

# United States Senate

WASHINGTON, D.C. 20510

June 27, 2008

The Honorable Kevin Martin  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

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 Chairman Martin:

We are writing with respect to the proposed merger of Sirius and XM Satellite Radio currently pending before the Commission. We remain concerned, notwithstanding the approval of the Department of Justice Antitrust Division, that the merger of these two companies will eliminate competition in the Satellite Digital Audio Radio Service ("SDARS") market in violation of the FCC's rules establishing this service. Without competition, consumer harms, including diminished service at increased cost to consumers and stifling competing, new technologies, are entirely predictable.

We read with interest the proposed merger conditions described in the front page story in the June 16, 2008, *Washington Post*. We believe that these proposals fall short of what is necessary to permit the Commission to conclude that the proposed merger meets the public interest test, as required by the Communications Act. The proposed conditions fail to provide meaningful competition in the SDARS market place and would leave the merged entity in a position to exercise its market power in anti-competitive ways against other media, including free, over-the-air radio.

First, although the merged entity has agreed to lease 12 channels (or roughly 4 percent of its satellite capacity) to minority programmers, and to set aside an additional 12 channels for noncommercial, informational programming, we believe that these commitments are not sufficient to ensure a viable competitor. As numerous State Attorneys General have expressed to the Commission, a lease of at least 20 percent of satellite system capacity to a completely independent service provider is necessary to create the competitive check required. Furthermore, this token offering does not guarantee more diverse voices and informational programming. Currently, when combined, XM and Sirius's national noncommercial, informational programming is 12 channels. Moreover, in light of the availability of 300 channels, allotting 12 for minority programming squanders the great opportunity for truly enhanced minority ownership or control created by the proposed merger.

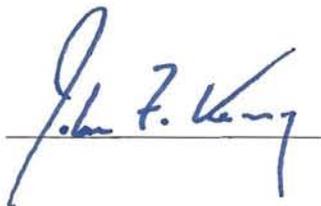
Instead of allowing this proposed *de minimis* lease of spectrum, the Commission should require the merged entity to lease as much as 50 percent of its satellite system capacity, thus preserving the essence of the current FCC rules, and certainly no less 20 percent of its capacity. The Commission should also require that the resulting leasing arrangement is a result of a transparent and competitive process. The key here is to ensure the presence of a viable intramodal competitor to keep a check on the merged company from exercising monopolistic powers.

Second, the Commission needs to ensure that device manufacturers are required to integrate HD radio receivers into all satellite radio receivers. Consumers deserve the opportunity to choose from all of the latest radio technologies, whether they listen at home, at the office or in the car. Just as the Congress and the FCC have required television receivers to be able to receive all channels, to have built in digital tuners and to integrate V-chip parental controls, the Commission should ensure access to digital radio technology to keep America moving forward in the digital age. The required integration of HD radio capability in these new satellite receivers is an essential check against the merged entity using its monopoly power to stifle a promising new free, over-the-air radio technology.

Third, the Commission must enforce its requirement that interoperable radios be produced. We note that one of the conditions XM and Sirius apparently have agreed upon is the production of interoperable radios within one year of the merger. In light of a decade of failure to provide interoperable radios notwithstanding Commission requirements to do so, we remain skeptical about the merged entity's ability to deliver on this fundamental requirement. To ensure that the HD radio and interoperable receiver mandates are enforced, as well as the ala carte radio promise made by Sirius, the FCC or another third party should certify these radios as well as enforce a robust open access requirement, so that the merged entity cannot be a gatekeeper to equipment attached to its system.

Fourth, and finally, the Commission should not only require the merged entity to adhere to the pricing constraints that XM and Sirius have already submitted to the Commission but should also develop a meaningful mechanism to ensure that these conditions are met. The Commission should include requirements to make pricing transparent and verifiable.

While we continue to believe that the wisest course of action is to disapprove the proposed XM-Sirius merger, we believe that the above conditions could mitigate the harms to the public and consumers that will occur in the event the Commission decides to change its rules regarding SDARS licensees and approve the license transfer application.

  
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Sincerely,

  
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