrial radio environment.")

[49] Joint Opposition at 36-42.

[50] Id., Appendix A, at 10-12.

[51] See NPR Petition to Deny at 12-13.

The Applicants also claim an inverse relationship between SDARS penetration and the number terrestrial radio stations in a given area.[52] Even if true, this would not demonstrate that consumers view SDARS and terrestrial broadcasters as interchangeable services. After all, in the relative absence of terrestrial broadcast stations, it is not surprising that consumers would turn to SDARS. The relevant question for purposes of defining the product market, however, is whether, given a *choice* between the two services, consumers would substitute one for the other. Existing data indicates such substitution is not occurring. This distinction is important because it is the substitution of SDARS and terrestrial broadcast services *when both are readily available* that would enable competition to blunt attempted anti-competitive conduct and define the relevant product market.

The Applicants and their expert also cite competitive responses to SDARS as evidence of a broader product market. The problem is that these "responses" are more imagined than real. The Applicant's expert tries to characterize HD Radio as a competitive response to SDARS, for instance, even though terrestrial broadcasters, including NPR, have been pursuing terrestrial digital audio broadcasting for twenty years or more[53] and consumer electronics manufacturers are only now beginning to produce and distribute HD Radio receivers. Likewise, the Applicants point to attempts by commercial broadcasters to reduce the amount of advertising, experiment with its placement, and offer a wider variety of music, and they conclude that such efforts are in

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[52] Joint Opposition at 39 & Appendix A, at 15-16.

[53] See Comments of National Public Radio, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, MM Docket No. 87-268, at 2-7, filed Nov. 18, 1987 (urging the Commission to consider the spectrum needs of digital terrestrial radio systems).

response to SDARS.[54] It is just as likely, however, that commercial broadcasters are attempting to reverse the ongoing loss of listeners that has occurred during much of the past decade.[55]

Underlying the Applicants' arguments is the flawed notion that all audio entertainment offerings are part of an undifferentiated market. While it is true that audio services compete for the attention of listeners, that simple fact does not define the relevant market. If it did, the market would consist of all "things that compete for people's attention," including newspapers, magazines, books, television, motion picture releases, and live theatre, to name a few.

It is also not true that only NAB and its purported "surrogates" oppose the proposed merger or that opposition to the merger reflects a competitive response.[56] NPR is certainly no one's surrogate. Moreover, we petitioned the Commission to deny the Consolidated Applications because, as a producer and distributor of audio programming including via the SDARS platform, we anticipate substantial harm to independent entities such as NPR if the universe of SDARS providers is reduced from two to one.[57]

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[54] Joint Opposition at 40-41.

[55] See George Williams, Review of the Radio Industry, 2007, at 14-15 (July 31, 2007) ("From the fall of 1998 to the fall of 2006, Arbitron reports that the average number of listeners per quarter hour has fallen from1approximately 19.7 million to approximately 18.4 million, a drop of 6.6 percent.").

[56] See Joint Opposition at 6 & 42-43.

[57] See NPR Petition to Deny, Appendix at 3. As we discussed in our Petition to Deny, NPR considers the unique attributes of each distribution medium and the potential audience of the medium, whether it is terrestrial broadcasting, various digital media, including podcasting, or SDARS. In programming its two channels on the Sirius SDARS platform, NPR has sought to offer programming that appeals to a younger, more ethnically diverse audience. Id. at 3-4 Because NPR controls the programming offered on those SDARS channels, it can also offer programs that have yet to find a sufficient audience in terrestrial broadcasting. Id. We expect the loss of intramodal SDARS competition to diminish these opportunities for NPR. Id. at 2-3.

Ultimately, the issue whether to repeal the market safeguard -- the subject of this NPRM -- is not strictly about defining the relevant market. Since the rule at issue is addressed to competition between the two SDARS providers, the question is whether the Commission should continue insisting upon intramodal SDARS competition, consistent with longstanding Federal pro-competitive spectrum policy, or abruptly change course because the Applicants have chosen to seek a merger. In resolving that question, it is important to remember that, when an agency reverses its course, it must give sound reasons for the change and show that the change is consistent with the law that gives the agency its authority to act.[58]

While the Applicants have not addressed how well they have performed as the result of a competitive SDARS market, we submit that SDARS has been a resounding success by most expectations, including the Commission's. When the Commission established the SDARS service, the Applicants represented that they would each be able to offer between 30 and 44 channels of audio programming.[59] The Commission estimated that the overall penetration rate of SDARS receivers in radio listening environments might reach 4 percent by 2005, but that, with even more rapid penetration, the Applicants share of radio listening time would grow relatively slowly over decades.[60] The Applicants have well exceeded those estimates.

Today, XM and Sirius offer 300 channels of audio content between them, including virtually every imaginable category of programming on a 24 hour, 7 day per week basis,

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[58] Fox Television Stations v. FCC, 489 F.3d 444, 2007 U.S. App. DC LEXIS 12868, *36-37 (2d Cir. June 4, 2007); Action for Children's Television v. FCC, 821 F.2d 741, 745 (D.C. Cir. 1987).

[59] SDARS Report and Order, 12 FCC Rcd at 5764-65.

[60] Id. at 5752 n.47.

anywhere in the country, and unencumbered by content restrictions.[61] The Applicants now claim14 million subscribers as of December 31, 2006,[62] an increase of almost 5.5 million subscribers just during 2006,[63] and a number expected to double in the next 3 years.[64] The Applicants also realized $1.6 billion, or approximately 7 percent of overall radio revenues, in 2006, and captured 3.4 percent of all radio listening. For services that have been in existence for less than 6 years, this success is remarkable.[65]

We attribute this success, in no small measure, to the fact that the Applicants have had to compete with each other to attract subscribers. This competition has produced significant technical advancements, particularly the Applicants' ability to roughly quadruple the number of channels they offer. This competition has manifested itself in the depth and breadth of their respective program offerings. It has resulted in the wide deployment of SDARS receivers and unparalleled public awareness of the services.

Indeed, the Applicants do not claim that intramodal competition has produced adverse results, only that the combination of all the SDARS authorizations in a single entity would create substantial additional consumer benefits. The Commission must be wary of any claim that an

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61 See Consolidated Application at 3, 5.

62 Joint Opposition, Appendix A, at 10

63 See XM Satellite Radio Holdings Inc., Form 10-K, at 41 (Mar. 1, 2007) (reporting 3,866,481 gross subscriber additions in 2006); Sirius Satellite Radio Inc., Form 10-K, at 27 (Mar. 1, 2007 (reporting 2,707,995 subscriber additions in 2006).

64 Joint Opposition a, Appendix A, at 2.

65 XM launched its service on September 25, 2001. XM Satellite Radio Holdings Inc., 2001 Annual Report at 1, reprinted at http://media.corporate-ir.net/media_files/irol/11/115922/reports/ 2001ar.pdf. Sirius launched its service on a nationwide basis on July 1, 2002. Sirius Satellite Radio Inc., 2002 Annual Report, at 2, reprinted at http://www.sirius.com/pdf/SIRI_2002.pdf.

exclusive provider of a spectrum based service is preferable to competing providers, given the role of competition as the unifying principle underlying modern communications policy.[66] In this case, scrutinizing the consumer benefits touted by the Applications reveals them to be much less than claimed.

The principal benefit consumers are promised is the ability to purchase customized packages of SDARS channels at a range of price points. For instance, "[s]ubscribers will be able to create a customized programming package of 50 channels for $6.99 per month," and "[s]ubscribers also will be able to create a customized programming package of 100 channels -- including some "best of" programming from both services -- for $14.99 per month."[67] Other contemplated offerings include a family friendly package, a "mostly music" package, and a "news, sports & talk" package.[68] While additional choice is ordinarily a good thing, we question whether the promised offerings justify the radical step of eliminating intramodal SDARS competition.

As a threshold matter, it is not clear how beneficial the proposed packaging and pricing would be to existing or future subscribers. The Applicants currently offer 130 and 170 channels of programming, with each service costing $12.95 per month.[69] The so-called "A La Carte I"

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[66] See Echostar/DirectTV Hearing Designation Order,17 FCC Rcd. at 20664 ("Allowing combination of the assets of the two companies with the strongest incentive and ability to compete in offering satellite broadband services would offend the Communication Act's strong overall preference for competition unless it were demonstrated convincingly that another significant objective could not be achieved except through such a combination.")

[67] Joint Opposition at 3.

[68] Id., Appendix B, at 1 & Appendix C, at 1.

[69] Id.

package starts at $6.99 per month, with the option of adding additional channels at additional, per channel cost, but the basic package includes only 50 channels and subscribers would have to purchase a new receiver.[70] The "mostly music" and "news, sports & talk" packages are similarly priced at a slightly lower rate ($9.99/month) but consist of far fewer channels.[71] Other packages offer the option of adding selected channels from the other SDARS platform, but at a price higher than the current $12.95 per month.[72]

More fundamentally, the Applicants offer no guarantees regarding either the availability or pricing of particular packages. Although stated indirectly, the Applicants caution that [a]ll content is subject to change from time to time due to contractual relationships with third-party providers *and for other reasons*."[73] The Applicants also note that "[t]he companies do not have a predetermined time period during which the new prices will remain in effect."[74] The net result is a set of promises of dubious consumer benefit and no enduring substance or duration.

While NPR has suggested possible conditions the Commission might impose if it were to approve the Consolidated Applications, the Applicants summarily dismissed the imposition of *any* conditions.[75] NPR is skeptical that any set of conditions would be sufficient to justify eliminating intramodal SDARS competition, but we find it telling that the Applicants are unwilling to offer or accept any conditions that might impinge on their ability to operate in whatever fashion they might choose. That is certainly their prerogative, but we do not see how

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70 Id.

71 Id.

72 Id.

73 Id.

74 Id. at 13 n. 31.

the Commission can justify an abrupt departure in this case from the inexorable advance of Federal pro-competitive spectrum policy. Accordingly, we urge the Commission to retain the market safeguard.

Conclusion

For the foregoing reasons, NPR asks the Commission to find that the competition preserving market safeguard constitutes a rule which should neither be waived nor repealed.

Respectfully submitted,

NATIONAL PUBLIC RADIO, INC.

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[75] Id. at 100-03.