

FCC Proceeding 07-57
MB Docket No. 07-57
Comments, electronically filed using ECFS on June 29, 2008

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

Re: Reply Comments to various FCC filings, including the June 13, 2008 letter from Richard Wiley and Gary Epstein to Chairman Martin which outlines voluntary concessions, and the subsequent Notice of Ex Parte filed on June 16 containing the letter

Dear Chairman Martin and Fellow Commissioners:

As a concerned citizen and consumer following the proposed satellite radio merger between Sirius Satellite Radio and XM Satellite Radio, I hereby submit these reply comments to various FCC filings, including the June 13, 2008 letter from Richard Wiley and Gary Epstein to Chairman Martin which outlines voluntary concessions, and the subsequent Notice of Ex Parte filed on June 16 containing the letter.

Please submit my attached comments into the public record.

Respectfully submitted,

Patrick Sharpless
Citizen and Consumer

TERMINOLOGY

This is a list of relevant terminology that can be very useful when evaluating the satellite radio merger. The pages that follow have more meaning when keeping these terms and concepts in mind.

Fallacy. A fallacy is a component of an argument which, being demonstrably flawed in its logic or form renders the argument invalid in whole.

Equivocation. Equivocation is the ambiguity arising from the misleading use of a word.

False Compromise. A false compromise is a logical fallacy which asserts that a compromise between two positions is the correct solution when in truth the compromise is not the correct solution.

Overton Window. The Overton window is a concept in political theory that describes a 'window' in the range of public reactions to ideas in public discourse, in a spectrum of all possible options on an issue. Overton described a method for moving that window, thereby including previously excluded ideas, while excluding previously acceptable ideas. The technique relies on people promoting ideas even less acceptable than the previous 'outer fringe' ideas.

Rent Seeking. In modern terms, rent seeking is often associated with government regulation and misuse of governmental authority.

Regulatory Capture. Regulatory capture is a phenomenon in which a government regulatory agency which is supposed to be acting in the public interest becomes dominated by the vested interests of the existing incumbents in the industry that it oversees.

Plausible Deniability. Plausible deniability is the term given to the creation of loose and informal chains of command in governments and other large organizations. More generally, 'plausible deniability' can also apply to any act that leaves little or no evidence of wrongdoing or abuse. In politics, deniability refers to the ability of a powerful player to avoid 'blowback' by secretly arranging for an action to be taken on their behalf by a third party—ostensibly unconnected with the major player.

Iron Triangle. The 'iron triangle' describes the policy-making relationship between the legislature, government agencies, and special interest groups. Much of the bureaucratic dysfunction may be attributable to the alliances formed between the agency and special interest groups. The official goals of an agency may appear to be thwarted or ignored altogether at the expense of the citizenry it is designed to serve. Consumers are often left out in the cold by this arrangement. An iron triangle can result in the passing of very narrow, unjust policies that benefit a small segment of the population. The interests of the agency's constituency (special interest groups) are met, while the public interests are passed over.

DEAL LIMBO

The public is waiting on the FCC to make a decision on the proposed satellite radio merger which is in deal limbo while regulators grapple with the flood of demands being made by opportunistic parties trying to take advantage of the FCC's regulatory review process and extract value for themselves that properly belongs to satellite radio subscribers and shareholders. The merging parties are offering additional 'voluntary' concessions above and beyond those concessions that were offered in 2007. Consumers and opportunists alike can look forward to a variety of programming options including: a-la-carte programming, public interest channels, qualified entity channels, open access, satellite radio service to Puerto Rico, interoperable receivers and discounted rates. Opposition comes from virtually all sides, demanding the FCC do everything from revoke satellite radio licenses, reject the merger proposal altogether, hold public hearings, and approve the proposal, but only with a variety of concessions designed to enrich others at shareholder expense. Merger opposition consists largely of three groups:

- 1) those competing with satellite radio who enjoy the competitive advantage provided by regulatory delays while investor confidence erodes,
- 2) market manipulators who profit from FCC indecision by issuing unsubstantiated price targets which drive core holding sell-offs, short sales, and widespread margin calls when predetermined thresholds are achieved, and
- 3) opportunists looking to profit from illegitimate FCC concessions.

Sirius and XM filed their application to consolidate with the FCC over 15 months ago. After an exhaustive review which ended in March 2008, the Department of Justice concluded the proposed merger between Sirius and XM would not harm competition. A growing number of citizens and legislators have become disenchanted with regulatory reviews because financial and political motivations have corrupted the process. Political infighting at the FCC has blurred the foresight and wisdom of our Commissioners. Issues facing the Commission are wrongly perceived to be too complex for resolution in a timely manner. The public interest has been put on the back burner while regulators ignore the public interest benefits of a timely decision.

Merger opponents rely upon flawed reasoning and false arguments to justify erroneous allegations against the satellite radio companies and their proposed merger while financial analysts manipulate the satellite radio stocks with unjustified price targets. The loss in shareholder value isn't because the satellite radio companies are correcting from overvaluation, rather, the losses are due to

FCC inaction which activates market manipulators and other opportunists. The public interest benefits from concessions offered by the companies last year were supported by thousands of people and organizations who filed public comments with the FCC; those public interest benefits would have been implemented long ago had the FCC made the proper decision in a timely manner. Now we have market manipulators feasting like vultures on this FCC neglected satellite radio merger, and these opportunists are extracting value for themselves which rightfully belong to shareholders. The FCC is just now getting around to doing the work they should have completed a year ago. Additional 'voluntary' concessions are now causing more dilution to shareholder value, and volatile shifts in share prices have all but destroyed investor confidence. As long as the FCC fosters a corrupt regulatory environment while ignoring the public interest, the opportunists will continue to capitalize on the FCC's negligence. Meanwhile, competitors to satellite radio enjoy comfort from FCC indecision, allowing them to gain competitive advantage while watching satellite radio investors lose confidence. The FCC's indecision and willingness to embrace satellite radio's competition by delaying this merger decision and extracting additional 'voluntary' merger concessions, is further evidence the FCC's racist policies of the past have extended to corrupt FCC practices in the present.

Merger opposition is asking the FCC to make rulings which undermine legitimate goals of sound telecommunication policy, and which also threaten competition, the public interest, and general fairness that should remain inviolate. After waiting over 15 months for a decision from the FCC, the Chairman's recent announcement in support of the merger following additional 'voluntary' concessions is a good sign; but there isn't anything 'voluntary' about being under duress.

DO THE SATELLITE RADIO COMPANIES DISCRIMINATE AGAINST MINORITIES?

Satellite radio is the most diverse entertainment platform to ever exist in the United States, and they didn't get that way because the value of diversity is discounted or the public interest is ignored. Satellite radio programming includes a vast selection of information, news and entertainment which satisfies almost every niche market and mainstream audience alike. The satellite radio licenses were granted by the FCC in 1997 following a non-discriminatory competitive bidding process which was designed in part to eliminate racial discrimination in media ownership. As a result, minorities and women were free to participate in the competitive bidding for satellite radio licenses. These satellite radio companies are publicly traded, and minorities and women are encouraged to purchase any amount of stock they wish. Men and women from a variety of different cultural and ethnic backgrounds are employed by both satellite radio

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companies and contribute to the overall success of satellite radio; ignoring these contributions discounts the credibility of those calling for even more diversity. Satellite radio attracts a wide range of subscribers because satellite radio respects diversity and reaches out to accommodate the public interest; among other things, backseat TV with live children's programming is a good example of this. Dedication to achievements like this, explain why such a wide cross section of women, minority and public interest organizations have expressed support for the merger.

Here is a partial list of merger supporters from a variety of backgrounds:

- Hispanic Federation
- Independent Women's Forum
- The Latino Coalition
- Latinos in Information Sciences and Technology Association
- League of United Latin American Citizens (LULAC)
- NAACP
- National Black Chamber of Commerce
- National Council of Women's Organizations
- National Latino Farmers and Ranchers
- New York State Federation of Hispanic Chambers of Commerce
- Okalahoma Black Historical Research Society Project, Inc.
- Women Impacting Public Policy
- Women Involved in Farm Economics
- African Methodist Episcopal (AME) Church
- American Values
- Citizens for Community Values
- Edward Cardinal Egan, Archbishop of New York
- Family Research Council
- FamilyNet Radio
- 60 Plus Association
- American Association of People with Disabilities
- American Trucking Associations
- Americans for Tax Reform
- Competitive Enterprise Institute
- The Free State Foundation
- The Heritage Foundation
- Intertribal Agriculture Council
- League of Rural Voters
- Progress and Freedom Foundation

One of the reasons the FCC has adopted minority based preferences is because past FCC practices excluded minorities and women from receiving FCC broadcast licenses. The FCC succeeded in preventing minorities from becoming

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members of the broadcast community for decades before finally issuing a minority broadcast license in 1956. Today, the FCC has plenty of programs to help foster diversity in media ownership, and although there is still room for improvement in this area, there have been many successes. These minority preferences are now being improperly used by the FCC to further protect the incumbent licensees from the threat of new competition. Satellite radio brings a new form of competition to the modern marketplace; one which respects the contribution diversity makes to the public interest. Taking away bandwidth from an existing competitor who successfully contributes to the public interest by satisfying diversity and public interest concerns, isn't the appropriate solution for overcoming present effects of past discrimination. Nor are the FCC's policy objectives achieved by simply shifting responsibilities from one party to another.

Why is the FCC allowing incumbent licensees and their lobbyists to perpetuate the cycle of discrimination by weakening satellite radio with concessions? Satellite radio is a relatively new entrant who never benefited from segregationist policies and practices, and fosters a very diverse culture. Unfortunately, the FCC is now using their own past failures and racially motivated practices of discrimination to punish satellite radio by protecting the incumbent licensees from unencumbered competition, and diluting shareholder value by extracting 'voluntary' bandwidth divestitures under the cloak of diversity.

Today, those same beneficiaries of segregationist policies are hoping to convince the FCC that satellite radio should divest, lease, surrender, share, or otherwise not use bandwidth which satellite radio paid for through a non-discriminatory competitive bidding process. Competitors to satellite radio know their flawed arguments about a "satellite radio monopoly" are not consistent with the Department of Justice's findings, and are in conflict with actual marketplace conditions, yet they continue to make these false and misleading arguments. Further, the uncodified policy statement prohibiting one licensee from owning both licenses is ambiguous and serves no legitimate purpose in the competitive market which exists today. The likely source of the language which was inserted into the final report and order is an incumbent licensee who envisioned a formidable future satellite radio company, and improperly influenced someone inside the FCC to insert that language into the final report and order, not realizing it was ambiguous upon insertion. This explains why incumbent licensees continue extolling the artificial importance of preserving the antiquated and ambiguous language in this outdated FCC policy statement—because they relied upon it to insulate them from future competition while failing to recognize the ambiguous language would one day become completely obsolete; that day has now come.

Now that competition is surrounding the incumbent licensees, their game plan is to attack satellite radio instead of creating a new business plan that would effectively compete in this rapidly changing marketplace. Efforts to prevent

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satellite radio licensing failed—but attempts to prevent the merger, or in the alternative, to delay and weaken it with concessions, prevail. Incumbent licensees attack satellite radio in a variety of ways, one of those ways is by trying to reduce satellite radio's access to bandwidth. One strategy to accomplish this objective is to reach out to minority and public interest organizations and build alliances so these organizations can be called upon in the future, if and when the need arises, to stake their claim and demand satellite radio bandwidth be divested in the name of diversity. These incumbent licensees, with the help of those with whom they built alliances, are asking the FCC to participate in an unjustified pursuit of bandwidth divestiture in an elaborate effort to harm satellite radio, and do so under the cloak of diversity and public interest. The FCC should distance themselves from these opportunistic parties seeking unwarranted concessions from satellite radio. It would be improper for the FCC to become entangled with an effort like this, orchestrated by incumbent licensees who are working to circumvent competition for private gain. If the FCC did entangle themselves with these incumbent licensees and allowed bandwidth divestiture or other concessions to weaken satellite radio, it would further demonstrate the FCC's commitment to diversity is no more useful than the 180 day timeclock.

Another method used to attack satellite radio is to enlist the support of select members of Congress. A large network of organizations which compete against satellite radio, organizations like AT&T, Verizon, Clear Channel and other groups like the National Beer Wholesalers and Koch Industries who have suspicious ties, all make political contributions to strategically placed politicians like Senator Brownback, who has an ax to grind against constitutionally protected free speech. These groups have all made contributions to Senator Brownback and have undoubtedly influenced his support to protect special interest concerns at the expense of public interest. Senator Brownback opposes the merger.

Bandwidth divestiture would only serve to lessen the competitive effectiveness of a consolidated satellite radio company. Employing racial preferences under the cloak of protecting diversity in order to justify bandwidth divestiture would violate the public interest by harming satellite radio which already serves minority interests very well. In fact, divesting satellite radio bandwidth would harm minority interests and strengthen competitors to satellite radio, some of which are the beneficiaries of segregationist policies and practices of the past. This raises the question: why is the FCC claiming to support policy objectives designed to foster diversity, when divesting satellite radio bandwidth violates the very objective the FCC claims they seek to achieve?

If the FCC wishes to remedy the present effects of past discrimination, they should approve the satellite radio merger without any concessions and allow a competitive marketplace to embrace diversity the way modern markets require. Satellite radio has successfully satisfied diversity and public interest concerns which continue to challenge other industries regulated by the FCC. Just because

the industries regulated by the FCC, and the FCC itself, have struggled with diversity and public interest issues for decades, doesn't mean the FCC should now force satellite radio to conform to remedial and compliance standards which are ill-suited for satellite radio and designed for incumbent licensees who actually violated the public interest concerns in the past. Remember, those past violations are what created the current policies designed to protect diversity; satellite radio already respects the principles of diversity and successfully satisfies the public interest. These achievements set a new and higher bar for others competing against satellite radio. This phenomena—new competitors introducing modern methods for competing which include satisfying diversity and public interest concerns—is what makes competition successful. Attempts by the FCC to weaken the effects of this new form of competition is counterintuitive to sound telecommunication policy and violates the public interest. Perhaps this is why incumbent licensees are so opposed to the satellite radio merger; they don't want to face these new, more effective forms of competition because they now recognize satellite radio is a formidable competitor and will compete even more effectively when the inappropriate FCC roadblocks that were placed before satellite radio in the past are removed.

WHY DO MINORITY AND PUBLIC INTEREST GROUPS SEEK FCC CONCESSIONS FROM SATELLITE RADIO?

Minority and public interest groups seek FCC mandated concessions from satellite radio because the FCC has committed to stop their racist practices of the past and promote diversity. This commitment includes various programs advanced by the FCC to help minorities and public interest groups receive favorable consideration under certain circumstances. Generally, it's good to see regulatory agencies implement programs and incentives designed to remedy the present effects of past discrimination.

Equally important to the commitment of remedying the present effects of past discrimination, is proper application of those programs and incentives to avoid the unintended consequences of causing more harm than good if the programs and incentives are applied under the wrong circumstances or to the benefit of the wrong people. If the FCC were to divest 20% of the satellite radio bandwidth as some parties have demanded, competitors to satellite radio would be the real beneficiaries, while consumers and shareholders would be considerably harmed. The diversity component would be awash, while satellite radio diversity is shifted from one party to another. Clearly this is not what the FCC policies are intended to accomplish; but certainly it is what the incumbent licensees are hoping to achieve. This is where the FCC should play a more helpful role, but instead, exacerbates the problem by making false compromises which further frustrate legitimate goals of FCC policy objectives designed to enhance diversity and

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satisfy the public interest. Trying to apply well meaning policy objectives to combat the shocking discriminatory FCC practices of the past, to circumstances today with satellite radio, begs the question: are those seeking satellite radio divestitures interested in reversing the present effects of past discrimination, or are incumbent licensees improperly using minorities and other special interest groups as a weapon against satellite radio to further weaken them if the merger is approved, thereby insulating incumbent licensees from unencumbered competition?

Improper and arbitrary application of appropriate policy objectives which are designed to remedy present effects of past discrimination will lead to undesirable results and unintended consequences; these improper and arbitrary applications are illegal and violate the public interest. The FCC should only apply their policies where appropriate and meaningful results are likely to be achieved. For example, these appropriate policy objectives should be implemented where racism exists, where beneficiaries of segregationist policies have been allowed to build empires, and where new opportunities for access to bandwidth arise; not where satellite radio struggles to overcome the efforts of their competitors to derail their future success by illegitimate requirements designed to thwart effective competition. Especially in this circumstance, where satellite radio are friends to diversity and have worked side by side with minorities to strengthen diversity in the name of public interest.

The FCC should approve this merger with no concessions explaining that this merger is already in the public interest and false compromises in this case aren't the appropriate solution for remedying present effects of past discrimination. This would help mitigate the perpetual cycle of special interest seeking regulatory protections for incumbent licensees who face formidable competition. Parties seeking satellite radio divestiture aren't interested in protecting minority or public interest, but instead seek 1) unjust enrichment, or 2) harm to satellite radio so they won't be as effective a competitor as they otherwise would be absent bandwidth divestiture. A bandwidth divestiture in this case, is nothing short of a false compromise designed to protect the incumbent licensees from unencumbered competition, validating the existence of an iron triangle between special interest organizations like NAB and others, the FCC and Congress.

FCC policy objectives designed to remedy present effects of past discrimination by increasing minority ownership in broadcast media and diversifying the content on the public's airwaves are the direct result of past FCC racist policies and practices. These objectives were created long before satellite radio was licensed and the predicate for satellite radio concessions simply does not exist and never did.

Chastleton Corp. v. Sinclair, 264 U.S. 543, 547-48 (1924), cited in *Geller v. FCC*, 610 F.2d 983, 980 (D.C. Cir. 1979)

“In our opinion, it is open to inquire whether the exigency still existed upon which the continued operation of the law depended... In that case, the operation of the statute would be at an end.”

THE NEED FOR NON-COMMERCIAL/EDUCATIONAL DIVESTITURE OF SATELLITE RADIO BANDWIDTH IS EQUALLY INAPPROPRIATE AS MINORITY INTEREST DIVESTITURE

The Hartfield-Wagner amendment to the Communications Act would have given 25% of all radio broadcasting facilities to non-profit institutions and organizations and allowed these educational stations to sell advertising in order to become self sufficient. Industry supporter Senator Dill opposed the Hartfield-Wagner amendment because there was already too much commercial advertising on the public's airwaves. The amendment died, and the FCC was created when the Communications Act was passed in 1934.

Essentially, the non-commercial provision was designed to prevent commercial broadcasters from saturating the public airwaves with commercial advertising because the public benefits from entertainment and information, not commercial advertisements. Most satellite radio channels don't even have commercials, and those that do, have far fewer commercials than the commercials on terrestrial radio. The precedent established by the FCC in 1945 to set aside 20% of the FM bandwidth for non-commercial broadcasters was an appropriate decision by the FCC since the FM band was saturated with commercials. Why would the FCC consider satellite radio divestiture for non-commercial programming when satellite radio is already mostly advertisement-free? This raises the question: are satellite radio divestiture concessions for non-commercial programmers designed to help the public enjoy the benefits of entertainment and information free from commercial advertising, or are these concessions instead designed to harm satellite radio who is seeking to overturn past injustices themselves?

Gigi Sohn of Public Knowledge said in her June 18, 2008 filing with the FCC, “The point of the [non-commercial] set-aside is to foster diversity in broadcasting”. If this were true, we wouldn't need non-commercial broadcasters to do it. Satellite radio is already diverse; but isn't the non-commercial set-aside actually designed to prevent the public airwaves from being filled with commercial advertising? But even if the non-commercial set-aside was to foster diversity, does that mean the qualified entity set-aside is for non-commercial use? Most importantly, since incumbent licensees have a 20% non-commercial set-aside for their FM broadcast bandwidth; it would be arbitrary and capricious to expect satellite radio which currently has over 50% of their bandwidth dedicated to advertisement-free content, to divest even more for that purpose.

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In a recent interview on C-Span, Commissioner Adelstein indicated the FCC is sitting on a large amount of unused bandwidth. If FCC policies seek to advance diversity and public interest programming—beyond that which satellite radio already provides—why isn't the FCC allocating unused bandwidth for those policy objectives instead of punishing the satellite radio companies and their shareholders by requiring bandwidth divestitures? As long as the Commission has policy objectives to advance the interests of minorities and women, the Commission should be committed to having spectrum auctions for unused bandwidth that will further those policy objectives. Taking away bandwidth from other competitors is not an appropriate solution.

WHY ARE THE SATELLITE RADIO COMPANIES MAKING VOLUNTARY CONCESSIONS?

Because the FCC has failed to act on the satellite radio merger for over 15 months and it doesn't appear the merger will proceed if the companies don't 'voluntarily' surrender more concessions.

Here is what the companies have stated:

The record in the above-referenced proceeding provides clear evidence that the merger of Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM") will benefit consumers and should therefore be approved promptly and without conditions. Sirius and XM have demonstrated that consumers will benefit substantially and the public interest will be served by approval of this transaction. The Commission should not impose conditions in this proceeding that will have the effect of reducing these public interest benefits.

Nevertheless, this letter is to inform you that, if the merger is approved, the combined company will implement the voluntary commitments listed below. These commitments are being made to further demonstrate that the merger is in the public interest and in the interest of facilitating the speediest possible approval of the merger by the Commission.

Withholding a decision on the satellite radio merger until more 'voluntary' concessions are proffered is not in keeping with the obligations of regulators to act inside the bounds of law.

Title 47, Chapter 5, Subchapter III, Part I, Section 309:

(a) Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

Title 5, Part 1, Chapter 7, Section 706:

The reviewing court shall:

- 1) compel agency action unlawfully withheld or unreasonably delayed; and
- 2) hold unlawful and set aside agency action, findings, and conclusions found to be:
 - arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - contrary to constitutional right, power, privilege, or immunity;
 - in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - without observance of procedure required by law;
 - unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

MINORITY INTEREST ISN'T A EUPHEMISM FOR PUBLIC INTEREST

From a Washington Post article published on June 17, 2008:

...Other prominent members of the caucus also expressed misgivings about the XM-Sirius plan. Rep. Elijah E. Cummings (D-Md.), a former chairman of the caucus, said yesterday that he was “extremely upset” about the proposed deal and that he would speak to his colleagues about taking action to stop the merger—perhaps legislative action—unless the percentage is increased.

Congressional membership accusing the merging parties of not acting in the public interest because they won't voluntarily divest 20%, 25% or 50% of their combined bandwidth to minority and other public interest organizations, and then threatening action to stop the merger--perhaps legislative action--unless the FCC

Chairman's proposal of an 8% divestiture is increased, is tantamount to legal coercion designed to deprive rights under the color of law. It's shocking to the conscience in this day and age that certain members of the Congressional Black Caucus would take this position against two companies who have shown more respect, appreciation and commitment to minorities, women and children, than any other entertainment platform in the United States.

Title 18 U.S.C. Section 242:

This statute makes it a crime for any person acting under color of law, statute, ordinance, regulation, or custom to willfully deprive or cause to be deprived from any person those rights, privileges, or immunities secured or protected by the Constitution and laws of the U.S... Acts under "color of any law" include acts not only done by federal, state, or local officials within the bounds or limits of their lawful authority, but also acts done without and beyond the bounds of their lawful authority; provided that, in order for unlawful acts of any official to be done under "color of any law," the unlawful acts must be done while such official is purporting or pretending to act in the performance of his/her official duties.

NAB AND THEIR COALITION

On June 16, 2008, it was announced that Chairman Martin was recommending support for the satellite radio merger and on that same day, NAB Executive Vice President Dennis Wharton was publicly quoted saying, "Given their systematic breaking of virtually every rule set forth by the FCC in their 11 years of existence, it would be curious if the Commission now rewards XM and Sirius with a monopoly." Curious indeed; was this another talking point passed along to Congress, designed to mislead elected officials into believing the merger should not be approved? Or was it only intended to mislead the citizens of the United States? Why else would NAB's executive vice president knowingly make this false statement? This is yet another example of the questionable integrity demonstrated by NAB.

The FCC has 1,795 employees including 510 attorneys, 273 engineers, and 56 economists. For the 2003-2006 period, the FCC's Enforcement Bureau took 2,102 written enforcement actions. The following is one enforcement action taken against a terrestrial radio station in Springfield, Missouri:

Before the Federal Communications Commission
Facility ID# 17137
Springfield, Missouri
File Number EB-05-KC-143
NAL/Acct. No. 200632560002
File Number EB-07-KC-017

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NOV No. V20073256002
NAL/Acct No. 200732560001
FRN 0011407814
ORDER

<http://www.fcc.gov/eb/FieldNotices/2003/DOC-272115A1.html>

- At the time of inspection, the station logs contained no records of having received a required monthly test (RMT) from any of its monitoring sources during the month of January 2007. In addition, required weekly tests (RWT) had not been documented for all required monitoring sources during the weeks of 1/7/07 - 1/20/07. No log entries were found indicating the reasons why these tests had not been received.
- The station's main studio was moved during calendar year 2006, but, as of the date of the inspection, notification had not been received by the FCC, Media Bureau in Washington, D.C.
- The station was monitored over several hours between February 15 and 17, 2007. The station identification was present during some hours and not present or cut off from airing during other hours.
- At 7:15pm on February 15, 2007, a spurious emission from KLFJ was observed on 1,700 kHz (150 kHz removed from 1550 kHz) that was attenuated approximately 20 dB below the KLFJ carrier level. During the inspection, the station engineers stated this was a known and ongoing condition that had been occurring for several months.
- At the time of inspection, the antenna current metering for the daytime power for KLFJ indicated 10.1 amps. This corresponds to an output power of 3,876 watts or 78% of the authorized power of 5000 watts. It is also noted that the licensee was notified of this same violation in an NOV dated July 11, 2006, when an inspection of the station on December 15, 2005 found the station operating at reduced power during the day.
- At the time of inspection, the station's public file only included an incomplete ownership report dated September 24, 2004. As of the inspection, [redacted] had not filed an updated ownership report on FCC Form 323.

Adopted: August 16, 2007

Released: August 20, 2007

http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3641A1.txt

- It has installed a new BE transmitter at the Station, and the station will operate at 28 watts during nighttime hours.
- At least two full time employees...have been hired to manage and operate the Station. These employees have been given instructions on maintenance of the public file and required weekly and monthly testing requirements for the station equipment.
- It has notified the Commission's Media Bureau of the relocation of the main studio to [redacted], Springfield, MO 65807.

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- All regular programming has been edited to insure at least hourly broadcast station identification, and all future programming shall contain at least hourly identification.
- The Station's studio engineer, currently [redacted], has successfully repaired the transmitter so that there are no spurious emissions in violation of Section 73.44(b) of the Rules and shall maintain the transmitter by regular inspections.
- [redacted] shall make a voluntary contribution to the United States Treasury in the amount of eighteen thousand four hundred and fifty dollars (\$18,450) within 10 days after the Adopting Order becomes a Final Order. Such payment will be made without further protest or recourse, by check or similar instrument, payable to the order of the Federal Communications Commission.

Summarizing the multiple FCC violations from this terrestrial radio station:

- failed to perform required testing
- failed to make proper log entries
- failed to properly notify the FCC that the station was relocated
- failed to make proper station identification
- failed to repair equipment causing spurious emissions
- failed to operate inside the required power band
- failed to maintain a complete ownership file

I find it curious the FCC settles this investigation for \$18,450 while the NAB and their coalition are calling for satellite radio licenses to be revoked, disgorgement in the hundreds of millions of dollars and public hearings to delay the merger review process even further. Enforcement actions for relatively minor infractions are simply not handled in this manner by the FCC.

When I hear the NAB coalition state in one of their many FCC filings:

Essentially, the Merger Parties have been unjustly enriched by their violations and use of their licenses to date. The Commission should compel XM and Sirius to disgorge their unjust enrichment and to reimburse the U.S. Treasury in full for the foregone auction proceeds. These measures should take the form of voluntary contributions to the U.S. Treasury pursuant to a consent decree between each licensee, binding on its successors, and the Commission.

And in another filing the NAB coalition states:

The ill-gotten gains to be disgorged from XM and Sirius resulting from the FCC rule violations are the excess

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revenue attributable to [redacted], treble damages are appropriate. Therefore, XM and Sirius must forfeit three times the excess revenues each earned during the period of violations, [redacted]. This forfeiture would likely be in excess of \$250 million.

I think back to the \$18,450 voluntary contribution that the Springfield, Missouri terrestrial radio station paid to settle their multiple, repeated violations which existed over an extended period of time, and after being previously noticed. This violation was just one of 2,102 enforcement actions taken by the FCC over a 4 year period (about 1.5 violations per day, every day, for four years). I wouldn't go so far as to say the terrestrial radio station from Springfield, Missouri systematically broke virtually every rule, but they did break a number of rules. Let's be candid—NAB and their coalition are abusing the regulatory review process.

The NAB coalition demands are so far removed from reality that a responsible regulator must question the motives of their counsel. More importantly, it calls into question abuse of process concerns. Indeed, this isn't the first time actions of NAB and their coalition have been called into question. Let's be candid—the NAB coalition isn't a couple of college kids; it is a couple of college kids working for NAB.

I am reminded of reports that NAB used pop-up advertisements on the internet to solicit public comments to be filed with the FCC in opposition to the satellite radio merger. Web surfers had no idea their responses to the pop-up ads were generating public comments with the FCC. Let's be candid—NAB and their coalition are abusing the regulatory review process.

NAB and their coalition are frustrating legitimate merger review proceedings by abusing the regulatory review process. The FCC is allowing them to behave in this way. This behavior is financially harmful to the merging parties and their shareholders. NAB and their coalition are causing financial distress to satellite radio and their investors, investor confidence is adversely affected as a result and the FCC has allowed it to continue for over 15 months. These unseemly efforts to harm satellite radio are an apparent attempt to protect NAB members from facing stronger competition. The FCC should be more helpful at preventing this sort of abuse; failure to prevent it is tantamount to encouraging it.

WHO PROVIDES TALKING POINTS TO CONGRESS?

Terrestrial radio representatives and their supporters, including some in Congress, are misrepresenting satellite radio bandwidth and its capabilities as it

relates to terrestrial radio bandwidth and its capabilities, all the while ignoring the bandwidth from other competitors in the relevant market. This false and misleading misinformation is not just oversimplifying the issues, but misrepresenting them altogether. Suggesting that the merger shouldn't be approved because satellite radio will have more bandwidth than all of terrestrial radio bandwidth combined, is an incomplete representation of the facts. This mischaracterization fails to recognize that multiple terrestrial radio markets can use the same bandwidth, thereby multiplying the effective bandwidth available for terrestrial radio use. Further, HD Radio splits the existing bandwidth, increasing the effective utilization by a multiple of approximately four. Besides, today, each satellite radio company has 12.5MHz; which is 68% less bandwidth than terrestrial radio has. Alternatively, a consummated satellite radio company will only have 19% more bandwidth than the entire AM and FM radio bands, and that's before factoring in the effective bandwidth from multiple markets and band splitting from HD Radio. This 19% variance is much smaller than the 68% variance. Additionally, Verizon and AT&T have music services which compete with both satellite and terrestrial radio. These competitors each have over 100MHz in a variety of different markets. Portable Wi-Fi devices compete with both satellite and terrestrial radio as well, and those devices have access to hundreds of thousands of wireless networks around the country. Even cable television companies have music channels. Apple iPods connect to the internet; internet service providers use bandwidth also. The point here is that the magnitude of bandwidth grossly misstates the capability of the service; rendering a decision about the merger based on misstatements like this is not only shortsighted, but intentionally designed to mislead the intended audience. Who issued these talking points to select members of Congress and why is this select group of members being misled with incomplete and inaccurate information?

Recent filings:

- Entercom said in a June 20, 2008 FCC filing, "The proposed merger would not create a fair and level playing field for competing audio services, *allocating 25MHz of spectrum in one licensee, which is more than allocation to the entire AM and FM radio bands combined*".
- Clear Channel said in a June 20, 2008 filing, "*Clear Channel emphasized the enormous amount of spectrum that would be concentrated in the control of one essentially unregulated entity* were the transaction to proceed as proposed, creating a genuine threat to the economic framework of terrestrial broadcast radio."
- Senator Christopher Bond said in a June 4, 2008 filing, "*The 25MHz that the merged company would possess would create obstacles for competitors* to enter the marketplace and would work to inhibit an open and competitive industry."
- NAB said in a June 11, 2008 filing, "Third, the attendees expressed their opposition to the proposed merger of XM Satellite Radio and Sirius Satellite Radio, noting the unprecedented nature of this merger, in that *it*

would enable one entity to control all of the spectrum allocated to a particular service.”

- Clear Channel said in a June 9, 2008 filing, “The union between XM and Sirius would result in a single entity in a service controlling the entire amount of dedicated spectrum, in this case, 25 MHz. Such an unprecedented advantage threatens the future viability of the radio industry, in that it would result in a satellite monopoly that would ***not only control more spectrum than all of FM and AM radio combined***, but would also enjoy a dual revenue stream that could easily outbid free radio for talent and programming, as well as erode local free radio’s advertising base.”
- Senators Olympia Snow and Claire McCaskill said in a May 21, 2008 filing, “Spectrum Divestiture: The merged entity will hold a significant amount of radio spectrum—***25MHz in the S band. This is more than all terrestrial FM and AM combined.***”

If bandwidth comparisons are going to be made, the comparisons should be evaluated based on all competitors in the relevant market instead of misrepresenting the bandwidth by only using the parameter of magnitude to argue against the merger, or that concessions should be required. The integrity of government decision making is a very important issue which affects competition, antitrust law and enforcement. The people don’t want their elected officials to be misled by incomplete information and flawed arguments from special interest groups. Since the people must be confident that their elected officials are not hoodwinked by special interest groups who provide talking points to members of Congress, the people deserve unbiased leadership to investigate who is misleading whom so public interest concerns are properly represented. It remains to be seen if vocal Senators are willing to represent the public interest after accepting contributions from special interest groups that compete with satellite radio and oppose this merger, but hopefully an unbiased member of Congress can look into this matter and report their findings to the FCC.

CONCLUSION

What the merging parties are seeking is an opportunity to compete in a fair market; opportunity which is free from the taint of unfair obstacles designed to harm satellite radio and protect incumbent licensees from fair competition. The FCC should not engage in any sort of anticompetitive regulatory practices. After all, Congress never intended for the FCC to make corporate decisions for telecommunication companies; if they had, they would have codified it. Instead, Congress intended for the FCC to regulate interstate and foreign commerce in communication. The record clearly shows approval of this transaction will substantially benefit consumers and the public interest will be served. The FCC

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shouldn't impose any concessions on these merging parties since they will only serve to harm public interest and protect other competitors from unencumbered competition by weakening satellite radio.

Notwithstanding the achievements, how long has the FCC been battling to overcome the failures of their own policies which excluded women and minorities? They've battled since 1934 when the FCC was first established and their racially motivated policies discriminated against women and minorities. And how long has the FCC been working to improve the quality of the public airwaves by reducing commercials and improving the public interest? They've been working since 1934 when the FCC was first established following the defeat of the Hartfield-Wagner amendment to the Communications Act. It wasn't until 1945 that the FCC set aside 20% of the FM bandwidth for non-commercial broadcasters and 1956 before the FCC issued their first minority owned broadcast license. Despite these accomplishments, the FCC is still struggling to overcome ongoing problems associated with their racially motivated policies of the past and preferential treatment of commercial broadcasters who saturate the public airwaves with commercial advertising.

Satellite radio was created in part for the purpose of providing diversity to the FCC regulated industries which have struggled to satisfy the public interest. The FCC fails to protect the public interest when they replace free market forces with financially, politically and racially motivated policies. These failures are largely the result of FCC policies which ignore diversity, protect incumbent licensees from competition and weaken new entrants with anticompetitive constraints imposed by the FCC. Now the FCC is considering proposals to perpetuate these same failures yet again.

Isn't it ironic that it is the FCC who is responsible for administering discriminatory policies which harmed women and minorities, protected incumbent licensees from unencumbered competition, and continues to struggle for 74 years now to overcome these failures, is now responsible for determining if satellite radio will be allowed to consolidate? And if so, also deciding which if any concessions will be imposed against satellite radio? Clearly the FCC isn't the independent organization Congress intended for them to be; instead, the FCC is nothing more than a third leg in the iron triangle, working to protect special interest at the expense of public interest. The FCC has yet another opportunity to reverse their longstanding failures and approve the satellite radio merger for the benefit of public interest. They are strongly encouraged to refrain from imposing any concessions since false compromises would only serve to harm the public interest by protecting incumbent licensees. Is the FCC willing to embrace the principle that the public deserves to respect decisions made by FCC?

On behalf of public interest, good luck with your decisions.