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July 10, 2008

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
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.
Written *Ex Parte* Presentation

Dear Ms. Dortch:

If approved without a competitively viable lease, the merger to monopoly of Sirius/XM will constitute an unprecedented spectrum grab at the expense of America's taxpayers and listeners. The value of the spectrum would have been many times the \$173.4 million total paid by Sirius and XM combined:

- *if* the spectrum had been auctioned under rules that permitted the only two licensees to merge into a monopoly, and
- *if* the spectrum had been subject to an allocation that permitted satellite broadcast television as well as radio, instead of being restricted to satellite radio and services ancillary to that service.¹

The value of this spectrum with an allocation permitting television broadcasting can be roughly estimated because the SDARS spectrum at 2.3 GHz is comparable to the 1.9 GHz spectrum in propagation, nationwide licensing, favorable technical rules and other relevant characteristics. The Commission valued the 1.9 GHz spectrum in its 2004 Nextel swap order at \$1.70 per MHz-pop for nationwide rights.² At this valuation, the SDARS spectrum was worth \$12.15 billion in 2004. While this valuation must be adjusted to account for allocation and service differences, it does provide a sense of this spectrum's potential value if the rules are changed to permit a monopoly license for SDARS and to permit television as well as radio broadcasting.³

¹ See Letter from Georgetown Partners to Kris Monteith, Chief, FCC Enforcement Bureau dated July 10, 2008, attached.

² *Improving Public Safety Communications in the 800 MHz Band etc.*, Report and Order, Fifth Report and Order, Fourth memorandum Opinion and Order, 19 FCC Rcd 14969 at ¶ 297 (2004) ("Nextel").

³ The Wireless Communications Service ("WCS") spectrum, adjacent to that of SDARS, has a flexible allocation but is saddled with strict and very costly technical rules to protect mobile SDARS receivers, was auctioned in smaller geographic areas rather than on a national basis, and is potentially subject to additional restrictive technical rules. These issues and uncertainty resulted in that spectrum being sold for

Sirius appears to be attempting to add to the services permitted on its spectrum, such as satellite television, without going through the Commission's rulemaking process and exposing to public light the changes and related unjust enrichment. Changing the rules governing use of the spectrum and the competitive environment dramatically increases the value of the spectrum and creates a financial windfall. As explained in the attached letter to the Enforcement Bureau, rather than petitioning the Commission to amend the allocation and associated service rules, Sirius appears to have simply ignored the restrictions and now is attempting to stretch the definition of ancillary services to include television services.

Georgetown adamantly opposes delivering to Sirius cartfulls of taxpayer dollars by granting spectrum flexibility for it to broadcast television, while at the same time Sirius denies that there is sufficient spectrum to provide for a satellite *radio* competitor such as that proposed by Georgetown. Based upon its business models, Georgetown proposed paying Sirius for a lease of 20 percent of the merged entities' capacity for the purpose of establishing an independent voice and providing competition. According to Arbitron, this accounts for the spectrum used for channels totaling only 2-3 percent of Sirius' listening audience. By Sirius' own admission, its television service is planned to occupy up to 20 percent of its spectrum,⁴ so obviously 20 percent of the spectrum is available for something other than digital radio services and could be made available to provide competition. Doing so would go a long way to satisfying the competition requirements of the Commission's public interest standard that must be met for the merger to be approved. Georgetown has never asked for a handout, but rather, to secure a lease on a commercially compensatory basis to provide an independent voice on satellite radio with enough channels to be commercially viable.⁵

We urge the Commission to recover for the American taxpayer some portion of the unjust enrichment to Sirius should, as outrageous as it would be, the Commission approve the merger without providing for an alternative competitor. There is a potential multi-billion dollar windfall gain that will result from changing policies to allow the duopoly to become a monopoly, and even more so if Sirius is permitted to provide television services notwithstanding the current explicit limitation to radio and ancillary services on this spectrum.

There is ample precedent for the Commission to prevent such unjust enrichment. As referenced above, when approving the Nextel rebanding effort, the Commission valued the 10

less than even the SDARS spectrum. Sirius has acknowledged that the difference in price between WCS and SDARS licenses reflected the technical limitations attached to the WCS licenses. *See Consolidated Request of the WCS Coalition For Limited Waiver of Construction Deadline for 132 WCS Licenses*, Report and Order, 21 FCC Rcd 14134 at ¶8 (2006).

⁴ See Letter from Counsel to Sirius Satellite Radio Inc. to the Chiefs of the International and Wireless Telecommunications Bureaus dated April 25, 2007, at p. 3 (Sirius' "back-seat video offering will operate in less than one-fifth" of its spectrum.).

⁵ In their proposal submitted to Chairman Martin on June 13, Sirius/XM completely fail to address or provide for viable competition and therefore fail to meet the Commission's statutory public interest standard. To avoid any prospect of competition -- even with an 80/20 spectrum split in favor of the merged entity -- Sirius/XM instead offered a few channels for specialized programming that would be available only to their subscribers. The Sirius/XM proposal has nothing to do with preserving an independent voice and competition on the satellite radio channels.

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MHz of spectrum in the 1.9 GHz band assigned to Nextel and required Nextel to make expenditures or pay the Commission for the value of the spectrum to avoid Nextel unjustly benefiting from the substantial windfall gain.⁶ The Commission also calculates and recovers from licensees any unjust enrichment that otherwise would occur when a designated entity receives a spectrum auction discount but seeks to transfer the license to a non-DE before expiration of the minimum holding period.⁷

As indicated in the record, Georgetown's economic analyses demonstrate that it could establish a competitive alternative voice using just the 20 percent of spectrum capacity that Sirius admits it is planning to use for broadcasting television instead of for radio. It now is crystal clear on the record that Sirius/XM does not require the entire 25 MHz swath of spectrum to provide digital audio radio programs. Given the extreme scarcity of spectrum allocated for SDARS -- there is only that which is licensed to Sirius and XM -- we again urge the Commission to deny the merger unless it conditions approval upon a lease for the purpose of providing an independent voice for satellite audio consumers and establishing competition to the resulting merged entity. Competition by a structural remedy is a viable alternative to the more detailed regulation necessary to oversee a monopoly.

In accordance with Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, this letter is being filed in the above docket.

Respectfully submitted,



David R. Siddall
Counsel to Georgetown Partners L.L.C.

⁶ See Nextel, *supra* note 2 at ¶ 7.

⁷ See, e.g., 47 C.F.R. § 1.2111(c).

July 10, 2008

Ms. Kris Monteith, Chief
Enforcement Bureau
Federal Communications Commission
445 12th St., SW
Washington, DC 20054

Subject: Sirius Satellite Radio

Dear Ms. Monteith:

On behalf of Georgetown Partners L.L.C., your attention is called to certain developments in the Satellite Digital Audio Radio Service (“SDARS”). Sirius Satellite Radio (“Sirius”) is reported to be broadcasting by satellite live *television* programs using spectrum that the Commission licensed exclusively for satellite *radio* broadcasting and services ancillary thereto.¹ Using SDARS for non-conforming satellite television broadcasting on spectrum so scarce that the Commission was forced to license only two providers² violates the basis for and explicit language of the international and domestic allocations governing the SDARS service and falls outside the scope of the ancillary services permitted by the Commission.

Accordingly, the Bureau respectfully is requested to restore this spectrum to its authorized and intended use by ordering Sirius to cease its unauthorized television broadcasting through appropriate orders after investigation. Any spectrum that no longer is required for digital audio service should be reassigned for the purpose of allowing a new independent entrant into the service.

After much debate and preparatory work, the World Administrative Radio Conference of 1992 (WARC-92) adopted an allocation of spectrum for Broadcasting-Satellite Service (Sound)

¹ See description of Sirius’ television service at: <http://www.sirius.com/backseattv/faq> (viewed July 7, 2008).

² The Commission originally proposed licensing 50 MHz of spectrum to four competitive providers, but interference issues and intervening legislation effectively limited the amount of available spectrum to 25 MHz. After a detailed analysis, the Commission reluctantly agreed to provide only two licenses in the service on the condition that neither licensee would never merge with the other. See *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Report and Order, 12 FCC Rcd 5754 at ¶¶ 77, 170 (1997).

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Enforcement Bureau
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(BSS-Sound) in the 2310-2360 MHz band.³ “Sound” obviously does not include “video” or “television”. The WARC-92 Acts have treaty status and the Commission implemented the allocation in the domestic U.S. Table of Frequency Allocations, 47 C.F.R. § 2.106, including language emphasizing that the allocation is limited to “audio.”⁴ Later, when adopting the final rules governing SDARS and permitting ancillary services, the Commission did not address or include television broadcasting among the authorized uses, and instead, it clearly indicated that permitted ancillary services do not include those “inconsistent with the international allocation”⁵

In the Table of Frequency Allocations, the Commission explicitly provided that the 2310-2360 MHz band, which includes the spectrum licensed to Sirius consistent with the allocation, “is limited to digital **audio** broadcasting” (emphasis added).⁶ An additional provision in the Table of Frequency Allocations similarly provides that the subject spectrum is “allocated to the broadcasting-satellite service (sound)” and again mandates that “[s]uch use is limited to digital audio broadcasting”.⁷ Finally, in accord and consistent with the allocation, the Commission later defined “Satellite Digital Audio Radio Service” as a “radiocommunication service in which **audio** programming is digitally transmitted” (emphasis added).⁸

Subsequently, when authorizing provision of “ancillary” services, the Commission offered a list of example ancillary services that notably did not include any type of video or television application. Instead, the Commission clearly stated that use of this spectrum must conform to the governing frequency allocation and even referenced the Table of Frequency Allocations and the WARC-92 Final Acts where the limitations are specified.⁹

The issue of television broadcasting in spectrum reserved for radio broadcasting was raised by the WCS Coalition in the context of interference concerns and filed in the public record of the Sirius/XM merger review, Docket 07-57.¹⁰ In that context, Sirius put forth two arguments for its actions, neither of which is availing.¹¹

³ See *Final Acts of the World Administrative Radio Conference, Malaga-Torremolinos, 1992*.

⁴ See *Amendment of the Commission’s Rules with Regard to the Establishment of New Digital Audio Radio Services*, Report and Order, 10 FCC Rcd 2310 (1995).

⁵ *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Report and Order, 12 FCC Rcd 5754 at ¶ 96 and fn. 173 (1997).

⁶ Table of Frequency Allocations, 47 C.F.R. § 2.106, fn. US327.

⁷ 47 C.F.R. § 2.106, international fn. 5.393.

⁸ 47 C.F.R. § 25.201.

⁹ *Supra* fn. 5.

¹⁰ See Letter dated April 17, 2007, to Helen Domenici, Chief, International Bureau and Fred Campbell, Chief, Wireless Telecommunications Bureau from Paul J. Sinderbrand, Counsel to the WCS Coalition; Sirius Reply dated April 25, 2007, from Robert L. Pettit, Counsel to Sirius Satellite Radio Inc.; and WCS Reply dated May 1, 2007 from Paul Sinderbrand, Counsel to the WCS Coalition.

¹¹ Reply from Robert L. Pettit, Counsel to Sirius Satellite Radio Inc., *id.*

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First, Sirius posited that video is included in “electronic graphic/visual information.” But “television” and “video” are known, simple terms repeatedly used by the Commission every day in its Rules, Regulations and Orders. The notion that the Commission would use the vague term “electronic graphic/visual information” to describe video or television is therefore specious at best. But the important point is that “television” is a service in its own right, and television broadcasting is well outside anyone’s definition of “sound” broadcasting or “ancillary” service. The term “sound” broadcasting *excludes* television.

Equally unavailing are Sirius’ attempts to equate the very specific and limited allocation for SDARS with completely different broad allocations for services that operate with sufficient spectrum to accommodate multiple competitors and a wide range of services. In contrast to some other allocations and rules governing hundreds of megahertz in other services, in the case of SDARS there was but one 25 megahertz band available -- not enough to satisfy even the four applications that had been filed years earlier. The Commission concluded in the SDARS proceeding that there was such little spectrum available that it could issue only two licenses, and consistent with both that finding and the international and domestic allocations already adopted, it underscored in its Report and Order that the use of this spectrum would be limited to satellite digital audio radio and services ancillary thereto consistent with the allocation.

Sirius also claims to have kept the FCC informed, and references a January 22, 2004, meeting with the staff. By its own admission, at that meeting it discussed only 3-4 television channels, whereas now it indicates that it is planning to devote up to 20 percent of its spectrum for this purpose (“will operate in less than one-fifth of Sirius’ exclusively-licensed band”).¹² While no official record of this meeting is known, it is well-settled precedent that staff advice has no legal standing and that licensees therefore rely on informal staff discussion and advice at their own risk.¹³

Sirius correctly notes that the ITU Regulations permit non-conforming use. What it fails to note, however, is that it is *Administrations*, not licensees, that decide when non-conforming uses are permitted. No such allocation change has been made, nor has Sirius ever requested the Commission to do so. Instead, the Commission in its allocation and service rules went out of its way to repeatedly emphasize the limited use of this particular spectrum for satellite digital audio radio and explicitly referenced the limitations of the allocation when authorizing ancillary services. Any change to the allocation or rules requires a rulemaking proceeding that would provide for public notice and comment.

¹² Sirius Reply dated April 25, 2007, *supra* fn. 9, *cf.* p. 3 & fn. 26.

¹³ See *Mary Ann Salvatoriello*, 6 FCC Rcd 4705 (1991) (citing *Texas Media Group*, 5 FCC Rcd 2851 at 2852 (1990)), *aff’d sub nom. Malkan FM Associates v. FCC*, 935 F.2 1313 (D.C. Cir. 1991) (“A person relying on informal advice given by the Commission staff does so at their own risk.”); see also *Office of Personnel Management v. Richmond*, 496 U.S. 414 at 433-34 (1990); *Livingston Radio Co.*, 10 FCC Rcd 574 at 575 (1995).

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Enforcement Bureau
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Accordingly, the Bureau is requested to stop these apparent violations and issue appropriate orders after investigation.

Sincerely,

A handwritten signature in blue ink, appearing to read "DR Siddall". The signature is written in a cursive, fluid style.

David R. Siddall
Counsel to Georgetown Partners L.L.C.

cc: Robert L. Pettit, Counsel to Sirius Satellite Radio