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March 24, 2008

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

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

Dear Ms. Dortch:

This is to notify you that on March 21, 2008, Michael Alston and Jon Fotos of Georgetown Partners ("Georgetown"), Andrew Berg of Sonnenschein, Nath & Rosenthal, LLP, and the undersigned met with William Freedman, Marcia Glauberman, and Elvis Stumbergs of the Media Bureau and Joel Rabinovitz and Virginia Metallo of the Office of General Counsel.

Georgetown's discussion was consistent with its earlier filings in this docket. As currently structured, approval of the merger would eliminate consumer choice and leave a single entity controlling the service. Georgetown emphasized that approving this merger and allowing a single monopoly entity to control all 300+ channels and 25 megahertz of satellite DARS spectrum would harm the public interest and be contrary to long-standing communications law and precedent.[1] We therefore urged the Commission to insist upon a new entrant. "Competition, given a fair test, will best protect the public interest. That is the American system."[2] As the U.S. Supreme Court stated, "It is the purpose of the First

[1] The Commission correctly concluded recently that satellite DARS providers and local radio stations are not "good substitutes" for each other and thus are not in the same product market., *see 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 para. 114 & n.370 (rel. Feb. 4, 2008).

[2] *See Report on Chain Broadcasting,* Commission Order No. 37; Docket 5060 (May, 1941), appeal dismissed *sub nom.* NBC v. United States, 47 F.Supp. 940 (1942), aff'd, 319 U.S. 190 (1943). A half-century later Congress named the Telecommunications Act of 1996 "An Act to Promote Competition".

Amendment to preserve an uninhibited market-place of ideas. . . .rather than to countenance monopolization of that market.[3]

Specifically, the merger should be denied or designated for hearing unless and until the applicants offer a *"fix-it-first"* remedy[4] or the Commission adopts specific conditions requiring that a competitive entity be in place *before* the merger is allowed to close. A specific proposal discussed in our prior filings and at this meeting is that the public interest would be served by a Commission-approved leasing arrangement with an unaffiliated and completely independent third party if the lease is in place before the merger's closing. A *minimum* of 20 percent of the total satellite DARS capacity and access to the requisite infrastructure would be required for an unaffiliated third party, such as Georgetown, due to the proprietary nature of the transmission standards and receiver technologies. Such a lessee could be selected in a variety of ways applying existing criteria, including that contained in current and proposed Commission rules[5] and subject to demonstrating financial sufficiency. A lease conveying rights analogous to Indefeasible Rights of Use, employed by the Commission to ensure competition in monopoly broadband situations,[6] could be effective.

Georgetown therefore continued to propose that a lease be privately negotiated or imposed at commercially acceptable terms that would compensate the merged entity while prohibiting any control or influence over the competitor or the competitor's programs. Georgetown also reiterated its commitment to free, over-the-air (advertiser-supported) programming receivable on all satellite receivers, including the estimated 17 million receivers (50 percent of the total) that are silent today even though consumers paid the cost of the receivers in their automobiles. Georgetown additionally stated that if it is the lessee, all of its programming will comply with the Commission's indecency provisions as applied to broadcasters.

A lease is the only feasible structure because of the substantial delay, at least 5-7 years, to design and launch satellites to compete in this market. Also, the embedded receivers – currently estimated at 34 million and growing by 6-7 million/year for the next several years – are in the majority of new automobiles and included in the cost of the car. The multiyear exclusive arrangements that the applicants have with virtually every automobile manufacturer

[3] *Associated Press v. United States,* 326 U.S. 1, 20 (1945); *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964); *Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[4] *See Written Ex Parte Presentation of Georgetown Partners L.L.C.,* dated February 28, 2008, concerning the "fix-it-first" remedy.

[5] *See, e.g., Report and Order and Third Further Notice of Proposed Rulemaking*, FCC 07-217 (released March 5, 2008).

[6] *See Memorandum Opinion and Order*, WC Docket 05-65, FCC 05-183 (released November 17, 2005) (assets divested in the form of Indefeasible Rights of Use in certain buildings where only SBC and AT&T had direct connections).

are the major source of growth in satellite DARS and prevent a new entity benefiting consumers *unless* an arms-length lease arrangement is required. Without it, the merger must be denied.

To effectuate Georgetown's proposals, we discussed including pre-merger conditions in any approval order that would have to be fulfilled before the applicants could close. Consummation of the merger must be permitted only *after* a satisfactory contractual leasing arrangement is submitted to and approved by the Commission. Alternatively, the Commission in its Order could adopt a selection process and lease terms, so long as the alternative programmer is approved and able to air its programs at the time of closing.

Georgetown explained that 20 percent of the combined entity's capacity must be leased, at commercially viable terms, to an entity that is totally independent of, and with no connection to, Sirius or XM. The competitor's programming should be carried in the same geographic areas and with the same quality and signal strength as that of the merged entity itself. The merged entity also should be required to guarantee that all programming by the new entrant is capable of reception on all radios and other receivers now in existence and to be distributed in the future, including receivers capable of video, audio, data and telemetry, in the same manner that each of the merged entity's own services are received.

The lessee must have the sole right to determine the content of its programming, including full control of the production of all content, the bandwidth used to transmit it, and factors affecting its audio quality, video definition, robustness, and any other factor affecting perceived quality and consumer perception. The lessee must be able to sell advertising on its programs free of any restrictions imposed by the merged entity. The Lessee would pay a negotiated lease rate on commercial terms as specified in the agreement entered into between the parties and submitted for approval to the Commission or as otherwise determined by the Commission.

In sum, immediately upon the merger's closing, the above minimum conditions must be in place. The applications to merge should be designated for hearing or otherwise denied should the contemplated leasing arrangement not be submitted with the above provisions and in a form that otherwise can be approved by the Commission.

In accordance with Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, this letter is being filed in the above docket.

Respectfully submitted,

DR Siddall

David R. Siddall
Counsel to Georgetown Partners L.L.C.