

**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

**REPLY COMMENTS**

Beasley Broadcast Group, Inc., Bonneville International Corporation, Clarke Broadcasting Corp., Emmis Communications Corporation, Entercom Communications Corp., Greater Media, Inc., Journal Broadcast Corporation, Premier Broadcasters, Inc., and Saga Communications, Inc., (“*Commenters*”), by their attorneys, hereby submit Reply Comments in the above-captioned proceeding.<sup>1</sup>

The assertion by the beneficiary of a government sanctioned “merger to monopoly”<sup>2</sup> that the central proposal in this proceeding is a “solution in search of a problem” is disingenuous and cannot be taken seriously.<sup>3</sup> Rather, the enhanced horizontal and vertical integration that resulted from the merger of Sirius XM Radio Inc. (“*Sirius XM*”), and that entity’s increased ability to inhibit the wide-spread adoption of HD Radio, make it critical that the Federal Communications

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<sup>1</sup> Commenters operate radio stations in markets of all sizes throughout the United States. Many of these stations have invested in HD Radio technology and are providing digital service to their listeners, including numerous multicast channels.

<sup>2</sup> See *Applications for Consent to the Transfer of Control of Licenses; XM Satellite Radio Holdings, Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, FCC 08-178, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348 (2008), at ¶ 51 (“*Merger Order*”).

<sup>3</sup> See *Comments of Sirius XM Radio Inc.*, MB Docket No. 08-172, filed Nov. 10, 2008, at 3. (“*Sirius XM Comments*”).

Commission (the “*Commission*” or “*FCC*”) clearly call for mandated inclusion of HD Radio reception technology in all Satellite Digital Audio Radio Services (“*SDARS*”) receivers that are the subject of contractual arrangements between the SDARS monopolist and manufacturers, distributors, or retailers.

**I. The Sirius XM Merger Threatens the Wide Adoption of HD Radio.**

In its comments, Sirius XM contends that the audio entertainment marketplace is highly competitive and that FCC intervention is not necessary “to tip the scale in favor of any one technology or sector.”<sup>4</sup> Sirius XM mischaracterizes the issue. The FCC did not initiate this proceeding to determine whether a particular technology should be favored, but rather because of the “important questions [that] have been raised that warrant further examination” regarding the prospective negative harm to HD Radio that could well result from the Sirius XM merger to monopoly.<sup>5</sup> By taking action to mitigate these harms the FCC would not be “favoring” any particular technology, but rather would be protecting an important public interest from being harmed by the enhancement of Sirius XM’s horizontal and vertical integration in the SDARS market resulting from the merger.

The potential negative merger-specific harms arise in two ways -- through the significant competitive advantages that the merger conferred upon Sirius XM, and through the patent inadequacy of the “open access” provisions contained in the Merger Order.

The competitive advantages bestowed upon a single SDARS entity as a result of the Sirius XM merger clearly create an inequitable playing field and are undeniable. As a result of the merger, Sirius XM now controls more spectrum than is licensed to all AM and FM broadcasters combined. That 25 MHz of spectrum allows Sirius XM to provide more than 300

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<sup>4</sup> *Id.*

<sup>5</sup> *See Merger Order*, at ¶ 130.

channels of audio programming in every local radio market nationwide. Even in the largest local radio markets, a terrestrial radio broadcaster can own no more than eight stations. This competitive advantage is even more pronounced in smaller markets. Moreover, Sirius XM is not subject to most of the public interest obligations that terrestrial radio broadcasters consistently fulfill, including, but not limited to, providing issue-responsive programming targeted to their local audiences. Sirius XM enjoys multiple revenue streams, including subscription fees and the licensing of technology, while HD Radio is provided to consumers for free. Thus, contrary to Sirius XM's baseless claims that "AM/FM radio has built-in financial advantages over competing forms of audio entertainment"<sup>6</sup> inequities such as these place terrestrial radio broadcasters at a significant disadvantage to a merged Sirius XM. Consequently, it is vital to the introduction of HD Radio, and the continued viability of free, over-the-air radio, that some reasonable counterbalancing actions be implemented to ensure a smooth transition to digital.

Sirius XM claims that the "open access" conditions contained in the Merger Order "ensure that both HD Radio and satellite radio technology *can* co-exist without a Commission mandate."<sup>7</sup> However, comments submitted in this proceeding clearly demonstrate that the Sirius XM merger has not only resulted in complete horizontal integration of SDARS providers, but also has significantly enhanced the already substantial vertical integration between Sirius XM and SDARS receiver manufacturers, sellers, and distributors.<sup>8</sup> Thus, through exploitation of its contractual relationships with these third party receiver vendors, Sirius XM is in a position where it *can* thwart introduction of HD Radio.

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<sup>6</sup> *Sirius XM Comments*, at 5.

<sup>7</sup> *Id.* at 7 (emphasis added).

<sup>8</sup> *See, e.g., Comments of Beasley Broadcast Group, Inc., et. al.*, MB Docket No. 08-172, filed Nov. 10, 2008, at 3 ("*Joint Comments*"); *Comments of Clear Channel Communications, Inc.*, MB Docket No. 08-172, filed Nov. 10, 2008, at 13; *Comments of the National Association of Broadcasters*, MB Docket No. 08-172, filed Nov. 10, 2008, at 2 ("*NAB Comments*").

Sirius XM claims that interoperable SDARS/HD Radio receivers “may be brought to market without interference from Sirius XM” if consumers desire such receivers or if manufacturers want to build them.<sup>9</sup> This claim, however, ignores the fact that as a monopolist, Sirius XM will have significant ability to influence manufacturers’ determinations. The FCC’s acceptance of Sirius XM’s “voluntary commitment” to permit manufacturers to include any technology in SDARS receivers, and its express prohibition on Sirius XM from preventing such multi-platform receivers from reaching the market, will not effectively mitigate the merged entity’s increased economic leverage and ability to continue to selectively target millions of dollars to the development and sale of SDARS-only receivers that exclude HD Radio reception capability. Similarly, the Merger Order’s open access provisions do not prevent Sirius XM from providing technical designs and assistance targeted to SDARS-only receivers, which would deter manufacturers from producing multifunctional devices.

Furthermore, it is noteworthy that conspicuously missing from the list of “numerous audio equipment options” Sirius XM states are already available is a single device containing an integrated satellite receiver and HD Radio receiver.<sup>10</sup>

The FCC has long recognized the benefits of free, over-the-air HD Radio.<sup>11</sup> The requested relief is designed to ensure the unimpeded introduction of HD Radio and to mitigate the enhanced anticompetitive leverage bestowed upon Sirius XM as a result of the merger.

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<sup>9</sup> *Sirius XM Comments*, at 8.

<sup>10</sup> *Id.* at 8-10.

<sup>11</sup> See, e.g., *Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, FCC 02-286, First Report and Order, 17 FCC Rcd 19990, 19993 (2002) (“We intend 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 DAB. We favor the rapid implementation of DAB . . . .”) (the “*First Report and Order*”).

## **II. The Commission Unquestionably Has Jurisdiction Over Sirius XM.**

Sirius XM states that the Commission has neither the authority to require receiver manufacturers to include HD Radio reception in SDARS receivers, nor the ability to require Sirius XM to certify that SDARS receiver manufacturers are fulfilling this obligation.<sup>12</sup> Sirius XM misunderstands the relief that the Commenters seek. The anti-competitive harm to which HD Radio will be subject stems directly from the enhanced leverage that the merged Sirius XM will have to prevent HD Radio reception technology from becoming widely available through the selective channeling of millions of dollars in subsidies to the manufacture and sale of SDARS receivers that exclude HD Radio reception technology. The Commission's express jurisdiction over the monopolized SDARS licensee is sufficient for it to impose a requirement on that regulated entity mandating that, to the extent that Sirius XM has a contractual relationship with the manufacturer, receivers produced must include HD Radio reception capability.<sup>13</sup>

As has been noted, the Commission has frequently exercised its jurisdiction over Sirius XM to advance the public interest.<sup>14</sup> The FCC has repeatedly stated that wide-spread adoption of HD Radio offers significant benefits.<sup>15</sup> Thus, the Commission should exercise its jurisdiction

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<sup>12</sup> See *Sirius XM Comments*, at 14-15.

<sup>13</sup> 47 U.S.C. § 152 (providing that the Commission's authority applies to "all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States").

<sup>14</sup> See, e.g., *Joint Comments*, at 5; *Comments of National Public Radio, Inc.* MB Docket No. 08-172, filed Nov. 10, 2008, at 11 ("*NPR Comments*"); *NAB Comments*, at 8. When the FCC first licensed SDARS providers, it mandated the development of an interoperable SDARS receiver that would enable SDARS consumers to access any SDARS service. The Commission did not mandate the inclusion of HD Radio reception in SDARS receivers at that time based, not on a lack of jurisdiction, but rather the basis that it was not necessary given the then-existing circumstances. With the SDARS merger dramatically increasing Sirius XM's market leverage, those circumstances have changed drastically.

<sup>15</sup> See *First Report and Order*, at 19993; *Merger Order*, at ¶ 130; *Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, FCC 99-327, Notice of Proposed Rule Making, 15 FCC Rcd 1722, 1724 (1999).

over Sirius XM to prevent the merged entity from using its horizontal and vertical integration to impede the implementation of HD Radio.

In addition to express jurisdiction, as noted by other commenters, the Commission has ancillary jurisdiction to adopt a regulation if: (i) the regulation is within the Commission's general authority over interstate or foreign communication by radio; and (ii) the regulation is reasonably ancillary to the FCC's performance of its statutory responsibilities.<sup>16</sup> Sirius XM argues that the Commission lacks adequate jurisdiction, analogizing the requested mandate with the Commission's "broadcast flag" requirement which was ultimately rejected on judicial review.<sup>17</sup> However, that case is inapposite.

The Commission's broadcast flag requirement utilized a digital code to prevent DTV receivers from subsequently redistributing or copying the previously-received programming illegally on an open broadcast system. In reviewing the regulation, the court noted that the Commission had cited no authority that would permit it to regulate DTV receivers "after the completion of a broadcast transmission."<sup>18</sup> Ultimately the court struck the requirement down, noting that the FCC does not have jurisdiction over receivers "[when they are] not engaged in 'communication by wire or radio'."<sup>19</sup> Instead, the court found that the Commission's jurisdiction over the regulation of receivers could at most extend to receivers "while those apparatus are engaged in communication."<sup>20</sup>

A regulation mandating that SDARS receivers be able to receive HD Radio technology inherently involves regulation of those devices while they are engaged in communication on a

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<sup>16</sup> See *NPR Comments*, at 12 (citing *Southwestern Cable*, 392 U.S. 157 (1968)).

<sup>17</sup> *Sirius XM Comments*, at 17 (citing *Am. Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005)).

<sup>18</sup> *Am. Library Ass'n v. FCC*, 406 F.3d at 691.

<sup>19</sup> *Id.* at 703.

<sup>20</sup> *Id.* at 704.

closed network, and does not involve a post-communication regulation of the type that existed in the case cited by Sirius XM.

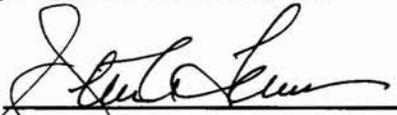
As a result, the Commission has both express and ancillary jurisdiction to impose the narrowly targeted requirement that SDARS receivers that are the subject of a contractual relationship with Sirius XM include HD Radio reception technology.

### **III. Conclusion**

To prevent the misuse of Sirius XM's enhanced power and leverage as a result of the Merger Order, and to further the rapid implementation of free, over-the-air HD Radio, the Commission should mandate that SDARS receivers over which Sirius XM has a contractual relationship include HD Radio reception capability.

Respectfully submitted,

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Greater Media, Inc.  
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