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July 18, 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:

On behalf of Clear Channel Communications, Inc., we write to reiterate Clear Channel's view that the proposed XM-Sirius merger is not in the public interest and therefore cannot lawfully be approved by the Commission.

We note, however, that many commenters, including Clear Channel, have requested the Commission to consider imposition of conditions on the merger that at least have the potential to mitigate the harm to competition and consumers that will flow inevitably were the Commission to approve the joint license transfer application. As a number of Members of Congress and numerous others have noted in recent weeks, such conditions must be enforceable if they are to be meaningful.

This letter addresses mechanisms to ensure enforceability of some of these suggested conditions. Such a guarantee of enforceability is all the more critical here in light of the trail of FCC rules violations and broken promises created by XM and Sirius on their way to the merger altar.

The Commission is currently evaluating at least three specific remedial measures that go to the structure of the satellite radio business (as opposed to merely regulating the future conduct of XM and Sirius) – namely, requiring satellite radio interoperability, terrestrial HD radio reception capability in all satellite receivers and leasing spectrum capacity to third-parties. One mechanism to ensure preservation of competition is to approve the merger only when there is concurrent fulfillment of the condition. This mechanism often is referred to as “fix-it first.” However, in situations where a contemplated merger antitrust remedy is structural in nature and not immediate upon closing of the transaction, remedial orders almost *always* include provisions designed to

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preserve interim competition and the ultimate success of the remedy until such time as the remedy has actually been achieved.<sup>1</sup>

Chief among such provisions are so-called “hold separate” and/or “preservation of assets” orders, which require the parties to separately maintain and operate the assets and business(s) that are the cause of the competitive concern until the remedial action is completed. To this end, hold separate and preservation of assets orders usually also include provisions reserving the right of the government to appoint, if appropriate, a third-party to oversee compliance and achievement of the remedy. These safeguards help ensure a successful remedy, incentivize the merger parties to fulfill their obligations in a complete and timely manner, and preserve competition in the interim period. As but one example in the telecommunications sector, in remedying the competitive concerns in connection with WorldCom’s 2001 acquisition of Intermedia, the hold separate order issued by the United States District Court for the District of Columbia states under the heading of “Objectives:”

The Final Judgment filed in this case is meant to ensure the prompt divestiture of Intermedia’s assets for the purpose of preserving a viable competitor in the provision of Internet backbone and access services and to remedy the effects that the United States alleges would otherwise result from WorldCom’s acquisition of Intermedia. The parties believe this goal can be best accomplished through this modification to the original Hold Separate Stipulation and Order. This Modified Hold Separate Stipulation and Order ensures, prior to such divestiture, that the IBI business remains an economically viable, and ongoing business concern that will remain independent and uninfluenced by WorldCom, and that competition is maintained during the pendency of the ordered divestiture.<sup>2</sup>

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<sup>1</sup> See, e.g., “Antitrust Division Policy Guide To Merger Remedies,” U.S. Department of Justice, Antitrust Division (October, 2004)

<sup>2</sup> Modified Hold Separate Stipulation and Order, United States v. Worldcom, Inc., No. 1:00CV02789 (RWR) (filed Aug. 29, 2001), available at <http://www.usdoj.gov/atr/cases/f9200/9201.htm>

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There are literally hundreds of examples of such remedial orders and provisions in merger antitrust matters, including in the telecommunications industry,<sup>3</sup> and, indeed, we are unaware of any reasonably recent merger antitrust matter from either the Department of Justice or the Federal Trade Commission requiring a structural remedy to be achieved in the future that did not also include these type provisions.

The equipment-related conditions mentioned above are structural in that they are designed to impact the number of firms and the availability of digital technologies in the competitive marketplace, rather than simply regulate ongoing business conduct. These conditions also entail competitive concerns involving essentially the whole of both parties' operations, as opposed to merely discrete assets or business units. As such, an appropriate hold separate type order, which is clearly called for, would likewise need to apply to the whole of both parties' operations unless and until the remedies are accomplished.

In addition to the abundant precedent supporting both "fix-it first" and "hold separate" provisions, the most obvious advantage for the Commission is that both approaches are essentially self-executing and do not require a regulatory apparatus for enforcement. They also are ideally suited to the expeditious fulfillment of the equipment related conditions because they align all the incentives in favor of rapid deployment of interoperable and HD radio capable satellite radio receivers.

Sincerely,



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Lawrence R. Sidman  
James H. Holden, Jr.  
Of PAUL, HASTINGS, JANOFKY & WALKER LLP

*Counsel to Clear Channel Communications, Inc.*

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<sup>3</sup> See, e.g., *Id.*; Hold Separate Stipulation and Order, United States v. CommScope, Inc., No. 1:07CV02200 (filed Dec. 6, 2007, available at <http://www.usdoj.gov/aatr/cases/f228300/228387.htm>); Hold Separate Stipulation and Order, United States v. The News Corporation Ltd., No. 1:01CV00771 (CKK) (filed Apr. 16, 2001), available at <http://www.usdoj.gov/aatr/cases/f8000/8043.htm>; Preservation of Assets Stipulation and Order, United States v. Cingular Wireless Corp., No. 1:04CV01850 (RBW) (filed Oct. 25, 2004), available at <http://www.usdoj.gov/aatr/cases/f206000/206015.htm>; Preservation of Assets Stipulation and Order, United States v. Verizon Communications Inc., No. 1:08CV00993 (EGS) (filed Jun. 10, 2008), available at <http://www.usdoj.gov/aatr/cases/f233900/233930.htm>; Preservation of Assets Stipulation and Order, United States v. AT&T Inc., No. 1:07CV1952 (ESH) (filed Nov. 5, 2007), available at <http://www.usdoj.gov/aatr/cases/f229900/229960.htm>.

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cc: Commissioner Michael J. Copps  
Commissioner Jonathan S. Adelstein  
Commissioner Deborah Taylor Tate  
Commissioner Robert M. McDowell  
Daniel Gonzalez, Chief of Staff to Commissioner Martin  
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