

**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)
)

To: The Commission

JOINT COMMENTS OF THE

**ALABAMA BROADCASTERS ASSOCIATION
ALASKA BROADCASTERS ASSOCIATION
ARKANSAS BROADCASTERS ASSOCIATION
ARIZONA BROADCASTERS ASSOCIATION
MISSISSIPPI ASSOCIATION OF BROADCASTERS
NEW MEXICO BROADCASTERS ASSOCIATION
PUERTO RICO RADIO BROADCASTERS ASSOCIATION
TENNESSEE ASSOCIATION OF BROADCASTERS**

The Alabama Broadcasters Association, the Alaska Broadcasters Association, the Arkansas Broadcasters Association, the Arizona Broadcasters Association, the Mississippi Association of Broadcasters, the New Mexico Broadcasters Association, the Puerto Rico Radio Broadcasters Association and the Tennessee Association of Broadcasters herein comment on the *Notice of Inquiry*¹ issued by the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned docket. It is the position of the aforementioned state broadcaster associations that the FCC should require that devices capable of receiving Satellite Digital Audio Radio Service (“SDARS”) also include digital audio broadcast — HD Radio™ — reception capability.

¹ *Development of Devices Capable of Supporting Multiple Audio Entertainment Services*, Notice of Inquiry, MB Docket No. 08-172, FCC 08-196 (rel. Aug. 25, 2008).

I. The Need for Regulation

While terrestrial AM and FM radio continues to serve as a mainstay of mass communications, providing free, over-the-air entertainment, news and information to millions of listeners, terrestrial radio broadcasters face significant competitive challenges. Radio broadcast industry revenues have been stagnant or declining for years; prices for publicly-traded broadcasters' stocks have plummeted. Growth for the industry as it exists today is severely limited in a fragmented market with many media and information outlets competing for a share of the public's attention. The transition from analog to digital radio promises tremendous benefits for the average American — better audio fidelity, more robust transmission systems, the ability to provide information services to the public, and access to diverse new program sources. HD Radio provides not only an opportunity for expanded programming and services, it is a competitive necessity for the survival and continued growth of the radio broadcast industry.

HD Radio has made strides toward more widespread deployment of equipment and increased programming availability, but it cannot yet be considered a competitive alternative to satellite radio. The FCC has professed its commitment to free, over-the-air terrestrial broadcasting, and in particular has noted its “inten[tion] to foster the development of a vibrant and vital terrestrial radio service for the public, and to ensure to the extent possible that existing broadcasters have the opportunity to implement [HD Radio].”² If the FCC truly does stand behind the future of free, over-the-air radio, it must not permit SDARS to enjoy an unfair competitive advantage over HD Radio.

² *Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, First Report and Order, 17 FCC Rcd 19990, 19993 (2002) (internal quotations omitted).

The vitality of HD Radio depends on the availability of exciting and desirable programming, the deployment of HD Radio receivers into the marketplace, and adoption by a mass audience. The first of these three elements has begun to come to fruition. There are now more than 1750 HD radio stations across the country, up from 500 just three years ago, and many more are in the works. Of those HD stations already on the air, more than half are broadcasting HD2 and HD3 multicast channels providing additional programming, such as locally-produced minority-focused and foreign language programming programming, not available on the main station channel. In this way, broadcasters are bringing more choice in content to consumers across the country. HD Radio's multicast capabilities are a tremendous boost to broadcast diversity and localism, as stations have more business flexibility with multicast digital channels to offer more locally-produced and -focused content and allowing radio broadcasters to provide niche programming of specific interest to the members of their communities.

In addition to audio, HD Radio offers new features enabled by the digital medium. iTunes™ Tagging technology, which allows HD Radio listeners to “tag” a tune for later purchase from iTunes, is already deployed, and innovative data services like real-time traffic and location-based services, such as integrated GPS navigation announcing traffic jams and construction detours, are coming to market. With all of these great features and benefits, it is a wonder that HD Radio has not yet gained mass market adoption. But the manufacturing, retail distribution, and installation of audio receivers have been suppressed by satellite radio, limiting the deployment of HD Radio equipment to the public and, in turn, causing a growing sense of uncertainty in the broadcasting industry about the future of digital radio.

When the FCC approved the merger to monopoly of Sirius XM, it did so with the knowledge that the merged company would gain strength in its existing business relationships

with companies dominating the distribution and retail of audio equipment. Indeed, as a direct result of the synergy from the previous rivals' long-term exclusive deals with automotive manufacturers, **50% of all new cars** in the United States in 2009 are projected to be equipped with Sirius XM satellite radio receivers.³ Terrestrial radio business lives and dies by the drive-time audience; failure to capture the listener in his car in most cases means failure to capture that listener at all. The merged satellite radio company has the market power to control the manufacturing, distribution and installation of satellite receivers, and the financial incentives to compel these partner companies to hinder the rollout of terrestrial digital radio receivers, effectively blocking 50% of new car buyers access to HD Radio. During the merger approval process, the satellite companies' tendency toward anticompetitive behavior came into focus, in particular their use of exclusive arrangements within distribution channels, strategic ownership interests by key distributors, such as automakers, and revenue sharing models that created barriers to new competitive digital platforms. The merged Sirius XM now has even greater incentive and enhanced ability to employ these same tactics to thwart the rollout of HD Radio in order to limit competition.

Moreover, the SDARS industry has proven that it will stop at nothing, even disregarding the law and the public good, to achieve competitive dominance. It is undisputed that, pre-merger, both XM and Sirius refused to integrate their technologies into dual source receivers in direct contravention of an FCC mandate to offer such devices to the public. Now, with concentration in the supply of satellite radio services and the enjoyment of cost savings associated with the merger, Sirius XM has even more weapons in its arsenal to thwart efforts to develop and deploy dual HD Radio-SDARS devices. If the two satellite companies were so willing to flagrantly

³ Scott, Patricia, *Satellite radio may reach 50% of U.S. 2009 vehicles*, AUTOMOTIVE NEWS, Oct. 20, 2008.

disregard the FCC before, why should we believe their assurances that they have changed their tune now that they have become one? The merger conditions are insufficient to rein in market power; only a rule with consequences can hold Sirius XM accountable.

An FCC rule requiring that HD Radio technology be integrated in devices that include both satellite radio and analog AM/FM receivers will provide the best assurance that equivalent digital platforms for satellite and terrestrial radio enter the marketplace. We urge the FCC to also adopt enforcement mechanisms, in the form of reporting requirements and forfeitures, to ensure compliance. We believe the FCC has express authority under Section 303(g) of the Communications Act, as amended, and, in the alternative, ancillary jurisdiction under Title I of the Act,⁴ to adopt such a mandate.

II. Authority to Regulate

Section 303(g) of the Communications Act, as amended, grants the Commission explicit authority to “[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest.”⁵ In committing to the development and deployment of HD Radio as the digital radio standard in 2002, the Commission set upon a path toward encouraging a larger and more effective use of radio to benefit the public interest. To refrain now from promulgating additional regulation to ensure HD Radio’s success would be to undermine the efforts taken thus far in satisfaction of this Congressional mandate. In fact, failure to mandate equivalent digital platforms for satellite and terrestrial radio would contravene the policy entirely.

⁴ See, e.g., 47 U.S.C. § 154(i) (“[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions”).

⁵ 47 U.S.C. § 303(g).

In addition, there is unambiguous ancillary authority for regulation to require HD Radio reception capability in SDARS equipment. In order for the Commission to regulate under its ancillary jurisdiction, two conditions must be met. First, “the subject of the regulation must be covered by the Commission’s general grant of jurisdiction under Title I of the Communications Act”⁶ Second, the subject of the regulation must be “reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”⁷ In *American Library Association v. FCC*, the D.C. Circuit rejected the FCC’s attempt to mandate digital rights management technology in television receivers (the so-called “broadcast flag”), finding that the FCC exceeded its ancillary authority because it sought to effect a radio communication *after* the transmission of communication was complete. In reaching this conclusion, however, the court affirmed that “the Commission . . . has general authority under Title I to regulate apparatus used for the receipt of radio or wire communication *while those apparatus are engaged in communication.*”⁸ An FCC mandate to ensure reception of digital radio transmissions by apparatus engaged in communication, as is proposed here, would certainly fall within the FCC’s Title I authority.

Moreover, such a regulation would satisfy the second prong of the authority standard. Section 154 of the Communications Act of 1934, as amended, states: “It shall be the policy of the United States to encourage the provision of new technologies and services to the public.”⁹ A regulation seeking to promote the dissemination of HD Radio to the public by removing unfair competitive barriers in the marketplace would epitomize this policy mandate. Such regulation,

⁶ *Am. Library Ass’n v. FCC*, 406 F.3d 689, 704 (D.C. Cir. 2006) (quoting *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968)) (internal quotations omitted).

⁷ *Am. Library Ass’n*, 406 F.3d at 700.

⁸ *Id.*, at 704 (emphasis added).

⁹ 47 U.S.C. § 154(a).

