1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

7925 JONES BRANCH DRIVE
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wileyrein.com

November 13, 2007

Robert L. Pettit
202.719.7019
rpettit@wileyrein.com

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 a copy of the Joint Ex Parte Submission of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. A complete copy of this ex parte, with the attachments referenced in the ex parte, was filed in MB Docket No. 07-57 today.

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 filing is being filed in the docket via ECFS.

Respectfully,

/s/ Robert L. Pettit

Robert L. Pettit

Attachment

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

REDACTED

FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of XM Satellite Radio Holdings Inc., *Transferor,* and Sirius Satellite Radio Inc., *Transferee.* Consolidated Application for Authority to Transfer Control of XM Radio Inc. and Sirius Satellite Radio Inc.	))))))))))))))	MB Docket No. 07-57

JOINT EX PARTE SUBMISSION OF SIRIUS SATELLITE RADIO INC. AND XM SATELLITE RADIO HOLDINGS INC.

Patrick L. Donnelly
Executive Vice President, General Counsel and Secretary
Sirius Satellite Radio Inc.
1221 Avenue of the Americas
36th Floor
New York, NY 10020

Richard E. Wiley
Robert L. Pettit
Peter D. Shields
Jennifer D. Hindin
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006
202.719.7000

Attorneys for Sirius Satellite Radio Inc.

Dara F. Altman
Executive Vice President, Business and Legal Affairs
XM Satellite Radio Holdings Inc.
1500 Eckington Place, NE
Washington, DC 20002

Gary M. Epstein
James H. Barker
Brian W. Murray
Barry J. Blonien
Latham & Watkins LLP
555 Eleventh Street, NW
Washington, DC 20004-1304
202.637.2200

Attorneys for XM Satellite Radio Holdings Inc.

November 13, 2007

TABLE OF CONTENTS

REDACTED

FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
XM Satellite Radio Holdings Inc.,	)	MB Docket No. 07-57
Transferor,	)	
and	)	
Sirius Satellite Radio Inc.,	)	
Transferee	)	
	)	
Consolidated Application for Authority to Transfer Control of XM Radio Inc. and Sirius Satellite Radio Inc.	)	

JOINT EX PARTE SUBMISSION OF SIRIUS SATELLITE RADIO INC. AND XM SATELLITE RADIO HOLDINGS INC.

Since July 24, 2007, when Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM") submitted their Joint Opposition to Petitions to Deny and Reply Comments ("Joint Opposition and Reply")[1] in this proceeding, a number of commenters have submitted additional documents in opposition to the pending merger. These submissions have included several purported economic studies and a variety of other ex parte filings. This Joint Submission attempts to provide a comprehensive response to these various filings.

I. THE NAB AND ITS SURROGATES CONTINUE TO MISAPPREHEND, MISSTATE, AND MISAPPLY APPLICABLE ANTITRUST PRECEDENT AND POLICY.

Over the past several months, the National Association of Broadcasters ("NAB") and its surrogates have continued to fund various papers attacking the analysis prepared by CRA

[1] Joint Opposition to Petitions to Deny and Reply Comments of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. (July 24, 2007) ("Joint Opposition and Reply").

International ("CRA").[2] In substantial part, these filings argue that satellite radio constitutes its own narrow product market and that CRA, in describing a broader market for audio entertainment, has abandoned the Department of Justice's Horizontal Merger Guidelines ("Merger Guidelines")[3] and accepted antitrust analysis.[4] These assertions are demonstrably wrong.

A. CRA Supplemental Report.

Attached as Exhibit A is a Supplemental Report prepared by CRA that reaffirms its previous conclusions that the relevant market is broader than satellite radio; that the market is highly competitive and technologically dynamic; and that the merger will enhance competition in the market.[5] CRA's analysis and conclusions comport with common sense, with numerous comments on the record in this proceeding, and with consumer-oriented experience reflected each day in mass-media[6] and trade-press[7] stories and ads.

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2 CRA International, *Economic Analysis of the Competitive Effects of the Sirius-XM Merger*, ("CRA Competitive Effects Analysis"), submitted as Exhibit A to the Joint Opposition and Reply.

3 U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, Issued April 2, 1992, Revised April 8, 1997 ("Merger Guidelines").

4 *See* J. Gregory Sidak, *Third Supplemental Declaration* 3-4, 8-10 (Oct. 1, 2007) ("Sidak Third Supplemental Declaration").

5 CRA International, *Further Economic Analysis of the Sirius-XM Merger* (Nov. 9, 2007) ("CRA Supplemental Report"), attached as Exhibit A.

6 *See, e.g.*, Christopher Stern, "Sirius, XM Offer Plan to Let Users Choose Channels," Bloomberg.com (July 23, 2007), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aWFvZ8eu5DD8 (last visited Nov. 8, 2007); David Hinckley, "'A la carte' looks choice to them," NY Daily News.com (Aug. 4, 2007), http://www.nydailynews.com/entertainment/tv/2007/08/04/2007-08-04_a_la_carte_looks_choice_to_them.html (last visited Nov. 8, 2007); Rick Aristotle Munarriz, "Get It On, XM and Sirius," The Motley Fool (Sept. 13, 2007), http://www.fool.com/investing/high-growth/2007/09/13/get-it-on-xm-and-sirius.aspx (last visited Nov. 8, 2007).

Moreover, CRA's conclusions fully comport with the Merger Guidelines and applicable antitrust precedent. Critics of the pending merger are simply wrong to say that the appropriate competition analysis should focus only on short-run profits.[8] The Merger Guidelines do not restrict the analysis to short-term economic interest. Quite the contrary: The Merger Guidelines require an evaluation of the profitability of a "ssnip" "*lasting for the foreseeable future*."[9]

Merger critics are wrong to focus their analysis exclusively on *current* Sirius and XM subscribers. In fact, any analysis that looks at hypothetical price increases "lasting for the foreseeable future" necessarily examines the impact on both current *and potential* customers.[10] This is particularly relevant to the Commission's consideration of the pending transaction under its broad "public interest" mandate.[11]

Merger critics also ignore the fact that satellite radio is an emerging sector of a broad audio entertainment market that includes the omnipresent terrestrial radio and other products.

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7 SatNews Daily, "CEI: XM-Sirius Merger Should Go Forward," July 10, 2007, http://www.satnews.com/stories2007/4735/ (last visited Nov. 8, 2007); Sky Report, "League: Sirius/XM is not Echostar/DirecTV," June 25, 2007, http://www.skyreport.com/archives/view/?publication_id=1&release_id=569 (last visited Nov. 8, 2007); Sky Report, "Women's Group Supports Merger," June 25, 2007, http://www.skyreport.com/archives/view/?publication_id=1&release_id=569; Orbitcast, "A Look at the Audio Entertainment Market," Apr. 17, 2007, http://www.orbitcast.com/archives/a-look-at-the-audio-entertainment-market.html (last visited Nov. 8, 2007).

8 The prior 1982 merger guidelines limited the investigation of a hypothetical price increase to one year. That language, however, was removed in the 1992 merger guidelines and no longer appears in the current Merger Guidelines. CRA Supplemental Report ¶ 9.

9 Merger Guidelines, § 1.11 (emphasis supplied) ("In attempting to determine objectively the effect of a 'small but significant and nontransitory' increase in price, the Agency, in most contexts, will use a price increase of five percent lasting for the foreseeable future."). *See* CRA Supplemental Report ¶ 8.

10 Merger Guidelines, § 0 ("[T]he picture of competitive conditions that develops from historical evidence may provide an incomplete answer to the forward-looking inquiry of the Guidelines."); CRA Supplemental Report ¶ 10.

11 *See* 47 U.S.C. § 309(a).

Both XM and Sirius are engaged in "penetration pricing" aimed at driving rapid growth in the number of subscribers, not maximizing short-term profits.[12] The merged firm would have an even greater incentive for penetration pricing and other demand-enhancing investments because significant "external demand spillovers" will be taken into account.[13] In addition, the large merger-specific cost savings and the ever increasing competition among audio entertainment devices will further eliminate any incentive to raise the price of satellite radio.[14]

Finally, and most fundamentally, merger critics miss the essential point that the Merger Guidelines expressly shun a mechanical, one-size-fits-all application of merger standards.[15] To the contrary, the Merger Guidelines specifically state that the standards should be applied "reasonably and flexibly" to accommodate the "particular facts and circumstances" of the merger.[16] By attempting to limit the Commission's analysis, these critics urge the Commission to exclude a broad range of evidence that is routinely reviewed by enforcement agencies, accepted and employed by courts and required under the Merger Guidelines.[17] Consideration of

[12] CRA Supplemental Report ¶¶ 110-112.

[13] CRA Supplemental Report ¶¶ 98-102; CRA Competitive Effects Analysis ¶ ¶ 117-119.

[14] CRA Competitive Effects Analysis ¶ 86; CRA Supplemental Report ¶ 142.

[15] Merger Guidelines, § 0.

[16] *Id*.

[17] *See, e.g.*, *FTC v. Whole Foods Market, Inc*. 502 F. Supp. 1 (D.D.C. 2007) (relying on a broad range of "practical indicia" in addition to econometrics to conclude that the market was broad; also pointing to data on regular cross-shopping between conventional supermarkets and premium natural and organic supermarkets as direct evidence that market included both shopping formats) citing *Brown Shoe Co. Inc. v. United States*, 370 U.S. 294, 325 (1962); *California v. Sutter Health System*, 130 F. Supp. 2d 1109, 1132 (N.D. Cal. 2000) (finding patient flow data supported broader relevant market); *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1053 (8th Cir. 1998) (finding that a narrow geographic market improperly discounted survey data on actual hospital usage and also excluded quality as important competitive dimension); *FTC v. Swedish*

this evidence is also necessary for the Commission to reach an appropriate conclusion in this case—that this merger is in the public interest. In fact, excluding this evidence and thus denying the Commission the benefit of having all of the relevant economic evidence, as the NAB wants, would provide "misleading answers to the economic questions raised under the antitrust laws."[18]

B. Supplemental Hazlett Report.

Some merger critics also have criticized the conclusions of Professor Thomas Hazlett, a former FCC Chief Economist, who has described at length the pro-consumer benefits that would result from the pending merger.[19] Attached as Exhibit B to this Joint Submission is a second white paper prepared by Professor Hazlett that, like CRA's Supplemental Report, reveals some of the numerous flaws in those submissions.[20]

First, Professor Hazlett describes some of the errors contained in several reports prepared by J. Gregory Sidak. Many of these errors arise from Mr. Sidak's penchant for misquoting or misrepresenting Professor Hazlett's determinations and attributing to him positions that he has

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Match North America, 131 F. Supp.2d 151, 16-164 (D.D.C. 2000) (examining econometric evidence and expert testimony as well as views of competitors, statements of distributors, internal documents, etc.).

18 Merger Guidelines, § 0; CRA Supplemental Report at ¶¶ 16, 90. Confirming the flaws in his examination, Mr. Gregory Sidak's approach reveals that each company is its own market – both XM and Sirius today are essentially monopolists in a market limited to only its offerings! CRA Supplemental Report at ¶ 94. Clearly, such an absurd result illustrates the pitfalls of a narrow analysis and underscores the merits of the more thorough factual investigation and sophisticated analysis condoned by the Merger Guidelines and undertaken by CRA.

19 Thomas W. Hazlett, *The Economics of the Satellite Radio Merger*, 5 (filed June 14, 2007).

20 Thomas W. Hazlett, *The Economics of the Satellite Radio Merger, Part II* (Nov. 8, 2007) ("Hazlett Part II"), attached as Exhibit B.

not taken.[21] In his recent analysis, Professor Hazlett corrects those problems as well as various aspects of Mr. Sidak's misunderstanding of antitrust precedent. For example, he observes that Mr. Sidak's desire to limit the relevant evidence of the proper market definition to information about consumer perceptions directly conflicts with the Merger Guidelines, which acknowledge the value of evidence gleaned from firms in the marketplace.[22] Professor Hazlett also explains that competitor opposition to a merger, such as that displayed by the National Association of Broadcasters and its surrogates in this proceeding, is widely understood to be a sign that the transaction will produce greater efficiencies and improve welfare—a concept that Mr. Sidak strives to deny.[23] These are but a few of the mistakes made by Mr. Sidak in his voluminous submissions.

Professor Hazlett also responds to the study submitted by Professor Steven Wildman on behalf of NAB.[24] In particular, he addresses Professor Wildman's contention that the merger would threaten "localism" by lowering the profits of terrestrial broadcasters and thus impairing their ability to provide locally oriented content.[25] As Professor Hazlett explains, this view can be fairly translated as a desire to protect *competitors* rather than consumers, a result that would preserve broadcasters' revenues at the expense of consumers. Professor Hazlett also exposes the illogical nature of Professor Wildman's conclusion on this subject, noting that an increase in

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21 *See, e.g.*, Hazlett Part II at 5-6, 8-9.

22 Hazlett Part II at 12; Merger Guidelines, § 1.11 (noting the relevance of, among other things, "evidence that sellers base business decisions on the prospect of buyer substitution between products in response to relative changes in price or other competitive variables").

23 Hazlett Part II at 14-16.

24 Declaration of Steven S. Wildman (July 23, 2007), Exhibit A to National Association of Broadcasters' Response to Comments, MB Docket No. 07-57 (filed July 24, 2007).

25 Hazlett Part II at 30-33.

national programming by the merged company should, if anything, encourage terrestrial broadcasters to air *more* local programming.

In the end, Professor Hazlett's analysis, like CRA's, underscores what the record already demonstrates—that the pending merger will generate merger-specific efficiencies leading to improved service for consumers and a stronger market overall for audio entertainment services. The aspersions cast by merger opponents on these economic studies should not prevent the Commission from concluding that such an outcome would promote the public interest.

II. THE CONTINUED OPPOSITION TO THE PROPOSED MERGER BY OTHER PARTIES IS UNPERSUASIVE.

Like their economic studies, other filings by merger opponents in this proceeding provide no basis for the Commission to reject the merger.

A. U.S. Electronics' Unsupported Assertions of a Vertical Monopoly Have Been Addressed in the Record.

In a series of filings made after the conclusion of the formal comment period on the merits of the merger, U.S. Electronics, Inc. ("USE") has alleged that the merger would create some sort of "vertical monopoly" in connection with the market for consumer electronics equipment.[26] This argument—and USE's corresponding call for an "open device requirement"

[26] *See, e.g.*, Petition of U.S. Electronics, Inc. to Designate Application for Hearing, MB Docket No. 07-57 (filed Nov. 9, 2007) ("USE Petition for Hearing"); Comments on Notice of Proposed Rulemaking Submitted by U.S. Electronics, Inc., MB Docket No. 07-57 (filed Aug. 10, 2007) ("USE Rulemaking Comments"); Letter from Charles Helein to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57 (Sept. 4, 2007); Letter from Charles Helein to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57 (Sept. 25, 2007). USE also has advanced various other complaints that at times border on sheer frivolity—for example, its suggestion that, despite making twenty-five filings in this docket to date it has somehow been denied access to the Commission. The companies have responded to those claims. *See* Joint Opposition of Sirius and XM to Petitions to Defer Action, MB Docket No. 07-57, at 8-9 (filed Oct. 25, 2007).

as a condition on the merger[27]—is unfounded. Moreover, any assertion by USE that Sirius and XM either before or after the merger could not enter into exclusive distributorships is wrong. Courts have routinely determined that exclusive distributorships are presumptively lawful because they are procompetitive vertical nonprice agreements almost uniformly designed to maximize sales and output.[28]

Notwithstanding USE's insistence that this issue is so new and significant that the Commission should defer its consideration of the merger and even hold a hearing to address it,[29] USE's "vertical integration" theory is really nothing more than a slightly different spin on the tired "merger-to-monopoly" claim thoroughly rebutted in this record. Indeed, the premise of USE's contention is that the combined company would be a "monopolist" with the ability to exercise market power in connection with the manufacture and distribution of consumer electronics devices.[30] But as XM and Sirius have shown, the merged company will in fact comprise a very small part of a rapidly evolving marketplace that features a growing array of audio entertainment and, more to the point, consumer electronics devices.

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27 Letter from Charles Helein to Michelle Carey, MB Docket No. 07-57, at 1 (Oct. 25, 2007). USE's apparent view that it is entitled to discovery to pursue its arguments is also off base. *Compare* USE Petition for Hearing at ii (complaining that the Commission's recent request for information from the companies does not include specific items sought by USE), *with, e.g.*, *Bilingual Bicultural Coal. on Mass Media, Inc. v. FCC*, 595 F.2d 621, 634 (D.C. Cir. 1978) ("[T]he FCC generally has elected to resolve factual uncertainties by conducting its own inquiry, rather than by affording petitioners discovery.").

28 *See, e.g.*, *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 241 (2d Cir. 2003) (noting that "'exclusive distributorship' arrangements . . . are 'presumptively legal'") (quoting *Elec. Communications Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 245 (2d Cir. 1997)).

29 U.S. Electronics, Inc.'s Petition to Defer Action, MB Docket No. 07-57, at 5 (filed Oct. 12, 2007); USE Petition for Hearing at 1.

30 *See, e.g.*, U.S. Electronics, Inc. Reply Comments on Notice of Proposed Rulemaking, MB Docket No. 07-57, at ii (filed Aug. 24, 2007) (referring to "the merged entity's . . . ability to leverage the monopoly over the network into other market areas (e.g., hardware/equipment)").

This competitive landscape, already well documented in this record, will prevent the harms about which USE speculates. In order to gain and then keep any share of the listening audience in this constantly expanding market, the combined company will have every incentive to ensure the availability of low-cost, high-quality receivers—regardless of whether it engages in "sole sourcing." Anything else would harm the combined company's reputation and lead to fewer subscriptions. Thus, the merged entity would be in no position "to dictate consumer choice of how and with what equipment they access the network,"[31] or to "stifle the development of new generation satellite radio receivers"[32] as consumers could respond to such restrictions by turning to any number of other entertainment options.

The burgeoning audio entertainment market also creates enormous opportunities for equipment manufacturers, distributors, and retailers. In fact, USE bills itself as "an importer and distributor of *a wide variety of electronic devices* that are retailed to the American public through some of the largest retail outlets in the country."[33] There is no reason to expect that USE's opportunities—or those of any other distributors or retailers—would suddenly become limited as a result of the pending merger, since all such entities will continue to have access to a market that constantly is yielding new services and devices. Further, neither XM nor Sirius manufacture, import, or distribute radios themselves, instead relying on a number of third parties to handle these functions. For example, XM radios currently are available in the aftermarket under the Delphi, Pioneer, Samsung, Alpine, Audiovox, Sony, and Polk brand names, among others. And Sirius devices have been manufactured, imported, and/or distributed by companies

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[31] *Id.* at iii.

[32] USE Petition for Hearing at 10.

[33] USE Rulemaking Comments at 1 (emphasis added).

such as Pioneer, Rotel, Delphi, Kenwood, Clarion, Visteon and Directed Electronics, Inc.—as well as USE.

The conditions proposed by USE are not only unnecessary but also counter-productive. For example, USE urges the Commission to prevent the merged company from directly or indirectly participating in the design of satellite radio receivers, and then to have an "independent monitor" assess the merged company's compliance with Commission rules.[34] It is unclear, however, how the merged company could be expected to comply with requirements such as those relating to noninterference and interoperability if it is denied any role in the design of its own devices. Such conditions could also delay if not prevent the introduction of next-generation receivers capable of supporting a la carte programming and providing the new and innovative services that the combined company is committed to offering.

Given the abundant record evidence that XM and Sirius have presented concerning the competitive market in which they would compete as a merged company, the notion that they have "ignore[d]" or otherwise left "un-refuted" USE's argument is hardly credible.[35] To the extent USE's complaint is that the companies have not yet specifically addressed its arguments, that is the inevitable consequence of USE's failure to raise these issues during the comment phase on the merger's merits. Indeed, USE did not even make its "vertical integration" argument on the record until *after* the formal comment period was closed and the rulemaking phase of the proceeding had begun—which addressed only discrete issues of administrative law.[36] USE's

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[34] USE Petition for Hearing at 15.

[35] Reply of U.S. Electronics, Inc. to Joint Opposition to Petition to Defer Action, MB Docket No. 07-57, at 4-5 (filed Oct. 11, 2007).

[36] *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

recent petition to designate these and other issues for a hearing comes a full *four months* after the Commission's stated deadline for such requests, and the Commission thus should dismiss it as procedurally improper.[37]

Finally, USE's eleventh-hour interest in FCC merger policy is obviously animated by USE's pending arbitration against Sirius relating to USE's prior role as a manufacturer and distributor of Sirius satellite radios and by its transparent desire to extend its role in the satellite radio receiver business.[38] The Commission should not condone USE's efforts to use this proceeding to advance its own private commercial goals in another context.[39]

B. The Extreme "Divestiture" Remedy Proposed by Georgetown Partners Is Unnecessary and Would Ultimately Deny Benefits to the Groups It Seeks to Benefit.

Making, MB Docket No. 07-57 (rel. June 27, 2007), 72 Fed. Reg. 38055 (July 12, 2007). Prior to filing its first formal comments in this proceeding on August 9, USE expressly refrained from taking any position on the transaction. *See* Letter from Charles Helein to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57, at 1 (July 6, 2007).

[37] *See* Public Notice, *Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. Seek Approval to Transfer Control of FCC Authorizations and Licenses; Pleading Cycle Established*, MB Docket No. 07-57, DA 07-2417 (rel. June 8, 2007).

[38] *See* Sirius 2006 10-K at 24 (filed Mar. 1, 2007); *Radio maker seeks $48 million from Sirius*, BOSTON GLOBE, Mar. 1, 2007; *see also* Letter from Charles H. Helein to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57, at 1 (July 17, 2007) (noting "the existence of litigations in which USE and [Sirius] are parties").

[39] *See Applications of Vodafone Airtouch, PLC and Bell Atlantic Corp.*, Order on Further Reconsideration, 17 FCC Rcd 10998, 11000 ¶ 6 (WTB 2002), *reconsideration dismissed* 18 FCC Rcd 1861 (WTB 2003), *review denied in part, dismissed in part* 20 FCC Rcd 6439 (2005). *See also Cingular-AT&T Wireless Order*, 19 FCC Rcd 21522, 21552 n.222 (citing *Vodafone AirTouch, PLC, and Bell Atlantic Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 16507, 16511-12 ¶ 12 (WTB, IB 2000) ("*Bell Atlantic-Vodaphone Order*") and *Applications of Centel Corp. and Sprint Corp.*, Memorandum Opinion and Order, 8 FCC Rcd 1829, 1831 ¶ 10 (CCB 1993)). The Commission has refused to interject itself into private matters, finding that a court, and not the Commission, is the proper forum to resolve such disputes. *Bell Atlantic-Vodaphone Order*, 15 FCC Rcd at 16514 n.37 (citing *Applications of WorldCom and MCI Communications Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18148 ¶ 214 (1998)). Thus, the Commission should reject USE's attempt to force XM and Sirius to produce various documents. *See* Letter from Charles Helein to Michelle Carey, MB Docket No. 07-57, at 2-3 (Oct. 25, 2007).

Georgetown Partners, an entity that did not comment formally in this proceeding at any phase, has recently asserted that the Commission should deny the merger applications or at least defer its consideration of them while it explores a condition aimed at leasing 20 percent of the combined company's spectrum to a minority-controlled entity to address programming diversity concerns.[40]

Georgetown Partners' proffered rationale for its opportunistic remedy is belied by Sirius' and XM's diverse programming and by the impressive record of content providers and organizations representing the interests of underserved communities supporting the merger.[41] These merger proponents recognize that the merger will produce more opportunities for content providers dedicated to diverse programming and, as a result, increased choice for underserved and minority consumers. Following the merger, the combined company will have an improved ability to provide such programming and every incentive to take advantage of it, if it is to gain any audience in this vibrantly competitive marketplace.[42]

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[40] Letter from Chester C. Davenport, Managing Director, Georgetown Partners, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57 (Oct. 18, 2007); Letter from Chester C. Davenport, Managing Director, Georgetown Partners, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57 (Nov. 2, 2007); Letter from David Siddall, Counsel to Georgetown Partners, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57 (Nov. 2, 2007).

[41] Joint Opposition and Reply at 20-21. *See* Letter from Robert G. de Posada, President, Latino Coalition, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57 (Apr. 16, 2007); Letter from Harry Alford, National Black Chamber of Commerce, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57 (Apr. 19, 2007); Letter from Brent Wilkes, Executive Director, League of United Latin American Citizens, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57 (May 11, 2007); Letter from Lillian Rodriguez-Lopez, President, Hispanic Federation, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57 (June 5, 2007); Letter from Susan Scanlan, Chair, National Council of Women's Organizations, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57 (June 20, 2007); Letter from Michelle D. Bernard, President and CEO, Independent Women's Forum, to Kevin Martin, Chairman, FCC, MB Docket No. 07-57 (Oct. 1, 2007).

[42] Joint Opposition and Reply Section II.B.

In particular, the National Association for the Advancement of Colored People ("NAACP") has endorsed the pending merger, noting both companies' current strong commitment to diversity—in terms of programming that addresses issues of particular concern to our nation's African American community, and in terms of efforts to recruit and to retain minority talent and leadership at all levels.[43] The NAACP is "convinced that the pending Sirius-XM merger will be a positive development for consumers," and that "more diverse, accessible and appealing options at lower prices in satellite radio will help further expand the reach of this medium."[44]

Georgetown Partners fails to provide any evidence whatsoever that the NAACP's predictions will not come to pass.[45] Its spectrum leasing proposal is unwarranted, and indeed, would affirmatively undermine many of the consumer benefits of the merger. As XM and Sirius have explained, they require *all* of their combined spectrum to realize the synergies of the merger, including in particular the merger-specific expanded programming choices and new services that will be offered by the combined company in the future. Divesting *any* of either company's spectrum—let alone the 20 percent of their combined channel capacity that

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[43] Letter from Hilary O. Shelton, NAACP to Chairman Kevin Martin and Commissioners Copps, Adelstein, Tate and McDowell (June 20, 2007). In addition, members of the Congressional Black Caucus submitted a letter in support of the merger. *See* Letter from Ed Towns, Bobby Rush, Yvette Clarke, Greg Meeks, Danny Davis, Sanford Bishop, Corrine Brown, and Alcee Hastings, *et al*. to Kevin Martin, Chairman, FCC, MB Docket No. 07-57 (Oct. 25, 2007).

[44] Letter from Hilary O. Shelton, NAACP to Chairman Kevin Martin and Commissioners Copps, Adelstein, Tate and McDowell, 1-2 (June 20, 2007).

[45] Georgetown Partners of course still has ample time to place further evidence or comment in the record, but its inexplicable decision not to weigh in at the formal comment stages of this proceeding should lead the Commission to decline its invitation to delay processing the merger.

Georgetown Partners seeks[46]—would close off those benefits and millions of existing subscribers would lose some portion of their service. Moreover, divestiture would undermine the billions of dollars the companies have invested in their legacy infrastructure, harming companies that have invested millions of dollars developing products designed in reliance on the existing satellite platforms.[47]

Finally, Georgetown Partners has ample opportunity to bring further diversity to the audio entertainment marketplace through other avenues, such as acquiring spectrum in upcoming auctions,[48] or utilizing a plethora of other technologies.[49] For these reasons, the Georgetown Partners proposal, which seeks to manipulate the regulatory process for private gain, should be rejected.

C. The Latest Carmel Group Statement Does Not Disprove the Existence of a Broad Market for Audio Entertainment Services.

NAB recently submitted a second report that it commissioned from the Carmel Group ("Carmel"), which purports to show the lack of competition between satellite radio and "the rest of the radio marketplace."[50] The report does nothing of the sort. Rather, it considers satellite

[46] Letter from David Siddall, Counsel to Georgetown Partners, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57, at 1 (Nov. 2, 2007).

[47] Joint Opposition and Reply at 87-88.

[48] *See* Public Notice, *Auction of 700 MHz Band Licenses*, AU Docket No. 07-157, DA 07-44514 (rel. Nov. 2, 2007).

[49] *See generally* Joint Opposition and Reply Section IV.D and Exhibit F (Charles L. Jackson, Service and Spectrum Alternatives for Audio News and Entertainment Services (July 24, 2007)).

[50] Letter from Larry Walke, National Association of Broadcasters, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57, at 1 (Oct. 26, 2007) (attaching "Competition Belied: Opposition to the Proposed Sirius-XM Merger" (Oct. 2007)).

radio in a vacuum, focusing on selected actions taken by XM and Sirius over the years while ignoring any developments relating to "the rest of the radio marketplace."

Carmel purports to demonstrate unique competitive effects with a so-called ping-pong chart. But the chart is as unremarkable (the fact that XM and Sirius compete with each other does not mean that they do not also compete with a variety of other entities) as it is flawed. Like the NAB Coalition's previous attempt,[51] Carmel's competitive effects showing simply ignores the extensive record of competitive responses among a variety of audio competitors. Sirius and XM have already submitted a more complete, but by no means comprehensive, timeline of events that have occurred just in the last three years[52] – a timeline demonstrating that satellite radio providers, terrestrial radio providers, MP3 manufacturers, Internet radio providers and others have all introduced new services and products in response to each other.[53]

In addition, the report's conclusions concerning the companies' exclusive contracts are implausible. After stating that the companies seek exclusive content "for the benefit of existing and would-be subscribers,"[54] the report proceeds to predict harms to consumer that would result if the merged company eliminated that programming. But if Carmel is correct that such exclusive content benefits consumers, it is unclear why the merged company would abandon it—

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[51] Petition to Deny of the Consumer Coalition for Competition in Satellite Radio ("NAB Coalition"), MB Docket No. 07-57 at 8-11 (July 9, 2007).

[52] Joint Opposition and Reply, Exhibit E.

[53] Carmel's exclusive focus on satellite radio produces some truly bizarre results. For example, the report notes that both XM and Sirius announced the kick-off of their respective college football coverage in August 2007 (when the season began) and aired special coverage about Pope John Paul II following his death in April 2005. *See* Carmel Group Report at 9. The idea that these decisions represented "competitive action/reactions" between the two satellite radio providers is patently absurd. Indeed, terrestrial broadcasters and other media presented identical programming at precisely the same time.

[54] Carmel Group Report at 2.

particularly given its need to remain competitive in the burgeoning market for audio entertainment.

In the end, perhaps the most notable "ping-pong" effect reflected by the report is Carmel's response to NAB's sponsorship in this proceeding. Prior to being commissioned by NAB to oppose the satellite radio merger, Carmel independently concluded that "satellite radio['s] . . . competition comes in the form of traditional analog AM & FM radio, as well as burgeoning services like MP3 players, terrestrial radio, and video- and Internet-to-the-vehicle."[55] That Carmel changed its tune when asked by the NAB to do so—even though competition from other sources has only increased since the Carmel Group first noted its existence—should eliminate any lingering credibility that its latest report may have.

III. COMPETITION IN THE AUDIO ENTERTAINMENT MARKET CONTINUES TO INCREASE RAPIDLY.

The companies and supporters of the pending merger have presented abundant evidence that an ever-growing number of audio entertainment services have emerged to compete with satellite radio.[56] This well-documented trend has continued unabated, as various entities using all forms of technology have introduced yet more audio entertainment services—all with the same goal. As Tim Westergren, the founder of the Internet radio service Pandora,[57] recently put

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[55] Jimmy Schaeffler, The Carmel Group, *Growing Another Telecom Pie: Satellite Radio's In-Vehicle Competition*, Oct. 5, 2005, http://carmelgroup.com/publications/document/growing_another_telecom_pie/ (last visited Nov. 4, 2007); *see also* Joint Opposition and Reply at 44 n.145.

[56] *See generally* XM Satellite Radio Holdings Inc., Transferor, and Sirius Satellite Radio Inc., Transferee, Consolidated Application for Authority to Transfer Control of XM Radio Inc. and Sirius Satellite Radio Inc., MB Docket No. 07-57, Section IV ("Application"); Joint Opposition and Reply Sections III.A, III.B; CRA Competitive Effects Analysis Section II.A.3.

[57] Pandora is a popular Internet radio service that recently partnered with Sprint/Nextel to deliver service. *See* Joint Opposition and Reply at 61-62 & n.214.

it during a congressional hearing, "[W]hen I'm asked who we compete against, it's anybody who's trying to attract someone else's listening hour."[58]

That competition has become more robust in just the few months since XM and Sirius filed their reply comments. Terrestrial radio, of course, remains the largest competitor in this market by a substantial margin. The *New York Times* recently reported that approximately 279 million Americans listen to terrestrial radio every week,[59] more than *seventeen times* the number of satellite radio subscribers.[60] Terrestrial radio also remains ubiquitous. While GM recently disclosed that as of October 2007 XM radio units have been installed in only 6 million GM vehicles, terrestrial radios are standard in virtually all of the more than 243 million vehicles on the road today.[61]

HD radio continues to offer strong competition, especially as terrestrial radio stations continue to upgrade to HD broadcast technology. The HD Radio Alliance recently increased its marketing budget to 680 million dollars.[62] HD radio receivers are becoming increasing

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58 Transcript, U.S. Senate Committee on Commerce, Science and Transportation, Hearing on "The Future of Radio," at 72 (Oct. 24, 2007).

59 *See* Shaun Assael, *Online and on the Edge*, N.Y. TIMES, Sept. 23, 2007, *available at* http://www.nytimes.com/2007/09/23/arts/music/23assa.html?ex=1348200000&en=2732fbddec1837b6&ei=5090&partner=rssuserland&emc=rss (last visited Nov. 2, 2007) (citing Bridge Ratings).

60 XM and Sirius recently reported that they had a combined 16.27 million subscribers as of October 30, 2007. *See* Franklin Paul, *Sirius Satellite loss narrows on subscriber growth*, Reuters, Oct. 30, 2007, *available at* http://investing.reuters.co.uk/news/articleinvesting.aspx?type=tnBusinessNews&storyID=2007-10-30T175637Z_01_N30606640_RTRIDST_0_BUSINESS-SIRIUSSATELLITE-RESULTS-DC.XML.

61 *GM Expands XM AS Standard on All 2008 Buick, HUMMER and Saab Models*, PR Newswire, Oct. 18, 2007; CRA Competitive Effects Analysis ¶ 19.

62 *HD Radio Alliance Renews Chart with Marketing Commitment that Takes Total to $680 Million*, Press Release, Oct. 15, 2007, http://www.hdradio.com/i/Alliance_Charter.pdf.

available—consumer electronics stores such as Circuit City, Best Buy and Crutchfield (in addition to the stores XM and Sirius already have identified[63]) now sell the devices.[64] HD radios also are being introduced as factory-installed options in automobiles. Along with BMW, Hyundai, and Jaguar, Mini USA now offers a factory-installed digital HD radio receiver with FM multicasting capability as an option in the all-new 2007 MINI Cooper and Cooper S hardtops.[65] Ford recently announced that HD radio will be available in almost all 2008 Ford, Lincoln, and Mercury models, and can also be installed on many earlier models from 2005 forward.[66] In total, iBiquity estimates that eleven automakers will begin offering HD radio within the next two years.[67]

Internet radio also continues to expand rapidly.[68] The *New York Times* recently reported that 55 million Americans listen to Internet radio every week.[69] Internet radio can be streamed to both fixed and mobile devices, and consumers are taking advantage. For example, companies

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63 Application at 28.

64 Louis Hau, *Digital Radio Lands at Wal-Mart*, FORBES.COM, Mar. 5, 2007, *available at* http://www.forbes.com/digitalentertainment/2007/03/02/radio-hd-satellite-tech-media-cx_lh_0305radio.html (last visited Aug. 6, 2007).

65 Press Release, iBiquity, Mini USA Offers Factory-Installed HD Radio Receiver in 2007 Mini Cooper and Cooper S (June 7, 2007), *available at* http://www.ibiquity.com/press_room/news_releases/2007/1040 (last visited Aug. 6, 2007).

66 *Ford to Offer HD Digital Radio in Nearly All Models*, Dow Jones Newswires, Sept. 29, 2007.

67 Press Release, HD Radio, HD Radio Celebrates Major Milestone: Rollout in Top 100 Markets (May 14, 2007), *available at* http://www.hdradio.com/press_room.php?newscontent=92 (last visited Aug. 6, 2007).

68 *See* Joint Opposition and Reply at 59-60.

69 Shaun Assael, *Online and on the Edge*, N.Y. TIMES, Sept. 23, 2007, *available at* http://www.nytimes.com/2007/09/23/arts/music/23assa.html?ex=1348200000&en=2732fbddec1837b6&ei=5090&partner=rssuserland&emc=rss (last visited Nov. 2, 2007).

like Roku, Com One, Revo, Terratec, and Tivoli produce tabletop or bookshelf radios that allow users to tune into radio shows using internal Wi-Fi receivers that connect to wireless networks.[70] One recent report noted that 80 million Americans had listened to Internet radio in the prior month,[71] and another noted that of the 30 million Americans who use wireless Internet, 75 percent (23 million) currently access Wi-Fi Internet radio. The number of wireless Internet radio listeners is expected to grow to 77 million by 2010.[72] The total number of WiFi-enabled consumer electronic devices is projected to grow from 40 million shipped in 2006 to nearly 249 million in 2011.[73] A recent study predicted that within eight years of market availability, more than 23 percent of Americans will have wireless Internet technology in their cars, and 50 percent will have it within nine years.[74] More generally, the market for automotive infotainment products is expected to grow from $28 billion currently to about $54 billion by 2012.[75]

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[70] David Pogue, *Internet Radio Made Easier*, N.Y. TIMES, Aug. 9, 2007, *available at* http://www.nytimes.com/2007/08/09/business/09pogue.html?ex=1187236800&en=88480857e2745b56&ei=5099&partner=TOPIXNEWS (noting that these "freaky hybrids of the old and new" can "pull in any of 10,000 Internet radio stations from all over the world, without a single pop of static") (last visited Aug. 9, 2007).

[71] Bridge Ratings, *Digital Audio Growth Projections Thru 2020*, Aug. 15, 2007, *at* http://www.bridgeratings.com/press_08,15,07-digitalprojectionsupd.htm (estimating the monthly audience for Internet radio in 2007 to be 33 percent of Americans, and 40 percent in 2008) (last visited Nov. 4, 2007).

[72] Bridge Ratings, *The Impact of Wireless Internet*, Sept. 12, 2007, *at* http://www.bridgratings.com/press_09.11.07-WiFi%20Impact.htm (last visited Nov. 2, 2007).

[73] *Id.*

[74] *Id.* (explaining that satellite radio "has found its greatest audience in-car but has the most to lose with wireless Internet radio reception").

[75] *Microsoft, Siemens to Develop In-Car Infotainment*, REUTERS, Sept. 7, 2007.

Options for in-car media systems have continued to expand.[76] Last month, Ford launched the Ford Sync, its new factory-installed, in-car communications and entertainment system.[77] Sync, based on Microsoft Auto software, allows consumers to operate a variety of digital devices from different companies in their vehicles through voice commands or steering wheel controls using either Bluetooth wireless technology or a USB 2.0 port to connect to players such as the Apple iPod and Microsoft Zune—as well as PlaysForSure music devices and most USB media storage devices. The *Wall Street Journal* recently described the Sync as a "big step forward in integrating cellphones and portable music players into cars," citing in particular its affordability and its versatility.[78] Ford is showcasing the availability of Sync on the revised 2008 Ford Focus, and it will be included in a total of 12 Ford, Lincoln, and Mercury products by year end, as well as on most other vehicles during the 2009 model year.[79] Ford's aggressive marketing of Sync marks the first time Ford will launch a technology feature with the same force it would use for a vehicle launch, which is one sign that in-car media technology is more important to buyers than ever.[80]

Additionally, Microsoft and Siemens recently announced plans to develop in-car entertainment and navigation products—specifically, a multimedia platform that will allow users

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[76] *See* Joint Opposition and Reply at 59-60; 66-67.

[77] Press Release, *Ford Motor Co., Ford Teams up with Microsoft to Deliver SYNC; In-car Digital System Exclusive to Ford* (Feb. 14, 2007), *available at* http://media.ford.com/newsroom/release_display.cfm?release=25168 (last visited Aug. 24, 2007).

[78] Walter S. Mossberg, *Ford, Microsoft Create Car System That Lets You Ask for a Song*, WALL ST. J., Nov. 8, 2007, at B1.

[79] Amy Wilson, *Ford gives Sync Full-Court-Press Ad Campaign*, AUTOMOTIVE NEWS, Sept. 24, 2007.

[80] *Id.*

to connect devices like mobile phones and MP3 players.[81] And Chrysler has unveiled its system, called MyGIG, in model year 2007 vehicles, featuring Sirius' Real-Time Traffic, AM/FM radio, CD/DVD player, a 20-gigabyte hard drive, a USB jack, line-in jack, two audio outputs, Bluetooth hands-free calling, and a 6.5-inch touchscreen with voice control.[82]

Consumers now have more choices for accessing music through MP3 players and mobile phones.[83] Software like Orb Networks can turn any device that connects to the Internet into a portable digital music player.[84] MusicGremlin allows direct wireless downloads to a media player without having to connect through a computer.[85] Apple's iPod, the most popular MP3 player with 110 million sold and counting, has just gone wireless with the new iPod Touch, introduced in October 2007.[86] The iPod Touch uses a touch screen and Wi-Fi technology similar to the Apple iPhone.

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81 *Microsoft, Siemens to Develop In-Car Infotainment*, REUTERS, Sept. 7, 2007. Production is expected to begin in 2009.

82 Bill Howard, *Chrysler MyGiG Hard Drive for Navigation, Music*, TECHNORIDE, July 14, 2006, *available at* http://www.technoride.com/article/Chrysler+MyGiG+Hard+Drive+for+Navigation+Music/183407_1.aspx (last visited Aug. 24, 2007). Other features include the ability to rip compact discs onto the hard drive directly in the car, plus the USB port allows users to transfer music and pictures onto the unit. *Id.*

83 *See generally, e.g.*, Joint Opposition and Reply at 60-62.

84 Orb, http://www.orb.com/en/how_does_orb_work. Orb Networks is a free software program that installs on a person's "always-on" home PC and allows the computer to act like a personal broadcasting system. The computer can stream the user's media content (such as music and video) through any Internet-connected device like a mobile phone, PDA, laptop or any other computer.

85 Edward C. Baig, *PC-free MusicGremlin trumps rivals but could use some fine-tuning*, USATODAY.COM, June 14, 2006, *at* http://www.usatoday.com/tech/columnist/edwardbaig/2006-06-14-gremlin-player_x.htm (last visited Aug. 6, 2007).

86 Roger Cheng et al., *Apple Unveils iPod Touch, Revamped Products*, Dow Jones, Sept. 5, 2007. The video iPod has been renamed the iPod Classic and has been updated to include double the storage space. The new iPod Nano features a two-inch video screen.

Meanwhile, mobile phone providers also continue to introduce new products. Verizon offers multiple new models, including the Chocolate; Alltel has the Wafer. Sprint Nextel and Samsung have teamed up to create the UpStage, which went on sale in April 2007.[87] The trend to provide Internet access in mobile phones is rapidly expanding. AT&T demonstrated its commitment to this technology in early October 2007 when it purchased spectrum licenses covering 196 million people in the 700 MHz frequency band from Aloha Partners for $2.5 billion, strengthening its position as a competitor to satellite radio.[88]

Finally, local broadcast stations recently announced a proposal to broadcast local television shows to mobile phones, video iPods and MP3 players, in-car DVD players, and other devices equipped with TV tuners after the scheduled conclusion to the digital TV transition in 2009.[89] Broadcasters can transmit their main channels for free, while charging advertisers a premium to reach larger audiences, as well as selling mobile ads that would let consumers purchase products at the touch of a button. Chips with TV tuners are being developed by LG and Samsung, among others, which are expected to add approximately $10 to the price of a mobile device, while an add-on tuner would cost less than $50.[90]

Given the rapid evolution of media technology, it is nearly impossible to discuss every development and update. It is clear, however, that with every innovation, the field of competitors to satellite radio only strengthens and expands. These developments reinforce the

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87 *See* Mark Wilson, *Frankenreview: Sprint/Samsung UpStage*, GIZMODO.COM, Mar. 28, 2007, http://gizmodo.com/gadgets/feature/frankenreview-sprintsamsung-upstage-247653.php (last visited July 22, 2007).

88 Press Release, AT&T, *AT&T Acquires Wireless Spectrum from Aloha Partners*, Oct. 9, 2007, *at* http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=24516.

89 Paul Davidson, *Free TV Shows May Air on Cellphones*, USA TODAY, Oct. 18, 2007.

90 *Id.*

now-inescapable conclusion that the combined company would be but a small player in a highly competitive and constantly evolving market for audio entertainment services.

IV. THE OUTCOME OF THIS MERGER WILL NOT PRE-DETERMINE THE OUTCOME OF ANY OTHER COMMISSION PROCEEDING, INCLUDING THE FCC'S MEDIA OWNERSHIP PROCEEDINGS.

At the same time that they are vehemently opposed to the proposed merger of Sirius and XM, broadcast interests have asserted that approval of the transaction would "prejudge" various broadcast ownership proceedings in their favor.[91] These parties contend that if the Commission approves the merger, "it would be compelled to reconsider other rules that it currently has in place regarding ownership restrictions on local radio intramodal competition and eliminate them."[92]

The Commission's decision in the Sirius-XM merger does not need to affect the outcome in any other proceeding. There is no reason as a matter of law or policy why approval of the Sirius-XM merger would force the Commission into altering its multiple ownership rules.

This is true for a number of obvious reasons. First, by any metric, terrestrial radio overwhelmingly dominates the market for audio entertainment:

- According to Arbitron, Sirius and XM *combined* have *4.1 percent* of all radio listenership spread out over approximately 300 channels.[93]

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91 *See, e.g.*, Letter from Lawrence R. Sidman to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57 (filed Nov. 7, 2007).

92 Comments of Clear Channel Communications, Inc., MB Docket No. 07-57, at 7 (Aug. 13, 2007).

93 Orbitcast, "Arbitron reports Satellite Radio listening is up" (Sept. 30, 2007), http://www.orbitcast.com/archives/arbitron-reports-satellite-radio-listening-is-up.html (last visited Nov. 8, 2007).

- Terrestrial radio broadcasters accounted for more than $21 billion in revenues in 2006. Satellite radio accounted for just $1.6 billion – less than seven percent of all radio revenues[94] – while facing disproportionately higher capital and operating expenses.

- While Sirius and XM combined had approximately 14 million subscribers at the end of last year, 230 million Americans listen to terrestrial radio every week.[95]

Terrestrial radio dwarfs satellite radio and all other forms of audio entertainment, and it will continue to do so after the merger. In fact, permitting the combination of two comparatively small satellite radio companies by itself will have virtually no impact on the dominant position that terrestrial radio holds among audio entertainment providers. [96]

Second, based on long-standing Commission policy, broadcast ownership rules are governed by a number of considerations that are irrelevant to the Sirius-XM merger—most particularly localism and local viewpoint diversity. The ownership proceeding now before the agency—launched in July 2006 as the result of a judicial remand[97] and a Congressionally required quadrennial review of broadcast ownership restrictions[98]—is, according to the

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94 *Id.* at 50-51 n.167 & accompanying text.

95 *Id.* at 51 nn.169, 174 & accompanying text. Similar numbers have been featured prominently in the NAB's continual we-will-bury-them rhetoric: "In 2006, we have satellite and Internet radio. . . But we have news for our competitors: 'We will beat you – as we have beaten those change agents in the past.' . . . And when people ask us are you focused on satellite radio because you're afraid of the competition – we say, 'No.' Satellite radio says it has at most 10 million subscribers, notwithstanding those 500,000 subscribers in empty car lots. But 260 million people listened to broadcast radio last week alone." Speech by David K. Rehr, President & CEO, NAB, The 2006 NAB Radio Show (September 21, 2006), http://www.nab.org/AM/Template.cfm?Section=Press_Releases1&CONTENTID=6802&TEMPLATE=/CM/ContentDisplay.cfm (last visited Nov. 1, 2007).

96 In addition, with the advent of HD radio, competition from terrestrial radio has increased.

97 *2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 (2003), *rev'd and remanded*, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

98 *2006 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Further Notice of Proposed Rulemaking, 21 FCC Rcd 8834 (2006) ("2006

Commission,[99] to be guided by longstanding core objectives, including localism[100] and local viewpoint diversity.[101]

These uniquely local public interest objectives have little connection to the issues at stake in or analysis of the proposed Sirius-XM merger. Neither Sirius nor XM is licensed to individual communities. Moreover, at the insistence of broadcasters, neither Sirius nor XM may broadcast differentiated programming to local areas; all Sirius and XM programming is transmitted, and available, nationwide,[102] and the FCC previously determined that government regulation is not "needed to preserve access to multiple sources of national news and public affairs information" because "[c]onsumers have numerous sources of national news and information available to them."[103]

FNPRM"). The current local radio ownership rules originally were imposed by statute in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), which legislation also required the Commission to periodically review the restrictions and to repeal or modify any of the regulations that it finds are "no longer in the public interest."

[99] *See 2006 NPRM* at ¶ 4 ("In the *2002 Biennial Review Order,* the Commission determined that its long-standing goals of competition, diversity, and localism would continue to guide its actions in regulating media ownership. These policy objectives also will guide our actions on remand.").

[100] As the FCC noted in its most recent media ownership decision, "localism continues to be an important policy objective" with respect to the regulation of broadcast ownership. *2002 Biennial Review Order* at ¶¶ 73-74. This is because federal regulation of local broadcasting "has historically placed significant emphasis on ensuring that local television and radio stations are responsive to the needs and interests of their local communities"—an objective "rooted in Congressional directives to this Commission and . . . affirmed as a valid regulatory objective many times by the courts." *Id*.

[101] Preserving "the availability of media content reflecting a variety of perspectives" on a local basis has been another basic tenet of the Commission's regulation of broadcast ownership. Id. at ¶ 10.

[102] *Sirius Satellite Radio*, DA 01-2171, ¶¶ 10-11 (Sept. 17, 2001); *XM Radio Inc*., DA 01-2172, ¶¶ 10-11 (Sept. 17, 2001).

[103] *2002 Biennial Review Order* at ¶ 106.

In sum, neither satellite radio in general nor the Sirius-XM merger in particular has any appreciable effect on localism or local viewpoint diversity. Certainly, no outcome in the merger review would need to affect decision in the Commission's pending ownership inquiry.

V. CONCLUSION

For these reasons, the Commission should reject the arguments raised in various recent ex parte filings and approve the merger of Sirius and XM.

Respectfully Submitted,

_/s/ *Patrick L. Donnelly*_________

Patrick L. Donnelly
Executive Vice President, General Counsel
and Secretary
Sirius Satellite Radio Inc.
1221 Avenue of the Americas
36th Floor
New York, NY 10020

Richard E. Wiley
Robert L. Pettit
Peter D. Shields
Jennifer D. Hindin
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006
202.719.7000

Attorneys for Sirius Satellite Radio Inc.

_/s/ *Dara F. Altman*_____________

Dara F. Altman
Executive Vice President, Business and
Legal Affairs
XM Satellite Radio Holdings Inc.
1500 Eckington Place, NE
Washington, DC 20002

Gary M. Epstein
James H. Barker
Brian W. Murray
Barry J. Blonien
Latham & Watkins LLP
555 Eleventh Street, NW
Washington, DC 20004-1304
202.637.2200

Attorneys for XM Satellite Radio Holdings Inc.

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