

CONDITIONS TO BE IMPOSED BY THE COMMISSION IN THE EVENT IT APPROVES SOME FORM OF THE XM-SIRIUS MERGER

The Commission required two licensees when it established the SDARS service. This decision was consistent with fundamental communications law and policy established by the courts, the Congress and the Commission over more than two decades of ensuring intramodal competition (AT&T divestiture, CMRS, PCS, DBS, *etc.*). The XM-Sirius merger as proposed would not only eliminate intramodal competition in the satellite radio service but also aggregate 25 MHz of spectrum in one licensee, more than that allocated to the entire AM and FM terrestrial radio bands combined. In any given market, it would permit the satellite radio provider to transmit roughly 40 times more channels of programming than the largest terrestrial broadcast radio licensee in that market, creating the potential for siphoning advertising revenue, talent and high-quality programming from free, over-the-air radio without any concomitant public interest obligations on satellite radio. Those consequences would impact directly and adversely the ability of terrestrial radio broadcasters to fulfill their core mission of serving their local communities. Especially in light of the recent Commission decision to provide no flexibility regarding the local radio ownership caps and the difficult financial straits free, over-the-air radio is currently encountering, approval of the XM-Sirius merger, as proposed, cannot in any manner be justified as in the public interest.

Were the Commission inclined to approve the merger, nonetheless, it should, at a minimum, impose the following conditions that would be essential to remain even remotely faithful to Commission precedents and policies regarding competition, spectrum and preservation of a viable, locally-oriented, free, over-the-air radio broadcast system:

(1) There must be intramodal competition within the SDARS service. Whether such competition be achieved through a long-term lease of satellite capacity to a third party having complete freedom to control programming over the leased channels or through some other means, a *viable* competitive alternative to XM-Sirius in the SDARS allocated spectrum must be ensured concurrent with any possible license transfer. No less than 50 percent of satellite capacity should be made available for this purpose which could include the five percent public interest set-aside set forth below in suggested condition 2.

(2) A public interest set-aside of no less than 5% modeled after the 4-7% of satellite capacity statutorily required for the DBS service should be required. There is no intrinsic public interest benefit flowing from the proposed XM-Sirius merger. If the public interest test for grant of the license transfer is to be met, there must be a reservation of satellite capacity dedicated to the public interest. No charges could be made by XM-Sirius for this set-aside.

(3) The operations of a merged XM-Sirius should be subject to the Commission's broadcast decency rules. One of the primary potential dangers to free, over-the-air radio posed by this merger is siphoning popular, including "edgy" content, with consequent loss of advertising revenue. That potential harm is mitigated if

broadcast decency rules were to apply to the merged entity. There is no constitutional bar to such a condition.

(4) The combined XM-Sirius should be prohibited from transmitting local programming. It should be reaffirmed that it is licensed only as a national service. The appropriate structural safeguard to accomplish this limitation is a prohibition on the merged company operating terrestrial-based repeaters. Both SDARS operators have operated terrestrial repeaters grossly outside Commission-approved parameters. Terrestrial repeaters are not necessary for adequate reception by subscribers but rather reflect design judgments. Satellite radio's subscribers do not deserve any greater protection than that accorded free, over-the-air radio listeners, as reflected in the Commission's recent Low Power FM Order.

(5) The combined XM-Sirius should be prohibited from receiving local advertising revenues. Local advertising revenue is the lifeblood of the terrestrial broadcasting system. Siphoning local advertising would pose a direct threat to the ability of terrestrial broadcast radio to fulfill its core missions. This condition has clear precedent in statute and regulation in the prohibition against importation of distant network signals (except for white spaces) by satellite operators and in the syndicated exclusivity rules. It fulfills the very same public policy objective to protect the local advertising revenue realized by free, over-the-air broadcasters.

(6) Last, but certainly not least, the Commission should require the merged entity to integrate subscription free HD radio reception capability into all satellite radio receivers. Absent such a condition, the merged XM-Sirius will have the incentive and capability, through its dominant market position, to engage in anti-competitive behavior by locking up exclusive agreements with automobile manufacturers, thereby impeding dramatically the growth of HD radio. Just as the Commission required manufacturers to build in DTV reception capability into television receivers and Congress required UHF signal reception for all television receivers, such a requirement is necessary to ensure that terrestrial radio also is able to evolve with technology. Although this condition does not mitigate the core problems posed by the proposed merger, imposition of this condition is absolutely critical to the future competitive viability of free, over-the-air radio in the digital era.