from the alleged FCC rule violations,[368] restitution to the public,[369] an order requiring the adoption of a corporate compliance plan,[370] and divestiture of one of the existing satellite systems.[371]

119. Applicants respond that they have fully complied with the Commission's interoperability requirement and that the documents cited by C3SR simply reflect the substantial efforts that Applicants have taken in developing an interoperable receiver.[372] They acknowledge building and developing a prototype of an interoperable receiver through a Joint Development Agreement, but have not taken the ultimate step of bringing such an interoperable radio to market.[373] Applicants deny that interoperable receivers designed under the Joint Development Agreement could be sold at **[REDACTED]** since the cost cited in the documents cited by C3SR included **[REDACTED]**.[374] Applicants state that the cost did not include **[REDACTED]**, and that existing receivers sold by Applicants are available at prices significantly less than **[REDACTED]**.[375] Applicants also state that the documents cited by C3SR reflect only the aspirations of one person who was directed to develop interoperable technology – not to evaluate the distribution or sale of interoperable radios – and that the views did not represent the views of

[368] *Id.* at 2-3. C3SR argues that the merged entity should be required to disgorge profits accrued as a result of **[REDACTED]** including treble damages for such actions. C3SR estimates the penalties would be in excess of $250,000,000. *Id.* at 3.

[369] *Id.* at 2-4. C3SR requests that the merged entity should be required to reimburse the public for the misconduct C3SR alleges, in the form of a monetary restitution (including interest) to the Federal treasury to compensate for the loss of spectrum auction revenue value resulting from the lack of interoperable radios in the market. C3SR argues that the auction revenues received by the Federal government as a result of the SDARS auction were lower than they would have been had the spectrum been auctioned without the interoperability requirement. *Id.* at 2-3. C3SR estimates the difference in value of approximately $267 million, and argues this amount should be required as payment from the merged entity, along with eleven years of interest on this sum. *Id.* at 4. C3SR further argues that the merged entity should be required to compensate consumers directly by providing all subscribers with a new interoperable radio device, "with comparable quality and features to replace each non-interoperable satellite radio purchased in commerce," at no charge, and to provide interoperable replacement units or refunds to consumers who purchased more than one non-interoperable receiver. *Id.*

[370] *Id.* at 2-3. C3SR argues that the merged entity should be required to adopt a compliance plan within 30 days of consummation requiring the merged entity to ensure truthfulness and accuracy in future communications with the FCC and permanently dismissing all officers, directors, and employees of Applicants who participated in, knew of, or conspired concerning the alleged violations of the FCC rules.

[371] *Id.* at 4-5. C3SR requests that the merged entity be required to divest itself of one of the two satellite licenses in order to "restore full competition to the SDARS market." *Id.* at 4. C3SR further states that as part of the divestiture, the merged entity should be required to cease exclusive agreements with programmers, retailers, and manufacturers, adhere to temporary restrictions on price increases and advertising limits, and abide by new program access requirements to be developed and adopted by the Commission in order to permit a new SDARS competitor with programming to be competitive with the merged entity in the short term. *Id.* at 4-5.

[372] Letter from Robert L. Pettit, Counsel for Sirius, and Gary M. Epstein, Counsel for XM, to Marlene H. Dortch, Secretary, FCC, transmitted by Letter from Jennifer D. Hindin, Wiley Rein LLP, to Marlene H. Dortch, Secretary, FCC (June 6, 2008) ("Applicants' June 6, 2008 Ex Parte").

[373] *Id.* at 3.

[374] *Id.* at 6.

[375] *Id.* (stating that a Sirius satellite radio is available nationwide for approximately $29, and that the most expensive comparable Sirius and XM radios cost less than $170).

Applicants.[376] Furthermore, Applicants claim that C3SR's pleading is procedurally and substantively deficient and should be dismissed.[377]

120. We conclude that Section 25.144(a)(3)(ii) requires Applicants to make an interoperable receiver commercially available. As stated above, the rule requires each applicant to "[c]ertify 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."[378] The rule's reference to "a receiver that will permit end users to access all licensed satellite DARS systems" also indicates that consumer availability is required,[379] as end users cannot use a receiver that is not commercially available. The Bureau's references in 1997 to Sirius's expressed "commitment to work with all interested parties to insure that the SDARS receivers will permit customers to access both systems,"[380] and in 2005 to the need for Sirius and XM to identify "a clear timeframe for making such an interoperable receiver available to the public,"[381] also support this interpretation. The 1997 condition that "final user receiver design" be interoperable[382] merely reflects the recognition that Sirius and XM still were designing receivers at the time: the Bureau did not intend (nor did it have authority) to modify the rule to require only the design of an interoperable receiver.[383]

121. Notwithstanding the rule's express language requiring that end users have access to receivers that can access all licensed satellite DARS systems, we do not believe that Applicants' interpretation of the receiver interoperability mandate as a design requirement was unreasonable, under the circumstances. As indicated above, Applicants do not manufacture or distribute SDARS receivers, and the 1997 condition requires that "final user receiver design" be interoperable. Further, the Commission did not explicitly require them to assure consumer availability of an interoperable receiver or require that all SDARS receivers sold in interstate commerce be interoperable. Moreover, the Commission never specified a deadline for compliance.

122. Based on our examination of the record, we are also not persuaded that C3SR's filing raises a substantial and material question of fact that requires a hearing before the Commission can make

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[376] *Id.* at 5, 7. Applicants also provide an affidavit from the author of the documents cited by C3SR which states that the documents "did not, and were not intended to, reflect the business judgment of Sirius or XM, and they were never endorsed or otherwise adopted by Sirius or XM." *Id.*, Decl. of Michael DeLuca at ¶ 2.

[377] Specifically, Applicants claim that C3SR's pleading was a *de facto* petition to deny that was not filed within the requisite 30-day period after public notice of acceptance of Applicants' merger applications. Applicants' June 6, 2008 Ex Parte at 8-9. Applicants also assert that the filing is substantively deficient because it does not contain a showing supported by affidavit by a person with personal knowledge, but instead relies on "speculative statements and surmised interpretation." *Id.* at 9-10 (citing 47 U.S.C. § 309(d)(1)).

[378] 47 C.F.R. § 25.144(a)(3)(ii).

[379] *1997 SDARS Service Rules Order*, 12 FCC Rcd at 5797 ¶ 106 ("[A]t the very least, consumers should be able to access the services from all licensed satellite DARS systems and our rule on receiver inter-operability accomplishes this.").

[380] *1997 Sirius Authorization Order*, 13 FCC Rcd at 7990 ¶ 42.

[381] *2005 XM Authorization Order*, 20 FCC Rcd at 1625 ¶ 12.

[382] *1997 XM Authorization Order*, 13 FCC Rcd at 8851 ¶ 54; *1997 Sirius Authorization Order*, 13 FCC Rcd at 7995 ¶ 57.

[383] *See 1997 Sirius Authorization Order*, 13 FCC Rcd at 7990 ¶ 42.

the required public interest determination in this proceeding.[384] First, neither the references to [REDACTED] nor the information that the documents reveal as to the joint venture company's activities reflect a lack of candor.[385] Contrary to C3SR's argument, the requirement that Applicants make an interoperable receiver commercially available was not "unambiguous," as the above analysis indicates, and the general language of the joint venture agreement does not cast significant doubt on Applicants' contention as to how they interpreted that requirement.[386] In addition, we perceive no discrepancy between the representations in Applicants' March 14, 2005 letter to the Commission concerning the status of their joint venture activities and later documents cited by C3SR, a presentation to the joint venture board and several "white papers" discussing potential means of distributing interoperable receivers.[387] As C3SR acknowledges, there is a time lag between the documents, and in any event we are not persuaded that Applicants had a duty under Section 1.65 of the Commission's rules to disclose an internal presentation or "white papers" prepared by the joint venture that did not reflect the companies' actual business plans or conclusions.[388]

123. C3SR urges the Commission to bring the documents in question to the attention the Department of Justice, the antitrust enforcement authority, arguing that they warrant antitrust investigation under Section 1 of the Sherman Act.[389] **[REDACTED]** Further, we are not persuaded that the documents cited by C3SR otherwise provide sufficient support for their allegations. The documents reflect **[REDACTED]**.[390] These estimates do not reflect that Applicants could have made an interoperable receiver available to the mass market, without any subsidy, at a cost comparable to that of commercially available Sirius and XM receivers. As Applicants point out, **[REDACTED]**.[391] C3SR also maintains that the documents reflect **[REDACTED]** does not contradict Applicants' representations that the mass market availability of interoperable radios depends in large part on factors outside of their control.[392] Finally, although C3SR characterizes Applicants' decisions not to make an interoperable receiver commercially available in 2006 and 2007 as improper, the documents are consistent with Applicants' rationale in the Merger Application that making an interoperable receiver commercially available would not make economic sense for them.[393] **[REDACTED]**; there is no evidence that

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[384] *See Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998). In light of our conclusion here, we need not address Applicants' claims that C3SR's pleading is procedurally deficient and should be dismissed.

[385] C3SR May 27, 2008 Ex Parte at 4-6 (citing Sirius Nov. 16, 2007 Response to Information and Document Request I.B. at SIRIUS-FCC-I.B.003104; Sirius Apr. 10, 2008 Response to Information Request at SIRIUS-FCC-SUPP.001051-001052, 001060-001061, 001087).

[386] *See* Sirius Nov. 16, 2007 Response to Information and Document Request I.B. at SIRIUS-FCC-I.B.003104-003139.

[387] *See* C3SR May 27, 2008 Ex Parte at 4, n.16, Exh. 3, XM/Sirius Mar. 14, 2005 Letter; *see also* Sirius Apr. 10, 2008 Response to Information Request, SIRIUS-FCC-SUPP.001048-001090.

[388] C3SR May 27, 2008 Ex Parte at 5; 47 C.F.R. § 1.65.

[389] C3SR May 27, 2008 Ex Parte at 3.

[390] Sirius Apr. 10, 2008 Response to Information Request at SIRIUS-FCC-SUPP.001061-001071; SIRIUS-FCC-SUPP.001078-001080.

[391] Applicants' June 6, 2008 Ex Parte at 6-7.

[392] Sirius Apr. 10, 2008 Response to Information Request at SIRIUS-FCC-SUPP.001060-001070; 001084-001089.

[393] Application at 15-16; Joint Opposition at 21-22.

Applicants ever had a business plan for mass market deployment.[394] **[REDACTED]**[395] Under the circumstances, there is not a substantial question of fact as to whether the companies' decisions not to go forward, in order to avoid creating the perception of such a change, were improper.

124. Applicants have voluntarily committed that the combined entity will offer for sale an interoperable receiver in the retail aftermarket within nine months of the consummation of the merger.[396] As a result, subscribers who already have purchased non-interoperable receivers will be able to transition to a receiver that has the ability to receive either of the complete programming offerings that the merged entity will offer without having to purchase two separate receivers. In light of this voluntary commitment, we dismiss a complaint filed by Michael Hartleib that seeks enforcement of the interoperability mandate.[397] We conclude that Applicants' voluntary commitment to establish a deadline to ensure the commercial availability of an interoperable receiver will enable and expedite realization of the full benefits of the merger, such as more efficient use of the SDARS spectrum.[398] We also find this commitment satisfies the request of commenters that commercial deployment of interoperable receivers by the merged entity be prompt and subject to a stringent timeline.[399]

125. We believe that the merged entity will adhere to this voluntary interoperability commitment and bring its system into compliance with the Commission's interoperability rule, despite commenters' views to the contrary.[400] Applicants' voluntary interoperability commitment is clear in its scope and deadline for implementation, which should remove any uncertainty as to what is necessary for compliance.[401] We decline to impose the additional receiver filtering requirements advocated by NextWave Wireless ("NextWave").[402] We observe that the Commission previously has declined to adopt SDARS receiver standards.[403] Furthermore, the issue underlying NextWave's proposal (that is, the potential for interference between SDARS licensees and adjacent terrestrial wireless services) is the subject of a pending rulemaking proceeding, and any filtering obligations are best addressed in the

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[394] Sirius Apr. 10, 2008 Response to Information Request at SIRIUS-FCC-SUPP.001061-001072.

[395] *Id.* at SIRIUS-FCC-SUPP.001060, 001088.

[396] Applicants' July 25, 2008 Ex Parte at 2. Applicants also voluntarily commit to make available, immediately after the merger, the design and the specifications for an interoperable radio available for license to equipment manufacturers. *Id.*

[397] Michael Hartleib states that if the Commission does not approve the merger, then the Commission must enforce the interoperability mandate. Michael Hartleib July 5, 2007 Petition for Declaratory Ruling at 5.

[398] *See* Section V.B.3, *supra*.

[399] *See* Tenn. Att'y Gen. July 3, 2008 Ex Parte at 3.

[400] NAB Apr. 6, 2007 Ex Parte, Solomon Memo at 7-9; NAB July 3, 2007 Ex Parte, Carmel White Paper at 7; NABOB Petition at 13-14; Letter from Lawrence R. Sidman, Paul Hastings, Counsel for Clear Channel, to Kevin J. Martin, Chairman, FCC (July 18, 2008) at 1-2 (proposing that the Commission require applicants to separately maintain and operate assets and businesses until remedial actions are complete and that it reserve the right for the Commission to appoint a third party to oversee compliance with the interoperability requirement).

[401] Although Applicants previously argued that interoperability has no relevance to the merger and should be addressed through traditional enforcement procedures, see Joint Opposition at 98-99 (citing *Adelphia Order*, 21 FCC Rcd at 8306 ¶ 240; *SBC-Ameritech Order*, 14 FCC Rcd at 14950 ¶ 571), we note that the precedents that they cite are distinguishable because SDARS receiver interoperability presently is not the subject of another proceeding before the Commission, and the issue relates entirely to the parties before the Commission in the merger proceeding.

[402] Letter from Jennifer M. McCarthy, Vice Pres., Reg. Affairs, NextWave, to Marlene H. Dortch, Secretary, FCC (June 18, 2008) ("NextWave June 18, 2008 Ex Parte").

[403] *1997 SDARS Service Rules Order*, 12 FCC Rcd at 5795 ¶ 102.

context of that proceeding.[404]

4. Open Access

126. As discussed in more detail in Section IV.B.2., USE proposes, as a condition to the merger, that the merged entity provide open access of the technical specifications of its devices and network so that receiver manufacturers may choose the receivers they develop for consumers.[405] USE claims that this condition will prevent a potential vertical monopoly in the manufacturing and distribution of satellite receivers and the merged entity from increasing the cost of equipment paid by consumers.[406] MAP and other commenters support USE's request.[407] Senator Christopher S. Bond and U.S. Representatives John Dingell and Edward Markey also support a condition that would allow any device manufacturer to develop SDARS equipment.[408] They support a condition that would allow device manufacturers to incorporate additional technology in receivers such as HD Radio technology, iPod ports, and Internet connectivity, so long as the technology would not harm the merged entity's network.[409] Finally, Reps. Dingell and Markey propose that the Commission bar the merged entity from entering into exclusive contracts that would, for example, prohibit the inclusion of HD Radio chips or iPod compatibility in satellite radio receivers.[410]

127. iBiquity Digital Corp. ("iBiquity")[411] requests that we condition the merger on mandating that the merged entity require manufacturers to include HD Radio™ technology for digital AM and FM radio in all satellite receivers containing analog AM or FM radio technology.[412] Other commenters

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[404] *See Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band; Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 22123 (2007) (*"2007 SDARS Second Further Notice"*).

[405] *See* USE Reply at 8.

[406] USE Jan. 15, 2008 Ex Parte at 1.

[407] Letters from Parul P. Desai & Andrew Jay Schwartzman, MAP, and Michael Calabrese, New America Foundation, to Marlene H. Dortch, Secretary, FCC (Jan. 29, 2008, Feb. 27, 2008, Mar. 4, 2008, and Mar. 24, 2008); Letters from Gigi B. Sohn, President, Public Knowledge, to Marlene H. Dortch, Secretary, FCC (Mar. 4, 2008 and May 20, 2008); Letter from Alex Nogales, President and CEO, National Hispanic Media Coalition, to Marlene H. Dortch, Secretary, FCC (May 8, 2008) at 1; Letter from State Att'y Gens. Robert McKenna (Washington) and Richard Blumenthal (Connecticut), to Marlene H. Dortch, Secretary, FCC (May 8, 2008) at 1 ("Att'y Gens. May 8, 2008 Ex Parte").

[408] Letter from U.S. Reps. John D. Dingell and Edward J. Markey, to Kevin J. Martin, Chairman, FCC (May 1, 2008) at 2 ("Reps. Dingell and Markey May 1, 2008 Ex Parte"); Letter from U.S. Sen. Christopher S. Bond, to Kevin J. Martin, Chairman, FCC (June 4, 2008) at 1 ("Sen. Bond June 4, 2008 Ex Parte").

[409] Reps. Dingell and Markey May 1, 2008 Ex Parte at 2; Sen. Bond June 4, 2008 Ex Parte at 1.

[410] Reps. Dingell and Markey May 1, 2008 Ex Parte at 2.

[411] iBiquity is the "developer and licenser of HD Radio technology, which is transforming AM and FM broadcasting with vastly increased number of channels, drastically improved sound quality and an array of new data services." iBiquity, http://www.ibiquity.com/index.php. We note that in 2002, the Commission formally selected IBOC technology developed by iBiquity as the technical format that will permit AM and FM radio broadcasters to introduce digital operations efficiently and rapidly. *See Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, First Report and Order, 17 FCC Rcd 19990, 19990 ¶ 1 (2002) ("*DAB First Report*").

[412] Letter from Robert A. Mazer, Vinson & Elkins, Counsel for iBiquity, to Marlene H. Dortch, Secretary, FCC at 1 (May 1, 2008) ("iBiquity May 1, 2008 Ex Parte").

support the HD Radio condition.[413] iBiquity argues that HD Radio compatibility is necessary because post merger, the merged entity will be in a stronger position to restrict iBiquity's sale of HD Radio receivers and because it will have more cash to fund subsidies and incentives that could prevent the growth of the HD Radio technology.[414] For original equipment manufacture ("OEM") receivers, iBiquity proposes that the condition become effective within three years, and for all other satellite receivers, within one year.[415] Applicants object to iBiquity's proposed condition as an unnecessary intrusion on their business plans. In addition, Applicants argue that it will harm satellite radio's ability to compete in the audio entertainment market.[416] Pioneer also opposes iBiquity's proposal, explaining that it would "limit

[413] Sens. Kerry, Cardin, and McCaskill June 27, 2008 Ex Parte; Letter from U.S. Reps. Betty McCollum, Collin Peterson, Timothy Walz, James Oberstar, and Keith Ellison, to Kevin J. Martin, Chairman, FCC (June 27, 2008) ("Reps. McCollum, Peterson, Walz, Obertar, and Ellison June 27, 2008 Ex Parte"); Att'y Gens. May 8, 2008 Ex Parte at 2; Rep. Markey July 15, 2008 Ex Parte at 1-2; Letter from U.S. Sen. Ted Stevens, to Kevin J. Martin, Chairman, FCC (July 15, 2008); Letter from U.S. Rep. Baron P. Hill, to Kevin J. Martin, Chairman, FCC (July 21, 2008); NPR Petition at 20-21. NPR suggests that the condition could encourage HD Radio deployment and consumer access to the technology, and may mitigate the merged entity's ability to increase prices or reduce the quality of service. *Id.* New ICO Satellite Services G.P. ("ICO"), the developer of an advanced hybrid service capable of providing wireless voice, data, video, and Internet services on mobile and portable devices, also requests that the Commission impose a condition prohibiting the merged entity from entering into exclusive agreements with automobile manufacturers that "have the effect of limiting the ability of other entities to provide competitive products or services." New ICO Comments at 2. Similarly, Slacker, Inc., which is developing a nationwide personal audio service, also requests that the Commission prohibit all current or future exclusive contracts between SDARS and car manufacturers. Slacker Comments at 3. As discussed herein, Applicants have agreed to not take any action that would prevent the inclusion of other audio technology in SDARS receivers, which resolves New ICO's and Slacker's concerns. Slacker also requests that the Commission prohibit car manufacturers from sitting on the board of directors of the merged entity. *Id.* We believe that Applicants' voluntary commitments resolve Slacker's primary concerns, and thus, we do not find it necessary to regulate the selection of board members for the merged entity.

[414] Letter from Robert A. Mazer, Vinson & Elkins, Counsel for iBiquity, to Marlene H. Dortch, Secretary, FCC (Dec. 20, 2007) at 1; Letter from Robert A. Mazer, Vinson & Elkins, Counsel for iBiquity, to Marlene H. Dortch, Secretary, FCC (Mar. 20, 2008) at 1; Letter from Robert A. Mazer, Vinson & Elkins, Counsel for iBiquity, to Marlene H. Dortch, Secretary, FCC (June 9, 2008) at 2. The HD Digital Radio Alliance agrees, explaining that the availability of HD Radio as a factory installed or factory authorized option in automobiles and other vehicles is very limited. Letter from Charles E. Biggio, Wilson Sonsini Goodrich & Rosati, Counsel for the HD Radio Alliance, to Marlene H. Dortch, Secretary, FCC (Jan. 24, 2008) at 2.

[415] iBiquity May 1, 2008 Ex Parte at 1. iBiquity also requests that the Commission require the merged entity to annually certify its compliance with the condition. *Id.* Earlier in this proceeding, iBiquity also proposed that the Commission require the merged entity to terminate all exclusive arrangements and, prospectively, that the Commission prohibit exclusive arrangements with suppliers, retailers, and vehicle manufacturers that could preclude the inclusion of HD Radio technology. Letter from Robert A. Mazer, Vinson & Elkins, Counsel for iBiquity, to Marlene H. Dortch, Secretary, FCC at 2 (Dec. 20, 2007) ("iBiquity Dec. 20, 2007 Ex Parte"). iBiquity reconsidered its position, however, stating that it does not believe that simply banning exclusive arrangements would ensure HD Radio technology would be included in SDARS receivers or would provide for a competitive landscape for terrestrial and satellite radio services. iBiquity May 1, 2008 Ex Parte at 2; iBiquity Jun. 9, 2008 Ex Parte at 1. iBiquity explains that its concern is focused not on formal contractual arrangements, but on existing business arrangements favoring satellite companies. *Id.* iBiquity argues that the merged entity "would have greater leverage to use these business relationships to disadvantage terrestrial digital radio." iBiquity May 1, 2008 Ex Parte at 2. iBiquity also does not support USE's open device proposal, arguing that it would not effectively ensure the distribution of HD Radio receivers to create a level playing field. Letter from Robert A. Mazer, Vinson & Elkins, Counsel for iBiquity, to Marlene H. Dortch, Secretary, FCC at 1 (June 6, 2008); iBiquity June. 9, 2008 Ex Parte at 1, 2.

[416] Joint Opposition at 101, n.358.

the breadth of radio product offerings to consumers, limit which radio component suppliers' products be designed into radios, have the effect of decreasing AM/FM tuning performance, unnecessarily increase costs to consumers uninterested in HD Radio and interfere with the useful and healthy free market mechanisms extant in radio electronics purchases."[417] Pioneer also argues that iBiquity's proposed phase-in periods do not provide sufficient time for typical design cycles for either retail or OEM receivers. Pioneer states that design cycles for retail equipment last from 18 to 24 months and OEM design cycles last significantly longer than the three years suggested by iBiquity.[418]

128. In response to the concerns raised by commenters, Applicants have voluntarily committed to comply with certain open access conditions.[419] First, the merged entity, immediately after consummation of the merger, will permit any device manufacturer to develop equipment that can deliver the combined entity's satellite radio service. Device manufacturers also must be permitted to incorporate in satellite radio receivers any other technology that would not result in harmful interference with the merged entity's network, including HD Radio technology, iPod ports, Internet connectivity, or other technology. This principle of openness would serve to promote competition, protect consumers, and spur technological innovation. In addition, we believe that it is not enough simply to require the open development of satellite radio devices. To ensure that consumers have unfettered access to these devices, we will prohibit the merged entity from preventing such devices, and any features such devices might contain, from reaching consumers, through exclusive contracts or otherwise. We find that it would be contrary to the public interest, for example, to permit the merged entity to bar HD Radio chips or iPod compatibility from inclusion in a manufacturer's satellite radio device, whether that device is freestanding or installed in an automobile. Applicants shall provide, on commercially reasonable terms, the intellectual property to permit any device manufacturer to develop equipment that can deliver the merged entity's satellite radio service. The encryption, conditional access, and security technology is embedded in chip sets that can be purchased from third party manufacturers.

129. We conclude that Applicants' voluntary commitments and other conditions address many of the commenters' concerns.[420] As we discussed in Section IV.B.2., the merger may provide the merged

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[417] Letter from Adam Goldberg, Vice President, Gov. and Indus. Affairs, Pioneer North America, Inc., to Marlene H. Dortch, Secretary, FCC (May 28, 2008); *See also* Letter from Adam Goldberg, Vice Pres., Gov. and Indus. Affairs, Pioneer North America, Inc., to Marlene H. Dortch, Secretary, FCC at 2 (June 6, 2008) ("Pioneer Jun. 6, 2008 Ex Parte").

[418] Pioneer Jun. 6, 2008 Ex Parte at 1; *see also* Letter from Richard M. Lee, Exec. Dir., Satellite Radio Servs., General Motors Corp. and David W. Danzer, Grp. Vice Pres., Strategic and Product Planning, Toyota Motor Sales, USA, Inc., to Marlene H. Dortch, Secretary, FCC (July 10, 2008) at 1-2 (opposing an HD Radio mandate because no agreements between XM and the automobile manufacturers currently prohibit their ability to offer HD Radio and any mandate to do so would distort the normal incentives to cost reduce and improve the HD Radio product).

[419] Applicants' June 13, 2008 Ex Parte at 3; Applicants' July 25, 2008 Ex Parte at 2,3.

[420] *See* Letter from Donald W. Riegle, Jr., Chairman, Gov't Relations, APCO Worldwide, to Kevin J. Martin, Chairman; Michael Copps, Commissioner; Jonathan Adelstein, Commissioner; Deborah Tate, Commissioner; and Robert McDowell, Commissioner, FCC (June 19, 2008); Letter from Charles H. Helein, Helein & Marashlian, LLC, Counsel for USE, to Marlene H. Dortch, Secretary, FCC (June 25, 2005). APCO and USE claim that Applicants' open access voluntary commitments are inadequate to promote competition or to spur technological innovation. For instance, they object to the right of the merged entity to require licensees to comply with its technical and quality assurance standards and tests, claiming that such in-house test will allow the merged entity to pick and choose among manufacturers based on its own standards, without oversight. APCO and USE ask that the Commission impose an open access condition immediately following approval of the merger, require independent certification testing and monitoring of compliance, prohibit the merged entity from setting prices for receivers, and prohibit it from manufacturing, selling, leasing, or distributing receivers; *see also* Sens. Kerry, Cardin, and McCaskill June 27, 2008 Ex Parte at 2 (seeking enforcement of the open access commitment); Letter from Gigi B. Sohn, President, (continued....)

entity with the ability and incentive to contract with fewer manufacturers to save on subsidies or other development and distribution costs. Such action would potentially reduce consumer choice for SDARS receivers and diminish current features or future innovations. Pursuant to Applicants' voluntary commitment, the merged entity will offer additional entities the option to license the intellectual property rights necessary to design and develop SDARS equipment. In addition to bringing more choices of receivers directly to consumers, this voluntary commitment may allow additional parties to directly negotiate with automobile makers, ultimately to the benefit of consumers. Given Applicants' open access voluntary commitment to allow additional parties to develop and design SDARS equipment and not to bar the inclusion of audio technology, including HD Radio technology, we conclude that discrimination by the merged entity is not likely to cause a public interest harm that warrants the imposition of additional conditions.

130. Though we are unpersuaded a case has been presented on this record of a merger-specific harm to HD Radio not remedied by the voluntary commitments and other conditions, we do believe important questions have been raised that warrant further examination in a separate proceeding. To this end, the Commission commits to initiating a notice of inquiry within 30 days from the adoption date of this Order to gather more information on issues including, but not limited to:

- Whether HD Radio chips or any other audio technology should be included in all satellite radio receivers;
- Whether satellite radio capability or any other audio technology should be included in all HD Radio receivers;
- The cost to auto manufacturers of including HD Radio chips;
- The cost to radio manufacturers of including HD Radio chips;
- Consumer demand for HD radio;
- The amount and type of programming available on HD Radio today, and that projected to be available over the next 3 years; and.
- Whether the FCC has jurisdiction to mandate inclusion of HD Radio, satellite radio, or other audio technology.

While we do not adopt iBiquity's proposed condition in this Order, we note that our actions today do not diminish our commitment to the HD Radio technology. We continue to believe that HD Radio is an important technological development that enables terrestrial radio stations to deliver better audio fidelity, more robust transmission systems, and the possibility of new auxiliary services.[421]

5. Third-Party Access to SDARS Capacity

131. *Overview.* Several commenters propose that the merger be conditioned on Applicants leasing a certain amount of their channel capacity to non-affiliated programmers.[422] The proposals

(Continued from previous page)
Public Knowledge, to Marlene H. Dortch, Secretary, FCC (July 15, 2008) at 1 (seeking a 60-day time period for Applicants to comply with voluntary commitments, running from approval of the Application); Letter from Robert A. Mazer, Vinson & Elkins, Counsel for iBiquity, to Marlene H. Dortch, Secretary, FCC (July 25, 2008). We find that Applicants' voluntary commitments address our concerns.

[421] *See DAB First Report,* 17 FCC Rcd at 19991 ¶ 3. Throughout the proceeding, the Commission articulated its objective "to foster the development of a vibrant terrestrial digital radio service for the public and to ensure that radio stations successfully implement DAB." *DAB Second Report*, 22 FCC Rcd at 10346 ¶ 2. *See* Letter from Anne Lucey, Sen. Vice Pres. for Reg. Policy, CBS Corp., to Marlene H. Dortch, Secretary, FCC (July 24, 2008) (urging the Commission to initiate a rulemaking on access to HD Radio technology).

[422] *See* Prometheus Comments at 5; Letter from Parul Desai, Media Access Project, Counsel for Prometheus, to Marlene H. Dortch, Secretary, FCC (Mar. 27, 2008) at 1 ("Prometheus Mar. 27, 2008 Ex Parte); TAP Petition at 7; (continued....)

advanced by the commenters include two related, but functionally distinct, mechanisms for permitting third parties to access to the SDARS system. Some commenters recommend adopting a mechanism similar to the Commission's cable leased access regulations,[423] while others propose a system akin to the Open Video System ("OVS") whereby a certain percentage of the total system capacity would be leased on a long-term basis to a third party. Although Applicants have asserted that such conditions are unnecessary,[424] they have voluntarily committed to enter into long-term leases with one or more third parties for use of a percentage of the combined entity's capacity.[425] We find that Applicants' voluntary commitment to provide such leases directly serves the public interest and will further the Commission's goals of fostering competition and diversity on the SDARS platform.

132. *Leased Capacity to Single Entity.* Georgetown Partners, LLC ("Georgetown") proposes a long-term capacity leasing mechanism somewhat similar in function to the Commission's rules governing Open Video Systems in the multichannel video programming distribution ("MVPD") context.[426] Georgetown proposes that the Commission condition the grant of the merger on Applicants leasing "at least 20 percent of the merged entities' total licensed bandwidth capacity, as measured in megahertz, ... on an exclusive basis to an entity that is totally independent of and unaffiliated with Sirius or XM."[427] Such a condition, Georgetown argues, would provide alternative access to satellite radio and counteract the merged entity's monopoly over the SDARS service.[428] Georgetown would require that the lease be consummated before the merger closes, would require the lease term to be coterminous with Applicants' FCC licenses, and would require certain other conditions to ensure the quality of the lessee's service on Applicants' system.[429] The proposed service would compete with that of Applicants by offering advertising-supported programming available to any consumer with a satellite radio receiver at no cost, regardless of whether the listener is a subscriber to Applicants' service.[430] The terms of the lease, under Georgetown's plan, would be privately negotiated between Applicants and the lessee and would be

(Continued from previous page)
Entravision Comments at 22; Letter from Chester C. Davenport, Managing Dir., Georgetown, to Marlene H. Dortch, Secretary, FCC (Oct. 18, 2007) at 3-5 ("Georgetown Oct. 18, 2007 Ex Parte"); Letter from David R. Siddall, Paul Hastings, Counsel for Georgetown, to Kevin J. Martin, Chairman; Michael Copps, Commissioner; Jonathan Adelstein, Commissioner; Deborah Tate, Commissioner; and Robert McDowell, Commissioner, FCC (Nov. 20, 2007) at 6-7 ("Georgetown Nov. 20, 2007 Ex Parte").

[423] *See* 47 C.F.R. §§ 76.970-977; *see also* Communications Act, § 612 (47 U.S.C. § 532).

[424] Letter from Robert L. Pettit, Wiley Rein LLP, Counsel for Sirius, to Kevin J. Martin, Chairman; Michael Copps, Commissioner; Jonathan Adelstein, Commissioner; Deborah Tate, Commissioner; and Robert McDowell, Commissioner, FCC (Nov. 13, 2007), Att. Joint Ex Parte Submission at 11-13 ("Applicants' Nov. 13, 2007 Ex Parte"); Joint Opposition at 100.

[425] Applicants' June 13, 2008 Ex Parte at 3.

[426] *See* 47 C.F.R. § 76.1500, *et. seq.* Under the Commission's rules, OVS operators are required to open access to a percentage of the system capacity for use by non-affiliated third parties for competing OVS services. 47 C.F.R. § 76.1503.

[427] Letter from David R. Siddall, Paul Hastings and Andrew G. Berg, Sonnenschein Nath & Rosenthal, LLP, Counsel for Georgetown, to Marlene H. Dortch, Secretary, FCC (Mar. 17, 2008) at 2 ("Georgetown Mar. 17, 2008 Ex Parte"); *see also* Letter from David R. Siddall, Sonnenschein Nath & Rosenthal LLP, Counsel for Georgetown Partners, to Marlene H. Dortch, Secretary, FCC (July 10, 2008) (claiming that Sirius' allocation of capacity to the Backseat TV service demonstrates that the merged firm could allocate 20 percent of its capacity for this purpose) ("Georgetown July 10, 2008 Ex Parte"); *see also* n.499, *infra*.

[428] Georgetown Mar. 17, 2008 Ex Parte at 3.

[429] *Id.* at 2.

[430] *Id.*

submitted to the DOJ and the Commission for approval.[431] Finally, should it be the lessee, Georgetown commits to complying with the "Commission's indecency provisions as applied to broadcasters."[432] Other commenters filed in support of a third-party leased access condition.[433]

133. *Leased Access Model.* Prometheus and Entravision each propose that the Commission apply a leased access regime patterned after the system used in cable television. Prometheus does not provide specific mechanisms for implementing leased access, but rather advocates generally that Applicants be required to "provide a reasonable amount of capacity at true market rates for commercial programming, over which [Applicants] would not exercise any editorial control."[434] Such a system would "offer to those who feel that satellite service is the preferred programming platform an opportunity to make use of it."[435] Applicants originally opposed the third-party leased access proposals advanced by Prometheus and Entravision and argued that they are counter to the public interest.[436]

134. *Discussion.* Though Applicants originally opposed the third-party access proposals described above, Applicants submitted a voluntary commitment to enter into long-term leases or other agreements to provide a Qualified Entity[437] or Entities rights to 4 percent of the full-time audio channels on the Sirius platform and on the XM platform, respectively (which currently represents six channels on the Sirius platform and six channels on the XM platform), and to enter into such leases within four

[431] *Id.* at 2-3. We note that its request for DOJ approval of leases is moot considering that the DOJ closed its investigation of the transaction without further action. *See* Mar. 24, 2008 DOJ Press Release.

[432] Georgetown Mar. 17, 2008 Ex Parte at 2. Georgetown has also agreed to facilitate the distribution of additional leased channel capacity dedicated to non-commercial and educational use, as advanced by MAP and Public Knowledge. Letter from Chester Davenport, Managing Dir., Georgetown, to Kevin J. Martin, Chairman, FCC (May 13, 2008) at 1-2 ("Georgetown May 13, 2008 Ex Parte"); *see also* Letter from Andrew J. Schwartzman and Parul Desai, MAP, and Gigi B. Sohn, Public Knowledge (May 14, 2008) (concurring with Georgetown's May 13, 2008 proposal). *See also* Section VI.B.6, *infra*. Georgetown commits to "work with MAP, PK, and other appropriate parties to establish a structure suitable for selection among eligible programmer applicants if more apply than the FCC designated capacity for educational non-commercial channels can accommodate" and, at Georgetown's expense, accept delivery of the non-commercial leased program streams, encode the programming, and deliver it to the merged entity for broadcast. *See* Georgetown May 13, 2008 Ex Parte at 2.

[433] *See* TAP Petition at 7 (stating Applicants "might be required to convey control over some portion of its bandwidth – such as one quarter (6.25 MHz) – and to provide an independent minority competitive provider carriage services."); *see also* Letter from U.S. Rep. Sanford D. Bishop, Jr., to Kevin J. Martin, Chairman, FCC (Nov. 7, 2007) at 1; Letter from U.S. Rep. Edolphus "Ed" Towns, to Kevin J. Martin, Chairman, FCC (May 5, 2008) at 1; Letter from U.S. Rep. Bobby L. Rush, to Kevin J. Martin, Chairman, FCC (May 6, 2008) at 1; Letter from State Att'y Gens. Douglas F. Gansler (Maryland), Richard Blumenthal (Connecticut), Marc Dann (Ohio), and Rob McKenna (Washington), to Kevin J. Martin, Chairman, FCC (Apr. 24, 2008) at 2; Letter from U.S. Rep. G. K. Butterfield, to Kevin J. Martin, Chairman, FCC (Apr. 15, 2008) at 1; Letter from U.S. Reps. Albert R. Wynn, Lacy Clay, G.K. Butterfield, Elijah Cummings, Bennie Thompson, and David Scott, to Kevin J. Martin, Chairman, FCC (Nov. 9, 2007) at 1-2; Letter from U.S. Rep. Corinne Brown, to Kevin J. Martin, Chairman, FCC (Nov. 9, 2007) at 1; Letter from U.S. Rep. Gregory W. Meeks, to Kevin J. Martin, Chairman, FCC (May 19, 2008) at 1.

[434] Prometheus Comments at 5. Prometheus also states its preference to lease channels on a per channel basis, where the combined entity would hold an auction to allocate the channels, and that the FCC separately license the leasees and treat the service as a broadcast service. Prometheus Mar. 27, 2008 Ex Parte at 1.

[435] Entravision Comments at 22.

[436] Joint Opposition at 100.

[437] A "Qualified Entity" includes any entity that is majority-owned by persons who are African American, not of Hispanic origin; Asian or Pacific Islanders; American Indians or Alaskan Natives; or Hispanics.

months of the consummation of the merger.[438] Applicants further voluntarily commit that, as digital compression technology enables the combined company to broadcast additional full-time audio channels, the combined company will ensure that 4 percent of full-time audio channels on the Sirius platform and the XM platform are reserved for a Qualified Entity or Entities, provided that in no event will the combined company reserve fewer than six channels on the Sirius platform and six channels on the XM platform.[439] The Qualified Entity or Entities will not be required to make any lease payments for such channels, and the combined company will not be involved in the selection of the Qualified Entity or Entities.[440] The combined company will have no editorial control over these channels.[441]

135. We find that Applicants' voluntary commitment to provide leased channel capacity to other programmers addresses the concerns voiced by Media Access Project, Public Knowledge, and others who contend that the consolidation of the SDARS service to a single provider will harm programming diversity.[442] We further find that Applicants' voluntary commitment is consistent with the Commission's stated goals to promote diversity as described in the recently adopted Diversity Order, which took steps to promote diversity in the broadcasting context and solicited comment on additional

[438] Applicants' June 13, 2008 Ex Parte at 3.

[439] *Id.*

[440] *Id.*

[441] *Id.*

[442] *See* Letter from Andrew J. Schwartzman, MAP, to Marlene H. Dortch, Secretary, FCC (June 18, 2008) at 1 (stating that MAP and Public Knowledge prefer that an independent party select unaffiliated minority programmers, and that the percent of channels to be set aside should be based on a percentage of channel capacity, and not on a percentage of live channels); Letter from William H. Kling, Pres. and CEO, American Public Media, to Kevin J. Martin, Chairman, FCC (June 20, 2008) at 2 (advocating that Applicants set aside 25 percent of total SDARS spectrum for non-commercial public service channels, minority broadcasters, and emergency services) ("APM June 20, 2008 Ex Parte"); Letter from David R. Siddall, Sonnenschein Nath & Rosenthal LLP, Counsel for Georgetown Partners, to Marlene H. Dortch, Secretary, FCC (June 27, 2008) at 1-2 (stating that Georgetown Partners, Entravision, and TSG Capital Group are not interested in providing programming and facilities with only 4 percent of channels offered for commercial leased access, and that an advertiser-supported service available to all owners of SDARS receivers would be preferred); Sens. Kerry, Cardin, and McCaskill June 27, 2008 Ex Parte at 1-2 (arguing that setting aside 4 percent is inadequate to ensure a viable competitor, and instead suggesting that leasing 20 percent to 50 percent is necessary, along with a transparent and competitive process for the leasing arrangement); Letter from U.S. Sen. Amy Klobuchar, to Kevin J. Martin, Chairman, FCC (June 27, 2008) (urging the Commission to require Applicants to set aside more than 8 percent of channels); Reps. McCollum, Peterson, Walz, Obestar, and Ellison June 27, 2008 Ex Parte at 1 (advocating 25 percent set-aside of total SDARS spectrum for non-commercial public service channels, minority broadcasters, and emergency services); Letter from Gigi B. Sohn, President, Public Knowledge and Andrew Jay Schwartzman, President and CEO, MAP, to Kevin J. Martin, Chairman, FCC (July 10, 2008) at 5 (proposing that the Commission appoint an independent "Monitor Trustee" to oversee enforcement of voluntary commitments); Letter from Albert H. Kramer, Dickstein Shapiro LLP, Counsel for The Word Network, to Marlene H. Dortch, Secretary, FCC (July 11, 2008) at 1 (proposing that Qualified Entities include not-for-profit entities offering programming designed to respond to the minority community) ("The Word Network July 11, 2008 Ex Parte"); Rep. Markey July 15, 2008 Ex Parte at 2 (recommending that the set aside be based on total capacity rather than specifying a set number of channels so that advances in digital capacity and service offerings do not diminish the impact of the set-aside limit); Letter from U.S. Rep. G.K. Butterfield, to Kevin J. Martin, Chairman, FCC (July 21, 2008) (supporting a 15 percent set aside for minority controlled programming); Letter from U.S. Rep. Bennie G. Thompson, to Kevin J. Martin, Chairman, FCC (July 22, 2008); Letter from U.S. Rep. Yvette D. Clarke, to Kevin J. Martin, Chairman, FCC (July 23, 2008); Letter from U.S. Rep. Elijah E. Cummings, to Kevin J. Martin, Chairman, FCC (July 23, 2008).

ways to increase minority involvement in the communications industry.[443] Commenters have raised concerns, however, about the mechanics of the channel lease administration and allocation.[444] We will determine the implementation details for use of these channels at a later date.

6. Reservation of Channels for Noncommercial Educational Use

136. Public Knowledge and Prometheus argue that if the Commission determines that the merger is in the public interest, the merged entity should be required to reserve a percentage of channel capacity for noncommercial educational or informational programming.[445] The commenters suggest that the Commission use the Direct Broadcast Satellite ("DBS") public interest obligations[446] as a model for implementation of the same obligations for SDARS. Applicants have committed to voluntarily make capacity available for this purpose.[447] We find that Applicants' voluntary commitment will help maintain a platform for diverse voices post-merger and, as a result, we find that it serves the public interest.

137. *Proposals by Commenters.* Prometheus and Public Knowledge each propose that the merger, if approved, be subject to a condition that a certain percentage of the merged entity's channel

[443] *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922 (2008).

[444] *See, e.g.*, Sens. Kerry, Cardin, and McCaskill June 27, 2008 Ex Parte at 1-2 (arguing for the creation of a transparent and competitive process for the leasing arrangement); Letter from Andrew J. Schwartzman, MAP, to Marlene H. Dortch, Secretary, FCC (June 18, 2008) at 1 (expressing preference that an independent party select unaffiliated minority programmers); Letter from Gigi B. Sohn, President, Public Knowledge and Andrew Jay Schwartzman, President and CEO, MAP, to Kevin J. Martin, Chairman, FCC (July 10, 2008) at 5 (proposing that the Commission appoint an independent "Monitor Trustee" to oversee enforcement of voluntary commitments); The Word Network July 11, 2008 Ex Parte at 1 (discussing the need for an entity independent of Applicants to administer the allocation of channels for minority programmers); Letter from Jose Luis Rodriguez, CEO, HITN, to Kevin J. Martin, Chairman, FCC (July 11, 2008) (advocating that the minority set-aside be reserved for stations managed and controlled by minority members); Letter from Jeneba Jalloh Ghatt, Counsel to AlphaStar, to Kevin J. Martin, Chairman, FCC (Jul. 16, 2008) at 1 (advocating that an independent entity administer leased capacity); Letter from U.S. Reps. Charles Gonzalez, Hilda Solis, Ed Towns, and Bobby Rush, to Kevin J. Martin, Chairman, FCC (July 18, 2008) (proposing that if a financial institution is selected to oversee leasing commitments, then the Commission should ensure that the entity "has a proven history of and experience with minority lending and business operations," and that it has no financial interest in the selection process. They also urge the Commission to provide potential lessees with adequate time to develop business plans and raise capital and recommend that the Commission prohibit the merged entity from dropping existing minority programming channels in order to allocate channels for new minority-owned channels).

[445] Public Knowledge proposes that the merged entity reserve 5 percent of channel capacity and Prometheus proposes a 4 percent reservation. Public Knowledge Comments at 2; Letter from Gigi B. Sohn, Pres., Public Knowledge, to Marlene H. Dortch, Secretary, FCC (Feb. 20, 2008), Att., Memorandum Regarding Set Aside Conditions at 1-2 ("Feb. 20, 2008 Ex Parte Letter"); Prometheus Comments at 5.

[446] *See* 47 C.F.R. § 25.701.

[447] Applicants' June 13, 2008 Ex Parte at 3. The Applicants' June 13, 2008 Ex Parte setting forth the Applicants' voluntary commitments states that this capacity will be made available for "programming within the meaning of 47 C.F.R. § 25.701(f)(2) of the DBS set aside rules." *Id.* We note that the cited definition defines a "Qualified Programmer" but does not define or describe specifically the programming that will be provided. Consistent with our approach in the DBS context, therefore, we interpret the Applicants' voluntary commitment to mean that Applicants will make available capacity to programmers that satisfy the definitions contained within 47 C.F.R. § 25.701(f)(2).

capacity be reserved for noncommercial educational programming.[448] Public Knowledge proposes the following four requirements to implement an SDARS noncommercial channel *reservation requirement.* First, similar to the DBS rule, Public Knowledge asserts that the merged company should allocate only one channel per qualified programmer unless all other requests for access have been granted in order to increase program diversity.[449] It also argues that any noncommercial channels already carried by SDARS should not count toward the reservation requirement and that "qualifying programmers currently on either service should not be eligible" for reserved channels.[450] Second, Public Knowledge proposes that all subscribers of the merged company should get access to all of the noncommercial programming on the reserved channels at no additional charge. Public Knowledge clarifies its proposal to mean that the 5 percent reservation should be based on the entire service offering and not on a reduced package that might be offered on an a la carte basis.[451] Third, as in the DBS context, the merged entity should not exercise any editorial control over the noncommercial programming, although it may select from among qualified applicants when demand exceeds capacity. Fourth, only national and local educational programming suppliers would be eligible for carriage on the reserved channels. Although in the DBS rules only national programmers are eligible, Public Knowledge urges the Commission to expand eligibility to local noncommercial entities. It states that this would permit low power radio stations and other local entities to have access to satellite radio audiences which Public Knowledge claims would in turn further the Commission's goal of promoting localism.

138. Applicants initially opposed the imposition of public interest obligations, asserting that their services "provide[] a tremendous range of public interest and educational content . . . because such programming is attractive to consumers."[452]

139. *Background: Public Interest Obligations in The SDARS and DBS Contexts.* When the Commission adopted licensing and service rules for SDARS in 1997, it considered imposing public interest obligations on the licensees.[453] Commenters in the proceeding cautioned against impeding the introduction of a new service with rapidly changing technology.[454] The Commission concluded that SDARS licensees should be subject to Equal Employment Opportunity requirements as well as certain political broadcasting rules.[455] The Commission declined, however, to impose additional public interest programming obligations on SDARS, but reserved the right to do so at a later date, "[i]f additional public interest obligations are found to be warranted."[456] This included a specific reservation of a future right to "adopt rules similar to those Congress enacted for DBS providers, including a 4-7 percent set-aside of

[448] Prometheus Comments at 5; Letter from Alex Curtis, Dir. of Policy, New Media, Public Knowledge to Marlene H. Dortch, Secretary, FCC (Dec. 7, 2007) at 1-2; APM June 20, 2008 Ex Parte at 1-2 (seeking a reservation of 25 percent of the combined entity's radio spectrum).

[449] Public Knowledge Feb. 20, 2008 Ex Parte, Att. at 1-2.

[450] *Id.* at 2.

[451] For example, under a 5 percent reservation, if the merged company offers 200 channels, each subscriber would receive 10 channels of noncommercial programming regardless of his or her particular subscription package. Public Knowledge Feb. 20, 2008 Ex Parte, Att. at 2; Public Knowledge June 18, 2008 Ex Parte at 1.

[452] Joint Opposition at 101-02.

[453] *1997 SDARS Service Rules Order*, 12 FCC Rcd at 5789-92 ¶¶ 85-93.

[454] *Id.* at 5789-90 ¶¶ 86-89.

[455] *Id.* at 5792 ¶ 92.

[456] *Id.* at 5792 ¶ 93.

capacity for noncommercial educational and informational programming."[457]

140. Applicants' voluntary commitment to make capacity available for noncommercial educational and informational programming is similar to the DBS public interest rules.[458] These rules were mandated by the Cable Television Consumer Protection and Competition Act of 1992 ("*1992 Cable Act*"),[459] which directed the Commission to impose public interest obligations on DBS providers, including a requirement to reserve a percentage, between 4 and 7 percent, of channel capacity for noncommercial educational or informational programming.[460] In implementing this statutory mandate, the Commission adopted a 4 percent reservation requirement[461] and elaborated on the definition of entities qualified to be carried on the reserved channels.[462] We concluded that in order to qualify for carriage, an entity must be noncommercial with an educational mission.[463]

141. *Discussion.* We find that Applicants' voluntary commitment to set aside 4 percent of their capacity for NCE programming mitigates the potential harm to program diversity and is consistent with the Commission's expectation, first stated in 1997, that diverse public interest programming would be available on the SDARS platform. Eleven years ago, when the Commission considered whether to impose such conditions on the nascent SDARS service, the Commission was persuaded by the parties' argument that "public interest programming obligations [were] not necessary to ensure diverse public oriented programming" because "the economic and distribution structure of satellite DARS makes it good business to offer programming that regular broadcasters would not offer absent incentives."[464] At that time, the Commission agreed that market forces produced by the robust competition between two SDARS competitors would ensure that listeners would receive noncommercial educational and public interest programming on the SDARS service. In the absence of such competitive forces post-merger, we find the potential harm to programming diversity greater than was the case in 1997.

142. Applicants have voluntarily committed to set aside 4 percent of the full-time audio channels for noncommercial educational and informational programming on both Sirius's and XM's current systems, a figure that currently represents six channels on each platform.[465] We accept Applicants' voluntary commitment. We find that this commitment addresses commenters' concerns and will promote diversity. To ensure that the commitment is implemented in a fair and efficient manner, we adopt additional requirements based on regulations implementing the DBS public interest requirement.[466] We are aware that "attractive" programming is not necessarily the same as "profitable" programming, particularly where it concerns programming of an educational and informational nature. While we

[457] *Id.* (citing 47 U.S.C. § 335).

[458] 47 C.F.R. § 25.701.

[459] *See* Cable Television Consumer Protection and Competition Act of 1992 ("*1992 Cable Act*"), Pub. L. No. 102-385, 106 Stat. 1460 (1992) (*codified at* 47 U.S.C. § 335).

[460] *See* 47 U.S.C. § 335(b)(1).

[461] *See Implementation of Section 25 of the Cable Television and Consumer Protection Act of 1992, Direct Broadcast Satellite Public Interest Obligations*, Report and Order, 13 FCC Rcd 23254, 23285 ¶ 74 (1998) ("*DBS PI Order*").

[462] *See DBS PI Order*, 13 FCC Rcd at 23286-92 ¶¶ 76-90. *See also* 47 C.F.R. § 25.701(f)(2).

[463] *DBS PI Order*, 13 FCC Rcd at 23290 ¶ 86.

[464] *SDARS Service Rules Order*, 12 FCC Rcd at 5789 ¶ 86 (citing comments filed by Digital Satellite Broadcasting Corp. and American Mobile Radio Corp).

[465] Applicants' June 13, 2008 Ex Parte at 3.

[466] 47 C.F.R. § 25.701(f).

acknowledge and expect that the merged company must behave in a profit-maximizing manner in order to operate as a successful commercial enterprise, we have a counterbalancing obligation to protect the public's interest in diverse programming choices. Accordingly, we find that the proposed set-asides are justified in order to balance the risk of harm to programming diversity and the amount and quality of noncommercial educational and informative public programming available via SDARS post-merger.[467] In addition, we find that the burden on the merged company as a result of this voluntary commitment will not prohibit the merged entity from realizing the benefits of the merger. Moreover, Applicants state in their pleadings that the merged company will eliminate a number of channels that offer substantially duplicative programming in order to free up channel capacity for other formats and services.[468] We expect that the consolidation of Applicants' merged channel offerings in this way will free a significant amount of capacity, a small portion of which can be reallocated for noncommercial services pursuant to Applicants' voluntary commitment.

143. As the Commission did in the context of imposing public interest obligations on DBS providers, we limit the number of channels that can be initially allocated to a single noncommercial programmer.[469] In adopting the DBS rules, the Commission was concerned that access to noncommercial channels not be dominated by a few national educational program suppliers and concluded that limiting the capacity for any one programmer will increase the development of quality educational and informational programming for carriage on the set aside channels.[470] The Commission also found that the limitation would provide an opportunity for carriage of programming that might not otherwise be available, including programming targeting traditionally underserved audiences.[471] We believe that these same concerns hold true for the merged entity. Accordingly, the merged entity will not be permitted to initially select a qualified programmer to be carried on more than one of its reserved channels. After all qualified entities seeking access to the reserved channels have been offered carriage, the merged entity may allocate an additional channel to a programmer without having to make further efforts to find other qualified programmers to fill the NCE set-aside channels.

144. In determining how many channels must be made available at any point in time in fulfillment of Applicants' commitment to set aside 4 percent of their full-time audio channels for this purpose, the merged entity shall use the method specified in section 25.701(f)(1) of the Commission's rules.[472] Specifically, the number of full-time audio channels shall be determined annually by calculating, based on measurements taken on a quarterly basis, the average number of channels available for audio programming on all satellites licensed to the provider during the previous year.[473] In addition, as provided in the regulations implementing the DBS set-aside, Applicants may use this reserved capacity for any purpose until such time as it is used for NCE programming.[474] We agree with Public Knowledge that the number of reserved channels must be based on total system capacity and not on the number of channels in any particular service package. Public interest channels must be made available to all

[467] *See* The Word Network July 11, 2008 Ex Parte at 1 (proposing that not-for-profit entities offering programming to minority audiences qualify for NCE set asides).

[468] Application at 12-14.

[469] *See DBS PI Order*, 13 FCC Rcd at 23302 ¶ 116.

[470] *Id.*

[471] *Id.*

[472] 47 C.F.R. § 25.701(f)(1). *See also DBS PI Order*, 13 FCC Rcd at 23282-84 ¶¶ 69-71.

[473] *See* 47 C.F.R. § 25.701(f)(1).

[474] *Id.*

subscribers at no additional charge.[475] With respect to noncommercial programming already carried by one or both of the SDARS licensees, we disagree with Public Knowledge that this programming never be counted as qualified for carriage on the reserved channels. The merged entity has the discretion to choose among programmers, and those noncommercial entities already carried should not be penalized for prior successful relationships with SDARS licensees.

145. As in the DBS context, the merged entity may not exercise editorial control over the programming on the reserved channels but may chose between qualified programmers when demand for capacity exceeds channel supply. With respect to Public Knowledge's suggestion that local as well as national programmers are qualified for carriage, the merged entity could choose a local programmer but must not use its terrestrial repeater network to originate local programming or local advertising that is not carried on its satellites.[476] In other words, any noncommercial programming on the reserved channels, like all other SDARS programming, must be carried by satellites that reach customers nationwide. The merged company may charge noncommercial programmers no more than 50 percent of the direct costs of making the channel available for access, although they may charge such programmers less than 50 percent.[477] As in the DBS context, direct costs may not include those related to the construction, launch, or general operation of the satellite, nor can they include marketing costs, general administrative costs, or similar overhead costs of the SDARS provider or the revenue it might have lost if it could have offered the channels to a commercial programmer.[478]

146. The merged entity shall reserve discrete channels and offer these to qualified programmers at consistent times to fulfill this reservation requirement.[479] In addition, the merged company must comply with the public file requirements of section 25.701(f)(6) of the Commission's Rules, 47 C.F.R. § 25.701(f)(6). Finally, the merged entity shall make NCE channel capacity available upon consummation of the transaction, and programming provided pursuant to this set-aside requirement must be available to the public no later than six months after the transaction's consummation.[480]

7. Service to Alaska, Hawaii, and Puerto Rico

147. Applicants have committed voluntarily to file applications with the Commission, within three months of the consummation of the merger, to provide the Sirius satellite radio service to the Commonwealth of Puerto Rico using terrestrial repeaters and to promptly introduce such service upon grants of permanent authority by the Commission to operate these repeaters.[481] We find that the public interest would be served by Applicants' voluntary commitment to provide service to Puerto Rico. We also strongly encourage the merged entity to expand service to Alaska, Hawaii, the U.S. Virgin Islands, and other territories of the United States, where technically feasible and economically reasonable to do so.

148. In this proceeding, we have received comments urging the Commission to expand the

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[475] *See DBS PI Order*, 13 FCC Rcd at 23285 ¶ 74. *See also American Distance Education Consortium*, Declaratory Ruling and Order, 14 FCC Rcd 19976 (1999) (ruling that reserved channels must be made available to subscribers in all parts of the country).

[476] *See* Section VI.C.2, *infra*.

[477] 47 C.F.R. § 25.701(f)(5). *See also DBS PI Order*, 13 FCC Rcd at 23306-09 ¶¶ 126-34 .

[478] *See DBS PI Order*, 13 FCC Rcd at 23306-08 ¶¶ 126-30.

[479] *See* 47 C.F.R. § 25.701(f)(5). *See also DBS PI Order*, 13 FCC Rcd at 23282 ¶ 68.

[480] *See* 47 C.F.R. § 25.701(f)(7). *See also DBS PI Order*, 13 FCC Rcd at 23309 ¶ 136.

[481] Applicants' June 13, 2008 Ex Parte at 4.

SDARS geographic coverage requirements as a condition on approving the merger.[482] In particular, commenters noted that although there was an expectation that access to SDARS would grow alongside technological advances, this has not been the case for consumers in Alaska, Hawaii, U.S. Virgin Islands, Puerto Rico, and the outlying territories of the United States.[483] Thus, commenters have requested that access by all consumers in the United States be a central tenet of the Commission's merger review.[484]

149. Our rules governing the provision of SDARS requires that each applicant for an SDARS license demonstrate that its system will, at a minimum, provide service throughout the 48 contiguous United States ("full CONUS").[485] Under existing rules, there is no obligation that SDARS licensees provide service beyond full CONUS.[486] Thus, Applicants' voluntary commitment to provide the Sirius satellite radio service to Puerto Rico will expand SDARS service beyond existing coverage requirements.[487]

150. We decline to require expansion of the SDARS licensees' geographic service area beyond this voluntary commitment. Based on the record in this proceeding, we conclude that service outside full CONUS by the existing SDARS satellite networks is not technically feasible or economically reasonable at this time. Although Applicants state that the Sirius satellite network is capable of serving Puerto Rico and southeastern portions of Alaska using its current three-satellite NGSO orbital

[482] Letter from Members of the Outlying Areas Senate Presidents Caucus, to Kevin J. Martin, Chairman, FCC (May 19, 2008) at 1-2 ("OASPC May 19, 2008 Ex Parte") (observing the lack of SDARS service to, among others, Guam, Northern Mariana Islands, and American Samoa); Letter from U.S. Rep. Luis G. Fortuño, to Kevin J. Martin, Chairman, FCC (Jan. 18, 2008) at 1 ("Rep. Fortuño Jan. 18, 2008 Ex Parte") (opposing the merger "[U]ntil such time that exclusion of Puerto Rico and other noncontiguous United States jurisdictions from coverage area of satellite radio ceases."); Letter from Chairman José E. Serrano of the Subcommittee on Finance Services and General Gov't Communications on Appropriations, to Kevin J. Martin, Chairman, FCC (Sept. 19, 2007) ("Rep. Serrano Sept. 19, 2007 Ex Parte") (asking the Commission to consider requiring Applicants to provide equal access to SDARS service to Alaska, Hawaii, Puerto Rico, and other U.S. Territories); Senate Resolution 3392, Commonwealth of Puerto Rico, October 1, 2007 (expressing opposition to the merger "until the exclusion of Puerto Rico and other jurisdictions not contiguous to the United States from the mandatory coverage area of said service, ceases.").

[483] Rep. Serrano Sept. 19, 2007 Ex Parte at 1 (noting that in 10 years since adopting the SDARS service rules, SDARS still is not available outside of full CONUS); Senate Resolution 3392, Commonwealth of Puerto Rico, October 1, 2007; OASPC May 19, 2008 Ex Parte at 2 ("Many technological advances have occurred during the decade since the FCC first authorized satellite radio systems . . . with the result that today there exists no legitimate excuse for subjecting any United States jurisdiction to arbitrary exclusion from satellite radio services.").

[484] Rep. Serrano Sept. 19, 2007 Ex Parte 2; Rep. Fortuño Jan. 18, 2008 Ex Parte at 2; OASPC May 19, 2008 Ex Parte at 2 (requesting that the Commission condition grant of merger on all American jurisdictions receiving satellite radio services within two years).

[485] 47 C.F.R. § 25.144(a)(3)(i) (requiring Applicants to demonstrate that its system will, at a minimum, serve the full CONUS).

[486] When adopting this rule, the Commission considered, but ultimately rejected, a proposal to require SDARS licensees to provide 50-state coverage, or 50-state plus Puerto Rico/Virgin Islands coverage. After reviewing the record, the Commission observed that 50-state coverage was not mandatory for satellite services at that time and that a service area beyond full CONUS might not be practical for first generation SDARS systems. *1997 SDARS Service Rules Order*, 12 FCC Rcd at 5794 ¶ 99.

[487] In light of Applicants' voluntary commitment to provide service to Puerto Rico, Rep. Fortuño states that he no longer objects to the proposed merger. Letter from U.S. Rep. Luis G. Fortuño to Kevin J. Martin, Chairman, FCC (June 25, 2008).

configuration and satellite design,[488] satellite coverage does not extend to the rest of Alaska or Hawaii due to technical limitations, such as low elevation angles[489] and requirements for high power over CONUS.[490] Applicants also state that **[REDACTED]**.[491] We nevertheless strongly encourage the merged entity to include service to Alaska, Hawaii, the U.S. Virgin Islands, and other territories of the United States as part of future applications to launch and operate SDARS satellites, where such service is technically feasible and economically reasonable.

C. Other Issues

1. Spectrum Givebacks

151. We decline to impose a condition requiring Applicants to divest a portion of their spectrum. Some commenters argue that, for the merger to serve the public interest, the merged entity must surrender up to half of its assigned spectrum in order to allow a new competitor to enter the market for SDARS.[492] Applicants, however, assert that the Commission should reject any proposals that involve divestiture of a portion of the combined entity's spectrum post-merger because such divestiture is unnecessary and would undermine the public benefit of the merger.[493] Other commenters join Applicants

[488] Sirius Nov. 16, 2007 Response to Information and Document Request III.G, Narrative at 49-50, n.11 (Response to Interrogatory Question III.G. requesting that Sirius "describe what factors went into the selection of the geographic coverage areas for the satellite network, as well any technical, economic, other considerations that limit the ability of the Sirius satellite network to serve US state and territories outside the contiguous United States." Sirius Information Request at 4).

[489] To provide a high quality of service and signal diversity, SDARS satellites usually need to be at a reasonable elevation angle above the horizon. When the angle of elevation is too low, mountainous terrain and buildings may obstruct the sight lines to the satellite blocking the signal. In addition, with a low angle of elevation atmospheric attenuation and electrical noise would also degrade the quality of service.

[490] Sirius Nov. 16, 2007 Response to Information and Document Request, Narrative at 50 ("Coverage was not extended to all of Alaska and/or Hawaii due to both technical limitations (need to keep high power density in primary service areas combined with low look angles in Alaska/Hawaii) and relatively low population densities in those states that limit the economic benefits of extending the coverage.") The original application for Sirius' network indicates that coverage for Puerto Rico and Alaska is at a lower power level than full CONUS coverage. *See Application of Satellite CD Radio Inc. for Minor Modification of License to Construct, Launch and Operate a Non-Geostationary Satellite Digital Audio Radio Service System*, IBFS File No. SAT-MOD-19981211-00099 (filed Dec. 11, 1998).

[491] XM Nov. 16, 2007 Response to Information and Document Request, Narrative at 33-41. (Response to Interrogatory Question III (G) requesting XM to "describe what factors went into the selection of the geographic coverage areas for the satellite network, as well any technical, economic, other considerations that limit the ability of the XM satellite network to serve US state and territories outside the contiguous United States." XM Information Request at 4).

[492] *See, e.g.*, Mt. Wilson Supp. to Petition at 2 (arguing the merger can be condoned only if the merged entity is limited to the allocated spectrum of one of Applicants); King Reply at ¶ 42 (stating that unless Applicants use one of the bands for expanded service, they should not be allowed to keep both bands if the merger is approved); Sen. Bond June 4, 2008 Ex Parte at 1 (requesting that the Commission require the merged entity to divest part of its spectrum); NPR Petition at 21; Blue Sky Comments at 7; Prometheus Comments at 5; Letter from U.S. Sens. Olympia J. Snowe and Claire McCaskill, to Kevin J. Martin, Chairman, FCC (May 21, 2008) at 2 ("Sens. Snowe and McCaskill May 21, 2008 Ex Parte).

[493] Joint Opposition at 87-88 (arguing divestiture is unnecessary because (1) there is sufficient spectrum available for new competition to enter the audio entertainment market, including those using satellite technology; (2) requiring one of the companies to divest its spectrum would make half of the 14 million satellite radios completely inoperable because the current receiver equipment cannot receive the signals of both companies; and (3) reducing (continued....)

in opposing spectrum divestiture as a condition to the merger.[494] For the reasons set forth below, we agree with Applicants that the public interest would not be served by requiring the merged entity to divest completely a portion of SDARS spectrum.

152. Applicants each use 12.5 MHz to deliver content to receivers, and transmit data streams by three separate data paths: two time-diverse satellite paths and a terrestrial repeater path.[495] Although these data streams are redundant, the redundancy of the signals, along with onboard digital signal processing, ensures that the listener experiences minimal outages.[496] Any divestiture of spectrum by Sirius would require an overhaul of the network and would require Sirius to replace all of its current user receivers.[497] A partial divestiture of spectrum by XM would also require an overhaul of the network, although XM could divest approximately 6.25 MHz without requiring XM to replace all customer radios.[498] The reduced bandwidth, however, would significantly reduce the number of channels and the quality of service for existing XM customers. Furthermore, in addition to the harm to existing SDARS customers from a partial divestiture, it is not clear to us that a new competitor would have sufficient spectrum to emerge as a significant competitor to the newly merged entity, nor is it clear that a new SDARS operator could overcome the regulatory and business hurdles required to offer service.

153. We also considered alternative methods that would permit a new SDARS operator in the spectrum.[499] We have determined, however, that each method has drawbacks that would make it

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available spectrum would limit the combined company's ability to realize merger-specific efficiencies, including the potential for expanded programming choices and additional services).

[494] NextWave June 18, 2008 Ex Parte at 1 (arguing that spectrum divestiture by the merged entity could negatively impact the ability of terrestrial wireless services in adjacent spectrum bands to coexist with licensees in the SDARS band).

[495] Sirius Nov. 16, 2007 Response to Information and Document Request, Narrative at 37.

[496] Unlike a broadcast radio band, where re-licensing of any single station will not affect other stations, the individual channels in an SDARS system exist only at the studio and in the user's receiver. Between these two locations, the data from all of the channels are combined into a single data stream with the number of bits allocated to any one channel varying on an instant-by-instant basis.

[497] The Sirius network transmits the data in three data streams of approximately four MHz each. Sirius Nov. 16, 2007 Response to Information and Document Request, Narrative at 37. We conclude that Sirius could not eliminate any one of the three 4 MHz data paths without significantly increasing the likelihood of dropouts. Similarly, Sirius could not reduce the size of its individual 4 MHz data path and offer fewer channels to its customers, because the user receivers and many other network components – including the receivers, terrestrial repeaters and space stations themselves – only recognize a data stream of approximately 4 MHz and would not recognize a stream of a different size.

[498] Unlike Sirius, XM divides each of its three data streams into two duplicative streams, for a total of six segments. *See* XM Nov. 16, 2007 Response to Information and Document Request, Narrative at 29. Thus, XM transmits the data for all its programming in six 1.8 MHz data streams: four time-diverse satellite bands (S1A, S2A, S2B and S1B) and two terrestrial repeater bands (TA and TB). *See* XM Nov. 16. 2007 Response to Information and Document Request, Narrative at 17, 29. XM could divest approximately 6.25 MHz by divesting either the "A" bands (S1A, S2A, TA) or the "B" bands (S1B, S2B and TB) without requiring XM to replace existing subscriber radios.

[499] WCS Coalition questions whether Sirius is authorized to provide its Backseat TV service and urges the Commission to prohibit Sirius from launching the service until the Commission has implemented WCS rules. Letter from Paul J. Sinderbrand, Wilkinson Barker Knauer LLP, Counsel for the WCS Coalition, to Helen Domenici, Chief, International Bureau, FCC and Fred Campbell, Chief, Wireless Telecommunications Bureau, FCC (Apr. 17, 2007) at 1-2. *See also* Letter from David R. Siddall, Sonnenschein Nath & Rosenthal LLP, Counsel for Georgetown, to Kris Monteith, Chief, Enforcement Bureau, FCC (July 10, 2008). The Enforcement Bureau is (continued....)

infeasible for a new SDARS operator to offer service. Requiring the merged entity to transfer the space and ground infrastructure of either Sirius or XM to a new SDARS operator might allow the new operator to begin service without the delays of building a new satellite network from scratch.[500] However, we believe that the cost of purchasing these assets would be prohibitively expensive for a new operator to enter the market in the near term.[501] For these reasons, we reject Primosphere's request for a condition to require the merged entity to enter into an agreement whereby Primosphere could deliver programming by means of the existing SDARS satellite systems.[502]

2. No Local Programming or Local Advertising

154. Terrestrial broadcasters contend that the merger will harm their ability to provide free over-the-air local programming. For example, NAB contends that Applicants will increase the amount of advertisements via their services after the merger is consummated,[503] and that the loss of even a small amount of advertising revenue to the merged entity would be "devastating" to local radio stations and would force them to reduce local programming.[504] Clear Channel requests that the Commission prohibit the merged entity from carrying local programming and local advertising.[505]

155. As stated above, we find that record before us now does not show that the merger will necessarily harm the ability of local broadcasters to air locally oriented programming.[506] In addition, we note that Applicants operate terrestrial repeaters pursuant to grants of special temporary authority that restrict the use of repeaters to the simultaneous retransmission of the complete programming, and only that programming, transmitted by the satellite directly to SDARS receivers.[507] Thus, SDARS licensees are already prohibited, independent of the merger, from using terrestrial repeaters to distribute localized content that is distinct from that provided to subscribers nationwide via satellite. We note that the

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reviewing the issues raised by Georgetown regarding the Sirius Backseat TV service and will address those issues separately.

[500] Primosphere Petition at 3-4 (proposing that the Commission require the merged entity to enter into an agreement with Primosphere to allow it to use a portion of the SDARS spectrum to begin delivering programming to consumers).

[501] *See, e.g.*, C3SR Petition at 12-13 (asserting that for a new entrant to establish itself in the market, it would take about five years and potentially billions of dollars).

[502] Primosphere Petition at 3-4; Primosphere Reply at 3.

[503] NAB Petition at 32-33 (arguing that the lower-priced a la carte and tiered service offerings proffered by the merged entity would likely be advertiser-supported).

[504] NAB Response to Comments at 21-22. *See also* McGannon at 6-7 (observing that broadcasters primarily rely on local advertising dollars); Letter from Lawrence R. Sidman, Counsel for Clear Channel, to Marlene H. Dortch, Secretary, FCC (Mar. 5, 2007), Att. at 1-2 (arguing that the spectrum advantage of SDARS – 300 channels vs. a limit of 8 channels for terrestrial station owners in the largest markets – would allow a merged company to lock up quality programming and to siphon off national and local advertising revenue).

[505] Clear Channel June 20, 2008 Ex Parte at 2; *see also* Sen. Bond June 4, 2008 Ex Parte at 2 (stating "it is vital that the new satellite radio company reaffirm its position as a national service only"); *see also* Sens. Snowe and McCaskill May 21, 2008 Ex Parte at 1.

[506] *See supra*, Section IV.C.2.

[507] *See, e.g., Sirius STA Order*, 16 FCC Rcd at 16780 ¶ 18. In addition, in the pending rulemaking proceeding to develop rules for the operation of SDARS terrestrial, repeaters the Commission has tentatively concluded that the origination of local programming from SDARS repeaters would be inconsistent with the allocation of the spectrum. *See 2007 SDARS Second Further Notice*, 22 FCC Rcd at 22141 ¶ 55 (citing *1997 SDARS Service Rules Order*, 12 FCC Rcd at 5812 ¶ 142).

prohibition on local content remains in effect and prohibits Applicants from distributing local programming as well as local advertising.[508] In light of the importance of local sports programming to terrestrial radio stations, we prohibit the merged entity from entering into any agreements that would preclude any terrestrial radio station from broadcasting live local sporting events. Entities concerned about Applicants' compliance with these mandates may file complaints with the Commission, which will act promptly to enforce the prohibitions.

VII. COMPLIANCE WITH COMMUNICATIONS ACT AND COMMISSION'S RULES AND POLICIES

A. 1997 SDARS Report & Order

156. In 1997, the Commission established the SDARS service and determined that there would be two initial SDARS licenses, sold at auction to different parties. The *1997 SDARS Service Rules Order* contained the following paragraph:

> *Transfer.* We note that DARS licensees, like other satellite licensees, will be subject to rule 25.118, which prohibits transfers or assignments of licenses except upon application to the Commission and upon a finding by the Commission that the public interest would be served thereby. Even after DARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellite DARS license. This prohibition on transfer of control will help assure sufficient continuing competition in the provision of satellite DARS service.[509]

157. The 2007 SDARS NPRM sought comment on whether this language in the *1997 SDARS Service Rules Order* constitutes a binding Commission rule and, if so, whether the Commission should waive, modify, or repeal the prohibition in the event it determines that the proposed merger would serve the public interest.[510] Commenters expressed conflicting views on these issues. Applicants maintain that this language is a policy statement under the Administrative Procedure Act ("APA"), rather than a binding Commission rule because it was not codified in the Code of Federal Regulations.[511] Specifically, they claim that it is "merely a policy statement reflecting the Commission's view, based on the evidence available in 1997, that two satellite radio licensees were needed to have enough competition in the audio entertainment market."[512] Other parties argue that the prohibition is a binding rule. They contend that the Commission intended to impose a binding legal prohibition on merger by the satellite DARS licensees, that it was adopted in a notice and comment rulemaking proceeding, and that it was published in the Federal Register.[513]

158. We find that the prohibition is a binding substantive rule, not a mere statement of policy. The prohibition is expressed in clear, specific, and unequivocal language; was characterized by the

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[508] *See* Applicants' July 25, 2008 Ex Parte at 2.

[509] *1997 SDARS Service Rules Order*, 12 FCC Rcd at 5823 ¶ 170 (this language is found under the subheading "Safeguards").

[510] *2007 SDARS NPRM*, 22 FCC Rcd at 12018 ¶ 1; *see also* June 8, 2007 Public Notice, *infra* n.1.

[511] Application at 50.

[512] *Id.* To the extent that the Commission considers the above-quoted language in the *1997 SDARS Service Rules Order* to be a binding rule prohibiting the proposed transfer of control, Applicants requested that the Commission waive, modify, or otherwise alter it to the extent necessary to permit the proposed merger. *Id.* at 51-52.

[513] NAB Comments at 3-4; NPR Comments at 4-9; Clear Channel Aug. 13, 2007 Comments at 3-5.

Commission in the *1997 SDARS Service Rules Order* as a "prohibition"; and leaves no room for the exercise of agency discretion (unless it is waived, modified or repealed). Recent decisions distill the D.C. Circuit's attempts to distinguish between rules and policy statements into two related lines of analysis:

> One line of analysis focuses on the effects of the agency action. *See Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (stating that the court should consider whether the agency action (1) "impose[s] any rights and obligations," or (2) "genuinely leaves the agency and its decisionmakers free to exercise discretion") (internal quotations omitted); *see also, e.g., Troy Corp. v. Browner*, 120 F.3d 277, 287 (D.C. Cir. 1997); *Am. Bus. Ass'n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980). The second line of analysis focuses on the agency's expressed intentions. *See Molycorp., Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999) (stating that the court should consider " (1) the Agency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency"); *see also, e.g., Am. Portland Cement Alliance v. EPA*, 101 F.3d 772, 776 (D.C. Cir. 1996).[514]

The ultimate focus of both analytic approaches is "whether the agency action binds private parties or the agency itself with the 'force of law.'"[515]

159. The plain language of the relevant paragraph in the *1997 Report and Order* binds both private parties and the Commission itself with the force of law. First, it removes the Commission's discretion to approve one satellite DARS licensee's acquisition of control of the other, absent repeal of the prohibition, by stating in advance that such an acquisition will not be permitted.[516] Second, the use of the words "will not be permitted" and "prohibition" strongly suggests that the Commission intended this to be a binding rule.[517] Indeed, it is difficult to imagine words that would have a more mandatory connotation than those used here.

160. Applicants assert that "the real dividing point between binding regulations and general statements of policy is publication in the Code of Federal Regulations, which the [APA] authorizes to contain only documents which 'having general applicability *and legal effect*,' and which the governing regulations provide shall contain only 'each Federal *regulation* of general applicability and current or future effect.'"[518] The D.C. Circuit, however, has refused to place such weight on the publication factor.

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[514] *CropLife America v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003) ("*CropLife*"); *see also Wilderness Soc. v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006) ("*Wilderness Soc.*"); *General Elec. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002) ("*General Elec.*").

[515] *CropLife*, 329 F.3d at 883 (quoting *General Elec.*, 290 F.3d at 382).

[516] *Cf. Wilderness Soc.*, 434 F.3d at 595 (internal agency policy did not read as a set of rules "as a whole" because it "lacks precision in its directives, and there is no indication of how the enunciated policies are to be prioritized"); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986) ("*Brock*") (language in published enforcement policy did not establish a binding rule where it was "replete with indications that the Secretary retained his discretion to cite production-operators as he saw fit").

[517] *See Community Nutrition Inst.*, 818 F.2d at 947 ("mandatory, definitive" language included in an FDA action level, which informs food procedures for the permissible levels of contaminants, "clearly reflects an interpretation of action levels as presently binding norms"); *Cf. Brock*, 796 F.2d at 538 ("We have ... given decisive weight to the agency's choice between the words 'may' and 'will.'").

[518] Applicants' Comments to NPRM at 3-4, n.11 (quoting *Wilderness Soc.*, 434 F.3d at 596).

As it has said, "[i]n none of the cases citing the distinction ... has the court taken publication in the Code of Federal Regulations, or its absence, as anything more than a snippet of evidence of agency intent."[519] In contrast, the D.C. Circuit has given decisive weight to mandatory language.[520] The publication factor is of even less significance here than in other cases because the prohibition at issue here applies to only two entities and those two entities were very familiar with the *1997 SDARS Service Rules Order*, making it less necessary to codify the prohibition.

161. For the foregoing reasons, we conclude that the prohibition on merger in the *1997 Service Rules Order* is a binding rule. Therefore, we must address the question raised in the Notice whether we should waive, modify, or repeal the prohibition in order to permit the proposed merger.[521]

162. First, we disagree with Applicants that it is appropriate to waive the prohibition in order to permit the merger.[522] As a number of commenters note,[523] it is well established that "[t]he function of a waiver is not to change the general standard, a matter for which the opportunity for general comment is a prerequisite under the Administrative Procedure Act, but to justify an ad hoc exception to that standard in a particular case."[524] Here, the prohibition against merger applies only to the two Applicants; it has no application beyond this proceeding. Thus, grant of a waiver clearly would eviscerate the rule and for that reason is not appropriate here.

163. We can, of course, repeal a rule if we decide that doing so would serve the public interest and we comply with rulemaking procedures.[525] In this proceeding, we repeal the prohibition on merger set forth in paragraph 170 of the *1997 SDARS Service Rules Order*. We find above that approval of the merger, subject to Applicants' voluntary commitments and the other conditions, will benefit consumers

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[519] *Health Ins. Ass'n of America, Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994). *See also Community Nutrition Inst.*, 818 F.2d at 947 n.8 (FDA action levels for contaminants were binding rules despite non-publication in the Code of Federal Regulations). Even in *Wilderness Soc.*, the case quoted at length by Applicants, the court focused on publication in the C.F.R. and the Federal Register as a means of discerning agency intent, not for purposes of establishing a bright-line distinction between binding rules and policy statements. *See, e.g., Wilderness Soc.*, 434 F.3d at 596 ("*Failure* to publish in the Federal Register is indication that the statement in question was *not* meant to be a regulation since the [APA] requires regulations to be so published. The converse, however, is not true: *Publication* in the Federal Register does *not* suggest that the matter published *was* meant to be a regulation.") (emphasis in the original).

[520] *See Brock*, 796 F.2d at 538; *see also General Elec.*, 290 F.3d at 383 ("the mandatory language of a document alone can be sufficient to render it binding").

[521] *See 2007 SDARS NPRM*, 22 FCC Rcd at 12019-21 ¶ 3.

[522] Application at 51.

[523] *See, e.g.*, NAB Comments at 10-13; NPR Comments at 10.

[524] *Authority to Construct and Operate an Automated Maritime Telecom. System*, 3 FCC Rcd 4690, 4692 (1988). *See also Am. Trucking Ass'n, Inc. v. FHA*, 51 F.3d 405, 414 (4th Cir. 1995) ("Commonly understood, administrative 'waivers' are a mechanism 'to seek out the "public interest" *in particular, individualized* cases.' They are not a device for repealing a general statutory directive." (quoting *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (emphasis added)); *WAIT Radio*, 418 F.2d at 1159 ("The court's insistence on the agency's observance of its obligation to give meaningful consideration to waiver applications emphatically does not contemplate that an agency must or should tolerate evisceration of a rule by waivers."). *Cf. WITN-TV v. FCC*, 849 F.2d 1521, 1525 (D.C. Cir. 1988) ("The waiver concept does not serve in this context, for petitioner's plea ... is in essence one for agency reconsideration of existing policy.").

[525] 5 U.S.C. § 553. *See, e.g., Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14857-60 ¶¶ 4-11 (2005) (eliminating rules after notice and comment rulemaking).

by making available to them a wider array of programming choices at various price points and affording them greater choice and control over the programming to which they subscribe, and that those benefits exceed the harms identified above. For the same reasons, we conclude that repeal of the rule prohibiting the merger will, on balance, serve the public interest.[526]

B. Enforcement Matters

164. NAB and other commenters argue that Applicants each have a "history of ignoring" the Commission's rules and the Commission therefore cannot reasonably rely on a merged XM-Sirius entity to comply with any regulatory conditions that might be imposed.[527] In particular, NAB makes two specific allegations concerning Applicants' marketing of FM modulators and use of terrestrial repeaters, which are discussed below.

165. First, NAB asserts that Applicants violated the Part 15 equipment rules intended to ensure that the modulators[528] in their satellite radio receivers do not interfere with broadcast radio stations.[529] Consequently, NAB states, listeners to noncommercial[530] radio stations may not only receive interference, but may also receive "signal bleed" that results in their hearing on their vehicle radios unwanted satellite radio programming.[531] NAB adds that "[i]t is a matter of record that these violations were apparently intentional on Sirius's part."[532]

166. Second, NAB alleges that XM violated the Commission's technical rules in constructing and operating its network of terrestrial repeaters.[533] XM's repeater violations, NAB states, include operation of 19 repeaters without any FCC authorization; construction and operation of at least 125 repeaters at unauthorized locations; operation of at least 221 repeaters at power levels in excess of its authorization; and installation of more than 80 of its repeaters at heights that exceeded authorized

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[526] We reject the arguments opposing repeal of the rule prohibition in Sections IV, V, and VI.B, *supra*, for the same reasons that we reject commenters' arguments opposing the merger. *See, e.g.*, NAB Comments at 13-23; NAB Reply at 3-8; NPR Comments at 11-20.

[527] NAB Petition at 50-51; *see also* NAB Response to Comments at 10; NABOB Petition at 13-14; USE Petition at 13-14; Entravision Comments at 19-20; Letter from U.S. Rep. Nancy Boyda to Kevin J. Martin, Chairman, FCC (Apr. 5, 2007) at 1; Letter from U.S. Reps. F. James Sensenbrenner, Jr. and Gene Green, to Kevin J. Martin, Chairman, FCC (June 18, 2007) at 2. In addition, Blue Sky questions whether Applicants meet the "citizenship, character ... and other qualifications" test set forth in Section 308(b) of the Act, 47 U.S.C. § 308 ("All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station."). Blue Sky Comments at 6-7; Blue Sky Reply at 1-3.

[528] Many portable satellite radio receivers have built-in FM modulators or transmitters, which are designed to permit users to listen to satellite radio over a car radio on unused FM frequencies. Such modulators must comply with the Commission's Part 15 technical requirements and receive an equipment certification prior to marketing. *See* 47 C.F.R. §§ 15.3(o), 15.201, 15.239.

[529] NAB Petition at 55.

[530] Noncommercial radio stations are more likely to receive interference from FM modulators because FM modulators are typically set to operate on vacant channels near the lower end of the FM band, where noncommercial stations frequently operate.

[531] NAB Petition at 55.

[532] *Id.* (citing Sirius's *SEC Form 10-Q for the Quarterly Period Ended September 30, 2006* at 35).

[533] *Id.* at 56.