

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
XM Satellite Radio Holdings Inc., Transferor,)
)
And)
) MB Docket No. 07-57
Sirius Satellite Radio Inc., Transferee,)
)
Consolidated Application for Authority to)
Transfer Control of XM Radio Inc. and Sirius)
Satellite Radio Inc.)

OPPOSITION OF SIRIUS XM RADIO INC.

Sirius XM Radio Inc. (“Sirius XM”)¹ hereby opposes Mt. Wilson FM Broadcasters, Inc.’s (“Mt. Wilson”) Petition for Reconsideration of the Memorandum Opinion and Order and Report and Order in the above-captioned proceeding. In its petition, Mt. Wilson asks the Commission to impose a merger condition “providing notification that the airing of indecent programming over terrestrial frequencies will be subject to Section 73.3999 of the FCC rules.”² Mt. Wilson’s petition is procedurally defective and, even if evaluated on its substance, entirely without merit, and the Commission promptly should deny it.

Mt. Wilson’s petition fails on many levels. First, as Mt. Wilson acknowledges, the Commission’s indecency rule does not apply to satellite radio providers. Rather, the rule in

¹ Sirius XM Radio Inc. is the surviving company resulting from consummation of the above-referenced merger, which the Commission approved July 25, 2008. *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd. 12348, FCC 08-178 (rel. Aug. 5, 2008).

² Petition for Reconsideration of Mt. Wilson FM Broadcasters, Inc., MB Docket No. 07-57, 3 (filed Sept. 4, 2008).

question applies exclusively to “licensee[s] of . . . radio or television broadcast station[s].”³ Since Sirius XM and its subsidiaries are licensed under Part 25 of the Commission's rules and hold no radio or television licenses, Section 73.3999 is inapplicable on its face. Moreover, Mt. Wilson fails to establish how the use of broadcast spectrum by the FM modulators of certain satellite radio receivers somehow converts Sirius XM into a Part 73 broadcaster. Nor does Mt. Wilson explain how the fact that some of these devices had overpowered FM modulators makes Sirius XM a broadcaster. Simply put, there is no basis for applying Section 73.3999 to Sirius XM, and Mt. Wilson’s suggestion that the FCC do so in the context of the Sirius-XM merger is specious.

In addition, there is no legal basis for Mt. Wilson’s proposed condition – essentially a declaration that satellite radio providers are henceforth subject to Section 73.3999. Expanding the scope of Section 73.3999 – to include satellite radio providers within the purview of the rule – would require a notice-and-comment rulemaking proceeding.⁴ And, indeed, the Commission has already considered and summarily rejected Mt. Wilson’s previous rulemaking request to include subscription satellite radio in the scope of Section 73.3999.⁵ Even assuming such a condition would be Constitutional,⁶ Mt. Wilson’s request has been asked and answered.

³ 47 C.F.R. § 73.3999(b) (“No licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent.”).

⁴ See 5 U.S.C. § 553 (outlining procedures required to petition for amendment of an agency rule); 47 C.F.R. §§ 1.399-1.407 (describing FCC-specific procedures required to petition for amendment of a Commission rule).

⁵ See Letter from W. Kenneth Ferree, Chief, Media Bureau, to Saul Levine, Mt. Wilson FM Broadcasters, Inc., DA 04-3907 (Dec. 15, 2004) (“Ferree Letter”).

⁶ In no small part because of well-understood First Amendment concerns, the FCC has made clear that “subscription” services, such as those provided by Sirius XM are not subject to the broadcast indecency laws, which are applicable only to “conventional broadcast service.” See, e.g., *Harriscop of Chicago, Inc.*, 3 FCC Rcd 757, 670 n. 2 (1988). Mt Wilson’s convoluted attempt to cast Sirius XM’s services as non-subscription in nature is wholly unavailing. At no

Moreover, because Mt. Wilson’s petition relies on facts not previously presented to the Commission, it may be granted only if the Commission determines that consideration of the facts is required in the public interest. Although Mt. Wilson participated in the merger proceeding, the argument that Sirius XM may have contravened the FCC’s indecency regulations through its previous actions was never raised in this proceeding nor has Mt. Wilson demonstrated that consideration of indecency issues in the context of this merger is in the public interest.⁷

With specific regard to the overpowered FM modulators in some models of satellite radio receivers, the Commission appropriately and forcefully dealt with those issues through enforcement actions. In doing so, the FCC specifically concluded its investigations regarding overmodulated receivers and dismissed complaints relating to those receivers.⁸ Accordingly, the agency affirmed that its past concerns relating to Sirius XM’s FM modulators had been settled.⁹ These actions were well within the Commission’s discretion and fully addressed the issue that appears to underlie Mt. Wilson’s petition. As such, further action is unwarranted.

point has either Sirius XM or its predecessor companies operated as a “conventional broadcast service.” *Id.* See also Ferree Letter.

⁷ See 47 C.F.R. § 1.106(c).

⁸ *Sirius Satellite Radio Inc.*, Consent Decree, FCC 08-176, ¶ 7 (2008) (“In express reliance on the covenants and representations in this Consent Decree and to avoid further expenditure of public resources, the Commission agrees to terminate its investigations and dismiss the complaints.”); *XM Radio, Inc.*, Consent Decree, FCC 08-177, ¶ 8 (2008) (same).

⁹ *Sirius Satellite Radio Inc.*, Order, FCC 08-176, ¶ 3 (2008) (“These considerations, taken together with the rigorous oversight and reporting obligations and substantial voluntary contribution prescribed in this Order and the Consent Decree, persuade us that settlement of these matters would best serve the public interest.”); *XM Radio, Inc.*, Order, FCC 08-177, ¶ 3 (2008) (same).

Because Mt. Wilson's petition is procedurally infirm, because its concern has already been addressed by the FCC, and because its proposed condition misconstrues Commission rules, the agency should promptly dismiss Mt. Wilson's Petition for Reconsideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Christy Hammond, hereby certify that on this 17th day of September, 2008, a copy of the foregoing Opposition was delivered via first class, U.S. mail, postage prepaid to the following:

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