

**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 THE MINORITY
MEDIA AND TELECOMMUNICATIONS COUNCIL**

The Minority Media and Telecommunications Council (MMTC)¹ respectfully offers these Reply Comments in response to the Notice of Inquiry (“NOI”)² in the above-captioned docket. In the NOI, the Commission seeks comment regarding devices that are capable of receiving digital audio broadcast (DAB) or HD Radio, satellite digital audio radio service (SDARS), and other audio entertainment services.³

The NOI was issued in response to the Commission’s Merger Order⁴ approving the merger of XM Satellite Radio Holdings Inc. (“XM”) and Sirius Satellite Radio Inc. (“Sirius”) into Sirius XM Radio Inc. (“Sirius XM”). In the Merger Order, the Commission imposed conditions on and accepted voluntary commitments from Sirius XM to lessen the possibility that the merger would create a monopoly that is harmful to consumers.

¹ MMTC is a non-profit organization dedicated to promoting equal opportunity and civil rights in the mass media and telecommunications industries. These Reply Comments reflect the institutional views of MMTC and are not intended to reflect the views of individual MMTC officers, directors or advisors.

² Development of Devices Capable of Supporting Multiple Audio Entertainment Services, MB Docket No. 08-172, Notice of Inquiry, 23 FCC Rcd 13178 (released August 25, 2008).

³ Id. at 1.

⁴ See Application 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 (released August 5, 2008) (“Merger Order”).

MMTC agrees with commenters who concluded that the Commission should require most SDARS receivers to also be capable of receiving HD Radio signals.⁵ Further, we endorse a seamless scan of analog AM, FM, HD and SDARS signals in SDARS receivers.

I. The Commission Should Require SDARS Receivers To Be Capable Of Providing A Seamless Scan Of AM, FM, And HD Signals

The Commission should require seamless scan AM/FM and HD Radio capacity in SDARS receivers because, without such a requirement, Sirius XM could use its satellite monopoly in the marketplace, the cost savings generated from the merger, and its relationships with equipment manufacturers and retailers to retard the growth of terrestrial services.

The competitiveness, diversity and localism benefits of local terrestrial analog service are well established. Terrestrial analog service is the heritage entry point for minority owned broadcasters, which struggle to survive and compete in the face of media consolidation and advertising discrimination.

Due to segregation, and with the Commission's own participation in institutional discrimination, minorities entered radio ownership two generations later than others.⁶ To this day, minorities continue to operate under what MMTC has designated the "analog divide." Minorities disproportionately tend to own AM stations, especially AMs with weak technical facilities. In 2001, 5.9% of AM stations were minority owned, and a minority owned station was 43% more likely to be an AM station than was a non-minority owned station. Only 3.9% of the low-band (540 kHz to 800 kHz) stations were minority owned, and minorities were 36% less

⁵ These commenters include the National Associations of Broadcasters, National Public Radio, Beasley Broadcast Group, Inc., Bonneville International Corp., CBS Radio, Inc., Clarke Broadcasting Corp., Emmis Communications Corp., Entercom Communications Corp., Greater Media, Inc., Journal Broadcast Corp., Premier Broadcasters, Inc., Saga Communications, Inc., Clear Channel Communications, Inc., and Mullaney Engineering, Inc.

⁶ For this sordid history, see David Honig, "How the FCC Helped Exclude Minorities from Ownership of the Airwaves" (MMTC, 2006) (available at <http://www.mmtconline.org/filemanager/fileview/75/>).

likely than non-minorities to own these desirable facilities. Further, 33.9% of minority-owned AM stations operated in the 1410-1600 kHz, and minorities were 19% more likely than non-minorities to own these generally less desirable high band facilities.⁷ By requiring satellite radio receivers to include reception capability that provides a seamless scan of analog AM and FM, HD Radio and SDARS, the Commission would ameliorate this historic residue of spectrum inequality by eliminating listeners' perception that AM radio is a separate and unequal service.

For its part, HD has the potential to offer public interest benefits dwarfing even those extant in analog service. Commissioner McDowell noted that these benefits include diverse programming, higher quality audio, and innovative data services,⁸ and Commissioner Copps declared that HD Radio is "great news for broadcasters because it provides exciting new business opportunities that just might reinvigorate free over-the-air radio."⁹ HD programmers are looking to expand their services to include multicultural and multilingual programming, as well as services for the hearing and visually impaired communities.¹⁰ These services will be offered free-of-charge to consumers, except for the cost of a HD Radio-capable receiver.

Further, a potential change in the ownership rules could vastly expand minority ownership of HD facilities. Last year, at the request of MMTC and over 30 other national organizations, and with the endorsement of many minority and non-minority broadcasters,

⁷ See FCC Advisory Committee on Diversity for Communications in the Digital Age, FM Radio Recommendations, June 11, 2004, at 2-4 (citing Kofi Ofori, "Radio Local Market Consolidation & Minority Ownership" (MMTC, March 2002)).

⁸ See 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, 10416 (2007) (Statement of Commissioner Robert M. McDowell).

⁹ Id. at 10411 (Statement of Commissioner Michael J. Copps).

¹⁰ See, e.g., Comments of National Public Radio, MB Docket 08-172 (November 11, 2008) at 3 ("Through the work of NPR Labs, NPR is now in the final year of a 3-year grant from the National Institute on Disability and Rehabilitation Research ('NIDRR') to examine ways of making radio more accessible to both the print-and hearing-impaired communities.")

financial institutions, and the Commission’s Advisory Committee on Diversity for Communications in the Digital Age, the Commission sought comment on whether to afford analog FM licensees the voluntary option of using the share-time rule to sell HD channels to third parties.¹¹

The current and future competitive service offerings of AM, FM and HD will be at risk if these services are not afforded the open access that the Commission expects.¹² In the interest of competition, localism and diversity, the Commission should require SDARS receivers to offer seamlessly scanned AM, FM, HD and SDARS reception technology.

II. The Commission Has Authority to Require SDARS Licensees To Include Other Technologies in SDARS Receiver Products

It is well established that the Commission may regulate contracts between licensees and third parties to the extent that doing so would fulfill the Commission’s mandate to promote the “effective use of radio in the public interest.”¹³ The courts have repeatedly upheld the Commission’s expansive authority to regulate contracts between licensees and third parties,¹⁴ where the Commission’s exercise of that authority would enable the Commission to fulfill

¹¹ See Promoting Diversification of Ownership In the Broadcasting Services, Report and Order and Third Further Notice of Proposed Rulemaking, MB Docket No. 07-294, 23 FCC Rcd 5922, 5952 ¶87 (released March 5, 2008) (“Diversity Second Report and Third FNPRM”) (discussing use of the share-time rule, 47 C.F.R. §73.1715).

¹² See Merger Order at ¶128 (“This principle of openness would serve to promote competition, protect consumers, and spur technological innovation.”)

¹³ See 47 U.S.C. §303(g) (2008).

¹⁴ See generally National Broadcasting Co. v. United States, 319 U.S. 190, 217-218 (1943); Nat’l Assoc. Of Theatre Owners v. FCC, 420 F.2d 194, 199 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970) (in holding that the Commission had the authority to prescribe rules for the development of cable television service, the court recognized the “continuing imperative need for an expansive interpretation of the Commission’s jurisdiction”) (citing United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (upholding the Commission’s authority to regulate CATV systems)). See also World Communications, Inc. v. FCC, 735 F.2d 1465, 1475 (1984) (reasoning that Congress afforded the Commission broad discretion to modify its administrative policies based upon developments in an evolving marketplace, the court held that the Commission was not bound to apply common carrier status to all domestic communications satellite operators applying for licenses) (citing Nat’l Assoc. Of Theater Owners, 420 F.2d at 199).

congressional instructions.¹⁵ Thus, to advance the nondiscrimination, market entry barrier and minority ownership objectives expressed in Sections 151, 257 and 307(j) respectively,¹⁶ the Commission should ensure that Sirius XM does not enter into third party relationships that would threaten minority radio ownership. In particular, using its public interest jurisdiction over SDARS as a regulated service and over Sirius XM as a licensee¹⁷ and contemplated in the Merger Order, the Commission may prohibit Sirius XM from entering into exclusive contracts with receiver manufacturers that would prevent open access devices from reaching consumers.¹⁸

For over ten years, the Commission has exercised its jurisdiction over SDARS and its licensees to promote the public interest. Sirius XM's obligation to the interoperable receiver mandate is a perfect example of the Commission's use of its authority to regulate SDARS receivers and service.¹⁹ SDARS licensees' political broadcasting and EEO obligations are yet more examples of the Commission authority over SDARS.²⁰

¹⁵ See, e.g., Brasfield & Gorrie, LLC, 21 FCC Rcd 9726, 9728 (2008) (The Commission held that "the action by a third party contractor in installing the unauthorized frequency which resulted in the unauthorized violation does not excuse the licensee from forfeiture liability.")

¹⁶ 47 U.S.C. §§151, 257 and 309(j) (2008).

¹⁷ See 47 U.S.C. §§151, 154(i), 303, 309 (2008); see also Omnibus Consolidated Appropriations Act of 1997, Pub.L. No. 104-208, §3001, 110 Stat. 3009-499 (1996) (the Commission is directed to relocate and auction the SDARS band); see generally Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services, Report and Order, 10 FCC Rcd 2310 (1995).

¹⁸ Merger Order at ¶128 ("To ensure that consumers have unfettered access to these devices, we prohibit the merged entity from preventing such devices, and any features such devices might contain, from reaching consumers, through exclusive contracts or otherwise.")

¹⁹ See Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, FCC 97-70, Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5754, 5795-98 (1997) ("SDARS Order"); see also Merger Order at ¶¶113-15 (describing the development of the interoperability requirement) and 47 C.F.R. §25.144(a)(3)(ii) (requiring SDARS licensees to certify that their systems include a receiver that will permit end users to access all licensed satellite digital audio radio services that are operational or under construction).

²⁰ SDARS Order at ¶¶91-92 (imposing political programming and equal opportunity requirements). Cf. Merger Order at ¶104 and n. 314 (confirming that Sirius XM's voluntary programming commitments are enforceable by the Commission).

Although the Commission does have direct authority over the manufacture, distribution, and sale of receivers, it is not disabled from using its regulatory authority over licensees to prevent a monopoly licensee from using its influence to distort the receiver marketplace. The Commission's jurisdiction over Sirius XM's contractual influence over manufacturers is consistent with the Merger Order's open access requirements for Sirius XM and promotes the public interest.

Conclusion

The Commission has acknowledged that minority ownership is a key regulatory objective,²¹ and that minority ownership must be considered in spectrum management proceedings.²² Given the inherent disadvantages facing minority radio owners, requiring satellite radio receivers to include seamlessly scanned AM, FM HD and SDARS reception capability would substantially improve minority radio owners' ability to compete in the marketplace.

Respectfully submitted,

David Honig

David Honig
Executive Director
Jocelyn James
John W. Jones Fellow
Minority Media and Telecommunications Council
3636 16th Street, N.W.
Suite B-366
Washington, D.C. 20010
(202) 332-7005
dhonig@crosslink.net

Of Counsel:

Jocelyn Tate
Associate Media Broker
MMTC Media Brokers

December 9, 2008

²¹ See Diversity Second Report and Third FNPRM, 23 FCC Rcd at 5924 ¶2.

²² See Garrett v. FCC, 513 F.2d 10567 (D.C. Cir 1975); Clear Channel Broadcasting in the AM Broadcast Band (R&O), 78 FCC 2d 1345, 1368-69 (1980), recon. denied, 83 FCC 2d 261 (1980), aff'd sub nom. Loyola University v. FCC, 670 F.2d 1222 (D.C. Cir. 1982) (including minority ownership as a justification for waiver of acceptance criteria for construction permit applications that proposed new service on domestic Class I-A Clear Channel AM frequencies).