

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

To: The Commission

**REPLY COMMENTS OF
NATIONAL PUBLIC RADIO, INC.**

Introduction

Pursuant to Section 1.415 of the Commission’s Rules, 47 C.F.R. § 1.415, National Public Radio, Inc. (“NPR”) hereby replies to the comments on the Commission's Notice of Inquiry filed in the above-captioned proceeding.¹

Summary

There is substantial evidence in the record to support the adoption of an HD chipset mandate to assure the inclusion of HD Radio functionality in SDARS receivers. HD Radio promises an exciting new era of terrestrial radio broadcasting, but the widespread deployment of HD Radio receiving capability is essential for that to happen. An HD chipset mandate would not only further the HD Radio transition, it is necessary to address the monopoly power Sirius XM

¹ In the Matter of Development of Devices Capable of Supporting Multiple Audio Entertainment Services Applications, Notice of Inquiry, MB Docket 08-172, rel. Aug. 25, 2008 [hereinafter "NOI"]. Unless otherwise indicated, all citations to comments are to comments filed in this proceeding in response to the NOI.

now enjoys over the SDARS spectrum. While Sirius XM and a few others oppose an HD chipset mandate, there is little merit to the claims that it will impose burdensome costs or otherwise harm consumers. Finally, the Commission enjoys both express and ancillary jurisdiction to act in this case, and, for the abundant reasons provided by NPR and others, the Commission should act expeditiously to require the inclusion of HD Radio functionality in all SDARS receivers.

Argument

In the initial comments, NPR and others described the substantial Federal interest in a successful transition to HD Radio.² The Commission has pledged its support for the HD Radio technology as a means of preserving and promoting a robust terrestrial radio broadcast system.³ In the case of public radio stations, Congress has appropriated substantial funding, enabling grants to more than 700 stations and the conversion of more than 430 stations.⁴ Stations converting to HD Radio have made a substantial commitment of time and money because HD Radio promises to revolutionize local broadcast services.⁵ Indeed, it represents the very future of terrestrial radio broadcasting.⁶

² See Comments of National Public Radio, Inc. at 2-5 [hereinafter "NPR Comments"].

³ See id. at 2.

⁴ See id.

⁵ See Comments of Beasley Broadcast Group, Inc., Bonneville International Corporation, CBS Radio, Inc., Clarke Broadcasting corp., Emmis Communications Corporation, Entercom Communications Corp., Greater Media, Inc., Journal Broadcast Corporation, Premier Broadcasters, Inc., and Saga Communications, Inc. at 14 (describing the independent, community-driven, and niche digital side channels being offered) [hereinafter "Joint Broadcasters Comments"]; Comments of Clear Channel Communications, Inc. at 6 (same) [hereinafter "Clear Channel Comments"]; Comments of the National Association of Broadcasters at 4; Comments of iBiquity Digital Corporation at 4 [hereinafter "iBiquity Comments"]. See

The broad deployment of HD receiving capability is essential to achieving the promise of HD Radio. As NPR's initial comments explained, the development of new HD Radio Services and the public's purchase of HD Radio-capable receivers are inter-dependent.⁷ The Commission confronted a similar situation in the digital television ("DTV") transition and responded by requiring that television sets be manufactured with digital tuners to spur the purchase of DTV-capable receivers and the development of DTV services.⁸ In this case, even if the newly established SDARS monopoly had continued as a competitive service, the Commission would be justified in mandating the inclusion of HD Radio functionality in SDARS receivers to encourage economies of scale that will reduce the cost to produce HD Radio-capable receivers, foster the wide availability of local HD Radio services, and, ultimately, promote the future of terrestrial radio broadcasting.⁹

As other commenters noted, however, the presence of an SDARS monopoly makes the inclusion of HD Radio functionality in SDARS receivers even more of an imperative. Monopoly

also Joint Comments of 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, and Tennessee Association of Broadcasters at 3 (describing new digital services, including iTunes™ Tagging, real-time traffic and location based services [hereinafter "Joint Broadcasters Association Comments"]).

NPR is using the technology to develop "accessible radio" services for the print- and hearing-impaired, among other services. NPR Comments at 3-4.

⁶ See Joint Broadcasters Comments at 13; Clear Channel Comments at 5-7.

⁷ NPR Comments at 5.

⁸ Id. See also Comments of Mullaney Engineering, Inc. at 2 (stating that "had it issued this mandate in the beginning, many believe that it would have been unnecessary for Congress to implement the coupon program" to subsidize the cost of set-top converter boxes).

⁹ NPR Comments at 7-9.

control over 25 MHz of spectrum, or more than the entire AM and FM bands combined, gives Sirius XM the opportunity and the incentive to obstruct the HD Radio transition. This spectrum monopoly translates into significant influence over the decisions of SDARS receiver manufacturers and retailers and automobile companies.¹⁰ The "open access" condition imposed as part of the merger approval may *permit* the manufacture of multifunction SDARS receivers, but Sirius XM's ability to manipulate the manufacturing decisions through financial inducements effectively negates it.¹¹

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 developing multifunctional hybrid satellite and HD Radio receivers.¹²

In the wake of the merger, the Commission can no longer rely on competitive market forces to ensure the deployment of HD Radio-capable SDARS receiving equipment.¹³

The entities opposed to an HD chipset mandate -- Sirius XM and certain automobile and related manufacturers -- offer no compelling reason for withholding such a requirement. Sirius XM and the automobile commenters take contrary positions on the state of HD Radio. Sirius XM contends that HD Radio, as an extension of AM/FM broadcasting, necessarily enjoys a

¹⁰ See Joint Broadcasters Comments at 7-12.

¹¹ See id. at 9-11.

¹² Clear Channel Comments at 14. See also Joint Broadcasters Association Comments at 4 ("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 [automobile] companies to hinder the rollout of terrestrial digital radio receivers, effectively blocking 50% of new car buyers [sic] to HD Radio.").

¹³ See NPR Comments at 6.

superior competitive position over SDARS,¹⁴ while the Alliance of Automobile Manufacturers Association takes the opposite position.¹⁵ Sirius XM's assessment is not credible, and, while the automobile manufacturers are correct in observing the lack of widespread consumer adoption of HD Radio, that observation only underscores the need for Commission action.

Even though its monopoly control over the SDARS spectrum gives it extraordinary leverage over the public's access to HD Radio, Sirius XM further takes the position that requiring HD Radio functionality in SDARS receivers is itself anticompetitive and anti-consumer.¹⁶ This assertion is based the claim that the inclusion of HD Radio functionality in SDARS receivers is, in actuality, a subterfuge to increase the cost of SDARS receivers and undermine their quality.¹⁷ The claim that an HD chipset mandate would impose burdensome costs has been shown to be without merit.¹⁸ It is also contrary to Sirius XM's own assertion that "[a]ll evidence suggests that the in-car, home, and portable audio entertainment marketplace is alive with options for multi-function devices."¹⁹ Even if including HD Radio functionality in

¹⁴ Comments of Sirius XM Radio, Inc. at 4-6 [hereinafter "Sirius XM Comments"].

¹⁵ Comments of the Alliance of Automobile Manufacturers, Inc. at 4 (stating that "HD Radio has yet to be adopted by consumers on a wide scale").

¹⁶ Sirius XM Comments at 11-14.

¹⁷ Id. at 11-12. Equally meritless are hyperbolic claims that auto manufacturers will have to substantially redesign automobile electrical systems and hardware to accommodate an HD chipset mandate. See Comments of Jaguar Cars Limited and Land Rover at 1 [hereinafter "Jaguar Comments"].

¹⁸ See iBiquity Comments at 10 ("As iBiquity previously informed the Commission, a mandate to include HD Radio technology in SDARS receivers will have a *de minimis* impact on the cost, design, and functionality of this equipment.").

¹⁹ Sirius XM Comments at 10.

certain types of SDARS receivers were shown to be cost prohibitive, the Commission could certainly entertain specific requests to waive the requirement for those receivers.

Taken at face value, moreover, the claim that an HD chipset mandate is cost prohibitive appears to concede that the "open access" condition imposed as part of the merger will be ineffectual. Indeed, if the cost of including HD Radio functionality in SDARS receivers were significant, no device manufacturer would attempt to produce SDARS receivers with HD Radio functionality.²⁰ In such circumstances, the need for Commission intervention might be even more compelling.

While there is a lack of multifunction options available to consumers,²¹ the cause appears to be Sirius XM's ability to offer financial incentives to discourage manufacturers from producing such equipment.²² That financial leverage derives from the subscription-based SDARS model which provides a source of revenue that Sirius XM can share with device manufacturers.²³ Left unchecked, moreover, the newly established SDARS monopoly can only accentuate Sirius XM's financial leverage. In such circumstances, we submit, there is nothing anticompetitive or anti-consumer about guaranteeing consumers a choice between SDARS and HD Radio.

Finally, Sirius XM's challenge to the Commission's statutory authority to require the inclusion of HD Radio functionality in SDARS receivers is without merit. In contending that the Commission lacks both express and ancillary jurisdiction in this case, Sirius XM simply ignores

²⁰ See Jaguar Comments at 2 ("The proposed combination of these technologies is without precedent elsewhere in the World.").

²¹ iBiquity Comments at 5-6.

²² Id. at 6.

²³ Id.

the Commission's authority to establish and maintain the SDARS service itself, as well as the Commission's ancillary jurisdiction to promote terrestrial broadcasting by requiring the availability of HD Radio reception capability in SDARS receivers. As NPR's initial comments explained, the Commission has asserted plenary authority over SDARS, including when it required SDARS providers to produce inter-operable receivers capable of receiving the competing SDARS services.²⁴ The All Channel Receiver Act and what it does or does not authorize is, therefore, irrelevant.²⁵

Sirius XM's attempt to dispute the Commission's ancillary jurisdiction is equally unavailing. Applying the first part of the relevant analysis,²⁶ Sirius XM concedes that SDARS falls within the Commission's general grant of authority over interstate or foreign communications by wire or radio. It argues, however, that requiring the inclusion of HD Radio functionality in SDARS receivers necessarily operates when the receiver is manufactured, which occurs before the actual reception of communications.²⁷ Such a literal reading of the American Library Association decision is unfounded, to the point of absurdity. Indeed, if ancillary jurisdiction depended on the timing of the steps necessary to comply with a particular regulation, the Commission's original "must carry" and other cable regulations would have been invalid

²⁴ NPR Comments at 12.

²⁵ See Sirius XM Comments at 15-16.

²⁶ See NPR Comments at 12 (ancillary jurisdiction exists when (1) the regulation falls within the Commission's general grant of authority over interstate or foreign communication by wire or radio and (2) the regulation is reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.).

²⁷ Sirius XM Comments at 17 (*citing* American Library Association v. FCC, 406 F.3d 689 (D.C. Cir. 2005). See also NPR Comments at 12-13 (explaining the judicial standard for assessing ancillary jurisdiction).

because, after all, compliance required cable systems to install equipment and take other actions before they could receive and retransmit broadcast signals or originate cable programming.²⁸ What the court in American Library Association was, in fact, addressing was a regulatory obligation limiting the subsequent use of copyrighted material that was independent of the receipt of the communication. Here, an HD chipset mandate directly concerns the means of receiving HD Radio communications.

Sirius XM's attempt to deny the second part of the ancillary jurisdiction analysis is equally disingenuous. It claims there is no statutorily mandated responsibility to regulate satellite radio receiver manufacturers to which an HD chipset mandate is reasonably ancillary.²⁹ As NPR explained in our comments, however, the purpose of an HD chipset mandate is to preserve and promote a nationwide system of local terrestrial broadcast stations,³⁰ which is one of the Commission's core statutory responsibilities.³¹ Requiring the inclusion of HD Radio functionality in SDARS receivers is, therefore, reasonably ancillary to that responsibility because the availability of HD Radio to SDARS subscribers will help assure the transition to HD Radio and the future of terrestrial radio broadcasting.

²⁸ See NPR Comments at 9-10 (explaining why an HD chipset mandate is comparable to the cable "must carry" obligation, except for any First Amendment implication or other significant burden). See also id. at 2-13 (addressing the Commission's ancillary jurisdiction underlying its original cable regulations).

²⁹ Sirius XM Comments at 18.

³⁰ NPR Comments at 13-14.

³¹ Id. at 13 (*citing* 47 U.S.C. § 307(b)).

Conclusion

For these reasons and as more fully stated in NPR's initial comments, NPR urges the Commission to act expeditiously to require the inclusion of HD functionality in all SDARS receivers.

Respectfully submitted,

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