REGARDLESS OF HOW ONE DEFINES THE MARKET, THE PROPOSED XM-SIRIUS MERGER RAISES SERIOUS COMPETITION AND TELECOMMUNICATIONS POLICY CONCERNS. THE FCC SHOULD NOT GRANT THE LICENSE TRANSFER APPLICATION.

The Federal Communications Commission cannot grant the license transfer application incident to the proposed XM-Sirius merger unless it finds that the merger would serve the public interest, convenience and necessity. Regardless of how the market is defined, the proposed XM-Sirius merger raises fundamental concerns in the current regulatory environment.

If the market is defined as the national subscription radio market, the proposed merger would fuse two head-to-head competitors into one, creating a monopoly with all its attendant anticompetitive effects. Even if the market is defined as either all radio or all audio services, the proposed merger would yield a new entity that would have far more spectrum than it could justify in every local market in the country. Permitting one company to control so much spectrum would inevitably undermine the viability of free, over-the-air, advertiser-supported radio's economic model, harming localism and diversity, the pillars of the public interest under the Communications Act of 1934, as amended.

THE PROPOSED XM-SIRIUS MERGER IS PER SE ANTICOMPETITIVE UNDER A NATIONAL PAY RADIO MARKET DEFINITION.

The Federal Communications Commission created satellite radio as a national service. Its enabling regulatory structure involved a large grant of spectrum, 25 MHz, *and* at least two competitors. Promoting competition within a service and within markets has been a core communications policy objective, strengthened significantly by the 1992 Cable Act and the Telecommunications Act of 1996.

Under a national subscription radio market definition, the proposed XM-Sirius merger would transform the market from one featuring two companies competing head-to-head on price, service quality, and programming choice into a market with only one provider free of competitive pricing constraints and the pressures of programming alternatives. The public harm that results from such a 2 to 1 merger has been the subject of numerous filings in the record of this proceeding by industry and public interest groups, as well as multiple letters signed in the aggregate by more than 80 Members of the House and the Senate.

IF THE MARKET IS DEFINED AS ALL RADIO SERVICES, THE ENORMOUS SPECTRUM ADVANTAGE POSSESSED BY THE MERGED SATELLITE RADIO COMPANY WOULD UNDERMINE THE ABILITY OF FREE, OVER-THE-AIR RADIO TO DISCHARGE ITS CORE PUBLIC INTEREST OBLIGATIONS TO PROVIDE A LOCALLY-FOCUSED AND DIVERSE SERVICE.

The existence of a monolithic satellite radio service would create overwhelming competitive pressures on free, local radio broadcasters – pressures that would threaten local broadcasters' ability to serve their communities consistent with their historic mission and statutory mandate.

Spectrum Advantage. A combined XM-Sirius would have more than 300 possible channels in every local market. Viewed another way, it would have 25 MHz of spectrum, more than the total amount of spectrum (21.18 MHz) allocated to the FM and AM terrestrial radio broadcast services combined. In other words, even in the largest U.S. markets, a combined XM-Sirius would have ***two to three times*** the number of channels as ***all*** of the local radio broadcast channels (AM and FM) ***combined*** in that market. This unprecedented spectrum advantage is even more lopsided when viewed through the prism of the current local radio ownership rules. The most stations that any single local radio broadcaster can own in even the largest market are eight stations (or 13 when including HD radio). Thus, in any local market a combined XM-Sirius could be beaming nearly 40 times (23 times including HD radio) the number of channels that could be broadcast by any one terrestrial radio broadcast owner in a given market. The enormous spectrum advantage of a combined XM-Sirius would seriously distort all marketplace dynamics, placing terrestrial broadcast radio at a dramatic competitive disadvantage necessarily undermining the ability of free, over-the-air local radio to fulfill its core mission of serving its local communities.

Migration of High Value Content to Satellite. A combined XM/Sirius would face no competition in satellite radio and therefore would no longer compete with each other for program content. As part of an anticompetitive strategy aimed at terrestrial radio, the combined firm would have the resources and incentive to extract exclusivity from the most popular content providers, especially certain sports programming and celebrity talk shows. Such a strategy would seriously jeopardize terrestrial broadcasters. By strategically denying key programming sources to terrestrial operators, the merged satellite firm is likely to reduce terrestrial broadcasters' ability to sell to advertisers, thus creating a spiral in which terrestrial broadcast content quality declines, while satellite content increases, without any cost-reducing efficiencies or any increase in listener/advertiser satisfaction. Such a weakened competitive posture would directly threaten terrestrial radio broadcasters’ ability to carry out their mission and obligation to invest in programming and services that respond to the needs of their local communities. One need only look to the migration of high value content, especially sports, from free, over-the-air to pay television to see the inevitable anti-consumer consequences of this shift.

Reduced Advertising Revenue to Support Local Free, Over-The-Air Broadcast Radio. Just as cable television commenced as a subscription-based service and evolved into a service with two revenue streams, subscription and advertising — both national and local — it is eminently foreseeable and probably inevitable that satellite radio will follow the same path. With such vast aggregation of spectrum, the merged company would siphon advertising dollars from free to pay radio, sapping the economic lifeblood of terrestrial broadcast radio and undermining its ability to serve local communities with diverse, informational programming.

IF THE MARKET IS DEFINED AS ALL AUDIO SERVICES, TERRESTRIAL BROADCAST RADIO IS UNDER EVEN MORE INTENSE COMPETITIVE PRESSURE BECAUSE IT REMAINS TIGHTLY REGULATED WHEREAS ALL OF ITS COMPETITORS ARE ESSENTIALLY UNREGULATED.

The broadest market definition — all audio services, including Internet streaming, iPods, *etc*. — leaves free, over-the-air terrestrial radio in an even more precarious position in terms of its ability to serve its local community. Not only is terrestrial broadcast radio subject to stringent local ownership limits, directly inhibiting its ability to compete against other audio services, but it is subject to a raft of other content and economic regulations. By contrast, satellite radio, Internet streaming, and iPods are essentially unregulated, having no ownership limits. All the problems posed by a merged XM-Sirius in the radio services market are magnified in an audio services market because of the disparities in regulatory treatment of terrestrial broadcast radio and all other audio services. This disparity of regulation would undermine the one service — terrestrial radio — that actually has and continues to have local employees in every market they serve.

HD RADIO IS NOT A MEANINGFUL THREAT TO SATELLITE RADIO – NOT NOW AND LIKELY NOT FOR SOME TIME, AND A COMBINED XM-SIRIUS COULD ABUSE ITS MARKET POWER TO IMPEDE THE GROWTH OF HD RADIO.

While HD radio holds much promise, satellite radio faces no meaningful, foreseeable threat from HD Radio. Satellite radio's pricing and its ability to provide mobility and unique programming will not be constrained by HD Radio. XM and Sirius today have a combined subscribership of nearly 17 million and is forecast to reach 20 million by 2009 without the merger. By contrast, the number of HD radios sold remains under 400,000. Moreover, XM and Sirius have competed with each other to obtain exclusive contracts with auto manufacturers – a crucial market into which HD radio is just beginning to gain entry. A combined XM-Sirius could abuse its substantially increased market power in this area to become a gatekeeper to the introduction and success of HD radio.

WERE THE COMMISSION TO CONSIDER SERIOUSLY GRANTING THE LICENSE TRANSFER APPLICATION, IT SHOULD IMPOSE STRINGENT CONDITIONS.

The aggregation of 25 MHz of spectrum in the hands of one SDARS licensee is simply too much market power. It would distort the marketplace, no matter how defined. Thus, the Commission as a condition of any approval should require a restructuring of the transaction under which the proposed merged entity's license would control no more than 15 MHz of spectrum. The remainder would have to be divested in some fashion.

The Commission should prohibit the merged entity from transmitting local programming. It should be clear that satellite radio is to be exclusively a national service.

As a condition of a granting of the application, as iBiquity and the HD Radio Alliance have proposed, the Commission should require the merged entity to embed HD radio reception capability into all satellite radio receivers. Furthermore, the Commission should prohibit exclusive agreements between the merged entity and automotive companies for satellite radio receivers.