

Blue Sky Services

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

**Blue Sky Services
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I. INTRODUCTION

1. On March 20, 2007, Sirius Satellite Radio Inc. (“Sirius”) and XM Satellite Radio Holdings Inc. (“XM”) (collectively, the “Applicants”), the only entities authorized by the Commission to provide satellite radio service in the United States, submitted applications seeking permission to transfer control of Commission licenses and authorizations held by Sirius and XM to a single, combined entity owned by the current shareholders of XM and Sirius. However, this proposed transfer conflicts with language prohibiting such a combination in the Commission’s 1997 Order establishing the Satellite Digital Audio Radio Service (“satellite DARS”), On June 28, 2007, the Commission issued a *Notice of Proposed Rule Making* seeking comment on whether the language in question constitutes a binding Commission rule and, if so, whether the Commission should waive, modify, or repeal the prohibition in the event that the Commission determines that the proposed merger, on balance, would serve the public interest.

2. In filings with the FCC¹ and in meetings with FCC officials, Georgetown Partners L.L.C. (“Georgetown”), a minority owned investor, urged that the proposed Sirius/XM merger not be approved as it is now structured because such approval would have unprecedented adverse competitive effects. Blue Sky Services concurs with Georgetown on this position. However, Georgetown has suggested a possible remedy to the adverse competitive effects of such a merger. Georgetown requested that the Commission require the merged entity to lease (i) their broadcast infrastructure, and (ii) at least 20% of their channel capacity on a long term basis to a minority controlled entity to ensure competition and diversity in the satellite radio marketplace. Georgetown has provided a brief overview on their vision of spectrum divestiture and the resulting lease of Satellite Radio Spectrum to a given interest. However, Georgetown has not addressed any technical issues of how such a divestiture would be implemented.

II. DISCUSSION

3. While the divestiture of spectrum may well become a topic of discussion in these proceedings. The Commission must take steps to ensure that such divestitures, were they to occur, are in the public interest. Blue Sky Services further believes that a simple long-term or permanent “lease” of spectrum from a merged entity is not an appropriate resolution. These types of contractual agreements can be effectively superceded and deemed “null and void” via court systems outside the direct control of the Commission. Therefore, only a full divestiture of spectrum assets via license transfers should be considered as an appropriate resolution

4. For example, such a divestiture must insure that the party that is allowed to control such a divestiture intends to provide a diverse, competitive service which would provide the needed anti-trust pricing “checks and balances”, and public interest issues against the merged entity. Blue Sky Services argues that 20% of the total SDARS allocation is insufficient to provide such competitive “checks and balances” and would not be in the public interest. Using Georgetown’s own speculative figure of a 20% divestiture would only provide a given party 5Mhz of total spectrum in the entire SDARS allocation. To alleviate anti-trust concerns, the selected party would need to provide service to the millions of legacy Sirius-only and XM-only user-terminals. To achieve this feat, the selected party would need to divide the total spectrum divestiture equally into both the current XM-only, and the current Sirius-only spectrum allocations. Only this format would allow each and every currently deployed SDAR user-terminal to receive the competitive and diverse program offerings of the selected party. This division of the spectrum divestiture would be further diluted into Terrestrial and Space Segment operations, leaving the divested interest only about 1.25Mhz of spectrum to provide a competitive service against the merged entity with 5Mhz in each of the current XM and Sirius allocations.

5. Duplicative programming would also reduce the total diversity available to SDAR subscribers employing such a divestiture. Since the selected interest would need to provide a competitive landscape against the merged entity on both legacy XM-only and Sirius-only user terminals. It appears that the programming content may be required to be highly duplicative on both of the selected parties XM and Sirius divested SDAR spectrum. Blue Sky argues that, as a whole, the use SDAR spectrum to provide identical, duplicative programming, neither promotes diversity, or is in the public interest. Yet, concedes that if such a divestiture is required to meet anti-trust and public interest issues in this proceeding. Such a divestiture should be sufficient enough to provide an *equal* competitive balance between the parties involved.

¹ See Georgetown Partners Letters filed in MB Docket Number 07-57 on October 18, 2007.

6. Blue Sky Services also argues that any SDAR spectrum divestiture to *any interest* must contain safeguards and conditions to ensure a competitive landscape against the merged entity. Blue Sky Services has observed how the use of arms-length agreements with “Designated Entities” in FCC Spectrum Auctions have been used to “game” spectrum caps to the benefit of established CMRS operators, instead of a competitive service offering as originally envisioned. Likewise, Blue Sky Services argues that such SDAR spectrum divestitures or broadcast facility lease agreements must be subject to Commission oversight to ensure that the party involved is indeed providing a competitive environment against the merged entity, and not simply providing some type of arms-length lease-back agreement to the merged entity.

III. CONCLUSION

7. While Blue Sky Services agrees that spectrum divestiture may be one solution to anti-trust and public interest concerns regarding the pending applications. We believe that the actual mechanics of such a divestiture would be detrimental to current and future SDAR subscribers, and would drastically reduce available program diversity due to the high degree of redundant programming required to serve all SDAR subscribers equally by both parties. We therefore believe such a divestiture is not in the public interest in absence of a much larger amount of spectrum involved in the divestiture.

8. However, a band plan that would provide equal amounts of SDAR spectrum held by both the merged entity, and the selected party would ensure greater competitive balance to both parties involved in the SDAR marketplace. However, if such a divestiture were enabled, we believe that only a complete legal divestiture of SDAR spectrum licenses should be the only plausible remedy considered. This spectrum divestiture should also require equal amounts of spectrum transfers in each of the current XM-Only and Sirius-Only spectrum allotments to ensure that all current and future SDAR receivers are capable of receiving the competitors programming. Likewise, such a divestiture should include both dedicated Space Segment and dedicated Terrestrial allocations in each service. Blue Sky also would also urge the commission to establish gating requirements that would prevent any type of commercial capacity lease-back, or bundling options between the two entities. These safeguards would help to guarantee that the selected party for divestiture would remain autonomous to the merged entity.

9. Blue Sky reaffirms its position that the approval of the Applicants request to transfer necessary FCC licenses is not in the public interest and approval of same would have unprecedented adverse competitive effects.