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April 10, 2008

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

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

Dear Mr. Chairman:

In light of the Department of Justice (“DOJ”) Antitrust Division’s recent decision to close its investigation of XM Satellite Radio Holdings Inc.’s merger with Sirius Satellite Radio Inc., we write on behalf of Clear Channel Communications, Inc. to briefly address DOJ’s decision, and point out several items of importance to the Commission in making its own, independent determination in this matter.

Specifically, DOJ cited four reasons for its conclusion that the XM-Sirius merger would not harm competition: (i) new technologies available to consumers in the future, (ii) efficiencies from the merger, (iii) a lack of existing competition between XM and Sirius for existing subscribers and new subscribers through the automotive sector, and (iv) existing alternative services available to consumers (such as traditional radio).¹ DOJ’s statement with respect to the first and second of these reasons is inconsistent with its own internal merger review guidelines. The third reason relies on a “boot-strapping” argument that rewards the merger proponents for violating the Commission’s interoperable radio requirement in the original grant of the satellite radio licenses to XM and Sirius. The fourth reason is directly contrary to the Commission’s recent *Report and Order on Reconsideration* concerning its 2006 Quadrennial Review of the broadcast ownership rules, adopted just this past December. Accordingly, DOJ’s decision is not entitled to any deference as the Commission deliberates on whether to approve the proposed license transfer.

¹ “Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Holdings Inc.’s Merger with Sirius Satellite Radio Inc.,” Issued Monday, March 24, 2008.

I. DOJ DID NOT FOLLOW ITS OWN MERGER GUIDELINES

DOJ analyzes mergers under the framework set out in the Horizontal Merger Guidelines (“Guidelines”), issued jointly by DOJ and the Federal Trade Commission. Indeed, the Guidelines are not only long-established internal DOJ merger enforcement policy, but are also continually used by federal courts in evaluating merger antitrust cases.² DOJ’s closing statement in the XM-Sirius matter, however, indicates that two of its stated reasons for closing the investigation, future technology and efficiencies, were essentially afterthought “throw-ins” that do not conform to the Merger Guidelines.

A. Future Competitive Technologies

First, DOJ cited technological change as an important reason for its decision to close its investigation. DOJ concluded that new technologies now under development will be available in the future as alternatives to satellite radio, so as to competitively constrain a merged XM-Sirius. For such a defense to pass antitrust muster under the Merger Guidelines there are certain factual criteria that must be present. Most importantly, entry by firms (other than the merging parties) supplying these new products must be “timely, likely, and sufficient in magnitude, character and scope to deter or counteract the competitive effects of concern.”³

Taking just the first of these criteria, that such new entry be “timely,” the standard is whether such entry will have a significant market impact within two years.⁴ DOJ’s statement indicates that it is unknown which, if any, of these new technologies will be successful in the marketplace, or when the timing of successful entry will be. Indeed, the statement names only wireless networks that can stream internet radio over mobile devices as a likely new competitive prospect, says that this technology is *the* most likely future competitive product, then states that its initial introduction is expected within “several years” -- outside the Merger Guidelines’ timeframe.

B. Efficiencies

Second, DOJ’s statement cites efficiencies from the combination of XM and Sirius as an important reason for closing its investigation, but again DOJ appears to not have followed the Merger Guidelines. Under the Guidelines, merging firms must substantiate

² See, e.g., United States v. Baker Hughes Inc., 908 F.2d 981 (D.C. Cir. 1990); United States v. Oracle Corp., 331 F.Supp.2d 1098 (N.D. Cal. 2004).

³ Horizontal Merger Guidelines, Section 3.0.

⁴ Id. at Section 3.2.

efficiency claims so that the magnitude of each claimed efficiency can be verified. Efficiencies simply are not “cognizable” unless they are so verified.⁵

DOJ’s closing statement plainly indicates that it was not possible to even estimate, much less verify, the magnitude of claimed efficiencies from the merger due to a lack of supporting evidence from XM and Sirius. DOJ mentions that it did “estimate” certain claimed cost savings from the merger, but again this falls far short of what the Guidelines require for a legitimate efficiencies defense. It is also worth noting that, under the Guidelines, “Efficiencies almost never justify a merger to monopoly or near monopoly.”⁶

II. DOJ RELIES ON A COMMISSION ORDER VIOLATION

Third, DOJ concluded that the proposed merger would have no anticompetitive effect on existing satellite radio subscribers, as well as new subscribers who receive service via their automobile, because of a lack of existing competition between the parties in these segments. The root reason for this absence of competition in DOJ’s analysis is that XM and Sirius radio equipment is not interoperable, thereby effectively eliminating the possibility of consumer switching between the two firms’ products.

The problem with this aspect of DOJ’s analysis is that it ignores the fundamental fact that in originally granting satellite radio licenses to XM and Sirius, the Commission expressly directed that XM and Sirius make their equipment interoperable. The Commission’s satellite radio licensing provisions state, “[E]ach applicant shall: certify that its satellite DARS system includes a receiver that will permit end users to access all licensed satellite DARS systems that are operational or under construction.”⁷ In adopting this rule, the Commission intended that it “[P]romote competition by reducing transaction costs and enhancing consumers’ ability to switch between competing DARS providers.”⁸

Had XM and Sirius complied with the Commission’s directive, there would now be competition between the parties for consumers in these segments, and this reason cited by DOJ would not exist. Thus, as a defense to this merger, the fact that XM and Sirius have not complied with the Commission’s directive is pure “boot-strapping.”

⁵ *Id.* at Section 4.

⁶ *Id.* at Section 4.

⁷ 47 C.F.R. 25.144(a)(3), (a)(3)3(ii).

⁸ In the Matter of Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, Report and Order Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5754 at Paragraph 103 (March 3, 1997).

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While evaluating XM and Sirius's failure to comply with an important Commission condition placed upon them was not DOJ's task in analyzing the proposed merger, it is a serious concern that is clearly the Commission's task in considering this merger. The Commission cannot be in the position of condoning a violation of an FCC rule adopted specifically to promote competition and rewarding the proposed merged entity with a grant of 25 MHz of spectrum, larger than the spectrum for the combined AM-FM terrestrial broadcast radio service. To permit the merged entity to make a virtue out of a vice would be counter to legal precedent generally,⁹ and to Commission precedent in particular.¹⁰ There is no more fundamental responsibility that any regulatory agency has than to uphold its own rules and preserve the integrity of its regulatory actions.

III. DOJ'S MARKET DEFINITION IS THE OPPOSITE OF THE COMMISSION'S

Fourth, the final reason provided by DOJ for closing its investigation is a product market definition that includes alternative services, including traditional radio. In short, DOJ concludes that traditional radio and satellite radio are competitors in the same market. That view of the market is clearly contrary to the Commission's "Report and Order and Order on Reconsideration" adopted December 18, 2007 in connection with its Quadrennial Review of broadcast ownership rules, in which the Commission stated,

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

⁹ For example, parties with unclean hands are not to be rewarded for such. See, e.g., In the Matter of Daniel A. Edelman, Esq., FCC Memorandum Opinion and Order, FOIA Control Nos. 2004-113, 2004-114 (Released July 7, 2004); United States v. Howell, 425 F.3d 971, 974 (11th Cir. 2005); In re Garfinkle, 672 F.2d 1340, 1346 (11th Cir. 1982).

¹⁰ The Commission is required by law to consider whether a proposed transferee is qualified to hold a Commission license (see, e.g., Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21546 Paragraph 44 (2004), and has stated many times that violations of Commission orders bear on whether an applicant is qualified. See, e.g., Applications of Western Wireless Corporation and ALLTEL Corporation, Memorandum Opinion and Order, WT Docket No. 05-50, Paragraph 18 and n. 85 (2005).

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... [including satellite radio] are good substitutes for listening to [traditional] radio.¹¹

The Commission thus plainly concluded, just a few short months ago, that traditional radio and satellite radio are not in the same product market – exactly the opposite of what DOJ concluded in its review of the proposed XM-Sirius merger. The Commission must be bound by its own precedent in this area unless it can justify a 180 degree reversal. Certainly, the flawed DOJ decision does not provide that justification.

Sincerely,



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cc: Marlene H. Dortch, Secretary, FCC
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¹¹ In the matter of 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, MB Docket No. 06-121, Paragraph 114 (December 18, 2007).

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CERTIFICATE OF SERVICE

I hereby certify that on this tenth (10th) day of April, 2008, a true and accurate copy of the foregoing "Written *Ex Parte* Communication" to be served via U.S. Postal Service, first class postage prepaid, upon each of the following:

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