

**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)
_____)

REPLY COMMENTS OF SIRIUS XM RADIO INC.

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I. INTRODUCTION AND SUMMARY

Sirius XM Radio Inc. (“Sirius XM”) hereby responds to the comments submitted in response to the Commission’s Notice of Inquiry (“NOI”) in the above-captioned docket.¹ As discussed in greater detail below, the record in this proceeding clearly shows that mandating the inclusion of HD Radio capability in all satellite radio equipment would be contrary to the public interest and would benefit only the terrestrial broadcast interests that already dominate the audio entertainment marketplace. The Commission should reject such a mandate and close this proceeding with no further action. In the event the Commission decides to intervene in the audio technology market in this manner, it should do so only reciprocally, by imposing a comparable requirement on HD Radio manufacturers.

First, an HD Radio mandate would be harmful to consumers, car manufacturers

¹ Development of Devices Capable of Supporting Multiple Audio Entertainment Services, MB Docket No. 08-172, *Notice of Inquiry*, 23 FCC Rcd 13178 (2008) (hereinafter “NOI”).

(“OEMs”), and receiver manufacturers. It would harm consumers by driving up costs for features and services that they may not want and would adversely impact consumer choice in audio entertainment. Moreover, it would add an unnecessary additional economic burden on struggling car manufacturers.

Second, there is simply no public interest basis for imposing an HD Radio requirement on satellite radio licensees or manufacturers. Terrestrial radio broadcasters do not require an additional government-sponsored advantage to deploy HD Radio. As their comments demonstrate, terrestrial radio broadcasters are using this docket to re-argue issues that were decided in the Sirius XM merger proceeding, to remedy perceived inequities regarding satellite radio’s spectrum, and as a bargaining chip in their efforts to relax media ownership rules. None of these reasons justifies Commission action in this wholly unrelated matter. Contrary to the comments submitted by terrestrial broadcasters in this proceeding, Sirius XM is not a monopoly and, as memorialized in the Merger Order, Sirius XM may not preclude radio receiver manufacturers from incorporating HD Radio technology into satellite radio receivers, as evidenced by Sirius XM’s commitment to allow manufacturers open access to Sirius XM’s receiver technology.² The highly competitive landscape of the audio entertainment marketplace and Sirius XM’s commitment to open access means that consumers who demand multi-functional digital radio receivers will get them. Commission intervention is entirely unwarranted.

Third, despite the broadcasters’ claims, the Commission lacks the legal authority to require the inclusion of HD Radio technology in satellite radio receivers. Neither the

² 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*”).

interoperability requirement in Part 25 of the Commission's rules nor Sirius XM's open access commitment constitute the necessary authority.

For these reasons, the Commission should refrain from mandating the inclusion of HD Radio technology in satellite radio receivers. Such a mandate would harm consumers and automakers, stifle innovation, and disserve the public interest.

II. AN HD RADIO REQUIREMENT WOULD BE HARMFUL TO CONSUMERS, OEMS, AND EQUIPMENT MANUFACTURERS.

As many commenters in this proceeding make clear, a Commission mandate to include HD Radio technology in satellite radio receivers will adversely impact consumers, equipment manufacturers, and automakers.

Sirius XM noted in its initial comments that an HD Radio mandate would significantly increase the cost of a digital radio receiver, a burden that would be borne by consumers, automakers, receiver manufacturers or all of the above. Indeed, as Delphi noted in its comments, "integration will drive higher costs for mid level systems where the consumer has either chosen HD Radio or [satellite radio], but does not have a desire for both."³ This sentiment is shared by the major car manufacturers as well, including Ford, which noted that "the mandate...will likely increase the price of audio entertainment options in vehicles, without regard to whether consumers actually want those options."⁴ The Alliance of Automobile Manufacturers, the major car companies' trade association, stated that such a mandate would "increase the costs to vehicle manufacturers of integrating audio entertainment systems into their vehicles, thus

³ Comments of Delphi Corporation, MB Docket No. 08-172, at 1 (filed Oct. 28, 2008).

⁴ Comments of Ford Motor Company, MB Docket No. 08-172, at 1 (filed Nov. 18, 2008) ("Ford Comments").

increasing the costs to consumers.”⁵ Consumers will most certainly be hit the hardest by a Commission mandate.⁶ At a time when U.S. car manufacturers face huge economic headwinds,⁷ this type of a government mandate is unthinkable.

In addition to raising the cost of receivers, an HD Radio requirement will adversely impact consumer choice. The audio entertainment marketplace is vibrantly competitive and new audio entertainment products incorporating the latest technology are being offered to consumers.⁸ But, as Ford noted, a mandate to include HD Radio technology in satellite radio receivers “would not allow consumers to make a choice” between and among audio entertainment options.⁹ Consumers should have the opportunity to decide on their own which audio entertainment technology they prefer, not have that decision made for them by government fiat.

III. THERE IS NO PUBLIC INTEREST BASIS TO IMPOSE AN HD RADIO REQUIREMENT ON SATELLITE RADIO LICENSEES OR MANUFACTURERS.

Commenters in the proceeding confirm Sirius XM’s position that no public interest benefit justifies a mandate to include HD Radio technology in satellite radio

⁵ Comments of the Alliance of Automobile Manufacturers, MB Docket No. 08-172, at 3 (filed Nov. 10, 2008) (“AAM Comments”).

⁶ *See, e.g.*, Brief Comment of Gary Saber, MB Docket No. 08-172 (filed Nov. 12, 2008) (noting that a mandate “would result in drastically increased prices for receivers at a time when consumers will be unwilling to pay the increased prices”); Brief Comment of Brian Rayl, MB Docket No. 08-172 (filed Nov. 14, 2008) (“Finally, you have multiple consumers, myself included, who do not want to pay more than I already have and already do, because the Federal Government and a few special interests want to force a failed technology into my car, into my portable SDARS player, and into my life in general, and want me to pay for that technology that I never wanted in the first place.”).

⁷ AAM Comments, at 4.

⁸ For instance, Nokia debuted this month a tabletop radio that incorporates Wi-Fi technology, which allows it to receive Internet radio stations, as well as a FM tuner and MP3 player connectivity. <http://www.engadget.com/2008/12/02/nokia-introduces-home-music-wifi-radio/> (last visited Dec. 2, 2008).

⁹ Ford Comments, at 1.

receivers. Any such mandate is truly a solution in search of a problem.

A. HD Radio Does Not Require Government Intervention to Compete with Satellite Radio.

Terrestrial broadcasters claim an HD Radio mandate is necessary to combat Sirius XM's alleged monopoly power,¹⁰ although neither the Commission nor the Department of Justice found that satellite radio is a monopoly in the recent merger proceeding.¹¹ The Department of Justice concluded that "evidence developed in the investigation [of the proposed merger] did not support defining a market limited to the two satellite radio firms."¹² For its part, the Commission found "insufficient evidence" that satellite radio "constitutes a distinct relevant product market."¹³ For terrestrial radio broadcasters to continue to refer to Sirius XM as a monopoly, absent any factual finding supporting that contention and in the face of the Justice Department's opposite conclusion, is disingenuous. Indeed, as was well documented in the merger process, when it serves

¹⁰ See, e.g., Comments of the National Association of Broadcasters, MB Docket No. 08-172, at 3 (filed Nov. 10, 2008) ("NAB Comments") (stating that "Sirius XM is now the sole satellite radio provider, with the market power, contractual relationships and incentives to impede the development of alternative audio services, especially HD Radio"); Comments of iBiquity Corporation, MB Docket No. 08-172, at 1 (filed Nov. 10, 2008) ("iBiquity Comments") ("[T]he merger creating Sirius XM presents a danger the combined entity will exercise monopoly power that will impair the ability of HD Radio technology to compete in the radio marketplace."); Comments of Beasley Broadcast Group, Inc. et al., MB Docket No. 08-172, at iv (filed Nov. 10, 2008) ("Beasley Comments") ("Because Sirius XM is now a monopoly, the vertical integration between Sirius XM and manufacturers, distributors and sellers of SDARS receivers has been substantially enhanced.").

¹¹ Beasley Broadcast Group, Inc. et al. suggests that the Commission definitively concluded that the merger of Sirius and XM is a merger to monopoly. Beasley Comments, at 2, n.5. However, this is not the case. The Commission only made such an assertion under "worst-case assumptions," which it found were not present in the merger and are not present now. *Merger Order* at ¶ 51.

¹² Department of Justice, *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.*, Press Release, March 24, 2008, at http://www.justice.gov/opa/pr/2008/March/08_at_226.html (last visited Dec. 2, 2008).

¹³ *Merger Order* at ¶ 44.

their purposes, terrestrial radio broadcasters admit that they compete head-to-head with satellite radio.¹⁴ It is this vigorous competition that motivates terrestrial radio's continuing scorched-earth opposition to satellite radio. Any suggestion that Sirius XM does not operate within a broad audio entertainment marketplace, which includes the well-established terrestrial radio broadcast industry, is without merit.

In any event, any perceived "market power" enjoyed by Sirius XM is more than vitiated by commitments the company made during the merger proceeding. The open access commitment made by Sirius XM in the merger proceeding and memorialized in the Merger Order will adequately protect the public interest. There is absolutely no evidence whatever that satellite radio providers have ever sought to exclude HD Radio technology from satellite radio receivers. Additionally, Sirius XM has not and will not engage in efforts to conspire with car manufacturers and equipment manufacturers to "squeeze out" terrestrial radio, as implausibly suggested by one commenter.¹⁵ Not only is such activity prohibited by the Merger Order and antitrust law, but the competitive landscape of the audio entertainment marketplace prevents Sirius XM from exercising

¹⁴ See, e.g., Comments of the National Association of Broadcasters, MM Docket No. 99-325, at 7 (filed June 16, 2004) (discussing the need for spectrum flexibility in order to "compete for consumers' attention with all the various media available today" including "direct competition from satellite radio providers..."); Radio One, Inc., 2006 SEC Form 10-K at 12 (filed June 14, 2007) ("The radio broadcasting industry is highly competitive. Radio One's stations compete for audiences and advertising revenue with other radio stations and with other media such as...the Internet [and] satellite radio."); CBS Corp., 2006 SEC Form 10-K at I-10-I-11 (filed Mar. 1, 2007) ("The radio industry is also subject to competition from two satellite-delivered audio programming services, Sirius Satellite Radio and XM Satellite Radio."); Beasley Broadcast Group, Inc., 2006 SEC Form 10-K at 17 (filed Mar. 12, 2007) ("Competition arising from other technologies or regulatory change may have an adverse effect on the radio broadcasting industry or on our company. Various other audio technologies and services that have been developed and introduced, include: satellite delivered digital audio radio services that offer numerous programming channels and the sound quality of compact disks.").

¹⁵ Comments of Clear Channel Communications, Inc., MB Docket No. 08-172, at 12 ("Clear Channel Comments").

undue leverage on car makers and equipment manufacturers.

Similarly, concerns about an unfair advantage arising from the subsidies Sirius XM provides to manufacturers and OEMs for producing satellite radio receivers are misplaced and disingenuous.¹⁶ Not unlike wireless carriers who subsidize the cost of mobile phones in order to attract customers, Sirius XM's subsidies are intended to gain subscribers by lowering equipment costs and by making satellite radios readily available. Satellite radio provides subsidies as a business necessity in order to attract audio entertainment market share from the ubiquitous and firmly-entrenched terrestrial radio industry and other competitors. The subsidies help to even the competitive playing field. iBiquity and other terrestrial radio supporters could easily offer subsidies to car manufacturers or discounts to consumers to spur the deployment of HD Radio devices. Instead they choose to piggyback onto the efforts of a competitor, satellite radio.

Proponents of FCC action also argue that an HD Radio mandate is necessary because Sirius XM possesses an unfair advantage with regard to its total spectrum allotment.¹⁷ This argument is a ludicrous non-sequitur. The differences in the spectrum allotments for terrestrial broadcast and satellite radio are attributable to differences between satellite and terrestrial radio technology and provide no competitive advantage or disadvantage. The allotted spectrum is necessary to provide the signal diversity (through satellite and terrestrial networks) that is essential to ensure continuous, high-quality service to homes and moving vehicles. Of course, these commenters also fail to acknowledge that Sirius XM paid more than \$170 million to the U.S. Treasury for the use of the spectrum, while terrestrial broadcasters enjoy free use of the public airwaves.

¹⁶ See, e.g., iBiquity Comments, at 6.

¹⁷ See, e.g., NAB Comments, at 5; Clear Channel Comments, at 10.

Finally, terrestrial radio broadcasters argue that a mandate requiring HD Radio technology in satellite radio receivers is a necessary remedy for the Commission's decision not to relax media ownership rules.¹⁸ This argument, likewise, is a complete non-sequitur, appears to be an attempt by terrestrial broadcasters to "bargain" with the FCC, and cannot form the basis for imposing a regulatory mandate on terrestrial broadcasters' competitors. The agency's broadcast media ownership rules have nothing to do with forcing automakers and equipment manufacturers to include HD Radio technology in satellite radios and forcing consumers to pay for it. It is clearly not in the public interest to have consumers and manufacturers pay for broadcasters' desire to change Commission rules, via increased costs for satellite radio receivers.

B. Terrestrial Radio, Which Dominates Radio Listening, Is Not Entitled To Further Government Largesse.

The terrestrial radio industry's clamor for a technological mandate requiring the inclusion of HD Radio technology in satellite radio receivers is just one more example of the broadcast industry's efforts at seeking government regulation to hobble their competitors, regardless of the public interest.

However, the terrestrial radio industry already has numerous regulatory and historical advantages over its competitors, including the free use of licensed spectrum, an exemption from paying copyright royalties (which is a significant expense for Internet radio and satellite radio providers),¹⁹ and near exclusivity in providing local news and advertising.

These existing advantages have helped make terrestrial radio the historically

¹⁸ *See, e.g.*, Beasley Comments, at 4.

¹⁹ Comments of the Recording Industry Association of America, MB Docket No. 08-172, at 2 (filed Nov. 7, 2008).

dominant participant in the audio entertainment market.²⁰ As Sirius XM noted in its initial comments, terrestrial radio enjoys near ubiquity and constitutes 95% of all radio listening.²¹

In light of these significant existing advantages, an HD Radio mandate, particularly one that unilaterally imposes a requirement on a singular competitor (i.e., satellite radio), would constitute unnecessary government intervention into a competitive market for no reason other than to unfairly favor broadcasters.

IV. THE COMMISSION LACKS AUTHORITY TO IMPOSE AN HD RADIO INCLUSION MANDATE.

As Sirius XM demonstrated in its initial comments, the Commission lacks the express or ancillary authority to mandate the inclusion of HD Radio technology into satellite radio receivers, either via the manufacturers themselves or via a licensee certification process.²²

As noted previously by Sirius XM, the Commission cannot impose such a technological mandate until Congress provides such authority, as it did for television receivers in the All Channel Receiver Act, which the Commission relied upon when mandating the inclusion of digital television tuners in television sets.

Some commenters believe that the Commission may impose such a mandate based on its rule requiring the interoperability of satellite radio receivers and/or its

²⁰ See Comments of the Alabama Broadcasters Association et al., MB Docket No. 08-172, at 2 (filed Nov. 10, 2008) (“Alabama Broadcasters Comments”) (“...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...”).

²¹ See Comments of Sirius XM, Inc., MB Docket No. 08-172, at 4-5 (filed Nov. 10, 2008) (“Sirius XM Comments”) (providing statistical evidence of the dominance of terrestrial radio).

²² See Sirius XM Comments, at 14-19 (detailing the parameters of the Commission’s jurisdiction, especially in light of the U.S. Court of Appeals, D.C. Circuit’s decision in *American Library Ass’n. v. FCC* (“Broadcast Flag case”)).

conditions imposed in the Merger Order.²³ Regardless of the source of authority underlying the interoperability requirement, the requirement's relevance to an HD Radio mandate is attenuated at best. Any attempt by proponents of an HD Radio mandate to bootstrap it to the interoperability requirement is illogical, considering the HD Radio mandate would dictate to third party manufacturers how to design their radio receivers and does not exclusively affect satellite radio licensees. As for the open access commitment in the Merger Order, it was made voluntarily by Sirius XM and not imposed unilaterally by the Commission. What is clear is that neither of these requirements constitutes the establishment of new explicit or implied authority from Congress to act in this specific matter.

²³ *See, e.g.*, NAB Comments, at 8-9 (suggesting that the Commission's previous actions concerning satellite radio provides it with plenary authority over all aspects of the satellite radio industry); *see also* 47 C.F.R. § 25.144(a)(3)(ii) (requiring each SDARS licensee to "certify that its satellite DARS system includes a receiver that will permit end users to access all licensed satellite DARS systems that are operational or under construction").

V. CONCLUSION

For the reasons stated above, and for the reasons stated previously by the company in this proceeding, Sirius XM respectfully requests that the Commission refrain from opening a rulemaking and decline to adopt any rules requiring the mandatory inclusion of HD Radio technology in satellite radio receivers. Such action is simply unnecessary, unfairly benefits the terrestrial radio industry at the expense of consumers, automakers, and equipment manufacturers with no corresponding public benefit, and is outside the bounds of the Commission's authority. If the Commission does decide to mandate the inclusion of HD Radio technology into satellite radio receivers, then it must also require the inclusion of satellite radio technology in terrestrial radio receivers.

Respectfully submitted,

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