

February 11, 2008

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

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

Dear Ms. Dortch:

The National Association of Broadcasters (“NAB”), by its attorneys and pursuant to 47 C.F.R. § 1.1206, hereby submits this *ex parte* presentation for inclusion in the above-referenced proceeding. In its recent *2006 Quadrennial Review Order*,<sup>1</sup> the Commission determined that satellite digital audio radio service (“satellite DARS”) providers and local radio stations are not “good substitutes” for each other and thus are not in the same radio listening product market. In light of this finding, and based on the record in this proceeding, the Commission must conclude that the proposed merger of XM Satellite Radio Holdings Inc. (“XM”) and Sirius Satellite Radio Inc. (“Sirius”) (collectively “Applicants”) would create a monopoly in the satellite DARS market. The Commission should therefore not permit Applicants to merge.

The *2006 Quadrennial Review Order* authoritatively resolves one of the key issues in this proceeding – whether the merger of XM and Sirius would be anticompetitive and harm consumers. NAB and numerous other parties argue that grant of the proposed merger would be a merger-to-monopoly in the satellite DARS market, which would necessarily cause higher prices and reduce choices for consumers. Applicants take the position that the merger would not be anticompetitive primarily because local radio competes with and substitutes for satellite DARS.

---

<sup>1</sup> *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*, FCC 07-216 at ¶ 114 & n.370 (rel. Feb. 4, 2008) (“*2006 Quadrennial Review Order*”).

Marlene H. Dortch, Secretary

February 11, 2008

Page 2 of 3

The *2006 Quadrennial Review Order* disposes of Applicants' argument. In defining relevant markets for purposes of the local radio ownership rule, the Commission found that satellite DARS is not part of the "radio listening" market because satellite DARS and local radio are not "good substitutes" for each other:

We also reaffirm our conclusions in the *2002 Biennial Review Order* that radio broadcasters operate in three relevant product markets: radio advertising, radio listening, and radio program production. Contrary to the arguments of several commenters, there continues to be a lack of persuasive evidence that various entertainment alternatives . . . are good substitutes for listening to radio.<sup>370/</sup>

---

<sup>370/</sup> Clear Channel Reply at 4-6, 10-13, 43-46 (citing competition from *satellite radio*, MP3 players, Internet radio stations, subscription-based music services from cable, DBS and IPTV providers, and Wi-Max); NAB Reply at 32-34, 50-52.<sup>2</sup>

Having reaffirmed its conclusion from the *2002 Biennial Review Order* that satellite DARS and local radio are *not* good substitutes,<sup>3</sup> the Commission has destroyed the foundation of Applicants' arguments that satellite DARS competes for listeners with local radio. It is now beyond dispute that satellite DARS and local radio should *not* be considered part of the same relevant product market for purposes of evaluating the proposed merger. It follows that grant of the proposed merger would be an anticompetitive merger-to-monopoly in the relevant market – satellite DARS. The Commission should therefore reject the proposed merger rather than revisit its own contemporaneous conclusion regarding competition between local radio and satellite DARS.<sup>4</sup>

---

<sup>2</sup> *Id.* (emphasis added; footnote omitted).

<sup>3</sup> *2002 Biennial Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13716 (2003) ("*2002 Biennial Review Order*") (subsequent history omitted) ("we conclude that satellite radio is not yet a good substitute for broadcast radio for most listeners.").

<sup>4</sup> This is by no means the only reason the Commission should reject the proposed merger. As NAB has demonstrated, grant of the merger application would violate: (1) the Commission's rule against satellite DARS mergers; (2) long-standing Commission policy against spectrum monopolies; and (3) long-standing Commission merger review standards, which incorporate the Department of Justice/Federal Trade Commission Horizontal Merger Guidelines. See NAB Petition to Deny (July 9, 2007), Response to Comments (July 24, 2007), Reply to Opposition (July 31, 2007), Comments (Aug. 13, 2007), Reply Comments (Aug. 27, 2007); Letter from David H. Solomon, Counsel to NAB, to Marlene H. Dortch, Secretary (Oct. 3, 2007).

Marlene H. Dortch, Secretary

February 11, 2008

Page 3 of 3

Accordingly, NAB respectfully requests that the Commission deny or designate for hearing the XM/Sirius merger application. NAB also points out that the Commission has still not acted on applications for review by Applicants and others challenging NAB's right to receive factual information regarding Applicants' widespread violation of Commission rules and authorizations. This information is critical to an evaluation of whether the Commission can rely on Applicants' programming and other promises. To the extent the Commission does not deny or designate the application for hearing, it should defer action until NAB receives that factual information – which the Enforcement Bureau ordered Applicants to provide eight months ago – and has an opportunity to supplement the record as appropriate.<sup>5</sup>

Respectfully submitted,

**NATIONAL ASSOCIATION OF BROADCASTERS**

By:           /s/ David H. Solomon          

David H. Solomon

J. Wade Lindsay

Marsha J. MacBride

Jane E. Mago

Lawrence A. Walke

NATIONAL ASSOCIATION OF BROADCASTERS

1771 N Street, N.W.

Washington, DC 20036

(202) 429-5300

---

<sup>5</sup> See NAB Petition to Defer (Oct. 9, 2007); NAB Reply to Joint Opposition (Nov. 1, 2007).