

levels.⁵³⁴ In addition, NAB asserts that XM continued the unauthorized operations even after the violations came to its attention.⁵³⁵ NAB states that Sirius has engaged in analogous, although less extensive, repeater violations.⁵³⁶

167. In response, Applicants assert that they take their obligations and responsibilities as FCC licensees seriously.⁵³⁷ According to Applicants, the allegations raised by NAB and others do not bear on their qualifications as Commission licensees or cast doubt on their willingness to comply with merger-specific conditions.⁵³⁸ Regarding the FM modulators, Applicants state that they have cooperated fully with the Enforcement Bureau in its investigations into whether some of their receivers were non-compliant with Commission regulations and that all newly produced receivers are fully consistent with applicable regulations.⁵³⁹ In addition, Applicants indicate that both companies voluntarily disclosed their terrestrial repeater variances to the Commission in October 2006 after taking unilateral actions to bring many of those variances into compliance, that no party has experienced interference as a result of the repeater variances, and that both companies have been working diligently with Commission staff to resolve issues concerning their repeaters.⁵⁴⁰

168. Applicants argue that the Commission has repeatedly rejected the notion that outstanding allegations of rule violations that can be addressed through the normal enforcement procedures have any bearing on a licensee's qualifications.⁵⁴¹ Rather, Applicants state, the Commission has made clear that "typically it will *not* consider in merger proceedings matters that are the subject of other proceedings before the Commission."⁵⁴² Applicants assert that NAB's allegations relate entirely to issues that have been brought to the Commission's attention and the agency is addressing these matters through its traditional enforcement procedures.⁵⁴³ Therefore, Applicants conclude that the issues raised by NAB have no relevance to the Commission's review of the merger.⁵⁴⁴

169. We agree that the issues concerning Applicants' apparent misconduct in connection with the manufacture, importation, marketing and distribution of modulators for their services and the construction and operation of various of their terrestrial repeaters are troubling. We have, however, fully investigated these matters and, after extensive discussions with the parties and careful consideration of the record, concluded that settlement of these issues by consent decrees was in the public interest. As we noted in the Orders adopting the Consent Decrees:

⁵³⁴ *Id.* at 56-57.

⁵³⁵ *Id.* at 57.

⁵³⁶ *Id.* at 56 (citing Sirius Supplemental Information, IBFS File Nos. SAT-STA-20061013-00121, 20061013-00122 (April 26, 2007), and Request of Sirius for Special Temporary Authorization Regarding Digital Audio Radio Service Terrestrial Repeaters, IBFS File Nos. SAT-STA-20061013-00122 (Nov. 17, 2006)). Additionally, as stated above, NAB argues that both Applicants have violated the SDARS receiver interoperability rule. NAB Petition at 52.

⁵³⁷ Joint Opposition at 94.

⁵³⁸ *Id.*

⁵³⁹ *Id.* at 96.

⁵⁴⁰ *Id.* at 97-98.

⁵⁴¹ *Id.* at 98.

⁵⁴² *Id.* (quoting *SBC-Ameritech Order*, 14 FCC Rcd at 14950 ¶ 50 (emphasis added)).

⁵⁴³ *Id.* at 99.

⁵⁴⁴ *Id.*

We do not come to this conclusion easily. The apparently intentional nature of some of the violations ... and the apparent involvement of certain XM [and Sirius] personnel in these violations are very troubling. Indeed, the ability and willingness to conform one's conduct to the requirements of the Commission's rules are central to the qualifications of any Commission licensee. We must balance our concern, however, against the public's interest in the continued availability and viability of [the companies'] satellite radio service and the impact on the public and other licensees that [the companies'] violations precipitated. These considerations, taken together with the rigorous oversight and reporting obligations and substantial voluntary contribution[s] prescribed in [the] Order[s] and the Consent Decree[s], persuade us that settlement of these matters would best serve the public interest.⁵⁴⁵

170. The Consent Decrees terminated the agency's investigations into Applicants' compliance with the Commission's regulations governing FM modulators and the terms of their authorizations for their terrestrial repeaters. The Consent Decrees also provide that Applicants will each make a substantial voluntary contribution to the U.S. Treasury, implement certain remedial measures with respect to radio receivers with built-in FM modulators in the hands of subscribers, and implement comprehensive compliance plans to ensure the companies' future compliance with the Commission's regulations. In addition, XM agrees, within a period of 60 days from the effective date of the Consent Decree, to shut down 50 variant terrestrial repeaters and to bring another 50 repeaters into compliance with the specifications that they were originally authorized or cease operating them. Sirius can return to operation two of its repeaters, which varied slightly from what they were originally authorized to do, and may return to operation another nine repeaters that varied significantly from their original authorization, provided they are first brought into compliance with what they were originally authorized to do.

171. The compliance plans in the Consent Decrees are extensive and involve the appointment of a dedicated FCC Compliance Officer, with explicit equipment design and certification authority and responsibility, the development and implementation of recurring and enduring compliance training programs, and the development and use of detailed guidelines governing equipment design and certification and the implementation of any changes to the Applicants' terrestrial repeater networks. Applicants also are subject to continuing reporting obligations that will serve to ensure that the Commission is informed on an ongoing basis of all developments relevant to the companies' compliance with the Consent Decrees. Except with respect to their training obligations, which continue indefinitely, the Consent Decrees will continue in effect for a period of five years.

172. In light of these and other provisions in the Consent Decrees and our consideration of the record as a whole, we concluded that our investigations raised no substantial and material questions of fact as to whether Applicants possess the basic qualifications, including those related to character, to hold or obtain any Commission license or authorization. In this connection, we note that NAB does not assert that Applicants lack the requisite qualifications to hold or obtain FCC licenses or authorizations. Moreover, while one commenter, Blue Sky Services, questions whether Applicants meet the "citizenship, character ... and other qualifications" test set forth in Section 308(b) of the Act,⁵⁴⁶ our conclusions in the settlement proceedings, as detailed above, directly address and adequately dispose of this contention.

173. Finally, to the extent that NAB and various commenters argue that the Commission cannot rely upon a merged XM-Sirius entity to comply with any regulatory conditions given Applicants'

⁵⁴⁵ *Sirius Consent Decree Order* at ¶ 3; *XM Consent Decree Order* at ¶ 3.

⁵⁴⁶ Blue Sky Comments at 6-7; Blue Sky Reply Comments at 1-3. See 47 U.S.C. § 308(b) ("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.").

past history of non-compliance with Commission rules, we disagree.⁵⁴⁷ We are conditioning our approval of the merger transaction on the merged entity's compliance with Applicants' voluntary commitments. We will rigorously monitor Applicants' compliance with the conditions of the Consent Decrees and the conditions specified herein and believe that the mechanisms put in place in those Decrees will fully serve to ensure compliance on an ongoing basis. Moreover, we will not hesitate to take prompt and effective enforcement action if these conditions are not satisfied.⁵⁴⁸

174. *EEO Obligations.* In the 1997 *SDARS Service Rules Order* the Commission determined that "satellite DARS licensees must comply with the Commission's equal employment opportunity requirements."⁵⁴⁹ We reiterate that decision here. When SDARS services were initially licensed, the Commission had a pending rulemaking proposing revision to its EEO rules; the Commission decided that licensees in the SDARS services would be required to comply with the then-current rule and any changes adopted when the rulemaking is completed.⁵⁵⁰ Thus, we clarify here that the merged entity must comply with the Commission's EEO broadcast rules and policies, including periodic submissions to the Commission consistent with the reporting schedule established for broadcast licensees.⁵⁵¹

⁵⁴⁷ NAB argues that the violations are "directly relevant to the Commission's review of the proposed merger, separate and apart from basic character qualifications issues," because they cast doubt on the reliability of Applicants' voluntary commitments. NAB Petition to Defer Action in MB Docket No. 07-57 (filed Oct. 9, 2007) at 3. See NAB Petition at 55-58. NAB points to the Commission's recognition in *EchoStar* that the merger applicant's history of past conduct should be "taken into account in assessing the likelihood that potential beneficial conduct will occur in the absence of private economic incentives." *EchoStar Communications Corp.*, 17 FCC Rcd at 20579 ¶ 35. In that case, however, "one of the prime subjects of the alleged prior misconduct," *EchoStar's* failure to adhere to its must-carry obligations, "[a]t the heart of the realization of the proffered public interest benefits claimed to flow from the merger - provision of additional local-into-local service pursuant to the must-carry rules." *Id.* Here, in contrast, none of Applicants' technical rule violations pertain specifically to their voluntary commitments. One of the commitments does concern the receiver interoperability mandate, which we conclude above was violated by Applicants. For the reasons discussed above, however, we do not believe that their interpretation of the mandate as a design requirement was unreasonable in light of all of the circumstances. Therefore, we are not persuaded that their violation of the mandate should be taken into account in considering the likelihood of fulfillment of their commitment to make an interoperable receiver commercially available within one year of the consummation of the merger.

⁵⁴⁸ See *SBC-Ameritech Order*, 14 FCC Rcd 14712, 14749-50 ¶ 571 (1999) (relying on SBC's voluntary commitments aimed at opening its local markets to competition in concluding that the public interest benefits of the proposed merger would outweigh the public interest harms, notwithstanding commenters' arguments that SBC had "history of vigorously resisting competition in its existing monopoly markets.").

⁵⁴⁹ 1997 *SDARS Service Order*, 12 FCC Rcd at 5791 § 91 ("The rationale behind these requirements is a belief that a licensee can better fulfill the needs of the community, whether local or national, if it makes an effort to hire a diverse staff, including minorities and women.").

⁵⁵⁰ *Streamlining Broadcast EEO Rules and Policies*, Order and Notice of Proposed Rulemaking, 11 FCC Rcd 5154 (1996); see also *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), *pet. for reh'g denied*, 154 F.3d 487, *pet. for reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998); *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, Report & Order, 15 FCC Rcd 2329 (2000); *MD/DC/DE Broadcasters' Association v. FCC*, 236 F.3d 13, *rehearing denied*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied* 122 S. Ct. 920 (2002); *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Second Report and Order and Third Notice of Proposed Rulemaking, 17 FCC Rcd 24018 (2002) ("2002 Broadcast EEO Order").

⁵⁵¹ 2002 *Broadcast EEO Order*, 17 FCC Rcd at 24062-69 ¶¶ 139-64. SDARS licensees therefore must refrain from discrimination in employment practices and engage in the same recruitment, outreach, public file, website posting, record-keeping, reporting, and self-assessment obligations required of broadcast licensees, consistent with Commission Rule 73.2080, 47 C.F.R. § 73.2080, the policies set forth in the 2002 *Broadcast EEO Order*, and any (continued....)

VIII. PROCEDURAL MATTERS

A. Petitions and Motions Addressing Various Other Issues

175. Various entities request the Commission to delay its decision on Applicants' proposed merger or to designate the Application for hearing. NAB filed a Petition to Defer Action urging the Commission to suspend its merger review until the Enforcement Bureau releases documents responsive to a Freedom of Information Act request filed by NAB.⁵⁵² NAB asserts that the documents, which pertain to Applicants' compliance with Commission rules governing the operation of FM modulators and terrestrial repeaters, are central in determining whether Applicants can be relied upon to adhere to promises made in their Application.⁵⁵³ In addition, USE asks the Commission to suspend its review to allow adequate time for the Commission to: (1) address adverse effects of vertical integration; (2) disclose its findings on compliance matters, including Applicants' failure to provide interoperable radios; (3) ensure that its ex parte rules are being followed; and (4) condition the merger should it be approved.⁵⁵⁴ USE also submitted filings arguing that the Commission should designate the Application for hearing because of material issues of fact regarding whether the public interest is served by the vertical integration that would occur with a merger and whether the information furnished in the Application is accurate and complete.⁵⁵⁵ The Leadership Conference on Civil Rights argues that the Commission should delay its final decision until it has had more time to assess the potential impact of a merger on media ownership diversity.⁵⁵⁶ We believe we have adequately addressed the issues relevant to this merger review and find that no further delay is warranted.⁵⁵⁷

176. Primosphere Limited Partnership ("Primosphere") has a pending Application for Review seeking authority to operate two satellites in the SDARS spectrum if the Commission approves this

(Continued from previous page)

other Commission EEO policy as explained in Public Notices, case decisions, or other items. This includes creating annual EEO public file reports and posting them on the company website and filing the same EEO reporting forms with the Commission used by terrestrial broadcasters (e.g., FCC Form 396 and 397) on the same schedule, notwithstanding the differences in license terms for broadcast stations and satellite facilities. In addition, we clarify that SDARS licensees also will be subject to the same random audits as broadcast licensees and all the same investigation and enforcement provisions including, but not limited to, audits for cause, reporting conditions, and forfeitures. *2002 Broadcast EEO Order*, 17 FCC Rcd at 24066-67 ¶¶ 153-58.

⁵⁵² NAB Petition to Defer Action at 1.

⁵⁵³ *Id.* at 1-4.

⁵⁵⁴ USE Petition to Defer Action at 3-16.

⁵⁵⁵ USE Petition to Designate Application for Hearing at 1-3; *see also* USE Motion to Designate and for Summary Decision at 1-3 (arguing that Applicants effectively conceded that material factual issues are in dispute by not opposing USE's designation petition).

⁵⁵⁶ Letter from Wade Henderson, President and CEO, Nancy Zirkin, Vice President/Dir. of Public Policy, and Mark Lloyd, Chairman, Media/Telecom. Task Force, Leadership Conference on Civil Rights, to Kevin J. Martin, Chairman, FCC (July 27, 2007) at 1.

⁵⁵⁷ NAB also requests that we make public certain documents that Applicants have submitted as confidential pursuant to our Protective Orders. Letter from David H. Solomon, J. Wade Lindsay, Wilkinson Barker Knauer, LLP, Counsel for NAB, to Marlene H. Dortch, Secretary, FCC (June 3, 2008). Consumers Union and Consumer Federation of America make a similar request. Letter from Chris Murray, Consumers Union, Dr. Mark Cooper, CFA, to Marlene H. Dortch, Secretary, FCC (July 9, 2008). We will consider their requests for public disclosure separately pursuant to the terms of the Protective Orders and our regulations, 47 C.F.R. §§ 0.459, 0.461. We note that NAB already has reviewed these documents, as has the Commission, and that other parties have done so or had the opportunity to do so pursuant to our Protective Orders.

merger. Primosphere filed a motion to consolidate its proceeding with the XM-Sirius review.⁵⁵⁸ We do not believe these two proceedings need to be linked, and we therefore deny Primosphere's motion. Primosphere filed a petition simultaneously with its motion, in which it attempts to preserve its request for SDARS spectrum in the event the Commission dismisses its Application for Review. We need review Primosphere's issues in only one proceeding. We therefore deny Primosphere's petition without prejudice to its Application for Review.

B. Final Regulatory Flexibility Certification

177. Pursuant to the Regulatory Flexibility Act,⁵⁵⁹ the Commission certifies that the outcome of this rulemaking will not have a significant economic impact on a substantial number of small entities. This rulemaking affects SDARS providers. SDARS provides nationally distributed subscription radio service. Currently, only two operators hold licenses to provide SDARS service, XM and Sirius, which requires a great investment of capital for operation. Because SDARS service requires significant capital, we believe it is unlikely that a small entity as defined by the Small Business Administration would have the financial wherewithal to become an SDARS licensee.

C. Final Paperwork Reduction Act Analysis

178. This document does not contain new or modified information collections subject to the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

D. Additional Information

179. For additional information on this proceeding, please contact Marcia Glauber or Rebekah Goodheart, Industry Analysis Division, Media Bureau, at (202) 418-2330.

IX. ORDERING CLAUSES

180. Accordingly, having reviewed the applications and the record in this matter, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 303(r), and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), 310(d), that this *Memorandum Opinion and Order and Report and Order* and the rule modifications included herein ARE ADOPTED, and that the Consolidated Application for Authority to Transfer Control of various Commission licenses and authorizations held by Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc., and the associated supplemental application,⁵⁶⁰ ARE GRANTED subject to the condition that Applicants fulfill the voluntary commitments as set forth in Appendix B, which is incorporated by reference into this *Memorandum Opinion and Order and Report and Order*, as well as the additional conditions set forth herein.

181. IT IS FURTHER ORDERED that the above grants shall include authority for XM and Sirius consistent with the terms of this *Memorandum Opinion and Order and Report and Order* to acquire control of any license or authorization issued for any station during the Commission's consideration of the Application or the period required for consummation of the transaction.

⁵⁵⁸ Primosphere Motion to Consolidate at 1-2; see also Primosphere Petition at 3 (addressing the same issues as its Application for Review).

⁵⁵⁹ See 5 U.S.C. § 605(b).

⁵⁶⁰ See supra n.1.

182. IT IS FURTHER ORDERED that Applicants are required to comply with the Commission's broadcast EEO rules and policies set forth in 47 C.F.R. § 73.2080.

183. IT IS FURTHER ORDERED that pursuant to sections 4(i), 4(j), and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 310(d), that the Petitions to Deny filed by American Women in Radio and Television; Common Cause, Consumer Federation of America, Consumers Union, and Free Press; Consumer Coalition for Competition in Satellite Radio; Forty-Six Broadcasting Organizations; Mt. Wilson FM Broadcasters, Inc.; The National Association of Black Owned Broadcasters, Inc.; National Association of Broadcasters; National Public Radio, Inc.; and The Telecommunications Advocacy Project ARE DENIED except to the extent otherwise indicated in this *Memorandum Opinion and Order and Report and Order*.

184. IT IS FURTHER ORDERED that pursuant to Sections 4(i), 4(j), and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 310(d), that the Petition for Declaratory Ruling filed by Michael Hartlieb IS DENIED.

185. IT IS FURTHER ORDERED that pursuant to Sections 4(i), 4(j), and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 310(d), that the Petitions to Defer Action filed by National Association of Broadcasters and U.S. Electronics, Inc. ARE DENIED.

186. IT IS FURTHER ORDERED that pursuant to Sections 4(i), 4(j), and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 310(d), that the Motion to Consolidate and the Petition filed by Primosphere Limited Partnership ARE DENIED.

187. IT IS FURTHER ORDERED that pursuant to Sections 4(i), 4(j), and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 310(d), that the Petition to Designate Application for Hearing and the Motion to Designate and for Summary Decision filed by U.S. Electronics, Inc. ARE DENIED.

188. IT IS FURTHER ORDERED that this *Memorandum Opinion and Order and Report and Order*, including the repeal of the rule prohibiting one SDARS licensee from acquiring control of the other SDARS licensee, SHALL BE EFFECTIVE upon adoption.⁵⁶¹

⁵⁶¹ See 47 C.F.R. § 1.4(b)(3). Repeal of the merger prohibition in the Commission's 1997 *SDARS Service Rules Order* is a rule of particular applicability that is not subject to the Administrative Procedure Act's publication requirement, 5 U.S.C. § 552(a)(1)(D); see *supra*, ¶ 162 ("the prohibition against merger applies only to the two Applicants; it has no application beyond this proceeding."), and may be effective on adoption under the Commission's rules. 47 C.F.R. §§ 1.4(b)(3), 1.103. Further, the prohibition's repeal is not subject to the statutory 30-day waiting period under the Administrative Procedure Act because it "relieves a restriction." 5 U.S.C. § 553(d)(1). In addition, the Congressional review procedures of Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801, *et seq.*, do not apply here because repeal of the merger prohibition is not a "rule" within the meaning of 5 U.S.C. § 804(3)(A) (excluding from the definition of the term "rule" "any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefore, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing").

189. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Memorandum Opinion and Order and Report and Order*, including the Final Regulatory Flexibility Analysis Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script that reads "Marlene H. Dortch". The signature is written in black ink and is positioned above the printed name and title.

Marlene H. Dortch
Secretary

APPENDIX A

Licenses to be Transferred

The Consolidated Application filed by XM and Sirius includes applications pertaining to the Commission authorizations and licenses listed below. They are separated below by the type of authorization or license, and, within each category, listed by licensee/registrant name, application file number, call sign, and/or other service-specific information, as appropriate. Interested parties should refer to the Consolidated Application for a more detailed listing of the authorizations or licenses. Each of Applicants' subsidiaries or affiliates may hold multiple authorizations or licenses of a particular type.

<u>File No.</u>	<u>Part 25 – Satellite Communications Licensee/Registrant</u>	<u>Call Signs</u>
Satellite Space Stations		
SAT-T/C-20070320-00054	XM Radio Inc.	S2118 S2119 S2616 S2617 ¹
SAT-T/C-20070320-00053	Satellite CD Radio, Inc.	S2105 ² S271
Satellite Earth Stations		
SES-T/C-20070320-00380	XM Radio Inc.	E000158 E000724 E040204

¹ The following applications for special temporary authority (either pending or in effect) to operate terrestrial repeaters are associated with the XM Radio Inc. space stations: SAT-STA-20010712-00063; SAT-STA-20020311-00049; SAT-STA-20020815-00153; SAT-STA-20030325-00056; SAT-STA-20030409-00076; SAT-STA-20031112-00371; SAT-STA-20031219-00373; SAT-STA-20050307-00056; SAT-STA-20050601-00113; SAT-STA-20050712-00145; SAT-STA-20061002-00114; SAT-STA-20061013-00119; SAT-STA-20061013-00120; SAT-STA-20061114-00138; SAT-STA-20061211-00147; SAT-STA-20070205-00026; SAT-STA-20070222-00036; SAT-STA-20070222-00037; SAT-STA-20070330-00059; SAT-STA-20070628-00091; SAT-STA-20070628-00093; SAT-STA-20070706-00095; SAT-STA-20070706-00096; SAT-STA-20071012-00140; SAT-STA-20071105-00148; SAT-STA-20071219-00178; SAT-STA-20080117-00026; SAT-STA-20080303-00056; SAT-STA-20080429-00094; SAT-STA-20080430-00095; SAT-STA-20080522-00111; SAT-STA-20080701-00139, and SAT-STA-20080724-00146.

² The following applications for special temporary authority (either pending or in effect) to operate terrestrial repeaters are associated with the Satellite CD Radio, Inc. space stations: SAT-STA-20010724-00064; SAT-STA-20020222-00028; SAT-STA-20020312-00029; SAT-STA-20020312-00048; SAT-STA-20020827-00162; SAT-STA-20020827-00248; SAT-STA-20030411-00075; SAT-STA-20030827-00299; SAT-STA-20031106-00370; SAT-STA-20031219-00369; SAT-STA-20040623-00119; SAT-STA-20040623-00122; SAT-STA-20050301-00053; SAT-STA-20050601-00114; SAT-STA-20060623-00067; SAT-STA-20061013-00121; SAT-STA-20061013-00122; SAT-STA-20061107-00131; SAT-STA-20061107-00132; SAT-STA-20061107-00133; SAT-STA-20061107-00135; SAT-STA-20061207-00145; SAT-STA-20061208-00146; SAT-STA-20070327-00057; SAT-STA-20070710-00097; SAT-STA-20070719-00104; SAT-STA-20070928-00135; SAT-STA-20071213-00174; SAT-STA-20071220-00179; SAT-STA-20080131-00034; SAT-STA-20080314-00071; SAT-STA-20080530-00116; SAT-STA-20080530-00117, and SAT-STA-20080728-00151.

In addition, Satellite CD Radio (Sirius) has a pending application to modify its NGSO space station constellation (Call Sign S2105) by launching and operating FM-6, which will eventually replace Sirius' two existing space stations, FM-1 and FM-2. IBFS File No. SAT-MOD-20080521-00110.

SES-T/C-20070320-00379	Sirius Satellite Radio Inc.	E040363 E060276 E060277 E990291 E060363
SES-T/C-20070625-00863	Sirius Satellite Radio Inc.	
<u>File No.</u> 0002948781	Part 90- Wireless License <u>Licensee</u> Sirius Satellite Radio Inc.	<u>Call Sign</u> WPTX369
<u>File No.</u> 0004-EX-TC-2007	Part 5- Experimental License <u>Licensee</u> XM Radio Inc.	<u>Call Sign</u> WB2XCA

APPENDIX B

Voluntary Commitments

June 13, 2008

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

**Re: Consolidated Application for Authority to Transfer Control of XM Radio Inc. and Sirius Satellite Radio Inc.,
MB Docket No. 07-57**

Dear Chairman Martin:

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

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

Programming.

1. **A La Carte Programming:** The combined company will offer the following a la carte programming options:
 - 50 Channels will be available for \$6.99 a month and will allow consumers to choose either 50 Sirius channels from approximately 100 Sirius channels or 50 XM channels from approximately 100 XM channels. Additional channels can be added for 25 cents each, with premium programming priced at additional cost. However, in no event will a customer subscribing to this a la carte option pay more than \$12.95 per month for this programming.
 - 100 Channels will be available on an a la carte basis for \$14.99 a month. This a la carte option will allow Sirius customers to choose from the Sirius programming line-up and some of the best of XM's programming, and XM customers to choose from the XM programming line-up and some of the best of Sirius' programming.

Within three months of the consummation of the pending merger, the first a la carte-capable radios will be introduced in the retail after-market and the combined company will commence offering a la carte programming.

2. **"Best of Both" Programming:** Within three months of the consummation of the pending merger, the combined company will offer customers the ability to receive the best of both Sirius and XM programming. Current XM customers will continue to receive their existing XM service, *and* be able to obtain select Sirius programming. Likewise, current Sirius customers will continue to receive their existing Sirius service, *and* be able to obtain select XM programming. This "best of" programming will be the same "best of" programming included as part of the 100 Channel A La Carte offering, and will be available at a monthly cost of \$16.99.
3. **Mostly Music or News, Sports and Talk Programming:** Within three months of the consummation of the pending merger, customers will have the option of choosing an option of "mostly music" programming. Subscribers will also be able to choose an option of news, sports and talk programming. Each of these programming options will be available on existing satellite radios at a cost of \$9.99 per month.
4. **Discounted Family-Friendly Programming:** Within three months of the consummation of the pending merger, consumers will be able to purchase a "family-friendly" version of existing Sirius or XM programming at a cost of \$11.95 a month, representing a credit of \$1.00 per month. Current Sirius customers will also be able to choose a family-friendly version of Sirius programming that includes select XM programming, and current XM customers can choose a family-friendly XM programming option that includes select Sirius programming. This programming will cost \$14.99 per month, representing a credit of \$2.00 per month from the cost of the "best of" programming.

These programming options were previously described in the companies' July 24, 2007 joint filing and are subject to individual channel changes in the ordinary course of business and, in the case of certain programming, the consent of third-party programming providers.

Public Interest and Qualified Entity Channels. The combined company will set aside 4 percent of the full-time audio channels¹ 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, for noncommercial, educational and informational programming within the meaning of 47 C.F.R. § 25.701(f)(2) of the DBS set aside rules.

In addition, within four months of the consummation of the merger, the combined company will enter into long-term leases or other agreements to provide a Qualified Entity or Entities² rights to four percent of the full-time audio channels on the Sirius platform and on the XM platform, respectively; which again currently represents six channels on the Sirius platform and six channels on the XM platform. As digital compression technology enables the company to broadcast additional full-time audio channels, the

¹ "Full-time audio channels" mean the aggregate number of channels of music, news, sports, entertainment or audio programming broadcast on a continuous basis, 24 hours a day, seven days a week, plus part-time channels aggregated on a full-time equivalent basis, on the Sirius platform or the XM platform, as the case may be.

² 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.

combined company will ensure that four 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.*

The Qualified Entity or Entities will not be required to make any lease payments for such channels. The combined company is willing not to be involved in the selection of the Qualified Entity or Entities. The combined company will have no editorial control over these channels.

Equipment. The merged company will permit any device manufacturer to develop equipment that can deliver the company's satellite radio service. Device manufacturers will also be permitted to incorporate in satellite radio receivers any other technology that would not result in harmful interference with the merged company's network, including hybrid digital (HD) radio technology, iPod ports, internet connectivity, or other technology. This principle of openness will serve to promote competition, protect consumers, and spur technological innovation. Within one year following the consummation of the merger, the combined company shall offer for license, on commercially reasonable and non-discriminatory terms, the intellectual property it owns and controls of the basic functionality of satellite radios that is necessary to independently design, develop and have manufactured satellite radios (other than chip set technology, which technology includes its encryption and conditional access keys) to any bona fide third party that wishes to design, develop, have manufactured and distribute subscriber equipment compatible with the Sirius system, the XM system, or both. Chip sets for satellite radios may be purchased by licensees from manufacturers in negotiated transactions with such manufacturers. Such technology license shall contain commercially reasonable terms, including, without limitation, confidentiality, indemnity and default obligations; require the licensee to comply with all existing and applicable law, including the rules and regulations of the Federal Communications Commission and applicable copyright laws of the United States; and require the licensee and qualified manufacturer to satisfy technical and quality assurance standards and tests established by the combined company from time to time and applicable to licensees and qualified manufacturers. Further, the merged company will not execute any agreement or take any other action that would bar, or have the effect of barring, a car manufacturer or other third party from including non-interfering HD radio chips, iPod compatibility, or other audio technology in an automobile or audio device. Each licensee shall be responsible for, and bear all costs associated with, the design, development, manufacturing, including parts procurement, logistics, warranty, sales, marketing, and distribution of such satellite radios.

Service to Puerto Rico. Within three months of the consummation of the merger, the combined company will file the necessary applications to provide the Sirius satellite radio service to the Commonwealth of Puerto Rico using terrestrial repeaters and will, upon grant of the necessary permanent authorizations, promptly introduce such satellite radio service to the Commonwealth.

Interoperable Receivers. Within one year of the consummation of the merger, the combined company will offer for sale an interoperable receiver in the retail after-market.

Rates. The combined company will not raise the retail price for its basic \$12.95 per month subscription package, the a la carte programming packages described in paragraph 1 of this letter, and the new programming packages described in paragraphs 2, 3 and 4 of this letter for thirty six months after consummation of the merger. Notwithstanding the foregoing, after the first anniversary of the consummation of the merger, the combined company may pass through cost increases incurred since the filing of the combined company's FCC merger application as a result of statutorily or contractually required payments to the music, recording and publishing industries for the performance of musical works and sound recordings or for device recording fees. The combined company will provide customers, either on individual bills or on the combined company's website, specific costs passed through to consumers

pursuant to the preceding sentence.

If you have any questions, please do not hesitate to contact us.

Sincerely,

Richard E. Wiley

Counsel for Sirius Satellite Radio Inc.

Robert L. Pettit

Gary M. Epstein

Counsel for XM Satellite Radio Holdings Inc.

James H. Barker

cc: Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell

July 25, 2008

The Honorable Kevin J. Martin
The Honorable Michael J. Copps
The Honorable Jonathan S. Adelstein
The Honorable Deborah Taylor Tate
The Honorable Robert M. McDowell
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Consolidated Application for Authority to Transfer Control of XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc., MB Docket No. 07-57

Dear Mr. Chairman and Commissioners:

The record in the above-referenced proceeding provides clear evidence that the merger of Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM") will benefit consumers and should therefore be approved promptly and without conditions. Sirius and XM have demonstrated that consumers will benefit substantially and the public interest will be served by approval of this transaction. The Commission should not impose conditions in this proceeding that will have the effect of reducing these public interest benefits. Sirius and XM have already agreed, in a June 13, 2008 letter, to implement voluntary commitments that leave no doubt that this merger is in the public interest.¹

Nevertheless, this letter is to inform you that, if the merger is approved, the combined company will implement the voluntary commitments described below, which supplement or clarify the voluntary commitments described in the companies' June 13, 2008 letter. As with the prior voluntary commitments, these commitments are being made to further demonstrate that the merger is in the public interest and in the interest of facilitating the speediest possible approval of the merger by the Commission.

Satellite Radio Terrestrial Repeater/WCS Proceedings. The Commission first commenced a proceeding to establish rules for satellite radio terrestrial repeaters in 1997.² The successor to that original proceeding is still pending.³ Sirius and XM have participated at every step of those proceedings in good-faith; the companies have submitted thousands of pages of pleadings,

¹ See Letter to Kevin J. Martin, Chairman, FCC from Richard E. Wiley, Counsel to Sirius and Gary M. Epstein, Counsel to XM, MB Dkt. No. 07-57 (filed June 16, 2008) ("Voluntary Commitments").

² *Establishment of Rules and Policies for the Digital Audio Radio Service in the 2310-2360 MHz Band*, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5754 (1997).

³ *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*, WT Docket No. 07-293, IB Docket No. 95-91, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 22 FCC Rcd 22123 (2007).

several engineering studies and even proposed rules.⁴ Sirius and XM believe that testing with FCC oversight can quickly bring these proceedings to a conclusion. Accordingly, the combined company will commit to provide the Commission whatever assistance it requests to allow the Commission to oversee such testing and resolve these proceedings by the end of 2008.

Interoperable Receivers. Sirius and XM clarify that immediately after the merger, the combined company will make the design and the specifications for an interoperable radio available for license to equipment manufacturers in accordance with the companies' commitment contained in Sirius' and XM's June 13, 2008 *ex parte* letter. Moreover, within nine months of the consummation of the merger, the combined company will offer for sale an interoperable receiver in the retail after-market. This accelerates the companies' previous voluntary commitment to do so within one year.

Local Programming and Advertising. Sirius and XM have committed, and reiterate their commitment, not to originate local programming or advertising through their repeater networks.⁵

Copyright Royalty Payments. In accordance with the Copyright Act, both Sirius and XM pay millions of dollars in royalties in connection with their public performance of sound recordings.⁶ The combined company's a la carte and other programming proposals were not intended, and are not anticipated, to reduce revenue from copyright royalty payments. They were designed to provide more choice and lower prices and hopefully increase revenue, which should have a positive effect on copyright royalty payments to artists and record companies.

Rates. Sirius and XM clarify that the combined companies' June 13, 2008 "Rates" voluntary commitment establishes a price freeze lasting thirty-six months for the combined company's basic \$12.95 per month subscription package, the a la carte programming packages described in paragraph 1 of the June 13, 2008 letter, and the new programming packages described in paragraphs 2, 3, and 4 of the June 13, 2008 letter, except for a pass through of certain cost increases. This does not affect any FCC authority to review this price freeze prior to its expiration.

Equipment Non-Exclusivity. Sirius and XM have not entered into any agreement that would bar, or have the effect of barring, a car manufacturer or other third party from including non-interfering HD radio chips, iPod compatibility, or other audio technology in an automobile or audio device. Sirius and XM have not entered into any agreement to grant, or that has the effect of granting, a device manufacturer an exclusive right to manufacture, market and sell equipment that can deliver the company's satellite radio service. Following the consummation of the merger, the combined company will not enter into any agreement that grants, or that would have the effect of granting, a device manufacturer an exclusive right to manufacture, market and sell equipment that can deliver the company's satellite radio service. This supplements XM's and Sirius' June 13, 2008 voluntary commitment. Sirius and XM also clarify their June 13 letter that they will provide, on commercially reasonable terms, the intellectual property "to permit any device manufacturer to develop equipment that can deliver the company's satellite radio

⁴ Neither Sirius, XM nor, to the knowledge of the companies, the FCC has ever received an interference complaint from a WCS licensee relating to a satellite radio terrestrial repeater.

⁵ See *Sirius Satellite Radio Inc.*, DA 01-2171, ¶¶ 10-11 (Sept. 17, 2001); *XM Radio Inc.*, DA 01-2172, ¶¶ 10-11 (Sept. 17, 2001).

⁶ 17 U.S.C. §§ 106(6); 114(d)(2); 114(f)(1).

service.” The encryption, conditional access and security technology is embedded in chip sets that can be purchased from third party manufacturers.

Public Interest Channel Set Asides. To clarify the commitment contained in Sirius’ and XM’s June 13, 2008 letter, Sirius and XM will not select a programmer to fill more than one non-commercial, educational or informational channel on each of the Sirius and XM platforms as long as demand for such channels exceeds available supply.

If you have any questions, please do not hesitate to contact us.

Sincerely,

/s/ Richard E. Wiley

Richard E. Wiley
Counsel for Sirius Satellite Radio Inc.

/s/ Gary M. Epstein

Gary M. Epstein
Counsel for XM Satellite Radio Holdings Inc.

APPENDIX C

Timeline of Commitments¹

- * Immediately upon consummation of the merger:
- The combined company must offer for license, on commercially reasonable and non-discriminatory terms, the intellectual property it owns and controls of the basic functionality of satellite radios that is necessary to independently design, develop and have manufactured satellite radios (other than chip set technology, which technology includes its encryption and conditional access keys) to any bona fide third party that wishes to design, develop, have manufactured and distribute subscriber equipment compatible with the Sirius system, the XM system, or both. In addition, Applicants will not bar, by agreement or otherwise, a car manufacturer or other third parties from including non-interfering HD Radio chips, iPod compatibility, or other audio technology in an automobile or audio device. Therefore, Applicants are prohibited from taking any action that would thwart, hinder, or obstruct any receiver manufacturer, automobile manufacturer, or chip manufacturer from including HD Radio technology in SDARS receivers. We note that this commitment serves to prohibit Applicants from entering into exclusive contracts with parties that control the chip set and encryption technology.
 - The combined company shall not raise the retail price for its basic \$12.95 per month subscription package, the a la carte programming packages, and the new programming packages nor reduce the number of channels in either their current packages or new packages for at least 36 months. Six months prior to the expiration of the commitment period, the Commission will seek public comment on whether the cap continues to be necessary in the public interest. The Commission will then determine whether it should be modified, removed, or extended. After the first anniversary of the consummation of the merger, the combined company may pass through cost increases incurred since the filing of the combined company's FCC merger application as a result of statutorily or contractually required payments to the music, recording and publishing industries for the performance of musical works and sound recordings or for device recording fees.
 - The combined company must make available 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, for noncommercial educational and informational programming provided by programmers that satisfy the qualifications set forth in 47 C.F.R § 25.701(f)(2) of the DBS set aside rules. Programming provided pursuant to this set-aside requirement must be available to the public no later than six months after the transaction's consummation. In fulfilling this commitment, the combined company shall adhere to the additional requirements set forth in the Order.

¹ We also are conditioning our approval of the transaction on the merged entity's continuing adherence to the other commitments and conditions, as specified herein, which continue indefinitely. The descriptions of the commitments and timeframes identified in this Appendix C are for informational purposes only and are not necessarily exhaustive. The Order, which incorporates the voluntary commitments set forth in Appendix B, specifies the precise terms and timeframes of the conditions adopted. Should there be any omissions in this Appendix or inconsistencies between this Appendix and the Order, the language in the Order will prevail.

- ~~CONFIDENTIAL~~
- * Within three months of consummation of the merger:
 - The first a la carte-capable radios must be introduced in the retail after-market and the combined company must begin offering a la carte programming.
 - The combined company must offer customers the ability to receive the best of both Sirius and XM programming at a monthly cost of \$16.99.
 - Customers must have the option of choosing an option of "mostly music" programming and an option of news, sports and talk programming at a monthly cost of \$9.99 for each of these programming options.
 - Consumers must be able to purchase a "family-friendly" version of existing Sirius or XM programming at a cost of \$11.95 a month, representing a credit of \$1.00 per month. Current Sirius customers must also be able to choose a family-friendly version of Sirius programming that includes select XM programming, and current XM customers must be able to choose a family-friendly XM programming option that includes select Sirius programming. This programming will cost \$14.99 per month, representing a credit of \$2.00 per month from the cost of the "best of" programming.
 - The combined company must file applications with the Commission to provide the Sirius satellite radio service to the Commonwealth of Puerto Rico using terrestrial repeaters and must promptly introduce such service upon grants of permanent authority by the Commission to operate these repeaters.
 - * Within four months of consummation of the merger:
 - The combined company must enter into long-term leases or other agreements to provide a Qualified Entity 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. As digital compression technology enables the company to broadcast additional full-time audio channels, the combined company must 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.
 - * Within nine months of consummation of the merger:
 - The combined company must offer for sale an interoperable receiver in the retail after-market.

**STATEMENT OF
CHAIRMAN KEVIN J. MARTIN**

Re: *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, MB Docket No. 07-57.*

The applications of XM and Sirius satellite radio to merge did not present the Commission with an easy case. When the Commission originally issued each company its license, the Commission determined that it would not be in the public interest for the same company to hold both licenses. Yet that is exactly what XM and Sirius asked to do.

I said at the time that the two companies announced their intent to merge that I thought they had a high hurdle to meet if they wanted to prove that the transaction would be in the public interest. It has taken some time, but I do believe that with the essential voluntary commitments they have made, the parties have met this burden.

In particular, I commend the parties for committing to offer consumers more choice and flexibility in how they purchase channels. I have long believed that consumers should be able to buy and pay for only those channels that they want. Such a free market approach to programming – whether its music or television – would benefit consumers through lower prices and more control. Consumers will be able to enjoy the best of programming on both services and pick and choose channels at lower prices. With these options as well as the companies' agreement not to raise prices for three years, consumers should be better off as a result of this merger.

I am pleased that the parties have committed to offering consumers, for the first time, with a specific percentage of diverse programming. The two companies have agreed to dedicate eight percent of their channels -- 24 channels in total -- to minority and public access programming. This will create greater opportunities for more voices to be heard on satellite radio, covering the issues that are important to those communities that may have traditionally been ignored in the past.

I also support the parties' commitment to an open technical standard that will allow for a competitive market to develop for radios that carry the satellite radio signals. Any device manufacturer will be able to develop satellite receivers and to incorporate other technology, such as HD radio, iPod ports, and Internet connectivity so long as it will not result in harmful interference with the merged company's network.

Finally, I support the Commission soon issuing a notice of inquiry to gather more information about whether HD chips or any other audio technology should be included in all satellite radio receivers.

In conjunction with this merger, I directed Commission staff to negotiate a Consent Decree resolving the two companies' numerous violations regarding the placement and technical properties of their radios and repeaters. I believed these violations to be significant, and was unwilling to support proposed fines that I did not believe held the companies accountable for their disregard for the Commission's rules. I am pleased that the companies eventually agreed to fines collectively totaling approximately \$19.6 million. The Commission will continue to monitor the combined company to ensure that it operates in the public interest and in accordance with all of our rules.

**DISSENTING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, MB Docket No. 07-57.*

The majority's own findings provide a compelling case for rejecting this merger:

- (1) We must assume that this is a merger to monopoly;²
- (2) The merged company will possess the incentive and ability to impose monopoly price hikes on consumers;³
- (3) Consumers will need protection for the foreseeable future because (a) the merged company's incentive and ability to impose monopoly price hikes will only grow over time,⁴ and (b) the emergence of another satellite radio competitor is unlikely;⁵ and
- (4) The pricing restrictions imposed on the merged company will expire in three years.⁶

The inescapable logic of the majority's findings is that by 2011 satellite radio subscribers will face monopoly price hikes by a company with the incentive and ability to impose them.⁷ No one has been able to explain to me how this could possibly serve the public interest.⁸

The majority's argument is that it can stack up enough "conditions" on the merged entity—spectrum set-asides, price controls, manufacturing mandates, etc.—to tip the scale in favor of approval. In essence, the majority asserts that satellite radio consumers will be better served by a regulated monopoly than by marketplace competition. I thought that debate was settled—as did a unanimous Commission in 2002 when it declined to approve the proposed merger between DirecTV and Echostar:

In essence, what Applicants propose is that we approve the replacement of viable facilities-based competition with regulation. This can hardly be said to be consistent with either the Communications Act or with contemporary regulatory policy and goals, all of which aim at replacing, wherever possible, the regulatory safeguards needed to ensure consumer welfare in communications markets served by a single provider, with free market competition, and

² See Order at ¶¶ 47-50 (finding that the Commission must presume that satellite radio constitutes a single, national product market, and that "the proposed merger is a merger to monopoly").

³ *Id.* at ¶¶ 5, 50.

⁴ *Id.* at ¶¶ 54, 104.

⁵ *Id.* at ¶¶ 5, 49.

⁶ *Id.* at ¶ 107. The majority's statement that the FCC will review the price cap before the three-year period expires is little more than a fig leaf. It permits the majority to imply that it is not leaving consumers completely unprotected in 2011, while leaving all of the difficult decisions to a future Commission. That Commission will scarcely appreciate the Hobson's choice we are bestowing on them: let the price caps expire in the face of a monopoly provider or impose a new system of rate regulation on an industry that has never had one in the past.

⁷ The price cap adopted by the majority permits certain costs to be passed through to consumers even during the three-year period. To the extent that occurs, even the three-year price controls could prove illusory.

⁸ None of the remaining conditions address this fundamental consumer harm and I therefore do not address them at length. I would note, however, that many of them are chock-full of holes and/or limitations that could render them meaningless.

particularly with facilities-based competition. Simply stated, the Applicants' proposed remedy is the antithesis of the 1996 Act's "pro-competitive, de-regulatory" policy direction.⁹

That preference for competition is why the Commission has almost never permitted a single commercial licensee to hold all of the spectrum allocated to a particular service, and why (until today) the Commission required that there always be at least two satellite radio licensees. I understand why the companies would prefer to escape the rigors of competition. What I cannot understand is why the majority thinks consumers will be better off without it.

Some may say that the majority isn't really permitting a merger-to-monopoly because satellite radio is part of a larger audio entertainment market that includes iPods, terrestrial radio, and a plethora of new technologies that everyone "knows" are just around the corner. But that is not the majority's position. The majority finds that no one has proved that the relevant product market includes anything other than satellite radio and that competitive entry is unlikely for the foreseeable future. So the majority itself takes the argument away.

Others may say that whether the combined entity is a monopoly is beside the point because one or both of them would not survive anyway—so there's no harm in letting them merge. But the merging companies do not seek approval on the basis of financial distress and the majority makes no findings in that regard. So this claim is not before us. I have said many times that I am willing to consider mergers where financial viability is at stake. But that's not this merger. We must assume that the marketplace can support two financially viable competitors.

I have said from the outset that approving this merger would be a steep climb for me. It proved to be just that. In the end, after cutting through all the heat and noise and lobbying this proceeding has generated, we are left with the unshakable reality of a merger-to-monopoly in a market that could sustain competition. I can find no precedent or public interest justification for that outcome. I dissent.

⁹ *Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation; and EchoStar Communications Corporation*, 17 FCC Rcd 20559, 20665 (2002).

**DISSENTING STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, MB Docket No. 07-57.*

Sirius and XM (collectively the "Applicants") currently offer dynamic and competitive audio programming to consumers. Their marketplace competition with each other has undoubtedly contributed to their cutting edge appeal. It also has exacerbated their difficult financial circumstances, as they have competed for compelling programming and driven up the costs for each other dramatically. Partly in response to this one-upmanship, which has improved the quality of programming and benefited consumers, the Applicants have sought to merge rather than compete.

It is precisely because the Applicants provide such a valuable service to consumers that it was critical for the Commission to respond appropriately to their dramatic effort to combine. They both now provide an outstanding service that their subscribers find extremely engaging. They employ creative and innovative talent who put on shows that many of their subscribers cannot easily live without. I truly hope the merged entity succeeds, and maintains its edge, and does not become a fat and happy monopoly.

I was hoping we could achieve a bipartisan consensus that would offer consumers more diversity in programming, better price protection, greater choices among innovative devices and real competition with digital terrestrial radio. Disappointingly, that was not accomplished. Instead, consumers will get a monopoly with window dressing. And, the dream of greater women and minority participation in media will be deferred once again.

It is not just me who considers this a monopoly. On that point, the majority and I do agree. The entire *Order* is appropriately premised on the reality that this is a "merger to monopoly."¹ Rather than accept the Applicants' broad definition of the market, today's *Order* defines the market narrowly and, thus, deliberately endows the Applicants with a monopoly over the entire licensed satellite radio service. To do so, the majority repeals the existing safeguard prohibiting the common ownership of the two satellite radio licenses, and instead relies on nominal conditions.² Incredibly, the merged entity will now have *more* spectrum than the AM and FM bands combined. Given the inadequacy of the merger conditions, this decision better serves the Applicants' self-interest rather than the public interest, so I am unable to support it.

The instant order follows in the wake of the Department of Justice (the "DOJ") Antitrust Division's questionable decision to close its investigation of the merger without requiring any conditions.³ The DOJ explained that it could not find that such a merger would substantially lessen competition, in part, because of a lack of competition between the parties even without the merger. Thus, the DOJ

¹ *Order* at ¶¶ 47-50.

² *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd 5754, 5823 ¶ 170 (1997) (stating, under a subheading entitled "Safeguards", that "[e]ven after DARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellite DARS license[,] and that "[t]his prohibition on transfer of control will help assure sufficient continuing competition in the provision of satellite DARS service.").

³ DOJ Press Release, *Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc.* (Mar. 24, 2008), available at http://www.usdoj.gov/opa/pr/2008/March/08_at_226.html.

concluded that the merger would not make matters much worse — hardly consolation for consumers.

Ostensibly, the DOJ relied on two key premises in reaching its decision: long-term sole source contracts with automobile manufacturers and the lack of an interoperable radio. Even though the DOJ acknowledged that the Applicants competed on the terms of automotive contracts, including the amount of equipment subsidization, it readily dispensed with this consumer benefit, because many of the sole-source contracts were locked up for extended periods. Further lack of competition between the Applicants was explained by their decision not to bring an interoperable radio to market despite a Commission requirement to do so. It is ironic that the DOJ relied on the Applicants' failure to comply with the interoperability mandate as a justification for the merger. The DOJ also gave the Applicants a pass on the financial interests and corporate directorships held by major automotive manufacturers in the Applicants' businesses and the merged entity's future business. While more analysis is needed, this relationship presents a potential for discrimination against the installation of competitive technologies in the automotive sector going forward.

In contrast to antitrust review, where the DOJ would have borne the burden of proving that the proposed transaction "substantially lessens competition,"⁴ the Commission's standard of review requires merger applicants to prove that the transaction will serve the greater public interest, informed by the core values of competition, diversity and localism.⁵ Yet, the Applicants have not even provided the Commission with sufficient evidence to perform a structural market analysis that would allow us to and predict the likelihood of competitive harm.

In the *Order*, the majority assumes the "worst-case" scenario, specifically that satellite radio has no real competitors and that the proposed transaction represents a merger to monopoly. In adopting this approach, the majority professes to create a high public interest standard by subjecting the merger application (with the Applicants retaining the burden of proof) to the most exacting scrutiny. Granting the merger under this approach should require significant conditions, proportional to the significant public interest harm assumed, in order to mitigate the extreme concentration of market power. Regrettably, the majority's acceptance of the Applicants' "voluntary commitments" fails to meet this professed prophylactic public interest standard because of gaping loopholes in them.

Price Cap. Though the Applicants have committed not to raise the retail rates on their existing and newly proposed programming packages for three years after the consummation of the merger, the *Order* fails to justify why the three-year period is sufficient and merely adopts the Applicants' terms and conditions. Although the majority is unable to identify competitors likely to constrain the merged entity's ability to raise prices, it is unwilling to impose a meaningful price cap for a reasonable period of time.

Even during the three-year period itself, the merged entity could evade or undermine this consumer protection in several significant respects. The manner in which this condition is crafted suffers from a myopic perception of satellite radio pricing. Retail rates of programming packages constitute only one element in the ultimate price of satellite radio service. The item completely overlooks additional implicit pricing elements of the service, such as equipment subsidies,⁶ ancillary services,⁷ activation fees,⁸

⁴ 15 U.S.C. § 18.

⁵ 47 U.S.C. § 310(d).

⁶ See "HD Radio" *infra*.

⁷ For example, Sirius presently provides an Internet radio service to subscribers for either no additional charge or an additional \$2.99 per month, depending on the quality of the audio. Sirius Internet Radio, (continued....)

termination fees,⁹ and transfer fees,¹⁰ all of which the merged entity could manipulate to undermine the consumer protection intent of the price cap. It also fails to adequately address the concern that the merged entity may have the incentive and ability to raise real prices by reducing content quality, either by increasing advertising or through other means. Sirius Chief Executive Officer Mel Karmazin has stated as much, declaring to investors that the post-merger “advertising line is going to contribute significantly in the future towards [average revenue per user].”¹¹ Consumers might as well prepare for a barrage of new commercials, because now they will have nowhere else to turn if they want satellite radio service.

Additionally, the merged entity could evade the price cap by siphoning off programming from the capped packages to new and presumably uncapped packages.¹² Indeed, not only do both Applicants already have service clauses to this effect, but they assert that the proposed “programming options ... are subject to individual channel changes in the ordinary course of business and, in the case of certain programming, the consent of third-party programming providers.”¹³ While the decision imposes a floor on the number of channels in the existing and proposed programming packages, the Applicants are left to exploit a loophole to siphon off high-quality channels to unregulated tiers while replacing them with lower cost, and possibly lower quality, channels. Thus, while this approach would maintain the same quantity of channels, it cannot guarantee consumers the same or better quality of programming.

(Continued from previous page)

<http://www.sirius.com/siriusinternetradio>. XM presently provides a similar, though not identically structured, Internet radio service to subscribers. See XM Radio Online, <http://xmro.xmradio.com/xstream/index.jsp>.

⁸ Sirius currently charges a one-time \$15.00 fee “to activate, reactivate, upgrade or modify each Satellite Radio Service Subscription.” Sirius Terms and Conditions, <http://shop.sirius.com>. XM charges a similar activation fee of undisclosed amount. XM Customer Agreement, <http://www.xmradio.com/about/customer-service-agreement.xmc> (“For each XM Radio on your account, we may charge you a fee to activate, upgrade or modify your Radio Services. The addition of premium channels or services, if any, may require an additional activation fee. The fee is payable with your first subscription fee payment.”).

⁹ Sirius currently charges a \$75 termination fee “if you cancel a one-year or longer Subscription during the first year of service.” Sirius Terms and Conditions, <http://shop.sirius.com>. XM charges a termination fee of undisclosed amount. XM Customer Agreement, <http://www.xmradio.com/about/customer-service-agreement.xmc> (“From time to time, we may offer the Services on an annual or other multi-month commitment basis. In such events, you agree to make payments for Services to be received and that are ordered by you in accordance with the terms of the applicable billing plan that you agree to, including, without limitation, payments of any early termination fees if you terminate your Services prior to the end of such commitment period.”).

¹⁰ Sirius currently charges a \$75 transfer fee “[i]f you transfer a lifetime Satellite Radio Service Subscription from one Receiver to another or from one person to another.” Sirius Terms and Conditions, <http://shop.sirius.com>. It is unclear whether or not XM charges a similar transfer fee or whether transfer is even permitted. See XM Customer Agreement, <http://www.xmradio.com/about/customer-service-agreement.xmc>.

¹¹ Investor Presentation, Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. (Feb. 20, 2007) (transcript available at <http://www.sec.gov/Archives/edgar/data/908937/000095012307002469/v30604be425.htm>).

¹² Sirius Terms and Conditions, <http://shop.sirius.com> (“Accordingly, we reserve the unrestricted right to change, rearrange, add, or delete programming, including canceling, moving or adding particular channels, at any time, with or without notice to you.”); XM Customer Agreement, <http://www.xmradio.com/about/customer-service-agreement.xmc> (“XM reserves the right to change programming on either or both [XM Radio Online and XM Radio] Services at any time and without notice, at our sole discretion, including canceling, modifying, moving or adding particular channels, with or without notice to you.”).

¹³ Letter from Richard E. Wiley, Robert L. Pettit, Wiley Rein LLC, Counsel for Sirius Satellite Radio Inc., and Gary M. Epstein, James H. Barker, Latham & Watkins LLP, Counsel for XM Satellite Radio Holdings Inc., to Kevin J. Martin, Chairman, FCC at 5 (June 13, 2008) (“Applicants’ June 13, 2008 Ex Parte”).

Precedent for this type of strategic behavior exists in the previous attempts to regulate cable rates.¹⁴

The *Order* provides an explicit loophole to the so-called "price cap" by allowing the merged entity to pass through statutory or contractual programming costs to the consumer one year after the merger is complete.¹⁵ While the genesis of this exception is left unexplained, the winners and losers are apparent. The Applicants benefit by passing the cost on to the consumer. And of course, consumers will be left to find out about these "programming costs" through increases in their bills.

Finally, even assuming the success of the price cap, there is nothing to prevent the merged entity from instantaneously increasing retail prices once it expires. To remedy this oversight, the duration of the price cap period should have been extended beyond three years (correlated with expected entry of sufficient competition to restrain prices) or, in the alternative, presumptively renewed with the merged entity bearing the burden of proving that the restriction is no longer necessary because of competition. Though there is some sort of interim review, the Commission's standard of review and the burdens of proof are left ambiguous.

Programming. While the majority accepts the Applicants' "voluntary commitment" to offer newly defined and a la carte programming packages, the benefits, never mind the merger-specific benefits, of such offerings are far from clear. With respect to the newly defined programming packages, it accepts the Applicants' unjustified assertion that such packages could not be offered absent a merger and summarily finds that such packages present merger-specific benefits.

At its core, the decision rests on the single assumption that new programming packages will increase consumer choice and, therefore, improve consumer welfare. However, the Commission failed to inquire into whether the newly proposed programming packages maximize consumer welfare or even estimate the magnitude of the claimed welfare gain. Does offering consumers more channels for more money or fewer channels for more money per channel create a cognizable public interest benefit? Is it "choice," in any meaningful sense of the word, if the relative value of the offering diminishes? By this logic, a decision to offer one channel at one hundred times the price of the total current package would also increase "choice" and improve consumer welfare. The same is true for the "safety valve" claim, that lower priced options correct the ills of take-it-or-leave-it offers by a monopolist. Would not one less channel for one less cent also create such nominal "choice?"

Even if so, a significant obstacle remains; namely, the exclusivity provisions found in talent contracts prevent the merged entity from offering certain channels, potentially the most popular channels, on both systems. As adopted, the *Order* notes that the Applicants have pledged to seek third party consent to such arrangements and willingly permits the merged entity to pass the cost of such consent directly on to the consumer.

A la carte makes its appearance here without any empirical analysis or any discussion reflective of the controversy surrounding the Commission's own a la carte inquiries.¹⁶ Nor is there any

¹⁴ See e.g., Thomas W. Hazlett, *Shedding Tiers for A La Carte? An Economic Analysis of Cable TV Pricing*, 5 J. Telecomm. & High Tech. L. 253, 258 (Fall 2006) ("The complexities of the video marketplace rendered price regulation unworkable; when rates were capped by authorities, cable operators and cable networks responded to these constraints by altering the nature, packaging, and quality of video programming services.").

¹⁵ Applicants' June 13, 2008 Ex Parte at 5.

¹⁶ See Media Bureau, *Report On the Packaging and Sale of Video Programming Services To the Public* (Med. Bur., Nov. 18, 2004); see also Media Bureau, *Further Report on the Packaging and Sale of Video Programming Services* (continued....)