February 28, 2008

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20054

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

Dear Ms. Dortch:

On behalf of Georgetown Partners L.L.C., the attached filing is submitted in response to questions raised at recent meetings with Commission staff. It is submitted for inclusion in MB Docket 07-57 in accordance with Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206.

Respectfully,

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Attachment

PRECEDENT AND REGULATORY AUTHORITY SUPPORT REQUIRING THE LEASING OF ASSETS NEEDED TO RESTORE PRE-MERGER COMPETITION ON A "FIX-IT-FIRST" APPROVAL BASIS

Adoption of the Georgetown Partners leasing proposal on a "fix-it-first" basis will ensure that consumers are protected from the competitive injury that would otherwise result from the XM Satellite Radio ("XM") merger with Sirius Satellite Radio ("Sirius") without the need for extensive regulatory oversight by the Department of Justice ("DOJ") and the Federal Communications Commission ("FCC" or "Commission"). Because the Georgetown Partners proposal will result in the creation of a strong and vibrant competitor to Sirius and XM before the merger can gain regulatory approval, consumers will not risk the regulatory uncertainty and delay associated with the ability of Sirius/XM to stifle competition until a competing satellite DARS provider can gain commercial traction in the marketplace. This "fix-it-first" approach is strongly favored by the DOJ under its merger remedy policies and has been successfully implemented in a number of recent merger reviews. It has also been successfully employed by the FCC in several recent merger reviews under concurrent consideration with the DOJ, in which the FCC used its own merger review procedures to achieve the same regulatory objectives underlying the DOJ remedy policies. Accordingly, Georgetown Partners urges that the Commission implement this "fix-it-first" approach for any merger conditions it imposes in the regulatory consideration of the proposed XM merger with Sirius.

INTRODUCTION

The preferred policy and practice at the DOJ in a merger investigation such as Sirius/XM is to require that the parties first remedy the anticompetitive effects of the proposed merger on a "fix-it-first" basis prior to granting regulatory approval to permit the transaction to be consummated. As discussed further below, this is consistent with the practice at the Commission where regulatory approval of the proposed transaction depends upon resolution of the anticompetitive effects and other issues based upon its public interest analysis under the Communications Act.[1] In the case of the Sirius/XM merger, the rapidly expanding market makes a pre-merger remedy the only option to ensure that an effective competitor is in the market to preserve pre-merger competition.

"FIX-IT-FIRST" AT THE U.S. DEPARTMENT OF JUSTICE

The DOJ Antitrust Division Policy Guide to Merger Remedies describes the "fix-it-first" remedy as "a structural remedy that the parties implement and the Division accepts before a merger is consummated."[2] A "fix-it-first" remedy eliminates anticompetitive concerns prior to granting regulatory approval to consummate the proposed transaction and therefore obviates the need to enter into a consent decree with a post-closing divestiture commitment and related conditions.[3] DOJ has expressed the view that "[a] fix-it-first remedy may be preferable to a

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[1] 47 U.S.C. § 310(d).

[2] Department of Justice Antitrust Division Policy Guide to Merger Remedies, at Section IV.A, p. 26 (Oct. 2004).

[3] *Id*.

consent decree when the appropriate remedy is a clean, structural change -- the 'cleaner the better' -- such as the sale of a business."[4]

A highly instructive example of DOJ's use of the "fix-it-first" remedy is the Cooper Cameron Corp./Ingram Cactus Co. merger. In that case, DOJ allowed the parties to consummate their merger "following the agreement by Cooper Cameron to license and supply certain oil well equipment and technology to a third company, Daniel Valve Co., to alleviate competitive concerns."[5] To remedy DOJ's anticompetitive concerns, Cooper Cameron, prior to obtaining DOJ approval to consummate the merger, entered into an exclusive agreement to license its technology, including its know-how and trade secrets, used in connection with the design, manufacture, and sale of geothermal wellheads and valves, to Daniel Valve, a third-party competitor. In addition, Cooper Cameron agreed to provide Daniel Valve with technical assistance and to provide Daniel Valve with components covered by the license for a period of years at its distributors' prices.

DOJ has cited Cooper Cameron as an example of its willingness as a policy matter to "fix-it-first" by "work[ing] with [the] parties to remedy competitive problems that arise in the context of mergers so that the transactions can proceed once the competitive problems are resolved."[6] DOJ in that case commented that "[t]ogether, the license and supply agreement resolved the Department's competitive concerns by providing Daniel with the assets, information, and products to become a long-term, viable competitor in this industry."[7] In the same manner, Georgetown Partners' leasing proposal would provide Georgetown Partners with the means to be a long-term, viable competitor to Sirius/XM immediately upon approval and consummation of the proposed merger.

Other examples of DOJ's use of the "fix-it-first" remedy include the FirstGroup plc/Laidlaw International, Inc. merger in which DOJ closed its investigation under the "'fix-it-first' policy based on the parties' commitment" to sell FirstGroup's "large school bus contract and associated assets in Alaska in order to proceed with its acquisition of Laidlaw."[8] In another example, DOJ allowed Genecor International to proceed with its acquisition of Solvay S.A. "following the agreement by Genecor to license and supply technology relating to certain enzymes used to process starch to a third company" to alleviate competitive concerns.[9]

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[4] *See* Address by Acting Assistant Attorney General R. Hewitt Pate Regarding Antitrust Enforcement at the DoJ -- Issues in Merger Investigation and Litigation Before the Association of the Bar of the City of New York (Dec. 10, 2002), *available at* http://www.usDoJ.gov/atr/public/speeches/200868.htm.

[5] Press Release, DOJ, Justice Department Protects Competition in Merger Involving Houston Oil Well Equipment Makers, *available at* http://www.usDoJ.gov/atr/public/press_releases/1996/0692.htm.

[6] *Id*.

[7] *Id*.

[8] Press Release, DOJ, FirstGroup plc and Laidlaw International Inc. Sell Off School Bus Contract in Alaska to Resolve Antitrust Concerns, *available at* http://www.usDoJ.gov/atr/public/press_releases/2007/226377.htm.

[9] Press Release, DOJ, Justice Department Protects Competition in Acquisition Involving Starch-Processing Enzymes, *available at* http://www.usDoJ.gov/atr/public/press_releases/1996/0701.htm.

The need for a "first-it-first" remedy is particularly compelling in light of difficulties DOJ has recently experienced in enforcing post-closing divestiture commitments. For example, in the Mittal Steel/Arcelor S.A. merger, DOJ concluded that the proposed transaction would unduly restrain competition in the market for tin mill products in the eastern United States.[10] To resolve these anticompetitive concerns, in August, 2006, DOJ accepted a consent decree requiring Mittal to divest its Sparrows Point mill near Baltimore within a specified time period after consummation of its merger.[11] Unable to do so within the specified timeframe, Mittal obtained several extensions of the deadline.[12] Although Mittal then agreed to sell Sparrows Point to a joint venture led by Esmark Corporation, Mittal still was unable to meet the extended deadline. [13] As a result, DOJ had to obtain a court-appointed trustee to accomplish the sale of the Sparrow Point facility.[14] However, financing difficulties and difficulties related to the negotiation of a purchase agreement led to further time delays,[15] and as of February 26, 2008 – 18 months later -- the Sparrows Point plant has still not been divested as agreed to by the parties.[16]

FEDERAL COMMUNICATIONS COMMISSION PRECEDENT

The FCC evaluates mergers involving the transfer of licenses pursuant to Section 310(d) of the Communications Act of 1934, as amended (the "Act"). [17] Section 310(d) provides that no Commission license can be transferred or assigned unless and until the Commission determines that the public interest, convenience, and necessity will be served thereby.[18] In making its determination, the Commission first determines whether the proposed transaction would comply with the specific provisions of the Act, other applicable statutes, and the Commission's rules and policies. The Commission then considers whether the merger could harm the public interest by substantially frustrating or impairing the objectives or implementation of the Act or related statutes. The Commission employs a balancing process, weighing potential public interest harms of the proposed merger against potential public interest benefits.

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[10] *United States v. Mittal Steel Company N.V.*, Complaint (D.D.C. Aug. 1, 2006), *available at* http://www.usDoJ.gov/atr/cases/f217400/217493.htm.

[11] *Mittal Steel*, Final Judgment (D.D.C. May 23, 2007), *available at* http://www.usDoJ.gov/atr/cases/f223500/223500.htm.

[12] *Mittal Steel*, Memorandum of Points and Authorities in Support of Motion of the United States to Appoint Trustee (D.D.C. Aug. 6, 2007), *available at* http://www.usDoJ.gov/atr/cases/f225000/225000.htm.

[13] *Id*.

[14] *Id*.

[15] *Mittal Steel*, Trustee's Fourth Report Pursuant to Final Judgment (D.D.C. Jan. 30, 2008), *available at* http://www.usDoJ.gov/atr/cases/f229800/229857.htm.

[16] *Id*.

[17] 47 U.S.C. § 310(d).

[18] Section 310(d) requires that the Commission consider the applications as if they were being applied for directly. 47 U.S.C. § 310(d). *See e.g., SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control,* Memorandum Opinion and Order,20 FCC Rcd 18290 (2005); and *Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control,* Memorandum Opinion and Order, 20 FCC Rcd 18433 (2005).

The applicants bear the burden of proving by a preponderance of the evidence that the proposed transaction, on balance, would serve the public interest.[19] In considering the applications of Sirius and XM to merge, the Commission must note, as it already has, that the merger would violate an explicit policy established before the licenses were issued that in order to preserve competition the two licensees would not be permitted to merge with each other.[20]

Although the FCC has not explicitly articulated a policy of preferring "fix-it-first" remedies to post-merger competitive conditions, in fact on several recent occasions it has approved divestitures at the same time as the underlying transaction. In these cases many of the same policy benefits accrue with a "fix-it-first" remedy at the FCC as are recognized by the DOJ. This is especially so where, as in the instant case, the marketplace is expanding rapidly and any delay would undercut the ability of the new entrant to succeed.[21]

In several recent cases the Commission has employed a "fix-it-first"-like remedy by taking the necessary actions simultaneous with its approval of the underlying merger. For example, in a transaction that dealt with the largest merger of radio station licenses in history, due to competitive concerns expressed by DOJ and the Commission, as well as to meet the Commission's radio ownership numerical limits, Clear Channel agreed to divest certain stations prior to the consummation of the transaction to third-party buyers or to an insulated trust (subject to DOJ approval of the buyers).[22]

As noted by the Commission in its approval Order, for the vast majority of the divestitures "Clear Channel and AMFM have committed to divesting certain stations pursuant to a "fix-it-first" approach in which they will divest the stations before consummating the merger."[23] Clear Channel filed applications with the Commission to sell the stations to third parties before the transfer was approved, and in the Order approving the merger these applications also were granted, thereby remedying the antitrust concerns at the same time as the merger was approved.[24] Clear Channel thereby avoided the need for a post-merger regulatory solution to the competitive issue by first selling certain stations, subject to DOJ and FCC approvals.

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[19] *Id*.

[20] *See Applications for Consent to Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, Notice of Proposed Rulemaking, 22 FCC Rcd 12018 (2007).

[21] The lack of an articulated policy may be because the FCC approves (or denies) merger applications in the same fashion whether or not the applications have been resubmitted with a "fix-it-first" remedy. In contrast, at the DOJ and FTC a "fix-it-first" remedy eliminates the need for a complaint, consent decree and related actions.

[22] *See Applications of Shareholders of AMFM, Inc. (Transferor) and Clear Channel Communications, Inc. (Transferee)*, Memorandum Opinion and Order, 15 FCC Rcd 16062 (2000).

[23] *Id.* at ¶ 17.

[24] Clear Channel agreed to divest stations for which it could not find an acceptable third-party buyer prior to consummation of the merger to a trustee who would then sell the stations, *Id*.

This method of a fix-it-first transaction relating directly to the FCC was addressed in 2007 by the current Assistant Attorney General for the Antitrust Division, Thomas O. Barnett.[25] Mr. Barnett, discussing the use of a "pocket consent decree" (by which the DOJ would have a consent decree ready to go, but only use it if the proposed fix-it-first remedy fell through) stated that such pocket decrees:

> typically arise in fix-it-first or analogous situations where the acquiring company has an exogenous legal obligation to divest certain assets that would eliminate any competitive concern. For example, in the acquisition of radio or television stations, FCC regulations might require the acquiring firm to sell a station to stay below a regulatory limit. If the divestiture takes place, no further investigation would be required. If for some reason it does not take place, the pocket decree protects the ability of the Division to address the competitive concern.

In another transaction, the SBC/Ameritech/ merger, SBC/Ameritech agreed to sell overlapping geographic cellular assets to GTE Consumers Services, Inc., a subsidiary of GTE and Georgetown Partners, before the FCC acted on the applications. The Commission granted the applications to transfer the cellular licenses to GTE and Georgetown Partners in a separate Order, and in the SBC/Ameritech Order the Commission relied upon that sale as a remedy for the anticompetitive effects that it had identified. Accordingly, the Commission granted the SBC/Ameritech merger "subject to the condition that Ameritech closes its deal with GTE before or simultaneous with the closing of the SBC/Ameritech transaction."[26]

In that case the Commission approved the sale of the cellular licenses without resorting to a post-merger search for a third-party divestiture buyer. DOJ approved GTE/Georgetown as the divestiture buyer, and the Commission then separately approved GTE/Georgetown as a buyer that would remedy the anticompetitive problem identified by DOJ and the FCC. This is another example of the Commission relying on the sale of assets to a specific party prior to approving the underlying transaction in order to remedy the identified anticompetitive harm raised by the transaction.

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[25] "Merger Review: A Request for Efficiency," Thomas O. Barnett, New York State Bar Association, Antitrust Section Annual Meeting (Jan. 25, 2007) *available at* http://www.usdoj.gov/atr/public/speeches/221173.htm.

[26] *See Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee,* Memorandum Opinion and Order, 14 FCC Rcd 14712 at ¶ 523 (1999).

CONCLUSION

Without a pre-merger remedy, Georgetown strongly urges the FCC to reject the proposed merger of Sirius and XM as it is currently structured because such approval would create unprecedented adverse competitive consequences in the satellite radio market, would harm consumers, and would fail to meet the FCC's public interest standard. As demonstrated above, there is ample precedent at both the DOJ and the FCC to insist upon a pre-merger "fix-it-first" remedy in this case. Given the structure of this market, anything less would seriously impair the viability of any post-merger competitive entrant and should not be countenanced. The new competitive entity must be in place before the underlying merger of Sirius with XM is consummated. Absent this fix-it-first divestiture remedy, the FCC should withhold its approval of this merger-to-monopoly in the market for satellite DARS service.