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

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| In the Matter of | ) | |
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| XM Satellite Radio Holdings Inc., | ) | |
| | ) | |
| Transferor | ) | |
| and | ) | MB Docket No. 07-57 |
| | ) | |
| Sirius Satellite Radio Inc., | ) | |
| | ) | |
| Transferee | ) | |
| | ) | |
| Consolidated Application for Authority to Transfer Control of XM Radio Inc. and Sirius Satellite Radio Inc. | ) | |

# COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS


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The National Association of Broadcasters ("NAB"), by its attorneys, hereby files these comments responding to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

## I. INTRODUCTION AND SUMMARY

This is an unusual case. In most merger proceedings before the Commission, the application details the information the merging parties believe demonstrates that their proposed transaction is consistent with established precedent, policy, and rules. Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM") (collectively "Applicants"), by contrast,

[1] *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, Notice of Proposed Rulemaking, FCC 07-119 (rel. June 27, 2007) ("*NPRM*"); *see also* Public Notice, "Media Bureau Announces Comment and Reply Comment Dates for the Notice of Proposed Rule Making Regarding Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee," DA 07-3241 (MB rel. July 13, 2007) (setting deadlines of August 13, 2007, for comments and August 27, 2007, for reply comments).

filed a merger application that was utterly devoid of such evidence.[2] Further, in response to the numerous petitions to deny filed against the Merger Application, Applicants filed a voluminous opposition but again declined to address their compliance with the relevant legal standards.[3] At bottom, Applicants urge the Commission to (1) ignore controlling Commission and antitrust precedent, (2) disregard long-standing Commission policy against spectrum monopolies, and (3) waive, modify or repeal the Commission's merger prohibition applicable to the Satellite Digital Audio Radio Service ("satellite DARS"). The Commission should not abandon relevant legal standards, rules and important public policies merely to allow this one merger to proceed.

Satellite DARS is a distinct, "continuous nationwide" service that "local radio inherently cannot provide."[4] Sirius and XM each hold a license to provide satellite DARS in the United States and, between them, they control all of the spectrum assigned for such service. Given these circumstances, and consistent with the long-standing Commission policy against spectrum monopolies, the Commission prohibited the two licensees from ever merging, in order to ensure that consumers benefit from competition in the satellite DARS service.[5] Specifically, the *Satellite DARS Order* states:

> Transfer. We note that DARS licensees, like other satellite licensees, will be subject to rule 25.118, which prohibits transfers or assignments of licenses except upon application to the Commission and upon a finding by the Commission that the public

[2] *See* Consolidated Application for Authority to Transfer Control (Mar. 20, 2007) ("Merger Application"); *see also* Petition to Deny of the National Association of Broadcasters ("NAB Petition to Deny") (July 9, 2007).

[3] *See* Joint Opposition to Petitions to Deny and Reply Comments of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. at 56-57 (July 24, 2007) ("Opposition"); *see also* National Association of Broadcasters' Response to Comments (July 24, 2007) ("NAB Response to Comments") and other petitions cited therein; National Association of Broadcasters' Reply to Opposition (July 31, 2007) ("NAB Reply to Opposition").

[4] *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd 5754, 5756 ¶ 1, 5760 ¶ 13 (1997) ("*Satellite DARS Order*").

[5] *Satellite DARS Order*, 12 FCC Rcd at 5823 ¶ 170.

> interest would be served thereby. *Even after DARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellite DARS license. This prohibition on transfer of control will help assure sufficient continuing competition in the provision of satellite DARS service.*[6]

CD Radio Inc., predecessor-in-interest to Sirius, proposed this anti-merger rule on the grounds that it was necessary to (1) "preserve intra-service competition and overall DARS diversity of programming" and (2) to prevent a "DARS monopoly."[7]

Despite the Commission's unambiguous language, Sirius and XM have now filed for Commission authority to transfer their licenses to a single, combined entity owned by the current shareholders of XM and Sirius, which would then control all of the satellite DARS spectrum.[8] Recognizing that the Merger Application conflicts with the express language of the satellite DARS merger prohibition, the Commission issued the *NPRM*, which seeks comment on "whether the language in question constitutes a binding Commission rule and, if so, whether the Commission should waive, modify, or repeal the prohibition in the event that the Commission determines that the proposed merger, on balance, would serve the public interest."[9]

As discussed below, the specific language and context of the satellite DARS anti-merger prohibition make clear that the Commission intended to impose a binding legal obligation upon the satellite DARS licensees not to merge and the effect of its action was to do so. Moreover, the Commission developed the merger prohibition in a notice and comment rulemaking and

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[6] *Id.* (emphasis added).

[7] Comments of CD Radio Inc., IB Docket No. 95-91 at 18 and n.31 (Sept. 15, 1995) ("1995 Sirius Comments").

[8] *See* Merger Application.

[9] *NPRM* at ¶ 3.

published it in the Federal Register.[10] As such, the satellite DARS merger prohibition is a substantive rule under the Administrative Procedure Act ("APA").[11]

It is beyond dispute that the proposed merger of the only two satellite DARS licensees would violate this rule and the Commission therefore would have to waive, modify or repeal the rule in order to grant the Merger Application. Under applicable judicial and Commission precedent, however, the Commission may not waive this rule because waiver would effectively eliminate the rule.

Further, the Commission should not modify or repeal the rule since doing so would violate (1) the long-standing Commission policy against spectrum monopolies that led the Commission to adopt the rule in the first instance, and (2) the pro-competitive vision enshrined in the Telecommunications Act of 1996.[12] The Commission's policy against spectrum monopolies remains as valid today as it was when the Commission first promulgated the satellite DARS anti-merger rule. Applicants have offered no evidence or rationale sufficient to justify a Commission decision to repudiate this spectrum policy and change the anti-merger rule in order to facilitate the proposed merger.

In addition, the proposed merger would create a monopoly in the national satellite DARS market, which would inevitably result in increased prices, fewer programming choices, less local programming for radio listeners, and other public interest harms. Surprisingly, Applicants have made no effort to confront and resolve these fundamental problems with their proposed merger.

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[10] Digital Audio Radio Service in the 2310-2360 MHZ Frequency Band, 62 Fed. Reg. 11083, 11102 (March 11, 1997).

[11] 5 U.S.C. § 553.

[12] *See* Preamble, Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (1996) ("An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.").

Instead, Applicants argue that the Commission should ignore long-standing Commission and antitrust precedent and analyze the proposed merger under a novel standard created to suit their allegedly "unique" circumstances. Applicants similarly make no effort to meet their evidentiary burden to demonstrate "extraordinarily large, cognizable, and non-speculative efficiencies" that outweigh the anti-competitive harms associated with the merger.[13] Instead, Applicants present a series of new, non-binding pricing and programming offerings, which they may change at any time and which offer few, if any, true benefits to existing subscribers. Applicants also fail to demonstrate that their promised new offerings flow directly from and are dependent upon the merger, beyond refusing to produce the new offerings (or deploy an interoperable radio) unless they are allowed to merge. In short, there is no basis for the Commission to conclude that the proposed merger would serve the public interest and thus eliminate the satellite DARS anti-merger rule.

In sum, the Commission should not waive, modify or repeal the satellite DARS anti-merger rule in order to facilitate the proposed merger. Instead, the Commission should enforce the rule and dismiss the Merger Application without further deliberation.

[13] *See, e.g., Application of EchoStar Communications Corporation (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations)*, 17 FCC Rcd 20559, 20604 ¶ 102 (2002) ("*EchoStar/DirecTV Merger Order*").