



LEVENTHAL SENTER & LERMAN PLLC

May 5, 2008

**BY HAND**

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

**Re: Applications for Consent to the Transfer of Control of Licenses from  
XM Satellite Radio Holdings, Inc., Transferor, to Sirius Satellite Radio  
Inc, Transferee (MB Docket No. 07-57)**

Dear Ms. Dortch:

This letter is filed on behalf of Beasley Broadcast Group, Inc., Entercom Communications Corp., Greater Media, Inc., Lincoln Financial Media Company, and Saga Communications, Inc. (collectively, the “Joint Broadcast Parties”) to update their comments in this proceeding in the wake of developments that have occurred since the beginning of 2008.<sup>1</sup> In their initial comments, the Joint Broadcast Parties opposed approval of the merger of XM and Sirius, and emphasized that the Commission ought not to consider altering the Satellite Digital Audio Radio Service Monopoly Prohibition (“Satellite Radio Monopoly Prohibition”)<sup>2</sup> without taking into consideration the larger framework of regulatory limitations on the common ownership of spectrum licenses used to provide audio entertainment services.

Consistent with these prior comments, the Joint Broadcast Parties believe that the Commission must now reconcile its own recent, unequivocal determination that terrestrial radio broadcasters do not compete in a larger market with alternative audio services with the U.S. Department of Justice’s contrary conclusion in the context of its investigation of the XM-Sirius

---

<sup>1</sup> Joint Broadcast Parties previously submitted Joint Reply Comments in this proceeding on August 27, 2007. The Joint Reply Comments were also filed in several other dockets concerning the Commission’s review of its broadcast ownership rules: *2006 Quadrennial Regulatory Review* (MB Docket No. 06-121); *2002 Biennial Regulatory Review* (MB Docket No. 02-277); *Local Radio Market Ownership* (MM Docket No. 01-317); and *Definition of Radio Markets* (MM Docket No. 00-244).

<sup>2</sup> *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd 5754, 5823 (¶ 170) (1997) (“Even after DARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellite DARS license. This prohibition on transfer of control will help assure sufficient continuing competition in the provision of satellite DARS service.”)



Ms. Marlene H. Dortch, Secretary  
May 5, 2008  
Page -2-

merger. In addition, for reasons outlined in the DOJ's recent statement concerning the XM-Sirius merger, the Commission, if it allows the XM-Sirius merger to proceed, should prohibit the merged company from subsidizing or licensing any satellite radio receiver unless the receiver includes an HD AM/FM radio tuner.

In early February, the Commission released its much-anticipated Report and Order and Order on Reconsideration with respect to its broadcast ownership rules.<sup>3</sup> In that decision, the Commission concluded that "there continues to be a lack of persuasive evidence that various entertainment alternatives ... are good substitutes for listening to radio." *Broadcast Ownership Order* at 62-63 (¶ 114). It rejected the contrary argument that terrestrial radio broadcasters were in competition with "satellite radio, MP3 players, Internet radio stations, subscription-based music services from cable, DBS and IPTV providers, and Wi-Max." *Id.* at 63 n.370.

Six weeks later, in its press release announcing the closure of its investigation of the proposed XM-Sirius merger, the DOJ reached a different conclusion. DOJ stated that its "investigation did not support defining a market limited to the two satellite radio firms," and accepted arguments by XM and Sirius that they were in competition for listeners with "traditional AM/FM radio, HD Radio, MP3 players (e.g., iPods®), and audio offerings delivered through wireless telephones." *Statement of the Department of Justice Antitrust Division on its Decision to Close Its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio, Inc.* (March 24, 2008).

These recent judgments of the FCC and the DOJ are fundamentally inconsistent. If audio market competition faced by satellite radio providers is as wide-ranging as the DOJ found, then this broader competition for listeners necessarily impacts "traditional AM/FM [and] HD Radio" as well, and should have been considered in weighing the continued relevance of the broadcast multiple ownership rules.<sup>4</sup>

The Commission, of course, is the expert agency in matters involving broadcasting and spectrum policy. With respect to the issue of source diversity that the Commission has emphasized in its broadcast ownership proceedings, regulations which would allow maximum consolidation of satellite radio, aggregating all 25 MHz of spectrum allocated for this service under the control of a single entity without any public service programming obligations, cannot reasonably coexist with regulations strictly limiting AM/FM broadcasters to a maximum of 1.03 MHz in the largest local markets (and substantially less in smaller markets). Indeed, a merged XM-Sirius entity would control more spectrum than the entire AM and FM bands combined.<sup>5</sup> If the DOJ is correct, and satellite radio and AM/FM radio are competitors, then one FCC-regulated

---

<sup>3</sup> 2006 *Quadrennial Regulatory Review - Review of the Commissions Broadcast Ownership Rules et al.*, Report and Order and Order on Reconsideration, FCC 07-216, slip op. (released February 4, 2008) ("*Broadcast Ownership Order*").

<sup>4</sup> See, e.g., "FCC Must Stop Sirius/XM Deal," *Seattle Times*, March 27, 2007 ("Other media face competition from those same sources of information, too, without the privilege of monopoly.")

<sup>5</sup> The satellite radio allocation is 25 MHz versus 21.2 MHz allocated to terrestrial radio (20 MHz (FM) + ~1.2 MHz (AM)).



Ms. Marlene H. Dortch, Secretary  
May 5, 2008  
Page -3-

market entrant must not be shackled by regulatory impediments, such as capacity and content limits, which do not apply to the other.

The Commission explicitly noted in its *Broadcast Ownership Order* that “numerical limits on radio station ownership help to keep the available radio spectrum from becoming ‘locked up’ in the hands of one or a few owners” and “that relaxing the rule to permit greater consolidation would be inconsistent with the Commission’s public interest objectives of ensuring that the benefits of competition and diversity are realized...” *Id.* (¶ 116). This very recent Commission determination would be fundamentally at odds with any conclusion in the instant rulemaking proceeding that the Satellite Radio Monopoly Prohibition, the sole satellite radio ownership limitation, is unnecessary because the audio-oriented media cited above are in competition with each other.

Moreover, one of the principal judgments upon which the DOJ premised the closure of its investigation of the proposed merger was a finding that there is little current competition between XM and Sirius for satellite radio subscribers because of the absence of interoperable radios that receive both the XM and Sirius services, as well as the reality that “such a radio likely would not be introduced in the near term.” *Id.* This circumstance is the exact opposite of what the Commission intended when it licensed Sirius and XM and conditioned their licenses upon certification by each “that its final user receiver design is interoperable with respect to” the other licensee’s final receiver design.<sup>6</sup> The existence of such interoperable receivers would have permitted existing subscribers to one service to switch with relative ease to the other, fostering intramodal competition, a policy goal that the Commission has consistently promoted.

Given the Commission’s longstanding, but wholly ignored, requirement of satellite radio interoperability, it is of critical significance (and significant irony) that the DOJ found the unavailability of such interoperable end-user equipment a substantial factor in its conclusion that XM and Sirius do not compete effectively with each other for existing subscribers. Even if the Commission does rescind its Satellite Radio Monopoly Prohibition – and undertakes the necessary review of the conclusions concerning the audio marketplace reached in its recent *Broadcast Ownership Order* that such an abrupt policy reversal would necessarily require – it will remain critically important to ensure that subscribers to a monopoly satellite radio service are not limited in their opportunities to sample other audio services.

At the moment, the only other available technology that provides a range of different audio program formats to mobile users is terrestrial AM/FM analog and HD service. In order to avoid the anticompetitive result that DOJ found to minimize competition between XM and Sirius, any order approving the merger should be explicitly and forcefully conditioned on a requirement that the combined entity may only subsidize or license satellite radio receiving equipment that both includes HD AM/FM tuners and allows users to switch easily between the satellite S-band and the AM and FM bands.

---

<sup>6</sup> *Satellite CD Radio, Inc.*, 13 FCC Rcd 7971, 7995 (¶ 57) (1997); *American Mobile Radio Corp.*, 13 FCC Rcd 8829, 8851 (¶ 54) (1997).

