

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

In the Matter of )  
 )  
Development of Devices Capable of Supporting ) MB Docket No. 08-172  
Multiple Audio Entertainment Services )  
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**COMMENTS OF SIRIUS XM RADIO INC.**

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November 10, 2008

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**I. INTRODUCTION AND SUMMARY**

Sirius XM Radio Inc. (“Sirius XM”) hereby responds to the Commission’s Notice of Inquiry (“NOI”) with regard to the mandatory inclusion of certain audio technologies in digital radio receivers.<sup>1</sup> No Commission action is warranted or authorized in this area and under no circumstances should the Commission require satellite radio receiver manufacturers to include HD Radio capabilities in their devices, absent a comparable requirement imposed on HD radio manufacturers to include satellite radio technology in HD radio receivers.

First, any Commission requirement for satellite radio to include HD radio technology is unnecessary and unwarranted. HD Radio is hardly a nascent start-up. It is an extension of AM-FM radio – an industry that dominates radio listenership. The current audio entertainment marketplace, including HD Radio, is thriving. Radio manufacturers are developing products that incorporate multiple audio entertainment functionalities, including HD Radio, satellite radio, MP3, and iPod capabilities. As the market for HD Radio and other technologies matures and consumer demand for multi-functional devices grows, receiver manufacturers will integrate a

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<sup>1</sup> *Notice of Inquiry*, 23 FCC Rcd 13178 (2008) (hereinafter “NOI”).

variety of audio technologies into satellite radio receivers.<sup>2</sup> The Commission should allow this process to respond to consumer demand.

Second, any effort by the Commission to impose such a mandate on receiver manufacturers or licensees would raise radio prices and be fundamentally anticompetitive. Increasing the cost of satellite radios may be good for terrestrial radio broadcasting interests. It is not good, however, for manufacturers or consumers who may or may not want to pay for satellite radios to include that capability.

Third, the Commission does not have the authority, either express or ancillary, to require satellite radio manufacturers to include certain technologies in their products. Similarly, the Commission lacks authority to require satellite radio licensees to certify that receiver manufacturers include certain technologies in their devices.

For these reasons, the Commission cannot and should not require satellite radio manufacturers to include HD Radio technology. If, nonetheless, the Commission seeks to take affirmative action in this proceeding, then it should do so reciprocally, requiring satellite radio receivers to include HD radio technology and also requiring HD Radio receivers and, in fact, all AM/FM receivers to include satellite radio functionality.

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<sup>2</sup> As a condition of merger, Sirius XM has agreed to allow device manufacturers to incorporate in satellite radio receivers any other technology that would not result in harmful interference with Sirius XM's network. *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, 12406, ¶ 128 (2008) (“*Merger Order*”).

## **II. THERE IS NO MARKET FAILURE IN THE AUDIO ENTERTAINMENT MARKETPLACE THAT REQUIRES THE COMMISSION'S INTERVENTION.**

The proposed requirement is a solution in search of a problem. The audio entertainment marketplace, which includes, among others, both satellite radio and AM/FM radio providers, is a highly competitive market – a market that does not need government intervention to tip the scale in favor of any one technology or sector. HD Radio, backed by the traditional AM/FM broadcasters who dominate the audio entertainment market, is growing rapidly without any Commission intervention. HD Radio does not need a government-sponsored advantage. The FCC should allow consumer demand, not unnecessary and costly regulation, to determine what devices are developed and sold.

### **A. The Audio Entertainment Market is Highly Competitive and Constantly Evolving.**

The market in which both satellite radio and AM/FM radio compete is highly competitive and dynamic. In addition to AM/FM radio, the competitors in the audio entertainment market include satellite radio, iPods and other personal music players, Internet radio, and even music options available on cellphones. In closing its investigation into the merger of Sirius and XM, the Department of Justice observed that many different competitive technologies offered alternatives to satellite radio and further noted that “a number of technology platforms are under development that are likely to offer new or improved alternatives to satellite radio,” including wireless Internet streaming audio.<sup>3</sup>

Every day new devices and services are introduced into the audio marketplace. For example, the company Slacker released a second-generation portable device that allows

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<sup>3</sup> 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., DOJ Press Release, [http://www.usdoj.gov/opa/pr/2008/March/08\\_at\\_226.html](http://www.usdoj.gov/opa/pr/2008/March/08_at_226.html) (last visited Nov. 10, 2008).

consumers to create personalized radio “stations” that can be updated using Wi-Fi connectivity.<sup>4</sup> Other devices recently have been released that facilitate the process of accessing Internet-based audio content. The Logitech Squeezebox Boom, for example, allows users to access both streaming Internet radio services like Rhapsody and Last.fm, podcasts, and a user’s own digital music collection, through a single device and without having to download manually or access the content through a personal computer.<sup>5</sup> Mobile Internet streaming is also becoming more commonplace. In fact, users of the Apple iPhone and iPod Touch can download third-party applications to access popular Internet radio stations like Pandora and AOL Radio from anywhere.<sup>6</sup> Retailers in the marketplace recognize the growing competition among these technologies.

**B. HD Radio, An Extension of AM/FM Broadcasting, Enjoys Many Competitive Advantages in the Audio Entertainment Market.**

There is no question that AM/FM radio continues to dominate the audio entertainment market. Far from being disadvantaged, there is significant evidence that HD Radio, as an extension of AM/FM broadcasting, is thriving.<sup>7</sup> Any further advantage granted to HD Radio is completely unwarranted.

AM/FM radio is the dominant force in the audio entertainment marketplace. Arbitron statistics demonstrate that AM/FM radio reaches 235 million Americans each week across a

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<sup>4</sup> See Slacker, [http://www.slacker.com/products/portables/?slk=g2\\_bkt1a](http://www.slacker.com/products/portables/?slk=g2_bkt1a) (last visited Nov. 7, 2008).

<sup>5</sup> “Logitech Squeezebox Boom – The Ultimate Wi-Fi Radio?” Cnet News, [http://news.cnet.com/8301-17938\\_105-10027437-1.html](http://news.cnet.com/8301-17938_105-10027437-1.html) (last visited Nov. 7, 2008).

<sup>6</sup> “Can the New iPhone Revolutionize Radio?”, CBS News, <http://www.cbsnews.com/stories/2008/07/14/scitech/pcanswer/main4256999.shtml> (last visited Nov. 10, 2008).

<sup>7</sup> See *infra* Section II.C.

broad spectrum of age, race, income, and other demographics.<sup>8</sup> Essentially every automobile sold in the U.S. is equipped with an AM/FM receiver, as are innumerable household and portable devices. Even with more than 18 million subscribers, Arbitron estimates that Sirius XM accounts for less than five percent of radio listening.<sup>9</sup> AM/FM radio has built-in financial advantages over competing forms of audio entertainment. Unlike satellite radio and wireless carriers, who paid for their spectrum at auction, broadcasters paid nothing to the taxpayers for their spectrum. And, unlike satellite radio and virtually every other audio entertainment competitor, AM/FM radio pays no royalties to musicians.<sup>10</sup>

The historical advantages of AM/FM radio also benefit HD Radio. HD Radio is simply a digital upgrade from existing AM/FM radio -- a platform that allows AM/FM licensees to broadcast additional, higher-quality audio and other services (including data) using their existing spectrum and leveraging their existing AM/FM infrastructure.<sup>11</sup> HD Radio also has massive financial backing from the biggest names in AM/FM radio, including Citadel Broadcasting,

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<sup>8</sup> Arbitron, [http://www.arbitron.com/national\\_radio/home.htm](http://www.arbitron.com/national_radio/home.htm) (last visited Nov. 7, 2008).

<sup>9</sup> Orbitcast, <http://www.orbitcast.com/archives/arbitron-reports-satellite-radio-listening-is-up.html> (last visited Nov. 7, 2008).

<sup>10</sup> Comments of Recording Industry Association of America, MB Docket No. 08-172, at 2 (filed Nov. 7, 2008) (recognizing that a technological mandate imposed upon satellite radio receivers “provides unfair advantages to HD Radio” since “SDARS pay artists and copyright owners for the use of sound recordings, while neither HD Radio nor analog radio pays artists or copyright owners”).

<sup>11</sup> *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, 10347, ¶ 4 (2007) (stating that “[in-band, on-channel] technology makes use of the existing AM and FM bands (In-Band) by adding digital carriers to a radio station’s analog signal, allowing broadcasters to transmit digitally on their existing channel assignments (On-Channel) while simultaneously maintaining their analog service” and that “iBiquity’s IBOC DAB technology enables radio stations to provide enhanced sound fidelity, improved reception, multiple audio streams, and new data services”).

Clear Channel Communications, CBS Radio, and Bonneville International.<sup>12</sup> This financial support has enabled AM/FM radio aggressively to market the HD format. In early 2006, the HD Digital Radio Alliance, a coalition of the nation's largest AM/FM broadcasters, announced a \$200 million campaign to advertise HD Radio.<sup>13</sup> In late 2006, it announced an additional \$250 million advertising campaign.<sup>14</sup> More recently, in June 2008, the Alliance commenced a \$57 million advertising campaign to further increase awareness and adoption of HD Radio.<sup>15</sup> These are hardly the hallmarks of a fledgling commercial enterprise. The promotion and growth of HD Radio only further counsels against a Commission mandate. Satellite radio and HD Radio remain in different stages of growth and development and a mandate would only impede the development of each service.<sup>16</sup>

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<sup>12</sup> All of these companies are members of the HD Digital Radio Alliance. *See* HD Radio, Press Room, [http://www.hdradio.com/press\\_room.php#alliancemembers](http://www.hdradio.com/press_room.php#alliancemembers) (last visited Nov. 7, 2008).

<sup>13</sup> HD Radio, *Radio Companies Kick Off First Phase of \$200 Million Ad Campaign for HD Digital Radio*, [http://www.hdradio.com/press\\_room.php?newscontent=23](http://www.hdradio.com/press_room.php?newscontent=23) (last visited Nov. 7, 2008).

<sup>14</sup> HD Radio, *HD Digital Radio Alliance Pumps Up the Volume in 2007; New Ad Campaign Will Top \$250 Million*, [http://www.hdradio.com/press\\_room.php?newscontent=50](http://www.hdradio.com/press_room.php?newscontent=50) (last visited Nov. 7, 2008).

<sup>15</sup> HD Radio, *HD Digital Radio Alliance Expands Marketing Campaign to Convert Consumer Awareness to Action*, [http://www.hdradio.com/press\\_room.php?newscontent=301](http://www.hdradio.com/press_room.php?newscontent=301) (last visited Nov. 7, 2008).

<sup>16</sup> The Commission recognized in 1997 that the differences in development of the two technologies prevents the Commission from imposing a technological mandate. The same philosophy remains applicable today. *See Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5754, 5795-96, ¶ 103 (1997) (“We do not mandate that satellite DARS receivers be capable of receiving terrestrial broadcasting formats. Terrestrial and satellite DARS are at different developmental stages and we do not want to impede implementation of either service.”).

### C. HD Radio is Growing Rapidly.

The listening public's knowledge and adoption of HD Radio has grown significantly. Consumer awareness of HD Radio has increased substantially over the past two years, from 38 percent in 2006 to 67 percent in 2008, according to a recent poll.<sup>17</sup> Not surprisingly, HD Radio is also being rapidly adopted. According to an iBiquity spokesperson, 500,000 HD Radio receivers have been sold in the U.S., and 1,750 radio stations are broadcasting using the HD platform.<sup>18</sup> Moreover, 1.5 million HD Radio chipsets have been shipped to manufacturers and 80 HD Radio products available at more than 14,000 retail locations nationwide.<sup>19</sup> And HD Radio is an option in automobiles from 14 car manufacturers, totaling 82 models.<sup>20</sup>

The open access conditions imposed on Sirius XM in the Merger Order ensure that both HD Radio and satellite radio technology can co-exist without a Commission mandate.<sup>21</sup> AM/FM radio and, by extension, HD Radio is well-financed and well-positioned to continue its significant role in the audio entertainment market. The Commission should allow radio consumers to decide winners and losers—not impose an additional policy preference for HD Radio over all other forms of audio entertainment.

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<sup>17</sup> Survey: HD Radio Awareness on the Rise, Sept. 16, 2008, [http://radiomagonline.com/convention\\_news/nab\\_radio\\_show/nabr\\_update\\_20080916/index2.html](http://radiomagonline.com/convention_news/nab_radio_show/nabr_update_20080916/index2.html) (last visited Nov. 10, 2008).

<sup>18</sup> *Broadcast*, Communications Daily, Oct. 15, 2008, at 13.

<sup>19</sup> *Id.*

<sup>20</sup> HD Digital Radio Alliance Marks Three Successful Years, Sept. 3, 2008, [http://hdradio.com/the\\_buzz.php?thebuzz=308](http://hdradio.com/the_buzz.php?thebuzz=308) (last visited Nov. 10, 2008).

<sup>21</sup> See *Merger Order* at ¶ 128 (“This principle of openness would serve to promote competition, protect consumers, and spur technological innovation.”).

**D. The Marketplace is Already Introducing Many Multifunction Devices and There is No Legal Impediment to the Introduction of Receivers That Incorporate Both HD Radio and Satellite Radio.**

In addition to the adoption of HD Radio capabilities, the market for multi-functional radio receivers is thriving and will only continue to evolve and grow. The car dashboard already incorporates numerous audio entertainment options. Home, portable, and handheld devices show a similar degree of integration among various audio entertainment options.<sup>22</sup> If consumers demand integrated HD Radio/satellite radio devices or if manufacturers want to build multifunction devices, such devices may be brought to market without interference from Sirius XM.

With regard to the car dashboard, at least 12 different aftermarket car dashboard radio receivers are currently available that include an AM/FM tuner, an HD Radio tuner, CD/MP3 capability, and an iPod port.<sup>23</sup> Of those 12 dashboard receivers, seven are also “satellite radio ready,” meaning that they can receive satellite radio with minimal additional expenditure.<sup>24</sup> As discussed above, 14 car manufacturers representing 82 different models have committed to including HD Radio receivers in their vehicles.<sup>25</sup> Most, if not all, of those car makers include a CD player in their models as well. At least 13 radio manufacturers supply the automotive industry with in-car receivers that incorporate HD Radio along with CD, DVD, and MP3

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<sup>22</sup> See, e.g., [www.apple.com](http://www.apple.com), [www.archos.com](http://www.archos.com), [www.cowonamerica.com](http://www.cowonamerica.com), [www.creative.com](http://www.creative.com), [www.iriverinc.com](http://www.iriverinc.com), [www.consumer.philips.com](http://www.consumer.philips.com), [www.samsung.com](http://www.samsung.com), [www.sansa.com](http://www.sansa.com), [www.sony.com](http://www.sony.com), and [www.toshiba.com](http://www.toshiba.com) for an overview of just some of the available multimedia products.

<sup>23</sup> See [http://www.hdradio.com/buyers\\_guide.php?prime=autonow](http://www.hdradio.com/buyers_guide.php?prime=autonow) (last visited Nov. 7, 2008). See also [www.insignia-products.com](http://www.insignia-products.com); <http://mobile.jensen.com/jensen/>; [www.jvc.com](http://www.jvc.com); and [www.kenwood.com](http://www.kenwood.com) for further product information.

<sup>24</sup> *Id.*

<sup>25</sup> “HD Digital Radio Alliance Marks Three Successful Years,” [http://hdradio.com/the\\_buzz.php?thebuzz=308](http://hdradio.com/the_buzz.php?thebuzz=308) (last visited Nov. 7, 2008).

players.<sup>26</sup> The availability of in-dash radio receivers that incorporate CD/MP3 capability and iPod functionality is extensive.<sup>27</sup> Many of these receivers are also “HD Radio ready,” “satellite radio ready,” or both.<sup>28</sup> Of particular note is Ford’s “Sync” technology. Sync is a voice-activated in-car communications and entertainment system. It is compatible with nearly all of the most popular media players in the market<sup>29</sup> and can wirelessly stream music from any Bluetooth supported device.<sup>30</sup> Coupled with Ford’s, Lincoln’s, and Mercury’s factory installed HD Radio and CD player, Sync provides motorists with multiple audio entertainment capabilities.

There are also many multifunction home, portable, and handheld devices available to consumers. Notably, home stereo components include an HD Radio receiver and are XM satellite radio ready.<sup>31</sup> Sirius XM sells numerous portable and handheld radios, including the XMP3 and the Sirius Stiletto 2, which include satellite radio, recording functionality, and MP3

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<sup>26</sup> Those manufacturers include Alpine, Continental, Fujitsu Ten, Panasonic, Visteon, Harman/Becker Automotive Systems, Daewoo, Hyundai Autonet, Pioneer, Clarion, Delphi, Mitsubishi Electric, and Sanyo. See [http://www.ibiquity.com/automotive/oem\\_manufacturers](http://www.ibiquity.com/automotive/oem_manufacturers) (last visited Nov. 7, 2008).

<sup>27</sup> For example, all 2008 Alpine in-dash receivers are iPod compatible and nearly all also include CD and MP3 playback. See <http://www.alpine-usa.com> (last visited Nov. 7, 2008).

<sup>28</sup> Evidence of this includes Alpine’s latest model, the iDA-X200, which is HD Radio ready, satellite radio ready, has iPod functionality, plays CDs and MP3s, and includes a USB port for additional multimedia functionality, <http://www.alpine-usa.com/US-en/products/product.php?model=iDA-X200> (last visited Nov. 7, 2008). Additional examples of multi-functional receivers include two Kenwood models, the KDC-MP238 and the KDV-412. See [www.kenwoodusa.com](http://www.kenwoodusa.com) for more information. Sony too makes car receivers that are HD Radio ready, satellite radio ready and iPod compatible (see, e.g., the CDXGT620IP and CDX-GT320 models).

<sup>29</sup> See [http://www.syncmyride.com/Own/SupportContent/PDF/IOP\\_V100\\_US\\_EN.pdf](http://www.syncmyride.com/Own/SupportContent/PDF/IOP_V100_US_EN.pdf).

<sup>30</sup> See [www.syncmyride.com](http://www.syncmyride.com) (last visited Nov. 7, 2008).

<sup>31</sup> See *Denon DRA-697CIHD Stereo Receiver with HD Radio*, <http://www.crutchfield.com/App/Product/Item/Main.aspx?g=305150&i=033DRA697H&c=4&tp=207> (last visited Nov. 7, 2008).

functionality.<sup>32</sup> As discussed above, new devices incorporate Internet radio streaming and MP3 functionality.<sup>33</sup> Numerous handheld MP3 players also feature FM or AM/FM receivers.<sup>34</sup>

No legal impediment exists to the introduction of third-party receivers that incorporate both HD Radio and satellite radio. The grant of the merger between Sirius and XM was conditioned on Sirius XM's agreement to "permit any device manufacturer to develop equipment that can deliver the company's satellite radio service" and permit device manufacturers to incorporate any other technology "including hybrid digital (HD) radio technology," as long as it did not interfere with satellite radio reception.<sup>35</sup> Virtually any third party manufacturer that wants to incorporate HD Radio and satellite radio into a single device can do so, and if consumers demand such a device, it will be brought to market.

All evidence suggests that the in-car, home, and portable audio entertainment marketplace is alive with options for multi-function devices. To the extent that consumers demand devices having both HD Radio and satellite radio functionality, there is no legal or practical impediment to bringing those devices to market. Thus, any Commission mandate imposed upon receiver manufacturers to uniquely advantage HD Radio is unwarranted and unnecessary.

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<sup>32</sup> See <http://www.xmradio.com/shop/index.xmc#> (last visited Nov. 7, 2008).

<sup>33</sup> See *supra* Section III.

<sup>34</sup> See e.g., <http://www.amazon.com/Radio-Your-Way-LX-Recorder/dp/B0008KL7IQ> (last visited Nov. 7, 2008), <http://www.crutchfield.com/App/Product/Item/Main.aspx?g=158150&i=158B133FBK&tp=242> (last visited Nov. 7, 2008).

<sup>35</sup> *Merger Order* at Appendix B.

### **III. REQUIRING SATELLITE RADIO RECEIVERS TO ALSO HAVE HD RADIO CAPABILITY IS FUNDAMENTALLY ANTICOMPETITIVE AND ANTI-CONSUMER.**

The Commission should refrain from requiring satellite radio receivers to include HD Radio technology because such a mandate is anticompetitive and not in the interest of consumers.

The FCC should recognize this attempt by the AM/FM broadcasting industry for what it is – part of AM/FM broadcasters’ continuing efforts to bury satellite radio as a competitor.<sup>36</sup> In this latest chapter, AM/FM broadcasters want to handicap satellite radio by increasing the cost of satellite radio receivers and piggybacking on the subsidies that Sirius XM pays in connection with the marketing of its receivers. By driving up the costs of satellite radios, AM/FM broadcasters hope to discourage consumers from buying satellite radios. Such actions are blatantly anticompetitive and will deprive manufacturers and consumers of the ability to choose the products and services that they want.

The inclusion of an HD Radio receiver will increase the cost of a satellite radio to consumers by a significant amount—potentially hundreds of dollars. Currently, consumers can

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<sup>36</sup> David K. Rehr, President & CEO, NAB, Speech at the 2006 NAB Radio Show, Sept. 21, 2006, [http://www.nab.org/AM/Template.cfm?Section=Press\\_Releases1&CONTENTID=6802&TEMPLATE=/CM/ContentDisplay.cfm](http://www.nab.org/AM/Template.cfm?Section=Press_Releases1&CONTENTID=6802&TEMPLATE=/CM/ContentDisplay.cfm) (last visited Nov. 10, 2008) (“In 2006, we have satellite and Internet radio. And barely a day passes without the introduction of a new competing device or service. But we have news for our competitors: ‘We will beat you – as we have beaten those change agents in the past.’”). *See also*, Comments of the National Association of Broadcasters, IB Docket No. 95-91, at 1 (filed June 13, 1997) (characterizing itself as an “ardent opponent of SDARS”); Comments of National Association of Broadcasters, IB Docket No. 95-91 (filed Aug. 23, 2001) (expressing opposition to requests from Sirius and XM for special temporary authority to operate DARS terrestrial repeaters); Petition for Declaratory Ruling of National Association of Broadcasters, IB Docket No. 95-91 (filed April 14, 2004) (reiterating its opposition to satellite radio transmitting any locally originated programming); Comments of Public Knowledge, MB Docket No. 07-57 at 12-16 (filed July 9, 2007) (summarizing NAB’s strident opposition to the deployment of satellite radio since its inception).

purchase a satellite radio for as low as \$39.99, with most costing between \$60 and \$150.<sup>37</sup> The majority of HD Radios cost between \$200 and \$300.<sup>38</sup> A radio that is required to include both satellite radio and HD Radio capabilities will be much more expensive than the currently available satellite radios. Even if an HD chipset costs as little as \$12-15, which iBiquity has dubiously claimed,<sup>39</sup> that cost alone would increase the cost of some satellite radios more than 33 percent – certainly enough to discourage potential satellite radio subscribers from signing up.

A requirement to include HD Radio in every satellite radio would force radio manufacturers to implement many additional features necessary to allow access to both the HD Radio and satellite radio functionalities of the radio. Like the addition of HD chipsets, the forced inclusion of these additional features increases costs for consumers. Consumers will lose the ability to choose radios that perform the exact functions they desire. If satellite radios are all required to include HD Radio functionality, many consumers will have to use radios with potentially confusing functionalities that they never had any desire to purchase.

Satellite radio providers currently subsidize the cost of satellite radios to attract customers and increase subscribers. HD Radio, which is free to the public, has no need for any subscriptions, and consequently no need to subsidize radios or the chipsets that receive HD

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<sup>37</sup> See, e.g., Sirius Satellite Radio, All Radios, [http://shop.sirius.com/edealinv/servlet/ExecMacro?nurl=control/CategoryHome.vm&ctl\\_nbr=2640&allradios=Y](http://shop.sirius.com/edealinv/servlet/ExecMacro?nurl=control/CategoryHome.vm&ctl_nbr=2640&allradios=Y) (last visited Nov. 7, 2008); XM Radio, Radios, <http://www.xmradio.com/shop/index.xmc> (last visited Nov. 7, 2008); Best Buy, Satellite Radio, <http://www.bestbuy.com/site/olspage.jsp?id=abcat0302019&type=category> (last visited Nov. 7, 2008).

<sup>38</sup> See, e.g., iBiquity Digital, HD Radio Products, [http://www.ibiquity.com/hd\\_radio/hdradio\\_buy\\_an\\_hd\\_radio/hdradio\\_products](http://www.ibiquity.com/hd_radio/hdradio_buy_an_hd_radio/hdradio_products) (last visited Nov. 7, 2008); Crutchfield, *HD Radio Discover It*, at <http://www.crutchfield.com/S-tVqdsN9uyd6/hdradio/> (last visited Nov. 7, 2008).

<sup>39</sup> Letter from Albert Shuldiner, Senior Vice President and General Counsel, iBiquity Digital Corporation, to The Honorable Deborah Taylor Tate, Commissioner, FCC, MB Docket No. 07-57, at 2 (July 9, 2008).

Radio programming. Without subsidies for the HD Radio components that would be required in all satellite radios, the cost of radios for satellite radio customers will increase, which, again, will undoubtedly reduce the number of consumers interested in subscribing to satellite radio. HD Radio interests will benefit from the cost savings available through the subsidy offered by satellite radio providers. This inequitable treatment of satellite radio and HD Radio listeners will provide little incentive for satellite radio to continue subsidizing radios, as it will be unclear whether these subsidies will result in more satellite radio customers, or if they will be useful only in benefiting HD Radio consumers without any contribution from HD Radio providers.

Finally, a requirement to include HD Radio chipsets in all satellite radios will harm the current market for handheld portable satellite radios. Although HD Radio advocates are developing plans for portable HD Radios,<sup>40</sup> no handheld portable HD Radios on the market that are comparable to the handheld devices available to satellite radio consumers, including the STILETTO and XMp3.<sup>41</sup> Requiring manufacturers to merge HD Radio and satellite radio technologies into currently available handheld portable radio devices will cause many technical difficulties, particularly with battery constraints,<sup>42</sup> that will impair consumers' ability to purchase and utilize handheld radio devices. Such a requirement will reduce the effectiveness of satellite radios, further solidifying AM/FM broadcasters' dominance of the audio entertainment marketplace.

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<sup>40</sup> See Joseph Palenchar, *HD Radio To Go Portable Via New, Smaller Chipset*, Twice, Jan. 28, 2008, <http://www.twice.com/article/CA6526388.html> (explaining that at the 2008 Consumer Electronic Show, iBiquity demonstrated an *engineering sample* of an HD Radio chipset that worked in an MP3 player). As of October 2008, this demonstration model is not yet available to consumers.

<sup>41</sup> Many of the HD Radios that are marketed as "portable" are actually "the size of a compact bookshelf-speaker." Consumer Electronics Daily, 2008 WLNR 13920685 (July 23, 2008).

<sup>42</sup> *Trying to Compete, Radio Broadcasters Cue Up Digital Signals*, NJBiz, Dec. 17, 2007, [http://findarticles.com/p/articles/mi\\_qa5292/is\\_/ai\\_n21275685](http://findarticles.com/p/articles/mi_qa5292/is_/ai_n21275685) (last visited Nov. 7, 2008).

For these and other reasons, both radio manufacturers and car companies strongly opposed and HD Radio mandate when it was raised in the context of the Sirius/XM merger proceeding. Pioneer North America, Inc. explained to the Commission that the required inclusion of HD radio:

“would limit the breadth of radio product offerings to consumers, limiting consumer choices. There are myriad features which may be incorporated into home, mobile and OEM automotive products and each product incorporates one or several of them. Eliminating the product choice of whether to include HD Radio or not in a particular product cuts by at least half the number of choices we may offer to our customers.”<sup>43</sup>

Similarly, General Motors Corporation and Toyota Motor Sales USA, Inc. disputed the need for such a mandate, arguing that:

“[t]he automotive environment is extraordinarily competitive and there has been no showing in the record to support the proposition that if consumers continue to show an interest in HD technology that those manufacturers currently pursuing other entertainment strategies will not take notice and adjust their strategies.”<sup>44</sup>

These radio and car manufacturers, who will ultimately be responsible for designing and selling radios, understand that this mandate is unnecessary and will serve only to harm consumers.

#### **IV. THE FCC LACKS AUTHORITY TO REQUIRE SATELLITE RADIO RECEIVER MANUFACTURERS TO INCLUDE OTHER TECHNOLOGIES IN THEIR PRODUCTS.**

Even if the Commission believes it is desirable to impose an HD Radio requirement – and it is not – the Commission lacks both express and ancillary authority to require receiver

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<sup>43</sup> Letter from Adam Goldberg, Vice President, Pioneer North America, Inc. to Marlene Dortch, Secretary, FCC, MB Docket No. 07-57, at 1 (filed June 26, 2008). *See also* Comments of Delphi Corp., MB Docket No. 08-172, at 1 (filed Oct. 29, 2008) (stating that integration of HD Radio and satellite radio “will drive higher costs for mid-level systems” and “will unduly burden the consumer by adding significant cost to the sell price compared to the stand alone SDARS receiver system”).

<sup>44</sup> Letter from Richard M. Lee, Executive Director, General Motors Corporation, and David W. Danzer, Toyota Motor Sales USA, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57, at 1 (July 10, 2008).

manufacturers to include “certain technology,” like HD Radio receivers, in satellite radios.<sup>45</sup> The Commission cannot lawfully extend its ancillary authority to impose such a requirement. Similarly, the Commission lacks authority to require satellite radio licensees to “certify” that HD Radio reception is integrated into their chipsets.

The Commission’s express authority over receiver manufacturing is very limited.<sup>46</sup> In fact, nowhere in the Communications Act or other applicable statutes is there authority for the Commission to mandate that satellite radio receiver manufacturers incorporate HD Radio technology or any other technology in their products. As the United States Court of Appeals for the District of Columbia Circuit has stated, “the FCC... ‘literally has no power to act...unless and until Congress confers power upon it’” and is “limited to the scope of the authority Congress has delegated to it.”<sup>47</sup>

The FCC’s lack of authority in this instance stands in stark contrast to the All Channel Receiver Act (ACRA)<sup>48</sup> and other limited and specific grants of authority over receiver manufacturing.<sup>49</sup> In ACRA, for example, Congress specifically authorized the Commission to

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<sup>45</sup> *NOI* at 13184, ¶ 21.

<sup>46</sup> Certainly, the Commission has authority under Part 15 of its rules has authority to regulate receiver manufacturers with regard to radio frequency interference and equipment authorization, but the *NOI* does not apply to such matters.

<sup>47</sup> *Am. Library Ass’n v. FCC*, 406 F.3d 689, 698 (D.C. Cir 2005) (citation omitted); *see also Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (explaining that an agency has “no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress”).

<sup>48</sup> 47 U.S.C. § 303(s).

<sup>49</sup> *See, e.g.*, *id.* §§ 302(a) (authorizing the Commission to regulate regarding the interference potential of devices), 303(e) (providing the Commission authority concerning an apparatus’s external effects and emissions), 303(s) (granting the Commission authority to require television apparatus to receive all frequencies), 303(u) (delegating the Commission authority to require closed-captioning in apparatus), and 303(x) (allowing the Commission the authority to require television apparatus to block certain content).

require that television sets “be capable of receiving all frequencies allocated by the Commission to television broadcasting.” The Commission relied on ACRA when it stipulated that television receiver manufacturers must include digital tuners in its products on a phased-in basis.<sup>50</sup> No comparable authority exists for satellite radios or any other audio service receiver.<sup>51</sup>

Nor does the Commission have ancillary authority to impose an obligation to include HD Radio in satellite radio devices.<sup>52</sup> The Commission’s ancillary authority is best described as collectively arising from a series of statutory provisions found in Title I of the Communications Act, including not only Section 1 (47 U.S.C. § 151) and Section 4(i) (47 U.S.C. § 154(i)), but also Section 2(a) (47 U.S.C. § 152(a)), and Section 7 (47 U.S.C. § 157). Although the Commission does not stipulate in the NOI the particular provision upon which it would rely, none of these provisions provides the Commission with ancillary authority to regulate satellite radio receive manufacturers.

The courts have narrowly circumscribed the Commission’s authority to act under “ancillary jurisdiction.” Ancillary authority exists only when: “(1) the Commission’s general jurisdictional grant in Title I covers the subject matter of the regulations; and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated

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<sup>50</sup> See *Consumer Elecs. Ass’n v. FCC*, 347 F.3d 291, 302 (D.C. Cir. 2003) (recognizing Congressionally mandated digital television transition and Commission determination of consumer expectations that “the television they purchase...be able to receive over-the-air broadcast signals,” and approving Commission action to mandate DTV tuner phase-in); see also *Review of the Commission Rules and Policies Affecting the Conversion to Digital Television*, Second Report and Order and Second Memorandum Opinion and Order, 17 FCC Rcd 15978, 15989, ¶ 24 (2002) (“...the authority provided under the ACRA applies to all devices used to receive broadcast television service, not just those used to receive analog signals.”).

<sup>51</sup> Congress is considering a bill, H.R. 7157, Radio All Digital Channel Receiver Act, 110th Cong. (2008), that would provide the Commission such authority – strongly suggesting that the Commission does not currently have that authority.

<sup>52</sup> *NOI* at 13184, ¶ 21.

responsibilities.”<sup>53</sup> While the regulation of satellite radio receivers and their manufacturers is related to the provisioning of “interstate and foreign commerce in communication by wire or radio,” as stipulated in 47 U.S.C. § 151, the analysis does not end there.<sup>54</sup>

In the *American Library Association* case, the court struck down the Commission’s “broadcast flag” regulations because the Commission lacked jurisdiction to regulate the communications facilities when they are “not engaged in the process of radio or wire transmission.”<sup>55</sup> The broadcast flag consisted of a digital code embedded in a digital television broadcast stream. It was meant to prevent digital television reception equipment from redistributing broadcast content.<sup>56</sup> In implementing its broadcast flag regulations, the Commission relied exclusively on its ancillary authority under Title I of the Communications Act.<sup>57</sup> The Court noted, however, that the Commission’s authority under Title I applies to the regulation of receiver apparatus only while it is “engaged in the process of receiving a transmission” and cannot be used to regulate apparatus “after” a transmission is complete.<sup>58</sup> By extension, if the Commission were to impose a technological mandate on satellite radio receivers, i.e. by requiring satellite radio receivers during manufacture to include an HD Radio chipset, such a mandate would regulate receivers *prior to* their operation and, therefore, would be outside the Commission’s jurisdiction.

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<sup>53</sup> *Am. Library Ass’n*, 406 F.3d at 700 (citations omitted).

<sup>54</sup> *Id.* at 701.

<sup>55</sup> *Id.* at 703.

<sup>56</sup> *Id.* at 691.

<sup>57</sup> *Id.* .

<sup>58</sup> *Id.* at 692.

Indeed, as the D.C. Circuit held, extending the Commission’s ancillary authority to include regulation of the non-communications activities of receiver manufacturers would lead to unbridled constructions of Section 1 “that impose[] no meaningful limits on the scope of the FCC’s general jurisdictional grant.”<sup>59</sup> As the Court emphatically found, the FCC has “never . . . possessed ancillary jurisdiction . . . to regulate consumer electronic devices that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission.”<sup>60</sup> Thus, there is no basis for ancillary authority in this case.

Even were the Commission to determine that mandating satellite radio receiver manufacturers to include certain technology in their products is within the scope of its general jurisdiction, the agency nevertheless would need to identify any “statutorily mandated responsibility” to which such a requirement could be reasonably ancillary. The Commission’s use of its ancillary authority has been upheld only where it could rely on a substantive congressional mandate elsewhere in the Communications Act.<sup>61</sup> No such congressional mandate to regulate satellite radio receiver manufacturers exists.

The Commission cannot extend its ancillary authority to require licensees, such as Sirius XM, to certify that its vendors and manufacturers require certain technology in their products.<sup>62</sup> The Commission’s regulatory authority over licensees such as Sirius XM does not encompass

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<sup>59</sup> *Id.* at 703 (citation omitted).

<sup>60</sup> *Id.* at 705. See also *id.* at 692 (“There is no statutory foundation for the broadcast flag rules, and consequently the rules are ancillary to nothing.”).

<sup>61</sup> See, e.g., *United States v. Sw. Cable Co.*, 392 U.S. 157, 178 (1968) (“[T]he authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission’s various responsibilities for the regulation of television broadcasting.”); *Computer & Commc’ns Indus. Ass’n v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982) (finding Title I authority as reasonably ancillary to Section 215 over common carrier services).

<sup>62</sup> *NOI* at 13184, ¶ 21.

requiring them to mandate that certain technologies be included in radios. In essence, the Commission would be doing indirectly what it cannot do directly. Suggesting that licensees certify that receiver manufacturers include certain technologies in receivers confuses the subject matter of the regulation with the regulated entity. After all, it is radio receiver manufacturers who shoulder the burden of the proposed regulation, not licensees. The Commission has only limited Congressionally-delegated authority over receiver manufacturers. Since Congress has not authorized the Commission to impose a technological mandate on satellite radio receiver manufacturers, it cannot and should not require its licensees to serve as de facto regulators by certifying that certain technologies are included in third party receivers.<sup>63</sup>

**V. ANY REQUIREMENT ADOPTED BY THE COMMISSION SHOULD APPLY EQUALLY TO ALL FCC-LICENSED AUDIO ENTERTAINMENT PROVIDERS.**

As detailed above, the highly competitive audio entertainment marketplace does not require regulatory intervention that would provide AM/FM broadcasters with additional competitive advantages. However, if the Commission decides to intervene in the audio equipment market, competitive neutrality and reciprocity should require that all AM/FM and HD Radio devices also include satellite radio capabilities.

The Commission has long favored policies of competitive neutrality. For example, with regard to universal service, the Commission has found that “[u]niversal service support mechanisms and rules should be competitively neutral. In this context, competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology

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<sup>63</sup> It has also been recognized that the Commission oversteps its authority when it imposes a condition that “directly affects” a licensee’s “contractual obligations to a third party.” *Ill. Citizens Comm. for Broad. v. FCC*, 467 F.2d 1397, 1400 (7th Cir. 1972) (citing *Regents of University System v. Carroll*, 338 U.S. 586 (1950)). To the extent that licensees have contracts with receiver manufacturers concerning the development of receivers, it seems likely that imposing a certification condition could be especially problematic.

over another.”<sup>64</sup> Additionally, in determining how to allocate the costs of telephone number portability, the FCC determined that using end-user telecommunications revenue was appropriate because this measurement met the competitive neutrality test.<sup>65</sup> To force one provider in the competitive audio entertainment marketplace to advance the market power and technological development of a competitor would run afoul of this well-established precedent.

This principal of competitive neutrality logically would require the FCC to mandate the inclusion of satellite radio capabilities in all HD Radios and in all AM/FM radios. There is no principled distinction between the two requirements. In fact, since AM/FM radio continues to dominate radio listening—with more than 95 percent of radio listenership—it would be unjustified and inequitable to force satellite radio providers to promote its stronger competitors without requiring those competitors to support the growth of satellite radio. Such equity would help to ensure a level playing field for all competitors in the audio entertainment marketplace.

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<sup>64</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8801, ¶ 47 (1997).

<sup>65</sup> *Telephone Number Portability*, Third Report and Order, 13 FCC Rcd 11701, 11755, ¶ 106 (1998).

## VI. CONCLUSION

The Commission should not require the inclusion of HD Radio in satellite radio receivers. Such a requirement would exceed the Commission's authority, is completely unnecessary in light of competitive marketplace realities, and is fundamentally anticompetitive. If the Commission were to impose such a requirement, however, it should also impose a reciprocal requirement that HD Radio manufacturers include satellite radio technology in HD Radio receivers.

Respectfully submitted,

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November 10, 2008