

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554**

In the Matter of )  
 )  
Development of Devices Capable of Supporting ) MB Docket No. 08-172  
Multiple Audio Entertainment Services )

**COMMENTS OF  
CLEAR CHANNEL COMMUNICATIONS, INC.**

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## SUMMARY

Clear Channel urges the Commission to move directly from an NOI to a Report and Order adopting a requirement that all satellite radio receivers have HD Radio reception capability.

Free local radio is and must remain a critically important service for the dissemination of local and public interest programming in communities across the United States. HD Radio is how free local radio will transition to the digital world. Without the successful adoption of HD Radio by consumers, the future of free local radio stations and their concomitant public interest obligations could be at risk, leading to a rapid decline of localism.

Clear Channel and other free local radio broadcasters are investing significant resources converting their stations to HD Radio, creating unique and compelling programming and promoting HD Radio. However, it is clear that the digital conversion of stations and the creation of new programming are not sufficient because the market for HD receivers is not working efficiently, principally because of distortions caused by the satellite radio monopoly.

Moreover, the Commission's harmful decisions to retain without even very modest modification its local radio ownership rules despite evidence of abundant competition and to bless the formation of a monopoly SDARS have severely tilted the market against free local radio, undermining the longstanding policy goals of promoting competitive, locally-focused and diverse audio programming. The magnitude and competitive importance of the spectrum advantage conferred upon Sirius XM by the Commission's approval of their merger cannot be overstated. Sirius can now provide more than 300 possible channels in every local market, or two to three times the number of channels as all of the local radio broadcast channels (AM and FM) combined in that market.

Importantly, the voluntary "open access" commitments made by Sirius XM are utterly inadequate to safeguard HD Radio from anticompetitive conduct of Sirius XM because they do not reach the non-contractual panoply of subsidies, cross-marketing and promotional activities and other arrangements that discourage automobile original equipment manufacturers and other vendors from investing in and developing multifunctional hybrid satellite and HD Radio receivers. Indeed, the best evidence of the impact of such practices is that it appears that there are no hybrid satellite radio/HD Radio receivers currently in the market today. The open access condition's focus on prohibiting exclusive contracts clearly misses the target and does not prevent Sirius XM from exerting non-contractual anticompetitive pressures on original equipment manufacturers and other vendors to HD Radio's demise.

It is now incumbent on the Commission to take the necessary steps to turn around the overall negative situation that free local radio faces, and a reasonable first step would be to adopt a rule to require SDARS receivers to include HD Radio reception capacity. The Commission possesses the authority to adopt an HD Radio reception requirement as a function of the SDARS service rules governing the process of radio transmission within the satellite network system.

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Clear Channel Communications, Inc. (“Clear Channel”) hereby submits its comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) *Notice of Inquiry* (“*NOI*”) in the above captioned proceeding.<sup>1</sup> The *Notice of Inquiry* is the result of a commitment made by the Commission in its decision approving a merger of the only two licensees of Satellite Digital Audio Radio Service (“SDARS”) systems in the United States, thereby creating a government-sanctioned SDARS monopoly with enough spectrum to provide hundreds of channels of audio programming in every local radio market nationwide.<sup>2</sup> The *NOI* seeks comment on “requiring devices capable of receiving SDARS to include digital audio broadcast (‘DAB’), or HD Radio™....”<sup>3</sup> Clear Channel strongly supports such a requirement and urges quick Commission adoption of appropriate rules to expedite the manufacture and use of the hybrid devices.

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<sup>1</sup> *In the Matter of Development of Devices Capable of Supporting Multiple Audio Entertainment Service*, MB Docket No. 08-172, *Notice of Inquiry*, 23 FCC Rcd 13178 (rel. Aug. 25, 2008) (73 FR 52657, pub. Sept. 10, 2008) (“*Notice of Inquiry*”).

<sup>2</sup> *See 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, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348 (rel. Aug. 5, 2008) (“*Merger Order*”).

<sup>3</sup> *Notice of Inquiry*, 23 FCC Rcd 13178 at ¶1.

## **I. STATEMENT OF INTEREST**

Clear Channel is a leading owner of free local radio broadcast stations, focused on serving local communities across the U.S.<sup>4</sup> Clear Channel has a significant interest in this proceeding and has been a leader in the development and roll-out of digital radio services (“DRB”) and HD Radio. Clear Channel recognizes that free local radio must transition to HD Radio to remain competitive in today’s audio marketplace. As a sign of its commitment, 477 Clear Channel stations have installed digital capability and are offering a digital simulcast of their analog broadcast, and 358 of those stations also are running an HD2 multicast channel, many of which bring entirely new niche programming to local listeners as well as to underserved populations.

## **II. FREE LOCAL RADIO REMAINS A CRITICALLY IMPORTANT SERVICE FOR THE DISSEMINATION OF IMPORTANT LOCAL AND PUBLIC INTEREST PROGRAMMING TO COMMUNITIES ACROSS THE NATION**

As the Commission is fully aware, free local broadcast radio is a distinctly local media service, and broadcasters are obligated to operate their stations to serve the public interest and air programming responsive to the needs and issues of the people in their communities of license. Moreover, free local radio’s key role in American society is a long standing and fundamental element of our nation’s communications policy, reflected in the Communications Act. Free local radio is, and must remain, a critically important service for the dissemination of local and public interest programming—especially during emergency situations—to Americans in communities across the United States.

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<sup>4</sup> Clear Channel subsidiaries currently are the licensees of 867 local radio broadcast stations, about 6 percent of the total number of radio broadcast stations in the United States. In any specific local market, Clear Channel controls less than 3 percent of the FCC authorized satellite and terrestrial audio service channels available to consumers. At this time, there are 53 Clear Channel stations being held in trust for divestiture, and, of those, four stations are currently subject to assignment applications pending before the Commission.

Every Clear Channel radio station takes seriously its role to enhance, educate, entertain and inspire the local communities it serves. The local community is the focal point for the programming and operation of every Clear Channel radio station. If a Clear Channel radio station fails to be responsive to local needs and interests, it will lose its audience. And if the station loses its audience, Clear Channel will have lost its business.

While free local radio is the only audio service that is able to provide such an important local public interest focus free of charge (the only cost being the radio) to consumers, hundreds of channels of satellite radio programming originating mainly from a New York City studio – together with other popular digital audio products and services, including iPods, MP3 players and Internet audio services – have fragmented the listening audience, creating unprecedented downward pressure on advertising revenue for free, local terrestrial radio stations. This loss of advertising revenue, combined with the disparate regulatory treatment that prevents realization of the benefits of economies of scale, especially within certain large markets, has incrementally negatively affected the financial capacity of free local radio stations to create, produce and air local programming. Confronted with these challenges, free local radio broadcasters, including Clear Channel, nonetheless are innovating and investing in new technology to compete for listeners in the expansive audio marketplace and maintain sufficient revenue to support their obligations to the local communities they serve.

**III. HD RADIO IS INDISPENSABLE TO THE CONTINUED VITALITY OF FREE, OVER-THE-AIR LOCAL RADIO**

**A. HD Radio Clearly Benefits Consumers; Free Local Radio Cannot Be Left Behind As An Analog Service In A Digital World**

In earlier proceedings, the Commission examined and detailed the myriad consumer benefits of HD Radio, including higher quality audio, diverse programming and innovative data

services to the public on free, over-the-air stations.<sup>5</sup> As Commissioner Copps observed, HD Radio “is great good news for broadcasters because it provides exciting new business opportunities that just might reinvigorate free over-the-air radio.”<sup>6</sup>

HD Radio provides free local radio stations with the best opportunity to offer listeners enhanced choice in today’s competitive digital audio marketplace. If allowed to grow, HD Radio can provide free local radio stations with economic resources necessary to sustain their commitments to the local communities that they serve. Without the successful adoption of HD Radio by consumers, the future of free local radio stations and their concomitant local public interest obligations could be at risk, leading to a rapid decline of localism in communities nationwide.

Commissioner Adelstein recognized clearly the importance of HD Radio to free local radio’s future over a year ago:

Today, the radio industry is at a challenging crossroads. With the emergence of different platforms such as broadband, MP3, and satellite radio, there is increased pressure on terrestrial radio to digitize and to expand its delivery capacity and capability over the most ubiquitous of all platforms – over-the-air broadcasting. The transition from analog to digital radio will undoubtedly create many new and exciting opportunities for the radio broadcasting industry and for the listening public....Digital radio is after all the natural evolution of radio, bringing CD quality sound to FM and FM quality to AM. It promises many new service offerings to eager listeners. I wholeheartedly support the transition, and the Commission should do everything it can to encourage it. In supporting digital radio, I cast a vote for the future....<sup>7</sup>

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<sup>5</sup> See *In the Matter of Digital Audio Broadcasting Systems And Their Impact on the Terrestrial Radio Broadcast Service*, Second Report and Order, *First Order on Reconsideration and Second Further Notice of Proposed Rulemaking*, 22 FCC Rcd 10344 (2007) (“DAB Second Report & Order”).

<sup>6</sup> *Id.* at 10411 (Statement of Commissioner Michael J. Copps).

<sup>7</sup> *Id.* at 10413 (Statement of Commissioner Jonathan S. Adelstein).

That assessment of the audio marketplace and the opportunities offered by the transition to digital remains accurate and operative. In this regard, it is important for the Commission to remember that, unlike the mandated transition to digital television, the transition to digital radio is a voluntary effort by free local radio broadcasters and efficiently uses the existing spectrum without an additional temporary transition allotment.

**B. Free Local Radio Stations Are Expending Significant Financial Resources Converting Stations To Digital**

Most of the free local radio broadcasters that are offering HD Radio are not now realizing any revenue from this new digital service, much less making a profit from them.<sup>8</sup> They, however, are incurring massive costs. The capital expenses to convert and program several stations to digital often amounts to millions of dollars and steadily increases as additional stations are converted.<sup>9</sup> Broadcasters also are investing heavily in other areas that are critical to consumer adoption of digital radio services, including extensive promotional and programming activities. For example, as a founding member of the HD Digital Radio Alliance, Clear Channel has committed substantial sums to the Alliance's marketing efforts that promote HD Radio to consumers. In fact, the HD Digital Radio Alliance committed an additional \$230 million in marketing funds for 2008, bringing the group's total financial marketing commitment to \$680 million.

With regard to Clear Channel's HD Radio infrastructure investment, it has invested almost \$70 million in converting its stations to digital and on related HD Radio programming

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<sup>8</sup> As of October 31, there were approximately a total of 1,800 digital AM or FM radio stations operating nationwide in 195 of the top 200 markets. Of those, 845 are offering digital multicast streams.

<sup>9</sup> The average cost to convert each free local radio station to HD Radio is around \$100,000. Therefore, approximately \$180,000,000 has been spent so far on converting the 1,800 stations to HD Radio.

initiatives. Currently, 477 of Clear Channel's free local radio stations have installed digital capability and are offering a simulcast of their analog broadcast, and 358 of those stations also are running an HD2 multicast channel.

As Clear Channel has previously noted in the Commission's recent localism and media ownership proceedings,<sup>10</sup> the multicast programming offered by Clear Channel's HD2 channels includes new and/or unsigned artists, in-depth local news, comedy formats, and targets underserved populations. For example, in Dallas, Denver, San Diego, Syracuse, Worcester, and other markets, Clear Channel offers "Pride Radio" with music, entertainment, and talk content of specific interest to the gay communities in those cities. "KBCO HD2 The Studio C Channel," airs programming that is produced locally at Clear Channel's studios in Boulder. Each of the songs broadcast on the HD2 channel has been recorded live at KBCO(FM)'s Studio C during live "sessions" of local, which normally include two or three songs. The station also airs interviews with the guest artists. KBCO Studio C also hosts local area bands for live performances during "KBCO Studio C Local Edition," aired weekly on HD2 Studio C.

Clear Channel is developing additional content for its HD2 channels, including programming focusing on business, religion, and a new talk format targeted specifically at issues affecting women. Many of these new HD2 formats are the result of the efforts of Clear Channel's innovative "Format Lab," which develops and provides new, unique, diverse programming for stations (including genres that have long been marginalized). As a leader in the transition to HD Radio, Clear Channel believes it is important to make available innovative,

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<sup>10</sup> See *In the Matter of Broadcast Localism*, Comments of Clear Channel (April 28, 2008) at 87-88; *In the Matter of 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Comments of Clear Channel (October 23, 2006) at 30-31.

unique, compelling programming. As such, all programming generated by Clear Channel's Format Lab is made available to rival broadcasters, who can use the programming as-is or can choose to supplement the elements – which include continually refreshed playlists, imaging and spoken-word vignettes – with their own locally customized content to create fully localized radio channels. To date, Format Lab has developed over 80 channels available for broadcast.

Accordingly, free local radio broadcasters have and are making the investments in HD Radio related programming to “ensure that digital radio enhances localism and that it translates into more locally originated programming, public affairs coverage and airtime for local musicians and creative artists;” to “ensure that digital radio enhances diversity through a wider range of programs, viewpoints and new opportunities for underserved and non-English speaking communities;” and to “give real meaning to public interest broadcasting in the digital age.”<sup>11</sup>

As discussed in Sections V and VI below, however, the conversion of broadcast stations and the availability of new programming is not sufficient because the market for HD Radio receivers is not working efficiently, principally, because of distortions caused by satellite radio. The remedy is a requirement that all satellite radio receivers have HD Radio reception capability.

#### **IV. IN THE PAST YEAR, THE FCC HAS HARMED FREE LOCAL RADIO STATIONS' CAPACITY TO COMPETE IN THE EXPANDING DIGITAL AUDIO MARKETPLACE**

Unfortunately, over the past year, the Commission has taken several actions that have seriously harmed the ability of free local radio stations to compete in the audio marketplace while strengthening their competitors. The Commission's decision to retain, without even very modest modification, its local radio ownership rules despite evidence of abundant competition,

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<sup>11</sup> See *DAB Second Report & Order*, 22 FCC Rcd 10344 at 10411 (Statement of Commissioner Michael J. Copps).

and its approval of the formation of a single national satellite radio provider with hundreds of audio channels have severely tilted the market against free local radio, completely undermining the Commission's and Congress's longstanding goals of promoting competitive, locally-focused and diverse audio programming and broadcast radio's unique responsibility to provide a truly local service. It is incumbent on the Commission to take the necessary steps to turn this situation around, and a good reasonable first step would be to adopt quickly a rule to require SDARS receivers to include HD Radio reception capacity.

The need for Commission action is only exacerbated by the current economic downturn, which is expected to limit overall economic growth and thereby reduce advertising revenue for most free local radio stations for some time to come.<sup>12</sup> For example, total local and national advertising revenue in all radio markets in September 2008 was down 8 percent compared to September 2007, and that trend likely will continue.<sup>13</sup>

**A. The FCC Failed To Update Its Local Radio Ownership Rules To Provide Free Local Radio Stations The Flexibility They Need to Compete In The Audio Marketplace**

Clear Channel and many other free local radio broadcasters have consistently advocated for the reasonable modernization of local radio ownership restrictions. Numerous economic

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<sup>12</sup> See, e.g., "A day of down revenues," Inside Radio Afternoon Report (Nov. 6, 2008) ("Underscoring how tough the advertising marketplace is, there's across the board revenue declines for the seven radio companies reporting earnings today. Spanish Broadcasting System (-12%), Citadel (-11%), Fisher Radio (-10%), Entercom (-6%), Cumulus (-5%), Radio One (-2%) and Regent (-2%). Nearly all groups say they're looking at cutting expenses and personnel to address the shortfalls."); "Radio One Posts Loss on License Write-Downs," Washington Post, Nov. 7, 2008, D1 ("...[P]osted a loss for the third quarter as the industry continues to swoon from falling advertising and competition from new media." "National ad revenue fell 17 percent from the same quarter a year earlier." "The radio industry was already battered, as listeners' options had grown with Internet radio, satellite radio or MP3 players. More recently, advertisers have cut back budgets. Many radio companies have been hit...").

<sup>13</sup> See "Radio Advertising Bureau Radio Revenue Pool Numbers: September 2008 v. September 2007," available at [http://www.rab.com/public/pr/revenue\\_detail.cfm?id=107](http://www.rab.com/public/pr/revenue_detail.cfm?id=107) (visited Nov. 5, 2008).

studies have shown that the greater efficiencies and economies of scale flowing from some increased ownership by numerous radio groups would yield competitive benefits that are pro-consumer, including the ability to increase investments in more locally-produced and focused programming and services, and increased diversity in programming and formats.

Notwithstanding clear showings, particularly in the larger markets, that targeted changes to the local ownership rules would provide station owners with the financial flexibility to improve their service to their communities, the Commission refused to make any change to the local radio ownership rules last December.<sup>14</sup> Regardless of other aspects of the ownership debate, it is incontrovertible that the Commission's inaction weakened the ability of free, over-the-air terrestrial radio broadcasting to compete in the digital audio marketplace.

**B. The FCC's Unprecedented Approval Of A Satellite Radio Monopoly Gave Sirius XM The Ability to Utilize Its Enormous Spectrum Advantage In An Anticompetitive Manner Injuring Free, Over-The-Air Radio**

This *Notice of Inquiry* is the direct result of the Commission's unprecedented approval of the applications for authority to transfer control of XM Satellite Radio Holdings, Inc., and Sirius Satellite Radio Inc. That Commission decision to sanction a monopoly provider of all of SDARS marked a reversal of decades of Commission precedent in both spectrum and competition policy, benefiting a national, pay service with virtually no public interest obligations to the express detriment of a local, free radio broadcasting charged with serving in the public interest.

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<sup>14</sup> See *In the Matter of 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010 at ¶¶ 110-138 (2008).

The magnitude and competitive importance of the spectrum advantage conferred upon Sirius XM by the Commission's approval of their merger cannot be overstated.<sup>15</sup> Sirius XM, the sole SDARS provider, can now provide more than 300 possible channels in every local market. Viewed another way, it has approximately 25 MHz of spectrum or more than the total amount of spectrum (21.18 MHz) allocated to the FM and AM terrestrial radio broadcast services combined. This means even in the largest U.S. radio markets, a combined XM-Sirius can have *two to three times* the number of channels as *all* of the free local radio broadcast channels (AM and FM) *combined* in that market. This unprecedented spectrum advantage is even more lopsided when viewed through the prism of the current local radio ownership rules. Any single free local radio broadcaster can own no more than eight stations in even the largest markets in the United States. Thus, in any local market, Sirius XM can beam nearly 40 times (23 times including HD

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<sup>15</sup> It should be noted that the Commission never addressed the actual monetary value of the combined SDARS spectrum in its decision approving the extraordinary merger in order to determine whether Sirius XM was receiving a windfall due to Sirius XM's request that the Commission "repeal...the rule prohibiting the merger." See *Merger Order*, 23 FCC Rcd 12348 at ¶ 163. One can only provide an educated guess about what the total satellite radio service spectrum (i.e., the 25 MHz in the valuable 2.3 GHz band) may have been worth at the time of the Commission's decision, especially since the licensee of the spectrum also received an exclusive right from the Federal government to be the only nationwide provider in a distinct audio service. Based on the tens of billions of dollars that the winning bids in the recent AWS and 700 MHz commercial auctions have generated and the fact that the FCC valued the 10 MHz of spectrum that was swapped with Nextel in 2004 at \$4.8 billion, one could estimate that the 25 MHz of combined satellite radio spectrum may be valued at as much as \$12 billion or maybe more, depending on the spectrum's authorized use and how the spectrum is licensed. See *Improving Public Safety Communications in the 800 MHz Band., Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd 14969, 15081 and 15112 (2004) ("To ensure that Nextel [was] treated equitably but [did] not realize any windfall gain," the Commission took a number of steps, including requiring Nextel to partially reimburse the Federal government at \$1.70 per MHz-pop for the nationwide rights to 10 MHz of spectrum at 1.9 GHz.); "Auction of 700 MHz Band Licenses Closes; Winning Bidders Announced for Auction No. 72," *Public Notice 23 FCC Rcd 4572 (Mar. 20, 2008)* ("\$18,957,582,150"); "Auction of Advanced Wireless Services Licenses Closes; Winning Bidders Announced for Auction No. 66," *Public Notice*, 21 FCC Rcd 10521 (2006) ("\$13,700,267,150"). Of course, in 1997, within the framework of the well known fact that the FCC had purposefully established "a rule that would outright prohibit a merger" of the two licenses, XM and Sirius collectively paid a total of \$173,234,888 for the nationwide SDARS spectrum at 2320-2345 MHz. Specifically, Sirius (formerly Satellite CD Radio, Inc.) paid \$83,346,000 for a 12.5 MHz nationwide satellite radio license at 2320-2332.5 MHz, and XM (formerly American Mobile Radio Corporation) paid \$89,888,888 for a 12.5 MHz nationwide satellite radio license at 2332.5-2345 MHz. See "FCC Announces Auction Winners for Digital Audio Radio Service," *Public Notice*, 12 FCC Rcd 18727 (1997).

Radio) the number of channels that are broadcast by any one free local radio broadcast owner in a given market. The competitive advantage is far greater in smaller markets. This enormous spectrum advantage of Sirius XM distorts all marketplace dynamics, placing terrestrial broadcast radio at a dramatic competitive disadvantage necessarily undermining the ability of free, over-the-air local radio to fulfill its core mission of serving its local communities.

With this enormous spectrum advantage and the elimination of head-to-head competition in satellite radio service, Sirius XM has the resources and incentive to obtain the most popular content, especially certain sports programming and celebrity talk shows, and develop an anticompetitive strategy aimed directly at free, over-the-air radio. Sirius XM actions are likely to reduce free local radio broadcasters' ability to sell to advertisers, thus creating a spiral in which terrestrial broadcast content quality declines, while satellite content increases, without any cost reducing efficiencies or any increase in listener/advertiser satisfaction. Such a weakened competitive posture can directly threaten terrestrial radio broadcasters' ability to carry out their mission and obligation to invest in programming and services that respond to the needs of their local communities. One need only look to the migration of high value content, especially sports, from free, over-the-air to pay television to see the inevitable anti-consumer consequences of this shift.

Just as cable television commenced as a subscription-based service and evolved into a service with two revenue streams, subscription and advertising – both national and local – it is eminently foreseeable and probably inevitable that satellite radio will follow a similar path. With such vast aggregation of spectrum, the monopoly likely will siphon advertising dollars from free to pay radio, sapping the economic lifeblood of terrestrial broadcast radio and undermining its ability to serve local communities with diverse, informational programming. Ultimately, the

consumer will suffer by having to pay a premium for previously free radio programming and will have less choice in terms of free radio options.

V. **A REQUIREMENT FOR HD RADIO RECEPTION CAPABILITY IN ALL SATELLITE RADIO RECEIVERS IS ESSENTIAL TO MITIGATE THE COMPETITIVE HARM TO FREE LOCAL RADIO RESULTING FROM APPROVAL OF THE SIRIUS XM MERGER**

The damaging distortion of the audio marketplace resulting from the Commission's approval of the merged Sirius XM requires that a remedy be fashioned to restore some semblance of competitive rationality, particularly where local broadcasters' ability to serve their communities, consistent with their historic mission and statutory mandate, is threatened.

The most efficacious way of rectifying the government created imbalance is to require that all satellite radio receivers have HD Radio reception capability. Only by requiring this capability will the Commission be able to ensure that Sirius XM will not be able to utilize its government bestowed monopoly power to suppress and ultimately squeeze out HD Radio.<sup>16</sup> Having approved the Sirius XM merger in derogation of all fundamental tenets of competition policy, the Commission is now obligated to rectify the imbalance its approval created. An HD Radio reception requirement for all satellite radio receivers is a critical initial step in doing so.

An HD Radio reception capability requirement will help ensure that free, over-the-air radio will have a path to the digital future and will not be relegated to the fate of an anachronistic analog service. The digital television transition was often marked by a "cart before the horse" debate regarding whether there was sufficient digital programming content provided by

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<sup>16</sup> While only 1 million HD Radio modules have been manufactured as of October 8, 2008, Sirius XM has more than 18 million current subscribers. Moreover, on November 6, 2008, Sirius XM projected that it will have 28.4 million subscribers by the end of 2013 despite the economic downturn. See "SIRIUS XM Releases Projections" (Nov. 6, 2008), available at <http://investor.sirius.com/releasedetail.cfm?ReleaseID=346082>; "1 Million HD Radio™ Modules Manufactured To Date" (Oct. 8, 2008) available at [http://www.ibiquity.com/press\\_room/news\\_releases/2008/1244](http://www.ibiquity.com/press_room/news_releases/2008/1244).

broadcasters to warrant manufacture of DTV receivers by equipment makers. Here, as described above, there is no question that radio broadcasters are converting their stations and producing new content for them. The impediment to broad HD Radio marketplace acceptance is squarely in the market for HD Radio equipment. In the case of the DTV transition, the Commission required DTV reception capability in all television receivers. In this circumstance, the rationale for requiring HD Radio reception capability in all satellite radio receivers is far more compelling; it is essential to cure a problem in the market resulting from, or at a minimum, exacerbated by the Commission's own action in approving the Sirius XM merger.

**VI. THE OPEN ACCESS VOLUNTARY CONDITION IS NOT SUFFICIENT TO RESTRAIN THE MONOPOLY POWER OF SIRIUS XM**

The “open access” condition – in fact, no more than the acceptance of voluntary commitments made by XM and Sirius – is utterly inadequate to safeguard HD Radio from anticompetitive conduct of Sirius XM. As the Commission correctly noted in its *Merger Order*, among other risks, the “loss of head-to-head competition between [XM and Sirius] has the potential of harming consumers by dampening innovation in the manufacture of SDARS receivers”<sup>17</sup> It elaborated that the creation of the monopoly SDARS provider “is likely to harm the public interest by allowing one company to gain increased leverage over the terms and conditions of the contracts for the manufacture of SDARS radios.”<sup>18</sup> The Commission observed that not only is Sirius XM “intimately involved with the design, manufacture, and sale of SDARS receivers” and “own[s] the intellectual property that is necessary for the receivers’ manufacture,” but it also subsidizes and co-brands the SDARS receivers.<sup>19</sup> Therefore, the

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<sup>17</sup> *Merger Order*, 23 FCC Rcd 12348 at ¶ 66.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at ¶ 65.

Commission concluded that “because of their involvement in the manufacture of SDARS receivers, [Sirius XM] could also prevent the development of SDARS receivers that are compatible with other forms of audio entertainment, such as ... HD Radio.”<sup>20</sup> The Commission’s diagnosis of the potential anticompetitive harm to the satellite and HD Radio market was accurate. Unfortunately, the “open access” condition does not provide a meaningful safeguard to mitigate the foreseeable injury resulting from the vertical monopoly the Commission has created for Sirius XM in the manufacturing and distribution of SDARS receivers.<sup>21</sup>

The “open access” condition has far more to do with prohibiting contractual exclusivity between Sirius XM and potentially competing satellite radio receiver manufacturers and preventing conspiracies in restraint of trade already subject to the antitrust laws than it does with preventing practices aimed at stifling HD Radio. The “open access” condition simply does not reach the non-contractual panoply of subsidies, cross-marketing and promotional activities and other arrangements that discourage automobile original equipment manufacturers and other vendors from investing in and developing multifunctional hybrid satellite and HD Radio receivers. Indeed, the best evidence of the impact of such practices and the need for an HD Radio reception capability requirement is that it appears that there are no hybrid satellite radio/HD Radio receivers currently in the market today. As such, the “open access” condition’s focus on prohibiting exclusive contracts clearly misses the target, which is the ability of Sirius XM to exert non-contractual anticompetitive pressures on original equipment manufacturers and other vendors.

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<sup>20</sup> *Id.* at ¶ 66.

<sup>21</sup> *Id.* at ¶¶ 126-130.

Moreover, the Commission has overlooked an apparent loophole in the voluntary “open access” commitments that Sirius XM will likely use to exert its non-contractual leverage to prevent SDARS receiver devices with HD Radio reception from being developed and entering the marketplace. By making clear that electronics and automobile manufacturers “... shall be responsible for, and bear all costs associated with, the design, development, manufacturing, including parts procurement, logistics, warranty, sales, marketing, and distribution of ...” all SDARS receivers that are developed pursuant to “open access,”<sup>22</sup> Sirius XM is basically admitting that it plans to continue to use its monopoly power to disadvantage HD Radio in the marketplace in spite of the open access commitments.

The Commission’s failure to address the non-contractual anticompetitive issues in its review of the merger needs to be corrected through direct Commission regulation of the monopoly provider’s activities and by a mandate on Sirius XM requiring that its devices include both SDARS and HD Radio receiver technology.

**VII. THERE IS NO NEED FOR A RECIPROCAL REQUIREMENT THAT ALL HD RADIO RECEIVERS HAVE SDARS RECEPTION CAPABILITY**

A requirement for HD Radio reception capability in all satellite radio receivers is a direct outgrowth of the Commission’s approval of the Sirius XM monopoly. The proposed rule is needed as a matter of sound competition policy and the preservation of free local radio and the values of localism and diversity that it fosters. The proposed requirement is an antidote to the threats posed by a monopoly SDARS provider. The notion of reciprocal treatment for satellite radio reception capability in HD receivers is completely at odds with the rationale and need for an HD Radio reception requirement. The monopoly SDARS provider does not need any

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<sup>22</sup> *Id.* at Appendix B.

additional help from the government with the advantageous arsenal it already has, including the right to be the exclusive SDARS provider, an enormous spectrum advantage over local free radio, dual revenue streams, virtually no public interest obligations in its service rules and no ownership limitations.

**VIII. THE FCC HAS AUTHORITY TO ADOPT RULES REQUIRING ALL SATELLITE RADIO RECEIVERS TO HAVE HD RADIO RECEPTION CAPABILITY**

The Commission’s authority to adopt a rule requiring devices capable of receiving SDARS to include HD Radio reception can be found in Part 25.144 of the Commission’s rules, which sets forth the service and licensing provisions for SDARS systems.<sup>23</sup> In a similar manner, those provisions currently require SDARS licensees to certify that its system “includes a receiver that will permit end users to access all licensed satellite DARS systems that are operational or under construction.”<sup>24</sup> When it adopted that rule and reaffirmed it in the *Merger Order*,<sup>25</sup> the Commission stated that the receiver interoperability would permit consumers “to access the services from all licensed satellite DARS systems.”<sup>26</sup> Moreover, the Commission stated that receiver interoperability would encourage consumer investment in SDARS equipment, would create economies of scale necessary to make SDARS receiving equipment affordable, and would promote competition by reducing transaction costs and enhancing consumers’ ability to switch

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<sup>23</sup> 47 C.F.R. § 25.144.

<sup>24</sup> 47 C.F.R. § 25.144(a)(3)(ii).

<sup>25</sup> See *Merger Order*, 23 FCC Rcd 12348 at ¶¶ 120-121.

<sup>26</sup> *In the Matter of Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, Report and Order Memorandum Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 5754 at ¶ 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.”).

between competing SDARS providers.<sup>27</sup> The Commission adopted the specific SDARS service rules and receiver interoperability under authority of Sections 1, 4(i), 4(j), 7, 303(r) and 309(j) of the Communications Act of 1934, as amended.<sup>28</sup>

The Court of Appeals for the District of Columbia Circuit decision in *American Library Association v. FCC* (“*American Library*”)<sup>29</sup> is distinguishable from the instant case. That decision overturned the Commission’s rules to impose broadcast flag regulations on over-the-air television devices after reception. Unlike satellite radio, however, the broadcast flag rules dealt with open systems – free, over-the-air broadcast signals being transmitted to receivers manufactured by independent and unrelated entities. In this instance, however, satellite radio is a closed system, now controlled by a monopoly SDARS provider. Thus, an HD radio reception requirement here is legitimately a function of the SDARS service rules governing the process of radio transmission within the satellite network system.<sup>30</sup>

## **IX. CONCLUSION**

Without a requirement for the integrating of free local HD Radio reception capability into all satellite radio receivers, it is foreseeable that the government-sanctioned monopoly SDARS provider will use its overwhelming spectrum advantage and non-contractual leverage over device and automobile manufacturers to suppress HD Radio. The existence of the monopoly SDARS provider combined with intense competition from other unregulated participants in the audio marketplace creates enormous competitive pressures on free, local radio broadcasters, which

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<sup>27</sup> *Id.* at ¶¶ 102-103.

<sup>28</sup> 47 U.S.C. §§ 151, 154 (i), 154 (j), 157, 303(r) and 309 (j).

<sup>29</sup> 406 F.3d 689 at 700 (D.C. Cir. 2005) (“*American Library*”).

<sup>30</sup> The *American Library* decision also would appear to be distinguishable because the broadcast flag regulations it overturned imposed requirements on device manufacturers after reception of broadcast signals. Here, any requirement would be incident to reception.

threaten their ability to serve their communities. Therefore, a rule requiring HD Radio reception capability in all satellite radio receivers is absolutely critical to the future competitive viability of free local radio in the digital era. Similar to the existing interoperability requirement, the Commission has authority to adopt such a service rule for the SDARS service. Accordingly, Clear Channel urges the Commission to move forward quickly and adopt a rule requiring that all SDARS receivers manufactured or imported in the United States or shipped in interstate commerce also have HD Radio reception capability.

Respectfully submitted,

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