Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications for Consent to the	)	MB Docket No. 07-57
Transfer of Control of Licenses	)	
	)	
XM Satellite Radio Holdings Inc.,	)	
Transferor	)	
	)	
To	)	
	)	
Sirius Satellite Radio Inc.,	)	
Transferee	)	

MEMORANDUM OPINION AND ORDER AND REPORT AND ORDER

Adopted: July 25, 2008 **Released: August 5, 2008**

By the Commission: Chairman Martin and Commissioners Tate and McDowell issuing separate statements; Commissioners Copps and Adelstein dissenting and issuing separate statements.

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I. INTRODUCTION

1. In this Memorandum Opinion and Order and Report and Order ("Order"), we consider the consolidated application of Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM," or jointly, the "Applicants") for consent to the transfer of control of the licenses and authorizations held by Sirius and XM, and their subsidiaries, for the provision of satellite digital audio radio service (or "SDARS") in the United States.[1] The Application is filed pursuant to section 310(d) of

[1] Consolidated Application for Authority to Transfer Control of XM Radio Inc. and Sirius Satellite Radio Inc., XM Satellite Radio Holdings Inc., Transferor, and Sirius Satellite Radio Inc., Transferee (Mar. 20, 2007) ("Application"). The Media Bureau placed the Application on public notice on June 8, 2007, establishing a comment cycle for this proceeding. *See Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. Seek Approval to Transfer Control of FCC Authorizations and Licenses*, 22 FCC Rcd 1032 (2007) ("Jun. 8, 2007 Public Notice"). On June 25, 2007, Applicants supplemented their Application with a further license transfer application. *See* Letter from Jennifer D. Hindin, Wiley Rein LLP, on behalf of Applicants, to Marlene H. Dortch, Secretary, FCC (June 25, 2007), attaching Form 312, Call Sign E060363. The supplemental application was accepted for filing on September 26, 2007. *See* Report No. SES-00966 (Earth Station Application SES-T/C-20070625-00863). That supplemental filing is deemed associated with the Application, which incorporates by reference the applications for approval of the transfer of control of those facilities listed in Appendix A hereto. On March 29, 2007, the Commission released a public notice designating this proceeding as "permit but disclose" for purposes of the Commission's *ex parte* rules. *See XM Satellite Radio Holdings, Inc. and Sirius Satellite Radio, Inc. Seek Approval To Transfer Control Of Licensee Entities Holding FCC Licenses and Other Authorizations,* 22 FCC Rcd 5548 (2007). On June 27, 2007, the Media Bureau initiated a rulemaking proceeding in MB Docket No. 07-57 seeking comment on whether language included in the 1997 Order establishing SDARS, which prohibited the transfer of (continued….)

the Communications Act of 1934, as amended ("Communications Act" or "Act"), and Sections 1.948 and 25.119 of the Commission's rules.[2] Applicants assert that grant of the Application will generate substantial, merger-specific public interest benefits and will not harm competition in any market because a combined satellite radio provider will have no market power.[3] Based on the review of the record as set forth in the discussion below, we find that grant of the Application, with Applicants' voluntary commitments[4] and other conditions discussed herein, is in the public interest.

2. Applicants operate satellite digital audio radio services in the 2320 to 2345 MHz spectrum band as authorized by the Commission after auction in 1997.[5] XM commenced service in September 2001, and Sirius began service in February 2002.[6] In order to establish fully a nationwide

(Continued from previous page)
control of one SDARS licensee to the other, constitutes a binding rule. *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings, Inc., Transferor, to Sirius Satellite Radio Inc., Transferee,* Notice of Proposed Rule Making, 22 FCC Rcd 12018 (2007) ("*2007 SDARS NPRM*"). See Section VII.A. for discussion of the rulemaking proceeding. On December 7, 2007, Sirius filed an informational Form 312 application for a new space station license that was granted to Sirius on April 16, 2007, approximately one month after the Application was filed. Sirius requests that the Commission take the new license into account in its processing of the Application. *See* Letter from Jennifer D. Hindin, Wiley Rein LLP, Counsel for Sirius, to Marlene H. Dortch, Secretary, FCC (Dec. 7, 2007). We grant the request and associate the new space station license with all other authorizations and licenses as identified in Appendix A.

[2] 47 U.S.C. § 310(d); 47 C.F.R. §§ 1.948, 25.119.

[3] Application at 2.

[4] Letter from Richard E. Wiley, Robert L. Pettit, Wiley Rein LLC, Counsel for Sirius, and Gary M. Epstein, James H. Barker, Latham & Watkins LLP, Counsel for XM, to Kevin J. Martin, Chairman, FCC (June 16, 2008), Attachment, Letter dated June 13, 2008 from Richard E. Wiley, Robert L. Pettit, Wiley Rein LLP, Counsel for Sirius and Gary M. Epstein, James H. Barker, Latham & Watkins LLP, Counsel for XM, to Kevin J. Martin, Chairman, FCC (June 13, 2008) ("Applicants' June 13, 2008 Ex Parte"); Letter from Richard E. Wiley, Counsel for Sirius and Gary M. Epstein, Counsel for XM, to Kevin J. Martin, Chairman, Michael Copps, Commissioner, Jonathan Adelstein, Commissioner, Deborah Tate, Commissioner, and Robert McDowell, Commissioner, FCC (July 25, 2008), transmitted by Letter from Robert L. Pettit, on behalf of Applicants, to Marlene H. Dortch, Secretary, FCC (July 25, 2008) ("Applicants' July 25, 2008 Ex Parte").

[5] *See American Mobile Radio Corporation Application for Authority to Construct, Launch, and Operate Two Satellites in the Satellite Digital Audio Radio Service*, Order and Authorization, 13 FCC Rcd 8829 (Int'l Bur. 1997) ("*1997 XM Authorization Order*"), modified by 16 FCC Rcd 18484, application for review denied, 16 FCC Rcd 21431 (2001), *aff'd sub nom. Primosphere Ltd. Partnership v. FCC* (Case Nos. 01-1526 and 1527), 2003 WL 472239 (C.A.D.C. Feb. 21, 2003); *XM Radio Inc.*, Order and Authorization, 20 FCC Rcd 1620 (Int'l Bur. 2005) ("*2005 XM Authorization Order*"). The Commission originally licensed Sirius to launch and operate two satellites in geostationary orbit at the 80° and 110° West Longitude orbital locations. *See Satellite CD Radio, Inc. Application for Authority to Construct, Launch, and Operate Two Satellites in the Satellite Digital Audio Radio Service*, Order and Authorization, 13 FCC Rcd 7971 (Int'l Bur. 1997) ("*1997 Sirius Authorization Order*"), application for review denied, 16 FCC Rcd 21458 (2001), *aff'd sub nom. Primosphere Ltd. Partnership v. FCC* (Case Nos. 01-1526 and 1527)), 2003 WL 472239 (C.A.D.C. Feb. 21, 2003). Sirius later requested, and was granted, authority to change its satellite configuration from two geostationary satellites to three satellites in non-geostationary satellite orbits (NGSO). *See Sirius Satellite Radio Inc., Application for Minor Modification of License to Construct, Launch and Operate a Non-Geostationary Satellite Digital Audio Radio Service System*, Order and Authorization, 16 FCC Rcd 5419 (Int'l Bur. 2001). SDARS is commonly referred to as "satellite radio." The Commission's rules define SDARS as "[a] radio communication service in which audio programming is digitally transmitted by one or more space stations directly to fixed, mobile, and/or portable stations, and which may involve complementary repeating terrestrial transmitters, telemetry, tracking and control facilities." 47 C.F.R. § 25.201. The term "DARS" refers to the same service that we refer to in this document as "SDARS."

[6] Application at 3, 5.

radio service, both SDARS licensees operate terrestrial repeaters in areas where satellite signal reception is blocked by trees, buildings, or tunnels.[7] Together, Sirius and XM offer hundreds of channels of music, entertainment, news, and sports programming, as well as weather and data information services for maritime, aeronautical and other purposes. In addition, Sirius offers video service in select vehicles equipped with a Sirius Backseat TV receiver.[8] As of December 31, 2007, Applicants, collectively, had approximately 17.3 million subscribers in the United States.[9] SDARS radio receivers are used in cars, trucks, boats, aircraft, and homes, and are available for portable use. Applicants also provide content to subscribers using streaming audio over the Internet as well as direct broadcast satellite ("DBS") and wireless networks.[10] The current fee charged by each of Applicants for its basic SDARS service is $12.95 per month.[11]

3. As a result of the merger, Applicants maintain that consumers will be able to customize their programming options by selecting among several new and smaller programming packages, as well as two a la carte packages.[12] Applicants assert that these new programming features will provide greater discretion to parents to control the programming their children receive because parents may individually select which programs to receive or may select programming packages that do not include any adult or other objectionable content.[13] Applicants indicate that, post-merger, subscribers will not pay more for the content they currently receive.[14] Thus, subscribers who choose to do so may continue to receive the same content for $12.95 per month and will not be harmed by the introduction of the a la carte and smaller programming packages proposed by Applicants. Applicants claim that permitting consumers to individually select channels will allow the combined company to make choices about content based on the choices made by subscribers, thus leading to the creation of more programming that consumers actually want.[15] Applicants further voluntarily commit to not raising the rates for either their current packages or these new packages for three years.[16] In addition, we are prohibiting Applicants from

[7] *Id*. at 4, 6.

[8] Sirius "Backseat TV" is currently offered in Dodge, Chrysler and Jeep vehicles. The service includes live television from three networks: Nickelodeon, Disney Channel and Cartoon Network. *See* Sirius, http://www.sirius.com/backseattv (visited June 24, 2008).

[9] XM Radio reported 9.03 million subscribers as of December 31, 2007. *See* XM Radio Holdings Inc. SEC Form 10-K for the Fiscal Year Ended Dec. 31, 2007 ("XM Form 10-K") at 34. Sirius reported 8,321,785 subscribers as of that date. Sirius Satellite Radio, Inc. SEC Form 10-K for the Fiscal Year Ended Dec. 31, 2007 ("Sirius Form 10-K") at 3.

[10] See Sections II.A-B for a complete description of the services offered by Applicants.

[11] Application at ii.

[12] See Section V.B.1. for discussion of new programming packages and prices, including A La Carte I and A La Carte II options. Applicants indicate that in the near term, subscribers will have to own two legacy receivers (one Sirius receiver and one XM receiver) to receive the complete offerings of both services because the combined company must continue to operate both legacy systems. Application at 12 n.27. The a la carte programming features will be available to customers who select their channels through the Internet and purchase next-generation radios. Joint Opposition at 11; *see also* Applicants' Supplemental Comments Regarding the Benefits of A La Carte ("Supp. Comments") at 2; Applicants' June 13, 2008 Ex Parte.

[13] Applicants indicate that the combined company will provide subscribers a credit or rebate on their subscription fee if they choose to block adult programming. Application at 10, n.25, 12; *see also* Supp. Comments at 4.

[14] Supp. Comments at 10.

[15] *Id*. at 5.

[16] Applicants' June 13, 2008 Ex Parte at 5. Applicants state that they may pass on some increases in programming costs after the first anniversary of the merger's consummation. *Id*.

reducing the number of channels in either their current packages or these new packages for three years.

4. To obtain Commission approval, Applicants must demonstrate that the proposed transaction will serve the public interest, convenience, and necessity pursuant to Section 310(d) of the Act.[17] The Commission weighs any potential public interest harms of proposed transactions against any potential public interest benefits.[18] Applicants have the burden of proving that the proposed transaction, on balance, serves the public interest by a preponderance of the evidence.[19]

5. We note that the Commission had been investigating Applicants' compliance with certain Commission regulations. On July 25, 2008, the Commission adopted Orders which adopted the Consent Decrees entered into between the Commission and XM, and the Commission and Sirius. These Consent Decrees terminated our investigations into Applicants' compliance with the Commission's regulations governing FM modulators and terrestrial repeaters. These issues are discussed in Section VII, below.

6. Based on the record before us, we conclude that the proposed transfer of control would violate our rule against one licensee controlling both SDARS licenses. We also conclude that, absent Applicants' voluntary commitments and other conditions discussed below, the proposed transaction would increase the likelihood of harms to competition and diversity. As discussed below, assuming a satellite radio product market, Applicants would have the incentive and ability to raise prices for an extended period of time. This is more likely given the spectrum and cost barriers which prevent entry by new SDARS providers that could offer consumers an alternative outlet for satellite radio service. In particular, additional spectrum is not available at this time without spectrum divestiture, which we have determined is inappropriate in light of the considerable financial investment needed to successfully operate an SDARS service, as well as the technical complications that might result from such divestiture.[20] Additionally, the regulatory and other business aspects involved in the start-up of such a cost-intensive operation make effective competitive entry unlikely within any relevant time horizon.

7. Applicants, however, have proposed significant voluntary commitments regarding steps the merged company would take to mitigate harms and achieve public interest benefits. We find that absent those voluntary commitments and other conditions, the harms of the transaction would outweigh the potential public interest benefits. On balance, however, we find that with Applicants' voluntary commitments and other conditions, the potential public interest benefits outweigh the harms. Accordingly, we conclude that repeal of the 1997 rule barring common ownership of SDARS licensees will serve the public interest. We also conclude that the transaction, with all of Applicants' voluntary commitments and other conditions, will serve the public interest, and we condition grant of the Applications on the merged firm's fulfillment of Applicants' voluntary commitments and other

[17] 47 U.S.C. § 310(d); *see also Applications for Consent to the Assignment And/Or Transfer of Control of Licenses, Adelphia Comm. Corp., (and Subsidiaries, Debtors-In-Possession), Assignors, to Time Warner Cable Inc.* (*Subsidiaries*), *Assignees*, *Adelphia Comm. Corp.*, (a*nd Subsidiaries, Debtors-In-Possession*)*, Assignors and Transferors, to Comcast Corp. (Subsidiaries), Assignees and Transferees,* 21 FCC Rcd 8203, 8217 ¶ 23 (2006) ("*Adelphia Order*"); *General Motors Corp. and Hughes Elec. Corp., Transferors, and The News Corp. Ltd., Transferee, for Authority to Transfer Control*, 19 FCC Rcd 473, 485 ¶ 18 (2004) ("*News Corp.-Hughes Order*"); *Application of EchoStar Comm. Corp., General Motors Corp., Hughes Elec. Corp.,* (*Transferors*), *and EchoStar Comm. Corp.,* (*Transferee*)*,* Hearing Designation Order, 17 FCC Rcd 20559, 20574 ¶ 25 (2002) ("*EchoStar-DIRECTV HDO*").

[18] *News Corp.-Hughes Order,* 19 FCC Rcd at 477 ¶ 5.

[19] *Id.* at 483 ¶ 15.

[20] *See* Section VI.C.1.

conditions.[21] Although we find it unnecessary to impose a condition requiring the inclusion of chips for digital audio broadcast ("DAB") or HD Radio™ in SDARS receivers,[22] we believe that important questions have been raised about DAB that warrant further examination in a separate proceeding. As discussed in Section VI.B.4, the Commission commits to initiating a notice of inquiry within 30 days after adoption of this Order to gather additional information on the issue.

II. DESCRIPTION OF APPLICANTS

A. XM Satellite Radio Holdings Inc.

8. XM is a publicly traded Delaware corporation[23] headquartered in Washington, D.C. XM stock is traded on the NASDAQ Global Select Market under the symbol "XMSR."[24] XM operates using 12.5 MHz of spectrum in the 2332.5-2345 MHz frequency band.[25] This represents half of the available 25 MHz of SDARS spectrum.[26] XM obtained a license to use this half of the available 25 MHz of SDARS spectrum through Commission auction conducted in April 1997.[27]

9. XM commenced operations in September 2001 and currently offers over 170 channels of music (including some commercial-free music channels), sports, news, talk and entertainment to its subscribers.[28] As of December 31, 2007, XM reported having over 9.03 million subscribers in the United States.[29] XM's programming includes channels devoted to broadcasts of Major League Baseball (MLB),

[21] *Compare Applications of Ameritech Corp., Transferor, and SBC Comm., Inc., Transferee*, 14 FCC Rcd 14712, 14712 ¶ 2 (1999) ("*SBC-Ameritech Order*").

[22] In 2002, the Commission adopted a single DAB transmission standard referred to as in-band, on-channel ("IBOC"), developed by iBiquity Digital Corp. ('iBiquity"), as the technology that would permit AM and FM radio broadcasters to introduce digital operations. "HD Radio" is part of iBiquity's brand name for its digital AM and FM radio technology. HD Radio, http://www.hdradio.com/faq.php. The term "HD Radio" in this Order refers to DAB operations. *See* Section VI.B.4, *infra*.

[23] Application at 4.

[24] XM Form 10-K at 29.

[25] Application at 4.

[26] SDARS is a domestic implementation of the Broadcasting Satellite Service (sound) (BSS (sound)) that was created as a result of the 1992 World Administrative Radio Conference. *See* International Telecommunications Union, *Final Acts of the World Admin. Radio Conf.* (Malaga-Torremolinos, 1992). The Commission originally allocated 50 megahertz of spectrum for SDARS on a primary basis in the 2310-2360 MHz frequency band to match the international allocation for BSS (sound) in this band. *See 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) ("*SDARS Allocation Order*"). Congress, however, subsequently directed the Commission to reallocate spectrum at 2310-2320 MHz and 2345-2360 MHz for terrestrial wireless services. *See* Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, 110 Stat. 3009 (1996). As a result, 25 MHz of spectrum at 2320-2345 MHz remains allocated exclusively for SDARS, although the Commission retained SDARS as a primary allocation throughout the 2310-2360 MHz frequency bands. *See* U.S. Table of Frequency Allocations, 47 C.F.R. § 2.106.

[27] *See* Public Notice, "*FCC Announces Auction Winners for Digital Audio Radio Service,*" 12 FCC Rcd 18727 (1997) ("1997 SDARS Public Notice").

[28] XM Form 10-K at 2. In addition, XM states that it has advertising sales offices in several major media markets to sell directly to advertising agencies and media buying groups, and has sold advertising programs and sponsorships to hundreds of advertisers and agencies, including many Fortune 500 companies. *Id*. at 7.

[29] *Id*. at 34. "XM Canada" launched its satellite radio service in Canada in November 2005, offering over 130 channels for a monthly subscription fee of CDN $14.99. Subscribers to XM Canada are not included in the subscriber totals for the United States. *Id*. at 6.

National Hockey League (NHL), Indy Racing League and college sports.[30] XM also carries ESPN Radio, ESPN News, Fox Sports, and XM Sports Nation (XMSN).[31] Some of XM's programming is available in languages other than English and targets niche audiences. XM provides 21 dedicated traffic and weather channels for several large U.S. metropolitan areas,[32] and offers a "free-to-air" channel for which no subscription is required that broadcasts emergency alerts, safety information, and Amber alerts on a 24-hour/7-days-a-week basis.[33] XM also offers content to subscribers using streaming audio over the Internet. XM original music, news and sports series are available as free podcasts for download through xmradio.com and Apple Inc.'s iTunes Store.[34] XM is available at participating Avis, National, and Alamo car rental locations, and on certain AirTran, JetBlue, and United airplanes.[35]

10. XM has agreements to include an SDARS receiver as a factory-installed feature or a dealer-installed option in over 140 different vehicle models for model year 2008 with General Motors, Honda/Acura, Toyota/Lexus/Scion, Hyundai and Nissan/Infiniti, among others.[36] XM's receivers are also available aftermarket at retailers nationwide and through XM's website.[37]

11. XM reports that it transmits content throughout the contiguous United States to vehicles, portable receivers, home and plug-and-play radios, some of which are capable of receiving both XM content and traditional AM/FM terrestrial radio stations.[38] XM's portable, handheld products include the Inno,® which allows consumers to "bookmark" songs heard on XM, connect the Inno® to a personal computer, and purchase the songs from the XM + Napster® online service.[39] XM plug-and-play radios include the "Xpress,®" which features split screen display and 30-minute pause and replay.[40] XM-ready

[30] XM's college sports programming includes the Atlantic Coast Conference, Pacific-10 Conference, Big Ten Conference, Big 12 Conference, Southeastern Conference and Big East Conference, PGA Tour, U.S. Open Tennis, and XM Deportivo. *Id.* at 3.

[31] XM offers a variety of talk formats, news and religious programming, such as "Oprah & Friends," the "Dr. Laura Show," the Food Network, HGTV, the "Good Morning America Radio Show," Fox News, CNN, and C-Span. XM offers comedy channels, including the "Opie & Anthony Show," and a medical information channel called ReachMD. XM has additional news/talk/information/entertainment programming, including CNBC, Bloomberg, Fox Talk, CNN Headline News, The Bob Edwards Show, BBC Worldservice, The Power and CNN en Español. *Id*. at 3-4.

[32] *Id*. at 4.

[33] Application at 5.

[34] XM Form 10-K at 7. XM Online, a subset of XM's satellite radio service, is available over the Internet as part of the basic radio subscription price of $12.95 per month, and can also be purchased as a standalone service for $7.99 per month. XM Online includes many of the commercial-free music channels available on XM's satellite radio service, several channels which are exclusively programmed for XM Online and various XM original news/talk/information channels, including XM Kids, P.O.T.U.S. '08, The Bob Edwards Show, XM Comedy, Laugh USA, Oprah & Friends, and The Virus, featuring Opie & Anthony. *Id.* at 6. Through DIRECTV, XM offers several channels of XM's music, children's and talk programming to DIRECTV's customers. *Id.*

[35] *Id*. at 7.

[36] *Id*. at 4. XM also has agreements with automotive manufacturers Ferrari, Isuzu, Lotus, Subaru, Suzuki, Porsche and Harley-Davidson as either a dealer and/or factory-installed option in several models. *Id.* at 5.

[37] *Id*. at 5.

[38] *Id.* at 7.

[39] *Id.* at 5.

[40] *Id.*

and Mini-Tuner technologies integrate into a broad range of home devices such as stereo receivers and DVD players by allowing consumers to connect an XM Mini-Tuner into an XM-ready receiver.[41] XM's advanced technology applications include XM NavTraffic® which provides continuously updated real-time traffic information for 80 major metropolitan areas across the United States for a monthly fee.[42] XM aviation and marine applications include the XM WX® weather service, which provides real-time graphical weather data.[43]

12. XM primarily provides its service directly to subscribers via satellite. XM, through its 100 percent owned subsidiary, XM Radio Inc. ("XM Radio"),[44] is licensed to operate four satellites in geostationary orbit at or near the 85° W.L. and 115° W.L. orbital locations.[45] From these orbital locations, XM is able to provide service to the contiguous United States, or "CONUS," as well as parts of Alaska.[46] XM operates a network of terrestrial repeaters, pursuant to grants of special temporary authority, in order to improve the quality of its signal in areas in which the signal may be obstructed, such as by tall buildings and tunnels.[47]

13. XM Radio holds three authorizations for transmit/receive earth stations that are licensed to communicate with XM's satellites in the S- (2320-2345 MHz), C- (4/6 GHz), and X- (7025-7075 GHz) bands.[48] XM Radio also holds an experimental license under Part 5 of the Commission's rules.[49]

B. Sirius Satellite Radio Inc.

14. Sirius is a publicly traded Delaware corporation and is headquartered in New York City, New York.[50] Sirius stock is traded on the NASDAQ Global Select Market under the symbol "SIRI."[51] Sirius operates using 12.5 MHz of spectrum in the 2320-2332.5 MHz frequency band. Sirius obtained a license to use its half of this spectrum through an auction conducted in April 1997.[52]

15. Sirius commenced service in February 2002, and currently offers over 130 channels, including 69 channels of commercial-free music, 54 channels of sports, news, talk, and entertainment, and 11 channels of traffic, weather, and informational data services.[53] As of December 31, 2007, Sirius

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[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] Application, Attachment A.

[45] *1997 XM Authorization Order*, 13 FCC Rcd at 8850 ¶¶ 51-52; *2005 XM Authorization Order*, 20 FCC Rcd at 1620 ¶ 1.

[46] Application at 6.

[47] *Id*. *See also XM Radio Inc., Application for Special Temporary Authority to Operate Satellite Digital Audio Radio Service Complementary Terrestrial Repeaters*, Order and Authorization, 16 FCC Rcd 16781 (Int'l Bur. 2001) ("*XM Radio STA Order*"); *XM Radio, Inc*., Order, FCC 08-177 (adopted July 25, 2008) ("*XM Consent Decree Order*"), as discussed in Section VII.B., *infra*.

[48] Application at 53.

[49] *Id*. (call sign WB2XCA).

[50] Sirius Form 10-K at 13.

[51] *Id*. at 24.

[52] *See* 1997 SDARS Public Notice.

[53] Application at 3; *see also* Sirius Form 10-K at 5.

reported 8,321,785 subscribers in the United States.[54] Sirius's musical offerings consist of channels dedicated to genres such as pop, rock, electronic, hip hop, rhythm and blues, country, Christian, blues, jazz, classical, Latin, big band, and show tunes.[55] Sports programming includes coverage of the National Football League (NFL), National Basketball Association (NBA), National Association of Stock Car Auto Racing (NASCAR), and college sports and other sports programming, such as ESPN Radio, ESPN News and ESPN Deportes, which is ESPN's Spanish language programming.[56]

16. Several of Sirius's music, news, and talk channels are available in languages other than English or target niche audiences, and include, among other programs, Howard Stern, Martha Stewart, and Barbara Walters.[57] Sirius news and information channels include BBC World Service News, Bloomberg Radio and CNBC.[58] Sirius reports that its 11 channels of traffic and weather cover 20 metropolitan markets throughout the United States, and include one channel dedicated to emergency information and the transmission of emergency messages as part of the Emergency Alert System (EAS).[59]

17. In 2007, Sirius introduced Sirius Backseat TV, a television service offering content designed primarily for children from Nickelodeon, Disney Channel and Cartoon Network in the backseat of vehicles.[60] Sirius also provides streaming audio content to subscribers via the Internet, and music channels to DISH satellite television and Sprint mobile telephone subscribers.[61]

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[54] Sirius Form 10-K at 3. In 2005, Sirius Canada launched its service in Canada offering 110 channels of commercial music and news, sports, talk and entertainment programming, including 11 channels of Canadian content and the Howard Stern 100 channel for CDN $14.99 per month. As of October 2007, Sirius Canada had more than 500,000 subscribers. Subscribers to Sirius Canada are not included in the subscriber total for the United States. *Id.* at 10.

[55] Application at 3.

[56] Sirius Form 10-K at 5-6. Sirius carries play-by-play coverage of football, basketball and other sports from 18 NCAA Division I Conferences, and has the right to broadcast all games of the NCAA Division I men's basketball tournament through 2009. Sirius also airs Wimbledon Championships, Arena Football League, National Lacrosse League and horse racing. *Id*. at 6.

[57] *Id*. Religious programming includes the Catholic Channel, programmed with the assistance of the Archdiocese of New York. Other religious programming includes EWTN Global Catholic Radio Network and Family Net Radio, programmed by Family Net, an affiliate of the Southern Baptist Convention. *Id.*

[58] *Id.* Sirius also carries CNN, Fox News, National Public Radio and the World Radio Network. *Id.* Additional content services offered by Sirius include Sirius Music for Business, a music service for commercial entities available through Applied Media Corporation, Dynamic Media, Turn Key Media and Info Hold Inc. *Id*. at 10. Sirius's marine weather service features information on weather and wave heights to sea surface temperatures for recreational boaters and covers the 48 contiguous states and waters extending hundreds of miles into the Atlantic and Pacific Oceans, Gulf of Mexico and Caribbean. *Id.*

[59] *Id*. at 6; *see also* Application at 3. The metropolitan areas covered are New York, Boston, Philadelphia, Los Angeles, Chicago, St. Louis, Washington D.C., Baltimore, Atlanta, Miami, Dallas, Houston, Detroit, Las Vegas, San Francisco, Seattle, Phoenix, San Diego, Tampa, and Orlando. SIRIUS, http://www.sirius.com/trafficweather (visited June 17, 2008).

[60] *See* Sirius, SIRIUS Satellite Radio Launches the First Aftermarket Satellite Radio Tuner That Can Receive SIRIUS Backseat TVTM (press release) Aug. 15, 2007.

[61] *See* Application at 3. Sirius offers graphic information on road closings, traffic flow and incident data to consumers with in-vehicle navigation systems, and a marine weather service that provides a range of information, including sea surface temperatures, wave heights and extended forecasts to recreational boaters. *See* Sirius Form 10-K at 4. Sirius states that it intends to launch Sirius Travel Link, a suite of data services that includes real-time traffic, tabular and graphical weather, fuel prices, sports schedules and scores, and movie listings. Sirius Travel (continued….)

18. Sirius has agreements with automobile manufacturers to include an SDARS receiver in vehicles as a factory or dealer-installed option in 116 vehicle models, and as a dealer only installed option in 37 vehicle models.[62] Sirius receivers are also available for installation in homes, automobiles, boats, and aircraft, and may be purchased through its website, as well as through retailers nationwide.[63] Sirius radios are also offered to renters of Hertz vehicles at airport locations nationwide.[64]

19. Sirius primarily provides its service directly to subscribers via satellite. Sirius, through its 100 percent owned subsidiary, Satellite CD Radio, Inc. ("Satellite CD Radio"),[65] holds a license from the Commission to operate a fleet of three satellites in highly-elliptical orbits ("HEO").[66] Sirius also holds an authorization to launch and operate a satellite in geostationary satellite orbit ("GSO") at the 96° West Longitude (W.L.) orbital location in conjunction with Sirius's three HEO satellites, but has not yet launched this satellite.[67] Sirius serves subscribers throughout the 48 contiguous United States via its satellite system. Sirius operates a network of terrestrial repeaters in urban areas, pursuant to grants of special temporary authority, in order to improve the quality of reception in areas where there is interference to the satellite signal from tall buildings, tunnels, heavy foliage or other obstructions.[68] In addition to its satellite licenses, Sirius holds four authorizations for transmit/receive earth stations that are licensed to communicate with Sirius's satellites in the S- (2320-2345 MHz), C- (4/6 GHz), X- (7025-7075

(Continued from previous page)
Link is expected to be standard on Ford's next generation navigation system and offered on select Ford, Lincoln and Mercury vehicles in 2008. *Id.*

[62] Sirius Form 10-K at 7. Sirius satellite radio is available in Chrysler, Dodge, Jeep, Mercedes-Benz, Ford, Mitsubishi, BMW, Freightliner LLC, Volkswagen, Kia, Audi, Lincoln, Mercury, Mazda, Land Rover, Jaguar, Aston Martin, MINI, Maybach, Bentley Motors Inc., Rolls-Royce, Toyota, Sterling, Peterbilt, Kenworth, Volvo, International and Scion vehicles. *Id.* at 7-8.

[63] *Id*. at 3. Sirius also offers a variety of portable radios. *Id*. at 3.

[64] Sirius Form 10-K at 4.

[65] Application at Attachment A.

[66] The Commission originally licensed Sirius to launch and operate two satellites in geostationary orbit at the 80° and 110° West Longitude orbital locations. *1997 Sirius Authorization Order*, 13 FCC Rcd at 7971, 7994. Sirius later requested, and was granted, authority to change its satellite configuration from two geostationary satellites to three satellites in a highly elliptical non-geostationary orbit (NGSO). *Sirius Satellite Radio Inc., Minor Modification of License to Construct, Launch and Operate a Non-Geostationary Satellite Digital Audio Radio Service System*, Order and Authorization, 16 FCC Rcd 5419 (Int'l Bur. 2001).

[67] *See Sirius Satellite Radio Inc., Application for Authority to Launch and Operate SIRIUS FM-5, a Geostationary Satellite, to Provide Satellite Digital Audio Radio Services*, IBFS File No. SAT-LOA-20060901-00096 (granted April 16, 2007). The Commission had not yet granted this application at the time of filing of the Transfer Application, but Applicants specifically request that the Commission include authority to transfer control of any applications issued during the period between submission of the Transfer Application and Commission action on the same. *See* Application at Part VI.B. In addition, Sirius subsequently filed an "informative" Form 312 to include this authorization as part of the transfer of control application. *See* n.1, *supra*.

[68] *See, e.g., Sirius Satellite Radio, Inc., Application for Special Temporary Authority to Operate Satellite Digital Audio Radio Service Complementary Terrestrial Repeaters*, Order and Authorization, 16 FCC Rcd 16773 (Int'l Bur. 2001) ("*Sirius STA Order*"). *See also Sirius Satellite Radio Inc*., Order, FCC 08-176 (adopted July 25, 2008) ("*Sirius Consent Decree Order*"), as discussed in Section VII.B., *infra*. Sirius states that it plans to deploy a significant number of additional terrestrial repeaters in the future. Sirius Form 10-K at 18.

GHz), and Ku- (12/14 GHz) bands.[69] Sirius also holds a Commission wireless license.[70]

C. The Proposed Transaction

20. On February 19, 2007, Applicants, the only entities authorized by the Commission to provide satellite digital audio radio service in the United States, entered into an Agreement and Plan of Merger.[71] The surviving corporation after all the transactional steps are completed will be Sirius Satellite Radio, Inc. It will hold, through its subsidiaries Satellite CD Radio, Inc. and XM Satellite Radio Holdings Inc., all of the Commission licenses and authorizations Sirius and XM respectively hold prior to the merger.[72] The merged corporation will be controlled by a new Board of Directors, selected by both Sirius and XM, and its equity ownership will be represented equally by former shareholders of Sirius and XM.[73]

21. Applicants propose that the merged company will offer a range of programming packages at lower prices than are currently available from the individual companies.[74] In their Joint Opposition, Applicants state that some packages will be offered beginning within six months of the consummation of the merger, including "best of both" packages, discounted "family friendly" packages, and a "best of both" package that excludes adult-themed content.[75] Beginning one year following the merger, Applicants state they will offer a la carte packages of 50 or 100 channels to those subscribers who purchase next-generation radios.[76] Applicants state that no satellite radio subscriber will have to pay

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[69] *See* Application at 54; *see also* Application to Transfer Control of Sirius Satellite Radio Inc. Earth Station Authorizations to Sirius Satellite Radio Inc., IBFS File No. SES-T/C-20070320-00379 (Call Signs E990291, E040363, E060276, E060277); File No. SES-T/C-20070625-00863 (Call Sign E060363).

[70] *See* ULS File No. 0002948781 (filed Mar. 20, 2007) (seeking Commission consent to the transfer of control of an Industrial/Business Pool license, call sign WPTX369, from Sirius Satellite Radio Inc. to the merged entity); *see also* Application at 54.

[71] Agreement and Plan of Merger dated as of February 19, 2007, by and among Sirius Satellite Radio Inc., Vernon Merger Corporation, and XM Satellite Radio Holdings Inc. ("Merger Agreement"). Application at 1, 6. Pursuant to the Merger Agreement, a wholly owned subsidiary of Sirius, Vernon Merger Corporation, will be merged with and into XM, with Sirius being the surviving corporation of the subsidiary merger. At the effective time of the merger, each outstanding share of XM common stock will generally be converted into the right to receive 4.6 shares of common stock of Sirius, and each outstanding share of XM Series A Convertible Preferred Stock will be similarly converted into the right to receive 4.6 shares of a newly designated series of preferred stock of Sirius having substantially the same qualifications as the stock so converted. XM will continue to hold the stock of its subsidiaries, and XM and its subsidiaries will continue to hold all of the FCC authorizations that they held prior to the merger. *Id.* at 6.

[72] Application at 6-7, Attachment A. These licenses are held pursuant to Section 310(d) of the Communications Act.

[73] *See* Application at 6-7. Following the merger, the surviving company's Board of Directors will consist of the following: four members selected by Sirius and four members selected by XM, each of whom shall qualify as an independent director pursuant to NASDAQ Market Rules; the Chief Executive Officer; the Chairman of the Board of Directors; and two additional members, one of whom is expected to be designated by General Motors and the other by American Honda. *See* Application at 7. *See* Slacker, Inc. Comments at n.413, *infra*.

[74] *See* Applicants' Joint Opposition to Petitions to Deny and Reply Comments ("Joint Opposition").

[75] *Id*. at 10-14. *See also* XM and Sirius, *XM and SIRIUS to Offer A La Carte Programming* (press release) Jul. 23, 2007.

[76] Joint Opposition at 11-14.

more for monthly services as a result of the merger.[77]

22. On June 13, 2008 and July 25, 2008, Applicants provided letters detailing and further modifying a number of voluntary commitments they were willing to implement to "further demonstrate" that the approval of their transaction would serve the public interest.[78] With regard to programming, the Applicants state that within three months of consummation of the merger, the combined company will offer (1) two a la carte options and introduce a la carte capable radios, (2) a "Best of Both" programming package, (3) a "mostly music" package and a "mostly news, sports and talk" package, and (4) a discounted "family-friendly" package. Applicants also state that the merged entity will set aside 4 percent of its full-time audio channels for noncommercial educational and informational programming, and will lease another 4 percent of its channels to "qualified entities."[79] With regard to rates, Applicants state that they will not raise their current rates nor the rates for their new services for at least 36 months after the consummation of the merger (except that after one year, Applicants may pass on cost increases to their subscribers).[80] Six months prior to the expiration of the commitment period, the Commission will seek public comment on whether the cap continues to be necessary in the public interest. The Commission will then determine whether it should be modified, removed, or extended. With regard to equipment, within nine months after consummation of the merger, Applicants state that the merged entity will offer for sale at retail an interoperable satellite radio receiver (i.e., one that is capable of receiving both the full Sirius and the full XM programming).[81] They state that the merged entity also will (1) permit any manufacturer to develop equipment that can deliver their satellite radio service and (2) permit manufacturers to incorporate in any satellite radio receivers other technology (so long as it does not result in harmful interference), including HD Radio technology.[82] To this end, immediately after consummation of the merger, Applicants will offer for license to bona fide third parties the intellectual property they own and control of the basic functionality of satellite radios (not including chip set and encryption technology). Applicants also voluntarily commit that the merged entity would not enter into any agreements that would bar others from including other (non-interfering) audio technology in any device or vehicle.[83] Finally, Applicants voluntarily commit to providing Sirius satellite radio service to Puerto Rico using terrestrial repeaters.[84]

D. Post-Merger Operations

23. Applicants state that, post merger, they will continue to operate the XM and Sirius infrastructures as separate, legacy systems in the near term, and that neither system currently has

[77] *Id*. at 13-14.

[78] Applicants' June 13, 2008 Ex Parte at 1; Applicants' July 25, 2008 Ex Parte at 1.

[79] Applicants define a "qualified entity" as any entity that is majority-owned by persons who are African American, not of Hispanic origin; Asian or Pacific Islanders; American Indians or Alaskan Natives; or Hispanics. Applicants' June 13, 2008 Ex Parte at 1 at 3 n.2.

[80] Applicants state that they "may pass through cost increases incurred since the filing of the combined company's FCC merger application as a result of statutorily or contractually required payments to the music, recording and publishing industries for the performance of musical works and sound recordings or for device recording fees." Applicants' June 13, 2008 Ex Parte at 4. *See* ¶ 107, *infra*.

[81] Applicants' July 25, 2008 Ex Parte at 2.

[82] Applicants' June 13, 2008 Ex Parte at 3.

[83] *Id*.

[84] *Id*. at 4.

sufficient capacity to offer both companies' full programming line-ups.[85] Although Applicants state that some aspects of the two legacy infrastructures could be integrated into a common platform in a relatively short time frame, combining all aspects of the two infrastructures will take much longer.[86] Consequently, Applicants state that subscribers of the merged entity would have to own two legacy receivers (one XM receiver and one Sirius receiver) in order to receive the complete offerings of the combined entity.[87] The need for two separate receivers results from the significant engineering differences between the XM and Sirius systems and the lack of an interoperable receiver capable of accessing all licensed SDARS systems.[88] As discussed below, the need to operate two separate legacy systems post-merger delays realization of some of the spectrum efficiency benefits claimed by Applicants.[89]

24. Applicants identify significant engineering differences in their existing platforms that would make integration difficult in the short term.[90] Both Applicants use satellites and terrestrial repeaters to deliver programming to subscribers, but each has taken a different approach in implementing its system. For example, XM operates its system using two active satellites in geostationary orbit,[91] whereas Sirius uses three satellites in a highly inclined, elliptical non-geostationary orbit.[92] The difference in orbital constellations affects the design of the antennas used to receive the satellite signal,[93] the terrestrial repeater network used to augment the satellite service,[94] and the uplink antennas used to communicate with the satellites.[95] Each Applicant has invested significantly in its existing infrastructure with the expectation of operating its infrastructure for years to come.[96]

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[85] Application at 12 n.27.

[86] XM Nov. 16, 2007 Response to Information and Document Request, Narrative at 25 (XM filed a duplicate submission on Dec. 4, 2007 to correct a formatting issue with the Nov. 16, 2007 filing. In this Order, we cite to the Nov. 16, 2007 filing).

[87] Application at 12, n.27.

[88] *See infra* Section VI.B.3; *see also* Sirius Nov. 16, 2007 Response to Information and Document Request, Narrative at 67 ("it is anticipated that consumers who want to access all of the programming offered by the merged company will have to purchase new interoperable radios capable of receiving signals on the spectrum now licensed separately to Sirius and XM").

[89] *See infra* Section V.B.4.

[90] XM Nov. 16, 2007 Response to Information and Document Request, Narrative at 25-29; Sirius Nov. 16, 2007 Response to Information and Document Request, Narrative at 37-40.

[91] *2005 XM Authorization Order*, 20 FCC Rcd at 1620 ¶ 1 (authorizing XM to launch and operate the XM-3 and XM-4 satellites and to operate the XM-1 and XM-2 satellites as in-orbit spares).

[92] Sirius Nov. 16, 2007 Response to Information and Document Request, Narrative at 38.

[93] Sirius states that the receive antennas of XM's and Sirius' radios are optimized differently in order to provide the best reception given the different elevation angles needed to view XM's satellites in geostationary orbit and Sirius's satellites in highly-elliptical orbits. *See* Sirius Nov. 16, 2007 Response to Information and Document Request, Narrative at 38-39.

[94] Sirius states that it needs fewer repeaters than XM due to the high angle of elevation of Sirius' satellites in highly-elliptical orbit. *See* Sirius Nov. 16, 2007 Response to Information and Document Request, Narrative at 39.

[95] Sirius states that its satellites in highly-elliptical orbits require uplink antennas with full motion to track the satellites across the sky, whereas XM's satellites in geostationary orbit do not. *See id*.

[96] XM's two operational satellites, XM-3 and XM-4, were launched in 2005 and 2006, respectively, and have expected operational lifetimes of 15 years. *See* XM, *XM Radio's XM-4 Satellite Successfully Delivered to Transfer Orbit* (press release) Oct. 30, 2006; XM, *XM Radio's Satellite Successfully Delivered to Orbit* (press release) Mar. 1, (continued….)

25. Besides differences in satellite infrastructure, Applicants currently use different technology for transmission and reception of their programming to subscribers that makes integration to a common platform difficult in the short term. XM and Sirius are assigned 12.5 MHz of spectrum each, but Sirius divides its spectrum into three identical carriers of approximately 4 MHz each, whereas XM divides its spectrum into six carriers.[97] As a result, current XM receivers are not designed to receive Sirius's programming, and vice versa. Furthermore, although XM and Sirius have used a common manufacturer for some of the chipsets used in their receivers, they also use a number of different chipset manufacturers, and the chipsets are highly tuned to address only the transmissions of Sirius or XM, respectively.[98] Applicants state that any migration to a common platform will likely require the development of new chipsets.[99] Applicants state that if the combined company were to migrate to a common platform while a significant number of single-platform devices were still in use, then the combined company would either risk losing millions of customers by forcing the purchase of new radios, or face prohibitive costs to replace millions of single-platform radios, most of which will be hard-wired into cars.[100] Thus, Applicants indicate that it is unlikely that the merged company would convert to a common platform until nearly all subscribers have migrated to receivers with new chipsets capable of operating under a common platform.[101]

E. Applications and Review Process

1. Commission Review

26. On March 20, 2007, Applicants submitted the Consolidated Application to the Commission seeking consent to transfer control of Commission licenses and authorizations held by Sirius, XM and their subsidiaries pursuant to Section 310(d) of the Communications Act of 1934, as amended.[102] On June 8, 2007, the Media Bureau accepted the Consolidated Application for filing and released a Public Notice establishing the pleading cycle for parties to file comments with respect to the transfer of control.[103]

27. On June 25, 2007, the Commission adopted the *2007 SDARS NPRM*, seeking public comment as to whether language included in the *1997 SDARS Service Rules Order* establishing SDARS

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2005. Sirius' current operational satellites were launched in 2000, and Sirius is in the process of implementing replacement satellites. *See* Satellite CD Radio, Inc., Application for Modification of Authority, IBFS File No. SAT-MOD-20080521-00110 (filed May 21, 2008) (requesting authority to launch and operate the FM-6 satellite as an eventual replacement for two in-orbit Sirius NGSO satellites). Because SDARS is the only commercial satellite service authorized to use the 2320-2345 MHz frequency band in the United States, it is unlikely that either Applicant would be able to sell its satellite infrastructure to a non-SDARS provider.

[97] XM Nov. 16, 2007 Response to Information and Document Request, Narrative at 29; Sirius Nov. 16, 2007 Response to Information and Document Request, Narrative at 37.

[98] Sirius Nov. 16, 2007 Response to Information and Document Request, Narrative at 40.

[99] *Id*. at 44-45.

[100] XM Nov. 16, 2007 Response to Information and Document Request, Narrative at 26. In addition, Applicants have committed to the public that no customer will need to purchase a new radio to keep "substantially similar service" after the merger. *Id.* at 27 n.11.

[101] *See* Sirius Nov. 16, 2007 Response to Information and Document Request, Narrative at 41, 44-45.

[102] *See* 47 U.S.C. § 310(d); Consolidated Application.

[103] Jun. 8, 2007 Public Notice, 22 FCC Rcd at 1032. Comments were due July 9, 2007, and responses and oppositions were due on July 24, 2007.

service, which prohibits the transfer of control of one SDARS licensee to the other,[104] constitutes a binding rule.[105] In the event the Commission was to determine that the language in the *1997 SDARS Service Rules Order* is a binding rule, the *2007 SDARS NPRM* sought comment on whether the Commission should waive, modify, or repeal the transfer prohibition if the Commission subsequently determined that the proposed merger of XM and Sirius, on balance, serves the public interest.[106]

28. Many entities filed comments in support of the transfer of control application, including Competitive Enterprise Institute ("CEI"); The Heritage Foundation ("Heritage"); Progress and Freedom Foundation ("PFF"); National Association for the Advancement of Colored People ("NAACP"); Hispanic Federation; General Motors Corp. ("GM"); Circuit City; Sen. John Ensign; Rep. Rick Boucher; and Former Sen. Bill Bradley. In addition, nine parties filed petitions to deny the application: Mt. Wilson FM Broadcasters, Inc. ("Mt. Wilson"); the National Association of Broadcasters ("NAB"); Common Cause, Consumer Federation of America, Consumers Union and Free Press ("Common Cause"); American Women in Radio and Television, Inc. ("AWRT"); the Consumer Coalition for Competition in Satellite Radio ("C3SR"); The Telecommunications Advocacy Project ("TAP"); The National Association of Black Owned Broadcasters ("NABOB"); National Public Radio ("NPR"); and Forty-Six Broadcasting Organizations.[107] An "informal objection" was filed by Prometheus Radio Project, U.S. Public Interest Research Group, and Media Access Project ("Prometheus Radio").[108] The Commission also received almost 17,000 formal and informal comments on the proposed transfer of control. In addition, comments and reply comments were filed with regard to issues raised in the *2007 SDARS NPRM* by 18 parties. The Commission also requested additional information from Applicants.[109] Applicants' separately-filed

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[104] *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5754, 5823 ¶ 170 (1997) ("*1997 SDARS Service Rules Order*").

[105] *2007 SDARS NPRM*, 22 FCC Rcd at 12018 ¶ 1.

[106] A summary of the *2007 SDARS NPRM* was published in the Federal Register on July 12, 2007, 72 FR 38055 (July 12, 2007). The following day, the Media Bureau issued the Public Notice setting forth deadlines for filing comments and reply comments to the *2007 SDARS NPRM*. 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 Ratio Inc*., Transferee, 22 FCC Rcd 13036 (Med. Bur. 2007). Comments were due by August 13, 2007, and reply comments were due by August 27, 2007.

[107] *See* Petition to Deny filed by Mt. Wilson FM Broadcasters, Inc. ("Mt. Wilson Petition"); Petition to Deny filed by the National Association of Broadcasters ("NAB Petition"); Petition to Deny filed by Common Cause, Consumer Federation of America, Consumers Union and Free Press ("Common Cause Petition"); Petition to Deny filed by American Women in Radio and Television, Inc. ("AWRT Petition"); Petition to Deny filed by the Consumer Coalition for Competition in Satellite Radio ("C3SR Petition"); Petition to Deny filed by The Telecommunications Advocacy Project ("TAP Petition"); Petition to Deny filed by The National Association of Black Owned Broadcasters ("NABOB Petition"); Petition to Deny filed by National Public Radio ("NPR Petition"), and Petition to Deny filed by Forty-Six Broadcasting Organizations ("46 Broadcasters Petition"). An untimely Petition to Deny was filed by the National Association of Telecommunications Officers and Advisors ("NATOA"). The NATOA Petition will be considered as a comment in the proceeding.

[108] *See* Informal Objection filed by Prometheus Radio Project, U.S. Public Interest Research Group, and Media Access Project ("Prometheus Radio Objection"). This filing will be considered as a comment in the proceeding.

[109] On July 11, 2007, the Media Bureau adopted a Protective Order under which third parties were allowed to review confidential or proprietary filings and documents submitted by Applicants. *See* Applications of Sirius Satellite Radio, Inc. and XM Satellite Radio Holdings Inc. For Approval to Transfer Control, Protective Order, 22 FCC Rcd 12822 (Med. Bur. 2007) ("*First Protective Order*"). On November 2, 2007, the Bureau issued a request for information from Sirius and XM. Letter from Monica Shah Desai, Chief, Media Bureau, FCC, to Richard E. Wiley, (continued….)

responses to those requests are included in the record.[110]

2. Department of Justice Review

29. In addition to Commission review, the proposed transaction is subject to review by federal antitrust authorities, in this instance by the U.S. Department of Justice ("DOJ"). The DOJ reviews communications mergers and transactions pursuant to section 7 of the Clayton Act, which prohibits mergers that may substantially lessen competition in any line of commerce.[111] On March 24, 2008, the DOJ announced that it had "close[d] its investigation of the transaction" without taking any enforcement action against the proposed merger.[112]

III. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

30. Pursuant to section 310(d) of the Communications Act, we must determine whether Applicants have demonstrated that the proposed transfers of control of the licenses and authorizations held by XM and Sirius will serve the public interest, convenience, and necessity.[113] In making this assessment, we evaluate whether the proposed transaction complies with the specific provisions of the

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Robert L. Pettit, Peter D. Shields and Jennifer D. Hindin, Wiley Rein LLP, Counsel for Sirius (Nov. 2, 2007) ("Sirius Information Request"); Letter from Monica Shah Desai, Chief, Media Bureau, FCC, to Gary M. Epstein, James H. Barker and Brian W. Murray, Latham & Watkins LLP, Counsel for XM (Nov. 2, 2007) ("XM Information Request"). On November 16, 2007, the Bureau issued a second Protective Order regarding additional conditions applicable to third party review of highly confidential competitively sensitive documents. *See* Applications of Sirius Satellite Radio, Inc. and XM Satellite Radio Holdings Inc. For Approval to Transfer Control, Protective Order, 22 FCC Rcd 19924 (Med. Bur. 2007) ("*Second Protective Order*").

[110] *See* Letter from Peter D. Shields, Wiley Rein LLP, Counsel for Sirius, to Marlene H. Dortch, Secretary, FCC (Nov. 16, 2007); Letter from Gary M. Epstein, Latham & Watkins LLP, Counsel for XM, to Marlene H. Dortch, Secretary, FCC (Nov. 16, 2007); Letter from Gary M. Epstein, Latham & Watkins LLP, Counsel for XM, to Marlene H. Dortch, Secretary, FCC (Mar. 3, 2008); Letter from Jennifer D. Hindin, Wiley Rein LLP, Counsel for Sirius, to Marlene H. Dortch, Secretary, FCC (Mar. 4, 2008); Letter from Gary M. Epstein, Latham & Watkins LLP, Counsel for XM, to Marlene H. Dortch, Secretary, FCC (Mar. 18, 2008); Letter from Jennifer D. Hindin, Wiley Rein LLP, Counsel for Sirius, to Marlene H. Dortch, Secretary, FCC (Mar. 18, 2008); Letter from Gary M. Epstein, Latham & Watkins LLP, Counsel for XM, to Marlene H. Dortch, Secretary, FCC (Apr. 10, 2008); Letter from Jennifer D. Hindin, Wiley Rein LLP, Counsel for Sirius, to Marlene H. Dortch, Secretary, FCC (Apr. 10, 2008).

C3SR asks that Applicants provide them in electronic form with documents submitted as Highly Confidential under the Second Protective Order. Letter from Julian L. Shepard, Williams Mullen, Counsel for C3SR, to Monica Shah Desai, Chief, Media Bureau, FCC (Dec. 4, 2007). However, those documents were marked "Copying Prohibited" and C3SR stated that it did not want to argue about whether the documents were correctly designated. *Id.* at 2. Further, C3SR did not contend that it was unable to review the documents in paper form. Accordingly, we deny C3SR's request.

[111] 15 U.S.C. § 18.

[112] DOJ, *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), http://www.justice.gov/opa/pr/2008/March/08_at_226.html ("Mar. 24, 2008 DOJ Press Release").

[113] 47 U.S.C. § 310(d).

Act,[114] other applicable statutes, and the Commission's rules.[115] We also consider whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes.[116] We employ a balancing process, weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.[117] Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest.[118] If we are unable to find that the proposed transaction serves the public interest, or if the record presents a substantial and material question of fact, we must designate the application for hearing under section 309(e) of the Act.[119]

31. The Commission's public interest evaluation necessarily encompasses the "broad aims of the Communications Act,"[120] which include, among other things, a deeply rooted preference for

[114] Section 310(d) requires that the Commission consider the applications as if the proposed transferee were applying for the licenses directly. 47 U.S.C. § 310(d). *See News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control*, 23 FCC Rcd 3265, 3276 ¶ 22 (2008) ("*Liberty Media-DIRECTV Order*"); *SBC Comm. Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, 18300 ¶ 16 (2005) ("*SBC-AT&T Order*"); *Verizon Comm., Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, 18443 ¶ 16 (2005) ("*Verizon-MCI Order*"); *Applications of Nextel Comm., Inc. and Sprint Corp.*, *for Consent to Transfer Control*, 20 FCC Rcd 13967, 13976 ¶ 20 (2005) ("*Sprint-Nextel Order*"); *News Corp.-Hughes Order*, 19 FCC Rcd at 483 ¶ 15; *Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee*, 17 FCC Rcd 23246, 23255 ¶ 26 (2002) ("*Comcast-AT&T Order*").

[115] *See, e.g., Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3276 ¶ 22; *SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18442-43 ¶ 16; *Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from NextWave Personal Comm., Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in-Possession, to Subsidiaries of Cingular Wireless LLC*, 19 FCC Rcd 2570, 2581 ¶ 24 (2004) ("*Cingular-NextWave Order*"); *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20574 ¶ 25.

[116] *See Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3276-77 ¶ 22; *SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13976 ¶ 20.

[117] *See Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3277 ¶ 22; *SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13976 ¶ 20; *News Corp.-Hughes Order*, 19 FCC Rcd at 483 ¶ 15; *Comcast-AT&T Order*, 17 FCC Rcd at 23255 ¶ 26.

[118] *See Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3277 ¶ 22; SBC-AT&T Order, 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443 ¶ 16; *Comcast-AT&T Order*, 17 FCC Rcd at 23255 ¶ 26; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20574 ¶ 25.

[119] 47 U.S.C. § 309(e); *see also Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3277 ¶ 22; *News Corp.-Hughes Order,* 19 FCC Rcd at 483 n.49; *EchoStar-DIRECTV HDO,* 17 FCC Rcd at 20574 ¶ 25.

[120] *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3277 ¶ 23; *AT&T Wireless Services, Inc. and Cingular Wireless Corp. for Consent to Transfer Control of Licenses and Authorizations*, 19 FCC Rcd 21522, 21544 ¶ 41 (2004) ("*Cingular-AT&T Wireless Order*"); *News Corp.-Hughes Order*, 19 FCC Rcd at 483 ¶ 16; *Comcast-AT&T Order*, 17 FCC Rcd at 23255 ¶ 27; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20575 ¶ 26; *MediaOne Group, Inc., Consent to the Transfer of Control (Transferor) to AT&T Corp. (Transferee)*, 15 FCC Rcd 9816, 9821 ¶ 11 (2000) ("*AT&T-MediaOne Order*"); *Applications of VoiceStream Wireless Corp. or Omnipoint Corp., Transferors, and VoiceStream Wireless Holding Company, Cook Inlet/VS GSM II PCS, LLC, or Cook Inlet/VS GSM III PCS, LLC, Transferees*, 15 FCC Rcd 3341, 3346-47 ¶ 11 (2000); *AT&T Corp., British Telecomm., PLC, VLT Co. L.L.C., Violet License Co. LLC, and TNV* [*Bahamas*] *Limited Applications*, 14 FCC Rcd 19140, 19146 ¶ 14 (1999) ("*AT&T Corp.-British Telecom. Order*"); *Application of WorldCom, Inc., and MCI Comm. Corp. for Transfer of Control of MCI Comm. Corp. to WorldCom, Inc*., 13 FCC Rcd 18025, 18030 ¶ 9 (1998) ("*WorldCom-MCI Order*").

preserving and enhancing competition in relevant markets,[121] accelerating private sector deployment of advanced services,[122] ensuring a diversity of information sources and services to the public,[123] and generally managing the spectrum in the public interest. This public interest analysis may also entail assessing whether a transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers.[124] In conducting this analysis, we may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.[125]

32. Our competitive analysis, which forms an important part of the public interest evaluation, is informed by, but not limited to, traditional antitrust principles.[126] The Commission and the DOJ each have independent authority to examine the competitive impacts of proposed communications mergers involving transfers of FCC licenses, but the standards governing the Commission's competitive review differ somewhat from those applied by the DOJ.[127] Like the DOJ, the Commission considers how a transaction will affect competition by defining a relevant market, looking at the market power of incumbent competitors, and analyzing barriers to entry, potential competition and the efficiencies, if any, that may result from the transaction. The Antitrust Division of the DOJ, however, reviews telecommunications mergers pursuant to section 7 of the Clayton Act, which prohibits mergers that may substantially lessen competition.[128] The Commission's competitive analysis under the public interest

[121] 47 U.S.C. § 521(6) (one purpose of statute is to "promote competition in cable communications and minimize unnecessary regulation"); 47 U.S.C. § 532(a) (purpose of section is "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems"); *see also Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3277 ¶ 23; *Applications for Consent to the Transfer of Control of Licenses and Authorizations by Time Warner, Inc. and America Online, Inc. to AOL Time Warner Inc.*, 16 FCC Rcd 6547, 6555-56 ¶ 22 (2001) ("*AOL-Time Warner Order*").

[122] *See, e.g.,* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 § 706 (1996) (providing for the deployment of advanced telecommunications capabilities).

[123] 47 U.S.C. § 521(4); *see also* 47 U.S.C. § 532(a).

[124] *See Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3277-78 ¶ 23; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 41; *Comcast-AT&T Order*, 17 FCC Rcd at 23255 ¶ 27; *AT&T-MediaOne Order*, 15 FCC Rcd at 9821-22 ¶ 11; *WorldCom-MCI Order*, 13 FCC Rcd at 18031 ¶ 9.

[125] *See Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3278 ¶ 23; *Comcast-AT&T Order*, 17 FCC Rcd at 23255-27; *AT&T-MediaOne Order*, 15 FCC Rcd at 9821-22 ¶ 11; *WorldCom-MCI Order*, 13 FCC Rcd at 18031 ¶ 9.

[126] *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3278 ¶ 24; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 42; *News Corp.-Hughes Order*, 19 FCC Rcd at 484 ¶ 17; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20575 ¶ 27; *Application of GTE Corp. and Bell Atlantic Corp. for Consent to Transfer Control of Domestic and International Authorizations and Application to Transfer Control of a Submarine Landing License*, 15 FCC Rcd 14032, 14046 ¶ 23 (2000) ("*Bell Atlantic-GTE Order*"); *Comcast-AT&T Order*, 17 FCC Rcd at 23256 ¶ 28; *WorldCom-MCI Order*, 13 FCC Rcd at 18033 ¶ 13.

[127] *See, e.g*., *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3278 ¶ 24; *Verizon-MCI Order*, 20 FCC Rcd at 18444 ¶ 18; *SBC-AT&T Order*, 20 FCC Rcd at 18302 ¶ 18; *Rainbow DBS Company LLC, Assignor, and EchoStar Satellite L.L.C., Assignee, Consolidated Application for Consent to Assignment of Space Station and Earth Station Licenses, and Related Special Temporary Authorization*, 20 FCC Rcd 16868, 16874 ¶ 12 (2005); *Sprint-Nextel Order*, 20 FCC Rcd at 13978 ¶ 22; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20575 ¶ 27. *See also Satellite Business Systems*, 62 FCC 2d 997, 1088 (1977), *aff'd sub nom. United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980) (*en banc*); *Northern Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agencies "to analyze proposed mergers under the same standards that the Department of Justice . . . must apply").

[128] 15 U.S.C. § 18.

standard is somewhat broader, for example, considering whether a transaction will enhance, rather than merely preserve, existing competition, and takes a more expansive view of potential and future competition and its impact on the relevant market.[129] The DOJ's review is also limited solely to an examination of the competitive effects of the acquisition, without reference to diversity, localism, or other public interest considerations.

33. Our analysis recognizes that a proposed transaction may lead to both beneficial and harmful consequences. For instance, combining assets may allow a firm to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, or create opportunities to disadvantage rivals in anticompetitive ways.[130] The Commission's public interest authority enables us, where appropriate, to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction.[131] Section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions, not inconsistent with law, which may be necessary to carry out the provisions of the Act.[132] Indeed, our public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions to ensure that a transaction will yield overall public interest benefits.[133]

34. The Order is set forth, as follows, in four principal components. First, we assess the potential horizontal and vertical harms presented by the transaction, including the impact on diversity. Second, we evaluate the public interest benefits that Applicants claim will result from the transaction. Next, we balance the public interest harms posed by, and the benefits to be gained from, the merger. We conclude by examining whether the proposed transaction complies with the Communications Act, other applicable statutes and the Commission's rules and policies, as modified herein.

IV. POTENTIAL PUBLIC INTEREST HARMS

A. Introduction

35. In this section, we gauge the potential public interest harms that are likely to result from

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[129] *See Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3278 ¶ 25; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14047 ¶ 23; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd at 19147-48 ¶ 15; *Comcast-AT&T Order*, 17 FCC Rcd at 23256 ¶ 28.

[130] *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3278-79 ¶ 25; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 42; *AOL-Time Warner Order*, 16 FCC Rcd at 6550, 6553 ¶¶ 5, 15.

[131] *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3279 ¶ 26; *Cingular-AT&T Wireless Order,* 19 FCC Rcd at 21545 ¶ 43; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14047 ¶ 24; *AT&T Corp.-British Telecom. Order,* 14 FCC Rcd at 19148 ¶ 15; *see also WorldCom-MCI Order,* 13 FCC Rcd at 18032 ¶ 10 (stating that the Commission may attach conditions to the transfers); *Applications of VoiceStream Wireless Corp., Powertel Inc. and Deutsche Telekom AG for Consent to Transfer Control of Licenses and Authorizations,* 16 FCC Rcd 9779, 9782 (2001) (conditioning approval on compliance with agreements with Department of Justice and Federal Bureau of Investigation addressing national security, law enforcement, and public safety concerns).

[132] 47 U.S.C. § 303(r). *See Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3279 ¶ 26; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43; *Bell Atlantic-GTE Order,* 15 FCC Rcd at 14047 ¶ 24; *WorldCom-MCI Order*, 13 FCC Rcd at 18032 ¶ 10 (citing *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (upholding broadcast-newspaper cross-ownership rules adopted pursuant to section 303(r)); *U.S. v. Southwestern Cable Co*., 392 U.S. 157, 178 (1968) (holding that section 303(r) permits the Commission to order a cable company not to carry broadcast signal beyond station's primary market); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989) (affirming syndicated exclusivity rules adopted pursuant to section 303(r) authority).

[133] *See, e.g., Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3279 ¶ 26; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43; *News Corp.-Hughes Order*, 19 FCC Rcd at 477 ¶ 5; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14047-48 ¶ 24; *WorldCom-MCI Order*, 13 FCC Rcd at 18034-35 ¶ 14.

this transaction. We conclude that there is insufficient evidence in the record to predict the likelihood of anticompetitive harms. Thus, we will evaluate the potential harms to competition, diversity, and localism under assumptions that maximize the likelihood of harm. This approach is necessary to protect consumers from any potential adverse effects of the transaction while simultaneously allowing us to balance potential harms against potential public interest benefits. As a result of our competitive analysis under "worst-case" assumptions, we conclude that the merger, absent Applicants' voluntary commitments and other conditions, would result in potential harms. However, Applicants have committed voluntarily to take steps that will mitigate these harms.

B. Potential Competitive Harms

36. Transactions involving the acquisition of a full or partial interest in another company may give rise to concerns regarding "horizontal" concentration and/or "vertical" integration, depending on the lines of business in which the two firms are engaged. A transaction is said to be horizontal when the firms in the transaction sell or buy products that are in the same relevant product and geographic markets and are viewed as reasonable substitutes.[134] Horizontal transactions can eliminate competition between the firms and increase concentration in the relevant markets. The reduction in overall competition in the relevant markets may lead to substantial increases in prices paid by purchasers of products in the markets.[135] Vertical transactions raise slightly different competitive concerns. Vertical relationships exist when upstream firms produce inputs that downstream firms use to create finished goods. Transactions are said to be vertical when upstream firms and downstream firms are combined.[136] In this section, we analyze the potential horizontal and vertical effects of the proposed transaction.

1. Potential Horizontal Effects

a. Record Evidence on Defining the Relevant Markets

37. Consistent with the *DOJ/FTC Guidelines,* the Commission typically begins its analysis of horizontal effects by defining the relevant product and geographic markets. The *DOJ/FTC Guidelines* define the relevant product market as the smallest group of competing products for which a hypothetical monopoly provider of the products would profitably impose at least a "small but significant and non-transitory increase in price," presuming no change in the terms of sale of other products.[137] (This procedure is often called the "SSNIP Test" for market definition.[138]) Thus, when one product is a

[134] *See News Corp.-Hughes Order*, 19 FCC Rcd at 507 ¶ 69.

[135] *See* ABA Sec. of Antitrust Law, *Antitrust Law Developments* 327 (5th ed. 2002); KIP VISCUSI, JOHN M. VERNON AND JOSEPH E. HARRINGTON, JR., ECON. OF REG. AND ANTITRUST 192 (3d ed. 2000) ("VISCUSI*, et al*.").

[136] *See* VISCUSI*, et al*. at 233. A merging of the firms, however, is not required for a vertical relationship to exist. Exclusive dealing arrangements between upstream and downstream firms, referred to as "vertical restraints," can accomplish the objectives of vertical integration. *Id.*

[137] *See DOJ/FTC Horizontal Merger Guidelines*, 57 Fed. Reg. 41552, §§ 1.11, 1.12 (Sept. 10, 1992), revised, 4 Trade Reg. Rep. (CCH) ¶ 13104 (Apr. 8, 1997). The *Guidelines* similarly define the relevant geographic market as "a region such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose at least a 'small but significant and nontransitory' increase in price, holding constant the terms of sale for all products produced elsewhere." *Id.* at § 1.21.

[138] One generally starts with a small relevant product market and asks if a hypothetical monopolist could profitably increase price in that market. If the price increase is not profitable because consumers will substitute to another competing product (i.e., if the cross-price elasticity between the products is large), then the SSNIP test is repeated, but the potential product market is expanded to include the next-best substitutes. The procedure continues until a hypothetical monopolist over all the included products can profitably raise price, identifying that set of products as the relevant product market. *DOJ/FTC Horizontal Merger Guidelines* at § 1.11.

reasonable substitute for the other in the eyes of a sufficiently large number of consumers, it is included in the relevant product market even though the products themselves are not identical.

38. *Product Market.* The commenters in this proceeding disagree as to the exact boundaries of the relevant product market. Applicants contend that the relevant product market is the relatively broad product market for "audio entertainment services," which includes terrestrial radio, HD Radio, wireless phones, iPods and other MP3 players.[139] They emphasize that substantial demand substitution exists "particularly between satellite radio and terrestrial radio."[140] Commenters opposing the transaction contend that SDARS constitutes a distinct relevant product market, separate from other audio entertainment services.[141]

39. In order to quantitatively determine the market, we must have certain statistical data, in particular the "elasticity" of demand for SDARS and other potentially competing products.[142] No

[139] Joint Opposition at 36-37; Joint Opposition, Exh. A, CRA International, Economic Analysis of the Competitive Effects of the Sirius-XM Merger at 9-10 ("Joint Opposition, CRA Study").

[140] Joint Opposition at 37. *See also* Americans for Tax Reform Comments at 4; Citizen Outreach Project Comments at 1 (arguing that SDARS competes with terrestrial radio); CEI Comments at 6-10 (arguing that the product market should include anything that delivers audio entertainment services); Crutchfield Corp. Comments at 1-2 (arguing that HD Radio and Internet radio are competitors to SDARS); Foust Comments at 3-4 (arguing that SDARS competes with broadcast radio, smart phones, PDAs, and iPods); Free State Foundation Comments at 2-6 (arguing that SDARS is part of a larger audio entertainment and information services market); Heritage Foundation Comments at 2-3 (arguing that SDARS competes in a dynamic market, including broadcast radio and MP3 devices, because all offer audio entertainment); Public Knowledge Comments at 3, 10 (arguing that the relevant product market includes terrestrial radio, HD Radio, Internet radio, MP3 players, mobile/cellular telephones, and emerging mobile Internet radio services); League of Rural Voters Comments at 2-5 (arguing that consumers have numerous choices, including broadcast radio, if XM and Sirius merged); Letter from Brent Wiles, Exec. Dir., League of United Latin American Citizens, to Marlene H. Dortch, Secretary, FCC (May 11, 2007) at 2 (arguing that the relevant product market includes terrestrial radio and downloadable music devices).

[141] *See, e.g.,* C3SR Petition at 13-14; Decl. by J. Gregory Sidak Concerning the Competitive Consequences of the Proposed Merger of Sirius Satellite Radio, Inc. and XM Satellite Radio, Inc. (Mar. 16, 2007) at 25-32, transmitted by Letter from Julian L. Shepard, Williams Mullen, Counsel for C3SR ("C3SR, Sidak Decl."); NAB Petition at 11-23; NPR Petition at 9-15 (arguing that consumers have no other alternatives to SDARS for 100 plus channels of unregulated music, news, entertainment, and talk formats); Common Cause Petition at 36; AWRT Petition at 3-4 (arguing that no other product is a true substitute for SDARS); NATOA Petition at 6-9 (arguing that other audio entertainment services are not comparable to the services offered by SDARS); AAI Comments at 22-24 (arguing that alternatives to SDARS have significant limitations in constraining an SDARS monopolist from exercising market power, and lack some or all of SDARS unique attributes); Blue Sky Comments at 6 (arguing that, when compared with SDARS, no other service offers comparable program diversity, portability, or sound quality); Entravision Comments at 8-15 (arguing that other audio services will not provide an adequate check against anti-competitive harms arising from the merger); Prometheus Comments at 2 (arguing that HD Radio, MP3 players, terrestrial broadcast stations and Internet radio are complementary products, not substitutes for SDARS); Letter from U.S. Sen. Herb Kohl, Chairman, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, to Kevin J. Martin, Chairman, FCC (May 23, 2007) at 1-2 (arguing that SDARS is the only medium offering hundreds of channels, programming on a national basis with superior sound quality, commercial free programming, and portable capabilities); Letter from U.S. Reps. James T. Walsh and John McHugh, to Kevin J. Martin, Chairman, FCC (May 9, 2007) at 1 (arguing that SDARS is a separate product market because it is a national multichannel audio service that users can use anywhere whereas local radio stations provided limited signal reach).

[142] Elasticity is a measure of how much the sales of a product will rise or fall in response to a change in price. The own-price elasticity of demand is the percentage change in the quantity demanded of good A divided by the percentage change in the price of good A. The cross-price elasticity of demand is the percentage change in the quantity demanded of good A divided by the percentage change in the price of good B.

commenter in this proceeding has provided detailed quantitative estimates of the own-price and cross-price elasticities of demand for the services that might be included within the relevant product market. We note that in its announcement of its intent not to block the transaction, the Antitrust Division of the Department of Justice did not discuss any such evidence from its investigation, nor did the Antitrust Division define a relevant product market.[143] Moreover, we are unable to perform our own analysis. This is chiefly because there has been little or no variation in prices for the various services at issue. Since SDARS services were launched in 2002, XM has changed its monthly recurring price only once, from $9.99 to $12.95 in April, 2005, and Sirius has not changed its corresponding price at all.[144] Terrestrial (broadcast) radio has a zero (and thus unchanging) price. Without price variation, it is not possible for us to develop our own estimates of the elasticities of demand required for a quantitative definition of the market.[145]

40. While there is other evidence and data in the record that shed some light on the relative substitutability of various audio entertainment services, as well as evidence concerning the product characteristics and prices of the various services that might be included in the relevant product market, this evidence is insufficient in this case for us to delineate the boundaries of the relevant product market with any precision or confidence. Most significantly, it is insufficient for us to quantitatively estimate whether and by how much prices might rise or fall if we were to approve this transaction without a voluntary commitment by Applicants not to raise prices.

41. The only systematic empirical analysis of substitutability between SDARS and any of its potential substitutes was provided in a study conducted by Charles River Associates ("CRA") on behalf of Applicants (the "CRA Study"). Applicants commissioned BIA Research, Inc. to provide data on the number of AM/FM radio stations reaching each census block in the lower 48 U.S. states. CRA used these data to estimate the average number of AM/FM stations received in each ZCTA (a Census Bureau area approximating a ZIP code). The CRA study examined the relationship between the total subscriptions to satellite radio and the number of available terrestrial broadcast stations. After controlling for a number of factors, such as income, gender mix, and the percentage of population commuting by car, the study finds a statistically significant inverse relationship between SDARS penetration and the number of terrestrial

[143] *See* Mar. 24, 2008 DOJ Press Release, n.112, *supra*.

[144] In addition to the price of a monthly subscription, subscribers listening to XM or Sirius programming in their automobile must also obtain a receiver and have it installed. XM and Sirius often subsidize the price of the receiver and the price of installation. C3SR, Sidak Decl. at 55.

[145] We find unpersuasive Sidak's estimated own-price elasticity of demand. While Sidak estimates a "critical" own-price elasticity of demand for SDARS of -1.52 using current operating margins of 65 percent and an assumption of constant own-price elasticity of demand. Sidak then explains why the "actual" own-price elasticity of demand is less than -1.52 (in absolute terms) using information from XM's price increase from $9.95 to $12.95, churn rates, conversion rates, and marquee content (specifically, indecent content). Sidak concludes that this is evidence that SDARS represents a distinct product market. C3SR, Sidak Decl. at 9-14. Hazlett asserts that there are several deficiencies in Sidak's approach and conclusions. Specifically, Hazlett argues that "there is no measurement of the actual, purportedly 'low' elasticity, and therefore nothing to specifically compare to the critical elasticity." *See* Thomas W. Hazlett, The Economics of the Satellite Radio Merger (June 14, 2007) at 29-32, transmitted by Letter, on behalf of Applicants, from Thomas Hazlett, Prof. of Law & Econ., George Mason Univ., to Marlene H. Dortch, Secretary, FCC (June 14, 2007) ("Hazlett Study"). CRA also disagrees with Sidak's estimates and conclusions regarding SDARS own-price elasticity. CRA argues that (1) Sidak's approach does not employ an objective and appropriate benchmark for XM's growth in the absence of the price increase from $9.95 to $12.95; (2) there were numerous other changes affecting demand that occurred around the same time as the price increase; (3) a finding that XM's demand is inelastic is inconsistent with standard profit-maximization conditions; and (4) Sidak's analysis was based only on the near-term impact on subscribers and profitability, not on the longer-term impact that is more relevant in growing market like this one. Joint Opposition, CRA Study at 44-45, n.170.

radio signals. In other words, as the number of terrestrial radio stations increases, SDARS penetration decreases. CRA uses this result to argue that SDARS and terrestrial radio are substitutes.[146]

42. We find that this study does not provide the evidence required to determine whether SDARS should be considered to be in the same product market as terrestrial radio. This indirect means of measuring substitutability of SDARS and terrestrial radio (as opposed to directly measuring cross-price elasticities)[147] leaves open the possibility that other unidentified (and possibly unobservable) factors could be the cause of this inverse relationship. The problem of unobserved confounding factors (i.e., omitted variables) is a well-known problem in the econometrics literature.[148] The most obvious potential factor is the density of the population of the area, since the number of radio stations will likely depend on the number of potential listeners. Density may be related in some direct or indirect way to factors affecting SDARS subscribership, such as the length of the driving commute (as opposed to the number of people who drive to work, which was included in CRA's analysis), or the number of professional truckers, deliverymen and other people in the area who spend the day driving, or demographic variation by race or age. In other words, we might expect that areas of the country where people spend less time in their vehicles have lower subscription rates to SDARS. Thus the inverse relationship between SDARS penetration and terrestrial radio station availability might not be because they are substitutes, as CRA contends, but because of other factors that are affected by population density and size.[149]

43. In addition to these theoretical problems with CRA's analysis, there is survey data available from Arbitron that indicates SDARS listeners are also heavy listeners of AM/FM radio. This suggests that AM/FM radio might be a complement rather than a substitute to SDARS.[150] Also, an analysis performed by C3SR finds that the results of the CRA study are not "robust" (the results do not hold) when the data are analyzed by Arbitron market instead of by ZCTA, with the analysis limited to just subscribers in Arbitron markets. Indeed, in this analysis a positive relationship was found between terrestrial radio station availability and SDARS penetration.[151] Finally, and perhaps most importantly,

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[146] Joint Opposition, CRA Study at 14-16; *also see* Timothy H. Savage, Martino De Stefano, and Steven R. Brenner, CRA, *Further Analysis of Econometric Evidence that Satellite and Terrestrial Radio are Demand Substitutes*, transmitted by Letter from Jennifer D. Hindin, Wiley Rein LLP, on behalf of Applicants, to Marlene H. Dortch, Secretary, FCC (Jan. 11, 2008) ("Applicants, CRA Further Analysis").

[147] Sidak points out that this analysis is not measuring the cross-price elasticity of demand for SDARS with respect to terrestrial radio, but is instead attempting to observe the elasticity of demand for SDARS with respect to changes in the number of terrestrial radio stations. Third Supplemental Decl. of J. Gregory Sidak, transmitted by Letter from Julian L. Shepard, Williams Mullen, Counsel for C3SR, to Marlene H. Dortch, Secretary, FCC (Oct. 1, 2007) at 21 ("C3SR, Sidak Third Supp. Decl.").

[148] *See, e,g.*, JEFFREY WOOLDRIDGE, INTRO. ECONOMETRICS: A MODERN APPROACH 95-99 (3d ed. 2005). PETER KENNEDY, A GUIDE TO ECONOMETRICS 3, 78-80, 88 (4th ed. 1998); WILLIAM H. GREENE, ECONOMETRIC ANALYSIS 401-04 (3d ed. 1997); and JACK JOHNSON AND JOHN DINARDO, ECONOMETRIC METHODS 110 (4th ed. 1997).

[149] C3SR, Sidak Third Supp. Decl. at 22; Letter from Julian L. Shepard, Williams Mullen, Counsel for C3SR, to Marlene H. Dortch, Secretary, FCC, Att. Preliminary Review of CRA Regression Analysis, J. Gregory Sidak, Georgetown Univ. Law Center, and Hal J. Singer and Allan Ingraham, Criterion Eon. (Dec. 7, 2007) ("C3SR, Review of CRA Analysis").

[150] Arbitron, "Satellite Radio Channels Account For 3.4 Percent of All Radio Listening In Fall 2006 Arbitron Survey" (press release), Feb. 27, 2007 (stating that "satellite listeners spent an average of 33 hours a week with radio compared with the typical listener who listened approximately 19 hours a week to radio. Also, people who listened to satellite spent more time with AM/FM radio (14 hours) than they did with satellite radio (10 hours 45 minutes) or Internet (8 hours 15 minutes)"); *see also* C3SR, Review of CRA Analysis at 13.

[151] C3SR, Review of CRA Analysis. C3SR asked that we seek the data underlying CRA's study. Letter from Julian L. Shepard, Williams Mullen, Counsel for C3SR, to Marcia Glauberman, Deputy Chief, Industry Analysis Division, (continued….)

even if we accept that the CRA study's results indicate that there is some substitutability between SDARS and terrestrial radio,[152] they do not demonstrate that SDARS and terrestrial radio are sufficiently close substitutes to be included in the same relevant product market. Just showing that there is some substitution is not enough for antitrust analysis – it is necessary to show that the degree of substitutability is high enough that a small but significant nontransitory price increase for SDARS service alone will cause sufficient numbers of consumers to drop SDARS service to make the price increase unprofitable. CRA's analysis provides us with insufficient evidence to make this determination.

44. Turning to the submissions of commenters opposing the transaction, we find that the evidence from other surveys C3SR provided or referenced, specifically the NRG Research Group survey and the Wilson Research Strategies survey, provide insufficient evidence that SDARS constitutes a distinct relevant product market. Between January 24 and January 30, 2008, NRG Research Group identified and interviewed 407 individuals who subscribe to satellite radio. The NRG survey provides evidence that if one competitor increases advertising content on its channels, large numbers of subscribers would choose the other service. The NRG survey supports the hypothesis that one reason for subscribing to satellite radio is to avoid commercials.[153] The survey, however, has several problems that make it difficult to use its results for the purpose of market definition. First, NRG report consumers' stated intentions and not their actual choices. Consumer behavior often differs from stated intentions. Second, the survey reports on consumer sensitivity to changes in advertising, but not on their sensitivity to changes in pricing. Consumers may differ in their sensitivity to each, with important implications for the analysis.

45. The Wilson survey, discussed by Sidak and NAB, is flawed and therefore cannot be relied upon for purposes of this transaction. In June 2007, Wilson Research Strategies conducted a survey of current satellite radio subscribers at the request of the NAB. According to the publicly available executive summary, the survey polled 501 current SDARS subscribers on a range of questions to determine their reasons for subscribing and their demographic characteristics. The survey results suggest that a significant number of satellite radio subscribers: (1) are less likely to have a sufficient amount of terrestrial radio service by virtue of their geographic location, (2) value certain attributes of satellite radio that are not available on terrestrial radio, (3) do not perceive MP3 players to be substitutes for satellite radio, and (4) are sensitive to the price, and would not pay more to receive the programming offered by both XM and Sirius.[154] We find the survey flawed for several reasons. First, again, this survey relies on

(Continued from previous page)
Media Bureau, FCC (Sept. 11, 2007). Because we reject the results of CRA's study based on the information submitted by Applicants, we find that access to the underlying data is unnecessary.

[152] This result is consistent with the *1997 SDARS Service Rules Order*, where the Commission predicted that while "not, of course, perfect substitutes," the SDARS providers would "face competition from terrestrial radio services, CD players in automobiles and homes, and audio services delivered as part of cable and satellite services." *1997 SDARS Service Rules Order*, 13 FCC Rcd at 5786 ¶¶ 77-78; *see also 2006 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2071-72 ¶ 114 (2008) (finding a lack of evidence to conclude that terrestrial radio is in the same product market as SDARS).

[153] Letter from Benjamin D. Arden, Williams Mullen, Counsel for C3SR, to Marlene H. Dortch, Secretary, FCC (Apr. 3, 2008), Att. NRG Research Group, Survey of Satellite Radio Users (Feb. 8, 2008) ("NRG Survey"); Letter from Julian L. Shepard, Williams Mullen, Counsel for C3SR, to Marlene H. Dortch, Secretary, FCC (Apr. 3, 2008), Att. Analysis of the Proposed XM-Sirius Merger, J. Gregory Sidak, and Hal J. Singer, Criterion Economics at 9-10 ("C3SR, Sidak, Singer Analysis").

[154] Wilson Research Strategies, Exec. Summary, Survey of Satellite Radio Subscribers at http://www.w-r-s.com/press/WRS_NAB%20Sat%20Radio%20Survey_PressRelease_070710.pdf (visited June 25, 2008); C3SR Petition, Exh. B, Supplemental Decl. of J. Gregory Sidak at 18-19 ("C3SR Petition, Sidak Supp. Decl").

consumers' stated intentions and not their actual choices. Second, this survey provides mixed evidence concerning the definition of the market and the likely impact of the merger, suggesting that many subscribers value SDARS service and its unique characteristics over alternative sources of audio entertainment, but are sensitive to the price and would not be willing to pay a higher price for combined programming from Applicants. In any event, the details of the survey were never made public or put into our record. Rather, just an executive summary was made available, such that, for example, we were unable to examine the methodology, the questions asked, or the underlying data, and therefore were unable to determine the survey's reliability.[155] We are thus unable to rely on any of this survey's results.

46. *Geographic Market*. Although Applicants do not explicitly address the relevant geographic market, their market share calculations suggest that they are assuming a national geographic market.[156] Opponents apparently disagree on the appropriate relevant geographic market: some appear to argue for a national market,[157] while others appear to advocate a more localized relevant geographic market.[158] However, without knowing the contours of the relevant product market, it is impossible to define precisely the relevant geographic market. For example, if the relevant product market were limited to SDARS, we could define the relevant geographic market as a national market. In contrast, if the relevant product market were to include terrestrial radio, we would need to adopt a more localized relevant geographic market to reflect the fact that terrestrial radio stations have a limited reach.

47. We find that the record evidence is insufficient to define precisely the relevant product or geographic markets. Without defining the relevant product and geographic markets, we cannot perform a structural analysis to predict the likelihood of anticompetitive harms. Thus, as explained below, we must make certain assumptions about the relevant product and geographic markets in order to perform our competitive analysis.

b. Competitive Analysis Under Worst-Case Assumptions

48. As stated in Section III above, Applicants bear the burden of proving that the proposed transaction, on balance, serves the public interest. If we are unable to find that the proposed transaction serves the public interest, or if the record presents a substantial and material question of fact, we would designate the application for hearing under section 309(e) of the Act.[159] However, not every question of fact is material. Specifically, even if we are unable to precisely determine the extent of the alleged harms, if we are able to determine that the conditions we are imposing would ameliorate any anticompetitive harm and that the transaction, as conditioned, would serve the public interest, then we may grant the application.[160] Because Applicants bear the burden of proof, we will evaluate potential horizontal competitive harms under assumptions that maximize the likelihood of harm. We note that the

[155] In particular, the phrasing of the questions, the order of the questions, and the specific distribution of responses are not available.

[156] C3SR, CRA Study at tbls. C1-C6.

[157] *See*, *e.g.,* AAI Comments at 29; C3SR, Sidak Decl. at 28; C3SR Petition, Sidak Supp. Decl. at 34; Letter from Philip M Napoli, Dir., Donald McGannon Communication Research Center, to Marlene H. Dortch, Secretary, FCC, Att. Market Definition in Satellite Radio: Why the Sirius/XM Merger Would Result in Anti-Competitive Conditions at 3-7 (June 29, 2007) ("McGannon June 29, 2007 Ex Parte"); NAB Petition at 11-16; NPR Petition at 15-16; Common Cause Petition at 14.

[158] *See, e.g.,* C3SR Reply at 7-11 (arguing that the geographic market is not national due to the differences in the availability of substitutes); John Smith Comments at 3-4.

[159] 47 U.S.C. § 309(e); *see also Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3276-77 ¶ 22; *News Corp.-Hughes Order*, 19 FCC Rcd at 483 n.49; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20574 ¶ 25.

[160] *See, e.g.*, *Comcast-AT&T Order*, 17 FCC Rcd 23256-57, 23270 ¶¶ 30, 66.

assumptions we adopt below provide a worst-case scenario for Applicants, but we find this approach is necessary in order to protect consumers from any potential adverse effects of the transaction while simultaneously allowing us to balance the potential harms against the potential public interest benefits of the transaction. After conducting the analysis under the worst-case assumptions, we find that with Applicants' voluntary commitments and other conditions, the transaction will be in the public interest.

49. Consistent with the foregoing principles, we will assume that SDARS constitutes a separate relevant product market. Furthermore, because Applicants are the only current participants in this relevant product market and because both provide nationwide service, we assume that the relevant geographic market is national. These assumptions will tend to *overestimate* any anticompetitive effects. Again, we believe it necessary to employ such worst-case assumptions to ensure that, when we balance the potential costs and benefits of the proposed transaction, we do not inadvertently approve a merger that is not in the public interest.

50. Given these assumptions about the relevant product and geographic markets, it is clear that Applicants are the only current providers of SDARS service. We find that entry by a new SDARS provider is unlikely to be sufficiently timely to defeat any attempted price increase.[161] First, we are unaware of any appropriate, unencumbered spectrum that is likely to become available in the near future that would allow another company to provide SDARS service. Second, even if such spectrum were available immediately, we believe that it would take years for the new entrant to build the necessary infrastructure and to develop the necessary programming and marketing resources to become a viable competitor.[162] Furthermore, we find no "uncommitted entrants" that should be counted as market

[161] *See, e.g., DOJ/FTC Horizontal Merger Guidelines* § 3.0 ("A merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above premerger levels. . . . Entry is that easy if entry would be timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern.").

[162] The *DOJ/FTC Horizontal Merger Guidelines* require that, for such potential entry to be considered, it must be "timely, and likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects" of the proposed transaction. With respect to timeliness, DOJ will generally consider only entry "that can be achieved within two years from initial planning to significant market impact." *Id*. at § 3.0. According to NAB, "[t]his is extremely unlikely in the case of satellite DARS, as evidenced by the fact that it reportedly took XM and Sirius nearly four years from the grant of spectrum by the FCC to commercial availability, including the technically difficult step of launching broadcast satellites." Analysis of Antitrust Concerns Regarding the XM/Sirius Merger, Crowell Moring at 8-9, transmitted by Letter from Lawrence A. Walke, NAB, to Marlene H. Dortch, Secretary, FCC (May 22, 2007) ("NAB, Antitrust Analysis Memo"). NAB adds that other entry barriers are extremely high, including capital costs, programming acquisition costs, and subscriber acquisition costs. *Id.* at 9. For example, NAB states, a new satellite could cost more than $300 million. *Id*. Therefore, NAB concludes, even if the Commission were to allocate additional spectrum to permit entry by a new SDARS provider, the threat of such entry is not likely to constrain short-term price increases by the merged firm and would not be sufficient to ameliorate the certain anticompetitive effects of the proposed transaction. *Id*.

The Sidak Declaration also argues "the experience of the existing SDARS suppliers implies that new entry would not impose any price discipline within the next two years. Applicants were founded in the early 1990s, but did not offer SDARS until September 2001. Both XM and Sirius had to overcome significant fixed costs of establishing a nationwide radio network, including the acquisition of spectrum and programming." C3SR, Sidak Decl. at 35-36. Sidak notes that Applicants have each invested roughly $5 billion to date and that such an entry cost for another SDARS provider makes it extremely unlikely that any firm will enter *de novo* in SDARS and have a constraining effect on price over the next two years. C3SR Petition, Sidak Supp. Decl. at 30-31.

In contrast, CRA argues that *de novo* entry could occur through the use of Mobile Satellite Service frequency bands in 2008 or 2009 or through the use of Wireless Communication Service spectrum in more than two years. Joint Opposition, CRA Study at 61.

participants.[163]

51. Under these worst-case assumptions, therefore, the proposed merger is a merger to monopoly. The post-merger Herfindahl Hirschman Index ("HHI") [164] is 10,000, and the change in the HHI is 4,992.[165] These estimates exceed the threshold specified in the *DOJ/FTC Guidelines* above which mergers are "presumed . . . to create or enhance market power or facilitate its exercise."[166] It is widely accepted that, absent offsetting economies, a monopolist will charge a higher price than firms in a competitive market, including a duopoly.[167] Thus, we would expect that, other things being equal, the merged firm would charge prices that are higher than those charged by Applicants pre-merger.

52. Unfortunately, we lack sufficient data to estimate the size of the likely price increase, if any. While it is true that economists, in recent years, have developed econometric techniques to simulate likely unilateral effects arising from horizontal mergers,[168] these merger simulation models require data or assumptions about demand, marginal cost, and firm behavior to estimate the likely unilateral effects of horizontal mergers. Because we lack sufficient data concerning demand elasticities, among other things, we cannot employ such a merger simulation to quantify the likely price increase. Nevertheless, given that we are assuming a merger to monopoly, it is reasonable to predict that, absent exceptional countervailing efficiencies,[169] prices are likely to be higher after the merger than before.

53. Applicants argue that, due to the dynamic nature of demand for satellite radio services, the merged entity would actually have an incentive to lower, not raise, prices.[170] In particular, CRA asserts that SDARS is subject to "dynamic demand effects."[171] According to CRA, firms like XM and Sirius must take into account the impact of price changes on not only their current subscribers, but also on prospective new subscribers. Such dynamic considerations lead to "penetration pricing," which involves

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[163] An "uncommitted entrant" is a firm that is likely to enter the market "within one year and without the expenditure of significant sunk costs of entry and exit, in response to a 'small but significant and nontransitory' price increase." *See DOJ/FTC Horizontal Merger Guidelines* at § 1.32.

[164] The HHI is calculated as the sum of the squares of the market shares of each firm participating in a relevant market. The HHI can range from nearly zero in the case of an atomistic market to 10,000 in the case of a pure monopoly. Because the HHI is based on the squares of the market shares of the participants, it gives proportionately greater weight to carriers with larger market shares. Changes in market concentration are measured by the change in the HHI. *See id.* § 1.5.

[165] The predicted change in HHI is based on 2007 year end SDARS market shares of 52 percent for XM and 48 percent for Sirius. XM, *XM Satellite Radio Holdings Inc. Announces Fourth Quarter and Full Year 2007 Results* (press release), Feb. 28, 2008; Sirius, *Sirius Reports Fourth Quarter and Full Year 2007 Results* (press release), Feb. 26, 2008.

[166] Section 1.51 of the *DOJ/FTC Horizontal Merger Guidelines* specifies that mergers that produce a post-merger HHI above 1800 and an increase in the HHI of greater than 100 points will be presumed to have an anticompetitive effect.

[167] DENNIS W. CARLTON AND JEFFREY M. PERLOFF, MOD. INDUS. ORG. 56-120, 153-235 (3d. ed. 2000) ("Carlton & Perloff").

[168] *See, e.g.,* Gregory J. Werden, *Simulating the Effects of Differentiated Products Mergers: A Practical Alternative to Structural Merger Policy,* 5 GEO. MASON L. REV. 363 (1997); Roy J. Epstein & Daniel L. Rubinfeld, *Merger Simulation: A Simplified Approach with New Applications,* 69 ANTITRUST. L. J. 883 (2002).

[169] *See* Section V, *infra*.

[170] Joint Opposition at 31-32.

[171] Joint Opposition, CRA Study at 61-63, App. A.

setting prices below the price that would maximize short-run profits in order to maximize subscriber growth and long-run profits. Applicants further argue that there are "dynamic demand *spillovers*," i.e., that the incentive of one SDARS provider to lower prices is diminished in the current market because some of the benefits of early adopters (e.g., word-of-mouth, product demonstrations, etc.) accrue to its competitor. The merger, according to CRA, could actually lower prices by internalizing these spillover effects and strengthening the incentive to price low, in order to "grow the market."

54. While we acknowledge the theoretical possibility of such a dynamic demand spillover externality, we note that Applicants have not attempted to quantify the effect of internalizing this externality. They have also failed to show convincingly the location of SDARS on the product adoption curve or the likely ultimate penetration rate for SDARS. Finally, they have not demonstrated that this internalization effect will outweigh the incentive of the merged firm to raise price once their main competitor is eliminated.

55. Furthermore, assuming, *arguendo,* that there are important dynamic demand spillovers and that immediately upon consummation of the merger the merged entity would have an overall incentive to lower price, the concern remains that the merged firm will have the incentive and ability to raise price at a later point in the product life cycle. In particular, when selling a product with dynamic demand effects, firms have an incentive early in the product's life-cycle to expand sales and enhance long-run profitability by pricing below the short-run profit maximizing price; but the incentive to engage in penetration pricing diminishes as the product matures, and prices can be expected eventually to rise to the short-run profit maximizing level.[172] Under our assumption of a separate SDARS product market and significant entry barriers, the merged firm would appear to have the incentive and ability to raise prices to the monopoly level later in the product cycle.[173]

56. Under the assumption that SDARS is the relevant product market, we therefore conclude that the merged firm may have an increased incentive and ability to raise the price of SDARS over a non-transitory period of time. As described in further detail in Section VI below, however, we find that the voluntary commitments and other conditions will adequately address this competitive concern. In particular, the price cap condition ameliorates possible harm to consumers, and the new programming packages offer consumers more pricing choices.[174] We therefore conclude, even assuming the worst-case scenario, that grant of the application is in the public interest.

57. Some commenters argue that the current transaction is similar to the proposed transaction in *EchoStar-DIRECTV*, and thus we must, as we did there, designate the application for hearing.[175] As we have stated, if we are unable to find that a proposed transaction serves the public interest or if the record presents a substantial and material question of fact, we must designate the application for hearing.[176] In *EchoStar-DIRECTV*, there was significant evidence in the record to demonstrate that the applicants

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[172] *Id*.

[173] CRA asserts that when SDARS is mature, the market will be subject to intense competition from audio content over mobile broadband access technologies, more robust and widespread cellular networks, and other technological advances that will prevent the merged firm from exercising market power. *Id.* at 27-30, 63. In response, Sidak contends that claims about future constraints on the market power of XM and Sirius are speculative and call for an unusually long time horizon for assessing market power. C3SR Response, Exh. A, Second Supp. Decl. of J. Gregory Sidak at 19-22 (July 24, 2007) ("C3SR, Sidak Second Supp. Decl.").

[174] *See* Sections VI.B.1 and VI.B.2., *infra*.

[175] *See, e.g.*, C3SR Petition at 25-28; NAB Petition at 3, 6; NABOB Petition at 5-6; Clear Channel Comments at 4-6; Entravision Comments at 6-8.

[176] *See* 47 U.S.C. § 309(e).

competed against one another and that, without such competition, prices were likely to increase, especially in markets that did not have access to cable. The Commission was unable to conclude, therefore, that the *EchoStar-DIRECTV* transaction served the public interest, and the transaction was designated for hearing.

58. Although there may be surface similarities between the two transactions, there are significant differences. As we have explained above,[177] because there has been little or no price variation it is not possible to use the normal tools of econometrics to define the relevant market or determine likely impacts on price, and conducting a hearing would not change this basic fact. In addition, as discussed below, Applicants have offered voluntary commitments to ensure that the transaction serves the public interest. For example, Applicants voluntarily commit to not raising their rates for three years after the consummation of their merger.[178] They voluntarily commit to allowing any manufacturer to develop SDARS receivers and to permit manufacturers to incorporate in satellite radio receivers any other technologies that would not result in harmful interference, including HD Radio technology, iPod ports, or Internet connectivity.[179] Applicants also voluntarily commit to setting aside some of their channels for noncommercial educational and informational programming and for lease to certain "qualified entities."[180] And, they voluntarily commit to offer a la carte and other programming packages, thereby increasing consumer choice and allowing parents, for example, to better control the types of programs to which their children are exposed. Applicants in *EchoStar/DIRECTV* made no such commitments to mitigate potential harms or to create benefits that would outweigh the potential harms. Thus, unlike in *EchoStar/DIRECTV,* in this transaction there is no need for a hearing. On the basis of the record before us, we are able to conclude that Applicants' significant voluntary commitments and the other conditions we are imposing to our approval of the transaction are sufficient to ameliorate any public interest harms that otherwise might have resulted from the transaction and that the transaction will, as a result, create consumer benefits and advance other aspects of the public interest. Moreover, to ensure that no longer-term harms will result from the transaction, six months prior to the expiration of the commitment period, the Commission will seek public comment on whether the price cap continues to be necessary in the public interest. The Commission will then determine whether it should be modified, removed, or extended.

2. Potential Vertical Effects

59. Some commenters express concern about the vertical effects the merger may have in the market for SDARS and SDARS-related equipment. Two commenters raise the possibility of monopsony power in the content market, and seek conditions to mitigate such harms. In addition, U.S. Electronics, Inc. ("USE") alleges that because there will be only one SDARS provider, the merged company will effectively have a monopoly in the market for SDARS receivers. Garmin expresses concern that its equipment for weather information in the aviation market will become obsolete if the merged company chooses to use the Sirius system rather than the XM/Garmin system. We address these issues in turn.

60. *Monopsony Power.* Two commenters, McGannon and King, raise the concern that the transaction creates the potential for monopsony power. Both argue that the upstream market for national satellite radio content is a separate market, and thus the merger will produce a single purchaser for content

[177] *See* Section IV.B.1.a., *supra*.

[178] Applicants' June 13, 2008 Ex Parte at 4.

[179] *Id*. at 3-4.

[180] *Id*. at 3. According to Applicants, a qualified entity "includes any entity that is majority-owned by persons who are African American, not of Hispanic origin; Asian or Pacific Islanders; American Indians or Alaskan Natives; or Hispanics." *Id*. at n.2.

in this market.[181] With respect to monopsony power in the market for programming, the economic literature does not identify a single point at which monopsony power becomes likely.[182] A necessary condition is that an entity or entities must possess sufficient size in the relevant market to dictate pricing. In general, large purchasing power delivers both benefits and potential costs to consumers. The benefits come from the fact that a large purchaser that receives programming discounts will pass on some of these reduced costs to subscribers (for example, in the form of lower prices). The potential harm to consumers comes from the fact that these discounts may discourage or preclude competitive entry,[183] and thereby result in higher prices or reduced service quality, or that the monopsony purchaser may negotiate such terms from content providers that the quality of programming is lowered.[184]

61. Neither commenter presents quantitative evidence that the upstream market for content in which Applicants purchase content is a separate market. Indeed, King refers to the fact that Sirius was able to "steal" Howard Stern away from terrestrial radio.[185] It would seem straightforward that, at least in that case, terrestrial radio and SDARS were bidding against each other for content. Additionally, neither commenter identifies specific harms that will result. Indeed, the merged firm's ability to negotiate better terms for expensive talent could benefit consumers via lower rates, and it would not be in the combined company's interests to negotiate deals that harm the quality of content, especially while seeking to increase subscriber penetration and so move to profitability. We thus find that the merger is not likely to harm the public interest as a result of the exercise of monopsony power over content providers. As a result, we decline to take action with regard to potential monopsony power.

62. *SDARS Receivers*. USE claims that the transaction would create a vertical monopoly in the manufacturing and distribution of satellite radio receivers and that this would harm consumers.[186] USE argues, for example, that even if the combined company does not raise its monthly subscription fee, it could raise equipment prices to optimize overall revenues. This is a potential harm, USE states, that

[181] McGannon June 29, 2007 Ex Parte at 3-4; Bert W. King ("King") Comments at ¶ 57; *see also* Letter from Lawrence A. Walke, NAB, to Marlene H. Dortch, Secretary, FCC (June 19, 2008) at 1 & Atts. (stating that content providers will lose negotiating leverage if the merger is approved).

[182] For a general discussion of monopsony power, see Carlton & Perloff, *supra* n.167, at 105-07.

[183] However, our current assumption that this is a merger to monopoly does not preclude future competition to SDARS by a new or nascent technology.

[184] The question of who benefits more from a bargain is merely a transfer between the two bargaining parties, not a detriment to efficiency that results in a societal cost. Efficiency concerns arise only once an entity with market power can restrict supply and thus change the market price from the most efficient level.

[185] King Comments at ¶ 57; *see also* Sirius Nov. 16, 2007 Response to Information and Document Request at SIRIUS-FCC-I.B.001647-001657 **[REDACTED]**.

In this Order, "REDACTED" indicates that confidential or proprietary information that is subject to a Protective Order in this proceeding has been redacted from the public version of this Order. The unredacted text is included in the confidential version of this Order, which is available upon request only to those parties who have executed and filed with the Commission signed acknowledgments of the protective orders. Qualified persons who have not yet signed the required acknowledgments may do so in order to obtain the confidential version of this Order.

[186] Letter from Charles H. Helein, Counsel for USE, to Robert M. McDowell, Commissioner, FCC (Jan. 15, 2008) at 1 ("USE Jan. 15, 2008 Ex Parte"); *see also* Letter from Robert E. Cooper, Jr., Att'y Gen. of Tennessee, on behalf of Att'y Gens. of Connecticut, Iowa, Kansas, Louisiana, Maryland, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, Rhode Island, Washington, and Wisconsin, to Marlene H. Dortch, Secretary, FCC (July 3, 2008) at 3 ("Tenn. Att'y Gen. July 3, 2008 Ex Parte").

will be difficult to detect because "prices at retail points of sale are diverse and hard to supervise."[187] To prevent this harm, USE asks that we require the combined company to open and make available the technical specifications of its devices and network so that receiver manufacturers can develop receivers for consumers to use as they choose.[188] USE states that its proposed condition is consistent with well-established open access polices and precedent of the Commission, including the *Carterfone*[189] decision and the Commission's recent "reaffirm[ation] [of] the historical rationale for open access policies in its service rules for the Upper 700 MHz spectrum block."[190] MAP supports USE's request, asserting that the post-transaction "vertical monopoly would, by design and in effect, eradicate consumer choice and price competition across manufacturers."[191]

63. Applicants initially opposed USE's request, arguing that USE is attempting to resolve a private contractual matter currently subject to arbitration in the guise of seeking a merger condition,[192] and that the proposed condition would inure to USE's benefit alone without regard to concerns about the quality of equipment made by Applicants' suppliers.[193] Applicants also contend that the combined company would not have an economic incentive to slow innovation, increase receiver prices, or cause any other potential harm of which USE complains.[194] Rather, Applicants maintain, the combined company would have the incentive to ensure the availability of low-cost, innovative, high-quality receivers.[195] Moreover, Applicants state that USE's argument is based on an erroneous factual predicate because neither XM nor Sirius relies on a single source for radios.[196]

64. USE replies that its current arbitration relates to past issues with Sirius and is unrelated to the potential anticompetitive effects posed by a vertical monopoly in the satellite radio market.[197] Further,

[187] USE Jan. 15, 2008 Ex Parte at 3. USE also claims that the merged entity's additional hard-to-detect harms to consumers could include reduced equipment quality, lower quality of customer service, and slower innovation cycles. *Id.*

[188] *See* USE Reply at 8 (quoting approvingly Public Knowledge's description of the open-device condition).

[189] *See Use of the Carterfone Device in Message Toll Telephone Service*, 13 FCC 2d 420 (1968).

[190] USE Jan. 15, 2008 Ex Parte at 2 (stating that the Commission determined that the winners of the six C Block licenses would not be permitted to restrict subscribers to using only those devices that the licensees provide).

[191] Letter from Parul P. Desai, Andrew Jay Schwartzman, MAP, and Michael Calabrese, New America Foundation, to Marlene H. Dortch, Secretary, FCC (Jan. 29, 2008) at 1. In addition to *Carterfone*, MAP mentions the Commission's 2005 cable set-top box leasing order as an example of Commission decisions following open access principles. *Id*. at 2.

[192] Consolidated Opposition of Sirius and XM to USE and NAB (Dec. 26, 2007) at 2 ("Consolidated Opposition"). Applicants state that USE is a former Sirius licensed manufacturer whose contract expired. *Id*. at 3. Applicants explain that Sirius opted not to continue the relationship because the parties had "incompatible business philosophies" and, at the time of the contract's expiration, "were in arbitration covering almost every aspect of the parties' relationship." *Id*.

[193] Consolidated Opposition at 4 ("This market intrusion would undoubtedly benefit USE – and essentially derail USE's arbitration with Sirius – but it is difficult to see how it would benefit consumers or, in fact, make it easier for the Commission to conclude the WCS/Satellite Radio Terrestrial Repeater rulemaking").

[194] *Id*.

[195] *Id*.

[196] *Id*. at 5 (citing radio suppliers as including Delphi, Pioneer, Samsung, Alpine, Audiovox, Sony, Polk, Rotel, Kenwood, Clarion, and Visteon).

[197] USE Reply at 1-2.

USE maintains that Applicants are the only parties responsible for the design and development of hardware compatible with their networks, and therefore would be able to control the manufacture of receivers.[198] Finally, USE argues that the power of the combined firm would hurt not only it but also small retailers because small retailers would not have sufficient negotiating power to receive favorable terms for such things as promotions and return policies.[199]

65. Currently, Applicants each are intimately involved with the design, manufacture, and sale of SDARS receivers. As is the case in other telecommunications industries (e.g., wireless telecommunications, satellite television), SDARS receivers are sold branded or co-branded with the XM or Sirius name and can receive only one of the two SDARS services. In addition, Applicants own the intellectual property that is necessary for the receivers' manufacture. Consistent with the practices of providers in other sectors of the telecommunications marketplace, the two Applicants subsidize the retail price of SDARS receivers paid by the consumer. Partially because of that subsidy, the only current manufacturers of SDARS receivers are in direct contractual agreements with Applicants, and we see no basis in the record for concluding that additional manufacturers would enter the market. The record also indicates that Applicants are **[REDACTED]**.[200]

66. We find that the proposed merger is likely to harm the public interest by allowing one company to gain increased leverage over the terms and conditions of the contracts for the manufacture of SDARS radios. We agree with USE's concern that the loss of head-to-head competition between Applicants has the potential of harming consumers by dampening innovation in the manufacture of SDARS receivers. In addition, we note that there could be other risks. For instance, because of their involvement in the manufacture of SDARS receivers, Applicants could also prevent the development of SDARS receivers that are compatible with other forms of audio entertainment, such as MP3 players and HD Radio. However, Applicants have addressed this concern by voluntarily committing to an open, non-exclusive architecture. Accordingly, we accept Applicants' voluntary commitment to permit any device manufacturer to develop SDARS receivers and to incorporate other technology, such as HD Radio, iPod ports, and Internet connectivity so long as it will not result in harmful interference with the merged company's network. We conclude that this, and the additional voluntary commitments on open access, adequately mitigate the potential harm presented by this transaction, as discussed in Section VI.B.4, below.

67. *Aeronautical Services.* Garmin International, Inc. ("Garmin") raises the concern that the equipment it developed for use with XM's real-time weather information services will become obsolete after the merger because Applicants' satellite-based weather systems are not compatible, and Garmin is

[198] *Id*. at 3. USE states that Directed Electronics, Inc. ("DEI") recently reported to analysts that it held 95 percent of Sirius's aftermarket sales in the third quarter and 62 percent of market share for retail satellite radio receivers. *Id*. at 2-3. With regard to the radio manufacturers listed by Applicants, USE states that Applicants have pointed to historical manufacturers and their historical account does not describe the market today. *Id*. at 3.

[199] *Id*. at 4. Applicants also argue that USE lacks standing because it did not file a petition to deny the merger application in a timely manner. Consolidated Opposition at 1. To the extent USE failed to timely file a petition to deny, we will treat USE's comments as an informal objection and address them here. *See* 47 C.F.R. § 1.41; *Pacific Gas and Electric Company*, Memorandum Opinion and Order, 18 FCC Rcd 22761, 22765-66 n.47 (2003); *see also Nextel License Holdings 4, Inc.*, Order, 17 FCC Rcd 7028, 7033 ¶ 16 (2002) (noting that there is no standing requirement to file an informal objection).

[200] *See, e.g.,* Sirius Mar. 4, 2008 Response to Information Request at SIRIUS-FCC-SUPP.000217-00018, SIRIUS-FCC-SUPP.000513-000559; SIRIUS-FCC-SUPP.000631-000700; XM Mar. 3, 2008 Response to Information Request at XM-S-0000001-0000053, XM-S-00000054-0000138, XM-S-0000139-0000208; XM Mar. 18, 2008 Response to Information Request at XM-S-001875-001928.

concerned that the merged company will choose Sirius's system and abandon that of XM.[201] Garmin states that abandoning the XM/Garmin system is contrary to the public interest because the Sirius system is not fully developed, and because commercial aviators will each face $5,000 to $6,000 in costs to switch.[202] Garmin therefore urges the Commission to condition approval of the merger on the continued use by XM of Garmin's devices for a period of 20 years, which it says are their normal life expectancy.[203]

68. We reject Garmin's proposed condition. First, Garmin's claims are speculative; it is not clear whether the merged company will choose to use only one weather information service or, if so, which one that will be.[204] Moreover, we find it unlikely in the near term that the merged company would strand its current customers. Indeed, their submissions indicate exactly the opposite.[205] Finally, as for the longer term, the question of which weather information service the merged company should choose (or whether it should provide both services) is one best answered by the company and the marketplace.[206]

C. Other Potential Public Interest Harms

69. In this section we examine the impact of the merger on the Commission's goals of diversity and localism. We find that Applicants' voluntary commitments address concerns about the potential loss of diversity. We find that the merger is not likely to frustrate the Commission's localism goal.

1. Impact of the Transaction on Diversity

70. Some commenters contend that the merger would result in reduced programming diversity because the reduction in competition would diminish the incentive to innovate and provide diverse programming[207] and because channel capacity available for other channels will be reduced when the combined entity allocates some of its capacity to "best of both" channels.[208] Additionally, some commenters allege that the merger will harm independent content producers, DJs, artists, and on-air personalities that now enjoy the potential of having two companies compete for their services; the merger, by eliminating this competition, therefore would lead to fewer choices and less program diversity for

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[201] *See generally* Letters from M. Anne Swanson, Dow Lohnes, Counsel for Garmin, to Marlene H. Dortch, Secretary, FCC (Apr. 26, 2007 and Apr. 27, 2007).

[202] *Id*.

[203] *Id*.

[204] *See, e.g., News Corp.-Hughes Order*, 19 FCC Rcd at 583, 585 ¶¶ 245, 248 (finding that speculative harms "do not provide a basis for either denying their Application or for imposing regulatory conditions"); *Comcast-AT&T Order*, 17 FCC Rcd at 23308 ¶ 160.

[205] *See* Joint Opposition at 22-23 ("the combined company will have every incentive to maintain and improve upon these offerings without any need for Commission action.").

[206] In addition, we decline to intercede here in distribution negotiations between Applicants and RCN Corp., who urges the Commission to require Applicants to make assurances that SDARS programming will continue to be made available to RCN. *See* Letter from Richard Ramlall, Senior Vice Pres., Strategic & External Affairs and Programming, RCN Corp., to Kevin J. Martin, Chairman, FCC (July 17, 2008) at 2-3.

[207] NAB Petition at 30-32; AAI Comments at 8, 12-15; Entravision Comments at 17-18; Prometheus Comments at 4-5; RIAA Comments at 7; John Smith Comments at 2, 4; Clear Channel Comments at 7; Letter from Michael L. Barrera, President and CEO, United States Hispanic Chamber of Commerce to Thomas Barnett, Asst. Att'y Gen, Antitrust Div., DOJ and Kevin J. Martin, Chairman, FCC (Aug. 28, 2007) at 2-3 ("USHCC Aug. 28, 2008 Ex Parte").

[208] AAI Comments at 12-13; Independent Spanish Broadcasters Assoc. ("ISBA") Comments at 1-2.

consumers.[209] Commenters also argue that the elimination of one of the SDARS providers would cause a reduction in viewpoint diversity.[210] Other commenters allege that the transaction would reduce diversity in minority- and women-oriented and owned programming[211] and adversely affect the hiring of minorities and women for management positions.[212]

71. Applicants and other commenters argue that the merger would likely lead to no significant reduction in programming diversity, and may enhance the incentives of Applicants to provide more diverse programming.[213] Applicants state that the merger will allow them to eliminate overlapping and redundant programming, giving them more channel capacity to use for more diverse offerings serving smaller audiences, including minority and children's programming.[214] Applicants note that they currently offer 12 identical program channels and 75 substantially similar channels,[215] and aver that eliminating their redundant programming would free capacity for more diverse offerings not currently offered on either system.[216] Further, Applicants argue that a combined company would be better positioned financially to take a chance on niche programming.[217] In this regard, Public Knowledge observes that low revenues and a small audience base have forced Applicants to abandon alternative and niche programming in favor of mainstream programming that attracts the largest audiences. It argues that the higher revenues and elimination of duplicate programming will provide the merged entity with the means to carry alternative programming and programming for underserved communities.[218]

72. To address this potential harm, as discussed in more detail in Sections VI.B.5 and VI.B.6., below, Applicants voluntarily commit to lease capacity to qualified entities and to set aside capacity for noncommercial educational and informational programming.[219] We believe this voluntary commitment mitigates the potential harm from a decrease in diversity.

2. Impact of the Transaction on Broadcasters' Advertising Revenues

73. Commenters claim that the merger would cause terrestrial broadcasters to lose advertising revenue to the merged SDARS provider, which would ultimately result in the reduction of their production and airing of local programming and thereby disserve listeners and the Commission's

[209] NAB Petition at 31-32; Prometheus Comments at 4-5; RIAA Comments at 7. This argument also is addressed in part in Section IV.B.2, *supra*.

[210] AAI Comments at 14-15; Entravision Comments at 18; NABOB Petition at 11, 12-13; NPR Petition at 3-7; TAP Petition at 3-4.

[211] AWRT Petition at 5-6; NABOB Petition at 9-12; TAP Petition at 4; ISBA Comments at 1-2; USHCC Aug. 28, 2007 Ex Parte at 2-3.

[212] AWRT Petition at 5-6.

[213] Application at 12-13; Public Knowledge Comments at 4; CEI Comments at 3-4.

[214] Application at 12-13; Joint Opposition at 19-21.

[215] Application at 12-14.

[216] *Id.* (stating that the freed-up capacity could be used for expanded non-English language programming, children's programming, minority-oriented programming, and programming related to public safety and homeland security).

[217] Joint Opposition at 19-21; *see also* Women Impacting Public Policy ("WIPP") Comments at 1 (asserting that a merger would offer more opportunities for women and minority programmers).

[218] Public Knowledge Comments at 4.

[219] *See* Sections VI.B.5, VI.B.6, *infra*.

localism policy goals.[220] NAB claims that the merged entity "would be expected to use revenues from its higher-priced premium service offerings to cross-subsidize its national advertising rates with revenues from its premium service offerings, which would allow the merged entity to drive down advertising rates, to the detriment – in the first instance – of broadcasters."[221] 46 Broadcasters similarly argue that the merged entity will use "monopoly rents" to cross-subsidize its "aggressive entry into the advertising markets" to the competitive detriment of local broadcasters.[222] NAB also claims that broadcasters will lose advertising revenue and thereby be forced to reduce the amount of locally produced programming as a result of the merger because the combined entity will increase the amount of commercials in its programming.[223] NAB asserts that as a result of a significant increase in commercial time post-merger, "[t]he amount radio stations can charge advertisers to reach SDARS subscribers in their audiences will fall as the satellite services sell more commercial time to advertisers, and radio stations' revenues will decline as a consequence."[224] Applicants have not responded to this issue.

74. The Commission finds that the commenters have failed to provide sufficient evidence that the proposed merger would substantially impact the revenues from the sale of advertising by broadcasters, to the detriment of their ability to air locally oriented programming. We find that these claims of harm are speculative. The commenters do not offer sufficient economic analysis to show that it would be economically beneficial to the merged entity. Commenters' only evidence that the merged entity plans to increase commercial time during programming, post-merger, is the mention of increased "advertising synergies" post-merger during a conference call with investors and in financial analyst reports.[225] Such evidence fails to show with any certainty that the merged entity intends to increase the use of commercials in its programming. Indeed, as NAB notes, programmers always run the risk of losing audience when they increase the amount of commercials during programming.[226] The loss of revenue from the loss of subscribers needs to be weighed against the incremental increase in revenue obtained from the additional commercial time, to determine whether it would be economically feasible.[227]

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[220] NAB Petition at 33.

[221] *Id*. at 33.

[222] 46 Broadcasters Petition at 5.

[223] NAB Response to Comments, Wildman Decl. at ¶ 12.

[224] *Id*. at ¶ 28. Wildman explains that currently, due to a lack of significant amount of commercials on satellite radio, "local radio stations remain the primary audio services through which advertisers can reach SDARS subscribers." For this reason, Wildman suggests, increased SDARS subscriber counts have not had as large an impact on terrestrial radio's revenues as one might otherwise predict." *Id*.

[225] *Id*. at ¶ 26. C3SR cites to a comment of Mel Karmazin made during an interview on Forbes.com: "[Sirius] would like to see advertising revenue eventually make up about 10% of Sirius' total revenue, up from the current 4% to 5%." C3SR Oct. 3, 2007 Ex Parte, Att. Mr. Karmazin's statement provides insufficient evidence to conclude that the merged entity has immediate plans to increase commercial time during programming to the detriment of broadcasters.

[226] *See* NAB Response to Comments, Wildman Decl. at ¶¶ 18, 23-24.

[227] C3SR submits a presentation, which includes the calculation "Profitability of an Increase in Commercial Time" to show whether it would be advantageous for the merged entity to increase commercial time. Letter from Benjamin D. Arden, Williams Mullen, Counsel for C3SR, to Marlene H. Dortch, Secretary, FCC (Oct. 3, 2007), Att., "Analysis of the CRA Submission" ("C3SR Oct. 3, 2007 Ex Parte"). However, we note that C3SR's computation only restates the above-referenced economic assumption: if the increased revenue from additional commercials is greater than the revenue declines due to subscription losses, then the merged entity would consider adding additional commercial time. There are no additional variables included in the calculation to make any conclusions as to (continued….)

Moreover, we note that Applicants cite to two studies from 2006 and 2007, which find satellite radio accounts for only about 4 percent of all radio listeners.[228] Thus, there is insufficient evidence that the merger would decrease the advertising prices that broadcasters could charge, thereby reducing their revenue and negatively affecting the amount of locally produced programming.[229]

V. POTENTIAL PUBLIC INTEREST BENEFITS

A. Analytical Framework

75. As part of our public interest evaluation, we consider whether the transaction is likely to produce public interest benefits.[230] We apply several criteria in deciding whether a claimed benefit should be considered and weighed against potential harms. First, the claimed benefit must be transaction specific. This means that the claimed benefit must be likely to be accomplished as a result of the transaction but be unlikely to be realized by other means that entail fewer anticompetitive effects. Second, the claimed benefit must be verifiable.[231] Applicants are required to provide sufficient supporting evidence so that the Commission can verify the likelihood and magnitude of each claimed benefit.[232] We will discount or dismiss speculative benefits that cannot be verified.[233] In this regard, benefits that are expected to occur only in the distant future are inherently more speculative than benefits that are expected to occur more immediately. Moreover, we calculate the magnitude of benefits net of the cost of achieving them.[234] Third, the benefits must flow through to consumers, and not inure solely to the benefit of the company.[235]

(Continued from previous page)
Applicants' course of action or whether increasing commercial time during programming would be economically advantageous.

[228] Application at 22, n.51 (citing Phil Rosenthal, *Satellite deal foes don't hear message*, CHICAGO TRIBUNE (Feb. 28, 2007) (summarizing an Arbitron study that found satellite radio accounted for 3.4 percent of radio listening)); see also The Katz Radio Group, *Satellite Radio Penetration*, RADIOWAVES (Dec. 2006) *at* http://www.katz-media.com/pubs/RadioWaves/121206/RadioWavesDEC2006.pdf (finding that satellite radio constituted 4.1 percent of the market) (visited June 19, 2008).

[229] For a related discussion concerning the prohibition on the insertion of local content on terrestrial repeaters, see Section VI.C.2, *infra*.

[230] For instance, we consider "any efficiencies and other benefits that might be gained through increased ownership or control." Communications Act § 613(F)(2)(D), 47 U.S.C. § 533(f)(2)(D).

[231] *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3330-31 ¶ 140; *News Corp.-Hughes Order*, 19 FCC Rcd at 610 ¶ 317; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20630 ¶ 189-90; *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and its Subsidiaries*, 12 FCC Rcd 19985, 20064 ("*Bell Atlantic-NYNEX Order*") (1997); *SBC-Ameritech Order*, 12 FCC Rcd at 20064 ¶ 158; *Comcast-AT&T Order*, 17 FCC Rcd at 23313 ¶ 173.

[232] *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3331 ¶ 140; *News Corp.-Hughes Order,* 19 FCC Rcd at 610 ¶ 317; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20630 ¶ 190; *Comcast-AT&T Order*, 17 FCC Rcd at 23313 ¶ 173*; see also 1992 Horizontal Merger Guidelines* § 4 (Rev. 1997).

[233] *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3331 ¶ 140; *News Corp.-Hughes Order,* 19 FCC Rcd at 611 ¶ 317; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20630 ¶ 190.

[234] *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3331 ¶ 140; *News Corp.-Hughes Order*, 19 FCC Rcd at 610-11 ¶ 317; *EchoStar-DIRECTV HDO,* 17 FCC Rcd at 20630 ¶ 190.

[235] *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3331 ¶ 140; *Applications of Western Wireless Corp. and ALLTEL Corp. for Consent to Transfer Control of Licenses and Authorizations*, 20 FCC Rcd 13053, 13100 ¶ 132 (2005) ("*ALLTEL-WWC Order*").

76. Finally, we apply a "sliding scale approach" to our ultimate evaluation of benefit claims. Under this approach, where potential harms appear both substantial and likely, Applicants' demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than the Commission would otherwise demand.[236] On the other hand, where potential harms appear less likely and less substantial, we will accept a lesser showing.[237]

B. Claimed Benefits

77. Applicants claim that the transaction will increase competition and benefit consumers. They maintain that the synergies and resulting cost savings from the merger will allow the combined entity to offer greater programming choices and lower prices, as well as preserve the future viability of satellite radio.[238] Specifically, the claimed benefits include: (1) more programming choice at lower prices,[239] (2) more diverse programming,[240] (3) accelerated deployment of advanced technology,[241] (4) commercialization of interoperable radio receivers,[242] and (5) operational efficiencies to safeguard the future of satellite radio.[243] Moreover, Applicants claim that the combined company will be able to eliminate redundant programming, which will eventually free capacity for more diverse offerings that are not currently available on either company's system, including expanded non-English language programming, children's programming, and additional programming aimed at minority and other underserved populations.[244] Applicants explain that without the merger, an increase in programming diversity is unlikely, as both companies will be required to maintain overlapping, mainstream content in order to retain and attract customers.[245] We find that these programming options offer consumers enhanced choices and are merger-specific benefits. Based on the evidence before us, however, we do not find the other claimed benefits to be merger specific. We discuss each of Applicants' claimed benefits below.

1. Increased Programming Options/Lower Prices

78. Applicants advance two types of additional programming options and pricing structures for consumers that, they argue, are benefits specific to the proposed merger. First, Applicants pledge to offer consumers new packaged channel options designed to take advantage of the addition of each Applicant's unique programming to the other's service in the short term. Second, to serve the interests of consumers who prefer greater control over their programming options, Applicants propose to offer an a la

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[236] *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3331 ¶ 141; *News Corp.-Hughes Order*, 19 FCC Rcd at 611 ¶ 318; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20631 ¶ 192 (citing *SBC-Ameritech Order*, 14 FCC Rcd at 14825 ¶ 256).

[237] *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3331 ¶ 141; *AT&T Inc., and BellSouth Corp., Application for Transfer of Control*, 22 FCC Rcd 5662, 5761-62 ¶ 203 (2007) ("*AT&T-Bell South Order*").

[238] Application at 10.

[239] *Id*. at 10-12.

[240] *Id*. at 12-14.

[241] *Id.* at 14-15.

[242] *Id*. at 15-16.

[243] *Id*. at 17-20.

[244] Applicants assert this increased program diversity on satellite radio may even stimulate more diverse programming on terrestrial radio. *Id*. at 13 n.32.

[245] *Id*. at 13.

carte channel selection system that will give subscribers the power to tailor their channel selections to their own tastes and interests.

a. New Programming Packages

79. Applicants propose to offer a number of new programming packages at lower prices to subscribers.[246] Specifically, Applicants claim that they will offer consumers a range of new programming packages at prices lower than currently available, including: (1) a "Mostly Music" package, which includes commercial-free music as well as several family-oriented and religious channels and emergency alerts, for $9.99 per month; (2) a "News, Sports & Talk" package, which includes various sports, talk and entertainment, family, news, traffic and weather, and emergency channels, for $9.99 per month; (3) two "Family Friendly" packages, which exclude adult-themed content, at a cost of $11.95 per month or $14.99 per month, respectively; and (4) a "best of both" package, which will enable customers to receive selected programming from both companies at a cost of $16.99 per month.[247] Applicants assert that these new programming packages will result in public interest benefits in the form of lower prices and greater consumer choice.[248]

80. Commenters disagree about the potential benefits of Applicants' proposal to offer new programming packages to subscribers. WIPP agrees with Applicants that the merger will create public interest benefits, because operational efficiencies created by the merger will result in lower prices for consumers.[249] Others criticize the proposal, particularly the proposed "best of both" package. C3SR criticizes Applicants' proposed tiered programming packages on the grounds that (1) the proposed packages will cost more than the current service packages offered by Applicants, (2) the premium channels cost more per channel, (3) the base rates are not guaranteed, (4) consumers are unlikely to have the two satellite receivers necessary to receive such programming, and (5) providing crossover programming would increase costs due to exclusive agreements and limiting technology in existing receivers and that costs per channel would increase.[250] NATOA expresses concerns about potential exclusivity clauses in Applicants' programming agreements, arguing that such clauses may place some of the exclusive content that might otherwise be offered in Applicants' "best of both" package out of consumers' reach.[251]

81. Applicants respond that the "best of both" package represents a significant discount – 34 percent – over the only way to obtain all of the programming included in this package today – buying a

[246] *See* Applicants' June 13, 2008 Ex Parte at 1-3. Applicants have voluntarily committed to provide these programming options, "subject to individual channel changes in the ordinary course of business and, in the case of certain programming, the consent of third-party programming providers." *Id.* at 3.

[247] *Id*. at 1-3.

[248] Joint Opposition at 12, 14. RIAA raised concerns about the impact of the transaction on the recording industry. Letter from Victoria F. Sheckler, Deputy Gen. Counsel, RIAA, to Marlene H. Dortch, Secretary, FCC (July 23, 2008). In response, Applicants state that the "a la carte and other programming proposals were not intended, and are not anticipated, to reduce revenue from copyright royalty payments." Instead, they explain that the programming packages "were designed to provide more choice and lower prices and hopefully increase revenue, which should have a positive effect on copyright royalty payments to artists and record companies." Applicants' July 25, 2008 Ex Parte at 2.

[249] WIPP Comments at 1-3.

[250] C3SR Reply at 17-18. C3SR also claims that subscribers will need a new receiver to have the option to choose smaller bundled packages with channels from both services. C3SR Reply at 17. Applicants specifically state that this is not a requirement. Joint Opposition at 12.

[251] NATOA Petition at 4.

Sirius satellite radio, an XM satellite radio, and paying monthly subscription fees totaling $25.90 (two times $12.95) to Sirius and XM.[252] Applicants note that a number of subscribers expressed interest in receiving through a single receiver exclusive content not available on their current service.[253] Applicants also cite to a CRA analysis that found that introducing new programming packages, without taking away current options, necessarily raises consumer welfare.[254] The study concluded that no packages that combine content from the two providers would be available absent the merger.[255]

82. Knowledge Ecology International ("KEI") states that the proposed pricing plans are temporary and are not guaranteed over the longer term.[256] We find that KEI's argument is sufficiently addressed by Applicants' voluntary commitment, which will ensure that these benefits materialize. As discussed below, Applicants have voluntarily committed to offer for sale an interoperable receiver in the retail after-market within nine months of the consummation of the merger,[257] as well as capping the price for all proposed (as well as current) programming packages for at least 36 months after consummation of the merger.[258] This voluntary commitment ensures that these programming packages will be available at the rates proposed by Applicants for at least three years after the merger occurs.

83. We conclude that Applicants' proposed new programming packages will increase consumer choice and offer consumers lower-cost options. These are well-recognized public interest benefits.[259] While some commenters criticize specific aspects of Applicants' proposal, no one disputes that these new packages would offer consumers additional choice, or that a number of the packages are priced lower than Applicants' current offerings. Although the proposed "best of both" package (which combines some of the most favored content from both XM and Sirius) is priced higher than Applicants' current offerings, the content included in this proposed package can be accessed today only by subscribing to both XM and Sirius, obtaining receivers for each Applicant's service, and paying monthly fees totaling $29.50.[260] Finally, with respect to comments addressing the impact of exclusivity provisions in Applicants' programming agreements, we find that only a small fraction of the agreements contain provisions of this type. In addition, Applicants have promised to "conduct a thorough analysis of the existing contracts and negotiate any new terms that may be necessary to implement the proposed programming options."[261] This pledge, in combination with the relatively small number of agreements containing exclusivity provisions, gives us confidence that the vast majority of Applicants' programming will be available post-merger.

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[252] Applicants' Supp. Comments at 9.

[253] *Id*.

[254] Joint Opposition at 16 (citing C3SR Petition, CRA Study at 83).

[255] *Id.*

[256] KEI Reply at 2-3.

[257] Applicants' July 25, 2008 Ex Parte at 2; see discussion in Section VI.B.3, *infra*.

[258] Applicants' June 13, 2008 Ex Parte at 5; see discussion in Section VI.B.1, *infra*.

[259] *Adelphia Order*, 21 FCC Rcd 8307 ¶ 243 (2006) ("[E]fficiencies created by a proposed transaction can mitigate anticompetitive harms if they enhance a firm's ability and incentive to compete and therefore result in lower prices, improved quality, enhanced service, or new products.); *News Corp.-Hughes Order,* 19 FCC Rcd at 610 ¶ 316; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063 ¶ 158; *Sprint-Nextel Order*, 20 FCC Rcd at 14013 ¶ 129; *see also Horizontal Merger Guidelines* § 4.

[260] Even if we were to consider the "best of both" package as being a price increase, a number of the other proposed packages are priced lower than Applicants' current offerings.

[261] Sirius Nov. 16, 2007 Response to Information and Document Request, Narrative at 61.

84. Moreover, despite some commenters' claims to the contrary, we find these benefits to be merger specific.[262] We note that "the Commission does not have to find that a proposed transaction or merger is the only means to achieve a claimed benefit,"[263] merely that the benefit is unlikely to be achieved by another means that would entail fewer anticompetitive effects. After reviewing the record, we conclude that this is the case with regard to each of the new programming packages. The record indicates that prior to the merger, **[REDACTED]**.[264] Accordingly, we accept Applicants' assertion that the proposed programming packages would not be offered by Applicants absent a merger and find the benefits that will accrue from the offering of such packages in the future to be merger specific.

b. A la Carte Programming

85. In addition to the new packaged programming options proposed by Applicants, Applicants voluntarily commit to offer two a la carte offerings to subscribers.[265] "A La Carte I" would allow a subscriber to individually select 50 channels for $6.99 per month. Subscribers to A La Carte I will be able to purchase additional individual channels for 25 cents per month each as well as "premium" packages of certain Sirius channels for $5 or $6 per month each and of certain XM channels for $3 or $6 per month each. "A La Carte II" would allow a subscriber to select 100 channels, including access to "best of both" programming offered by the other satellite provider, for $14.99 per month. Subscribers would have the ability to craft an individualized line-up that includes some of the most popular and appealing programming currently offered by the other provider. Subscribers would select the channels they wish to receive via Applicants' websites. Applicants assert that the proposed a la carte plans would create public interest benefits in the form of lower prices and greater choice.

86. A number of commenters respond that subscribers will receive fewer channels and will pay the same or slightly more for them.[266] C3SR asserts that Applicants' a la carte plan is in reality a tiered bundling of reduced total programming that costs more on a channel-by-channel basis than Applicants' current packages.[267] C3SR states that Applicants fail to explain how less content for less money is the same or better than the current competition between two providers.[268]

87. Applicants dispute these assertions. According to Applicants, "[a] subscriber choosing the A La Carte I plan would save more than 70 dollars a year."[269] Applicants contend that opponents' assertions regarding the per-channel price of the a la carte options are fundamentally flawed because they

[262] King Comments at ¶¶ 77-78; Smith Comments at 8-11; NAB Response to Comments at 22-25; Letter from David K. Rehr, NAB, to Kevin J. Martin, Chairman, FCC (July 25, 2007) at 3-4; KEI Reply at 2-3.

[263] *Adelphia Order*, 21 FCC Rcd at 8314 ¶ 261.

[264] *See, e.g.,* XMH-008-00002391, XMH-001-00004380, and XME-009-00046821 **[REDACTED]**.

[265] Applicants' June 13, 2008 Ex Parte at 1-3. Applicants have voluntarily committed to provide these programming options, "subject to individual channel changes in the ordinary course of business and, in the case of certain programming, the consent of third-party programming providers." *Id.* at 3.

[266] NATOA asserts that consumers will receive fewer channels under the a la carte option while paying essentially the same $12.95 price as that charged for the regular XM or Sirius package. NATOA Petition at 4. Similarly, Common Cause argues that the opt-out system proposed by XM and Sirius may not save consumers money, depending on how channels are valued. Common Cause Petition at 44. *See also* NPR Petition at 18-19; NAB Reply to Opposition at 8-9.

[267] CS3R Reply at 17; *see also* NAB Petition at 20-21 (arguing that a la carte would require the manufacture and sale of next generation receivers).

[268] CS3R Reply at 17.

[269] Applicants' Supp. Comments at 8.

assume that all subscribers value all channels equally, which, Applicants assert, is not the case.[270] Rather, Applicants claim that a subscriber who only listens to 20 channels on Sirius' service would pay more than 64 cents per month per valued channel under the current Sirius plan, but would pay approximately 35 cents per month for those channels under the A La Carte I plan. Applicants add that consumers who value having more channels will not be harmed because such individuals will continue to be able to purchase the full set of channels offered by Sirius or XM at the current price or choose a new option that includes additional programming.[271]

88. We conclude that Applicants' voluntary a la carte commitment represents a clear public interest benefit. First, consumers will benefit from their ability to tailor the programming they receive to match their individual tastes and interests. The proposed a la carte system will allow consumers to, in effect, "block" unwanted or objectionable content that would otherwise be delivered to consumers' SDARS devices. Second, the proposed a la carte system will ensure that customers of the merged company have greater control over the programming they receive and pay for than subscribers to XM or Sirius currently enjoy. Third, consumers will benefit from their ability to obtain more programming that they desire for lower prices. In order to ensure that consumers have ready access to relevant information concerning their programming options, we also require that the combined company make the content and price details concerning its a la carte options and channel lineups clearly available on its websites.

89. Our conclusion that the voluntary a la carte commitment proposed by Applicants is by nature a public interest benefit is consistent with the conclusion in the *Further Report on the Packaging and Sale of Video Programming Services to the Public* that "[a] la carte could be preferable to bundling in providing diverse programming response to consumer demand."[272] In that Report, the Media Bureau also noted that consumer choice over content is an important consumer benefit, stating that "[t]he marketplace will thus be able more quickly to shed unpopular networks in favor of popular networks under a la carte than under bundling and in the process become more responsive to consumer demand for better programming. Programmers may also have an increased incentive to improve their programming under a la carte."[273]

90. We find unpersuasive the argument that Applicants' proposal falls short of a "true" a la carte option.[274] The Commission's goal is to ensure that the public receives the greatest benefit from services that require use of public spectrum. Applicants' promised a la carte options plainly will enhance consumer choice and will provide subscribers with an opportunity to lower their bills.

91. We find other criticisms of the proposal likewise unpersuasive. For example, NAB, NPR, and the Consumer Federation of America, Consumers Union, and Free Press ("CFA") assert that Applicants' claims of benefits arising from their proposed new programming packages are speculative and non-verifiable.[275] As stated above, both NAB and C3SR question when Applicants will make available the interoperable receiver necessary to initiate the proposed a la carte offering.[276] Commenters

[270] *Id*.

[271] *Id*. at 8-9.

[272] Media Bureau, *Further Report On the Packaging and Sale of Video Programming Services To the Public* (Med. Bur., Feb. 9, 2006) at 5 ("*Further Report on Video Programming*"), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-263740A1.pdf.

[273] *Further Report on Video Programming* at 35-36.

[274] C3SR Reply at 17.

[275] NAB Petition at 37-38; NPR Petition at 19; Common Cause Petition at 42-43; CFA Supp. Comments at 4; C3SR Reply at 17-21, 23.

[276] NAB Reply to Opposition 8; C3SR Reply at 17-21, 23-24.

also contend that subscribers have no guarantees as to the quality or duration of any benefits from the pricing and programming offerings.[277] As discussed further below, we find that Applicants' voluntary commitments address these criticisms by ensuring that the claimed benefits are likely to materialize in the near term. We note that in addition to the voluntary commitments regarding programming, Applicants also have voluntarily committed to offer for sale an interoperable receiver in the retail after-market within nine months of the consummation of the merger,[278] and cap for at least 36 months the price of all proposed (as well as current) programming packages.[279] These voluntary commitments ensure that consumers will receive Applicants' proposed a la carte offerings and that these offerings will be available for at least three years at the proposed price.

92. Finally, a number of commenters assert that Applicants' promised a la carte offering is not a merger-specific benefit because each company could offer a la carte today.[280] Applicants disagree, asserting that both Sirius and XM have experienced billions of dollars in losses and that neither company has ever turned a profit.[281] They assert that, without the synergies and economies of scale created by this merger, neither company could afford to introduce a la carte offerings.[282] We find that Applicants are not likely to offer a la carte options absent the merger. Thus, the public interest benefits associated with these a la carte offerings are merger specific.

93. As we note in Section IV.B.1., above, under our "worst-case scenario" approach, we assume, *arguendo,* that the merged firm would have an incentive to charge prices that are higher than those charged by Applicants as independent competitors. The voluntary a la carte commitments will provide an additional "safety valve" against price increases in the future. The a la carte system provides individual consumers with increased choice as to the cost of the services they will receive from the merged entity, allowing consumers to tailor their SDARS service not only to fit their programming tastes, but individual budgets as well. Should the merged entity choose to raise prices for its services in the future, consumers electing the a la carte plan will be able to reduce the number of channels selected to compensate for the price increase. This option for consumers places an additional check on the merged entity's ability to raise prices that does not exist under Applicants' current "take-it-or-leave-it" single service offerings. Accordingly, in addition to the general increase in consumer welfare that results from giving subscribers increased control over the type of programming they receive, the increased bargaining power held by consumers post-merger will help alleviate the potential competitive harms resulting from the merger.

2. Accelerated Deployment of Advanced Technology

94. Applicants claim that the merged entity will realize efficiencies that will allow the offering of advanced technologies and new services sooner than would occur absent the transaction. They state that subscribers will have access to a wider range of easy-to-use, multi-functional devices such as real-time traffic and rear-seat video devices, as well as new services such as advanced data and telematics

[277] NAB Petition at 37-39; NPR Petition at 19; Common Cause Petition at 42-43; CFA Supp. Comments at 4; C3SR Reply at 17-21.

[278] Applicants' July 25, 2008 Ex Parte at 2; see discussion in Section VI.B.3, *infra*.

[279] Applicants' June 13, 2008 Ex Parte at 5; see discussion in Section VI.B.1, *infra*.

[280] C3SR Comments at 34-35; NABOB Petition at 6-7; NPR Petition at 18-19; AAI Comments at 10-12; Clear Channel Comments at 6; Common Cause Petition at 44; Entravision July 9, 2007 Comments at 17; King Comments at ¶ 78; Smith Comments at 8-11; King Reply at ¶ 24; NAB Response to Comments at 22-25.

[281] Joint Opposition at 17.

[282] *Id*. As noted in Section V.B.1.a., above, evidence in the record indicates that **[REDACTED]**. *See* section V.B.1.a, *supra*. **[REDACTED]**

services, including traffic, weather, and "infotainment" services.[283] The claimed efficiencies are based on combining Applicants' engineering resources, as well as accelerated involvement of third-party manufacturers and technology partners in developing and offering new devices and services based on common engineering standards and protocols for the combined company.[284]

95. We agree with commenters that these claimed public interest benefits are not cognizable.[285] Some advanced services data and telematics services already are being introduced by Applicants.[286] Moreover, the analysis submitted by Applicants relies **[REDACTED]**. Given that the additional capacity will not be available until after interoperable receivers are widespread, we find that, to the extent that this claimed benefit might be based on the availability of additional capacity (and thus be merger specific), it is speculative.[287]

3. Commercial Availability of Interoperable Satellite Radio Receivers

96. Applicants claim that the proposed transaction will foster the commercial introduction of interoperable satellite radios.[288] Applicants state that, absent the merger, they would have little incentive to subsidize the cost of interoperable receivers, and that, without a subsidy, manufacturers have not expressed interest in producing or distributing interoperable radios.[289]

97. Regardless of whether the proposed merger facilitates the commercial introduction of an interoperable satellite radio, it cannot be considered as a merger-specific benefit because existing Commission rules already require Applicants to introduce such a radio regardless of the merger.[290] Eleven years ago, when the Commission required that SDARS operators certify that their system includes a receiver design that permits all users to access all SDARS systems, it noted that the mandate would encourage consumer investment in equipment, create economies of scale, and "promote competition by reducing transaction costs and enhancing consumers' ability to switch between competing DARS providers."[291] To the extent that increased competition between SDARS providers was viewed as one of the benefits from promoting receiver interoperability, the commercial availability of interoperable satellite receivers, in the context of the proposed transaction, will not provide that benefit.

98. Furthermore, to the extent that timely, widespread penetration of interoperable receivers will be necessary for the realization of any of the other potential public interest benefits, such as increased

[283] Application at 14-15.

[284] *Id*. at 15.

[285] NAB Petition at 42-43 (stating "nothing currently prevents the companies from working together to develop 'common engineering standards and protocols'" (citing Application at 15)); *see also* AAI Comments at 15 (stating that there is "no indication why such benefits 'would not be possible absent the proposed transaction.'" (citing Application at 14-15)).

[286] *See* Application at 14-15; Joint Opposition at 22-23, nn.62-63 (stating that both companies currently offer integrated traffic and navigation systems for automobiles and that Sirius and Chrysler Group announced the launch of SIRIUS Backseat TV™).

[287] *See* Sirius Nov. 16, 2007 Response to Information and Document Request IV.A-B at SIRIUS-FCC-IV.000005 and SIRIUS-FCC-IV.000087.

[288] Application at 15-16.

[289] *Id*. at 16.

[290] *See* 47 C.F.R. § 25.144(a)(3)(ii). For a detailed discussion of Applicants' existing interoperable radio obligations, *see* Section VI.B.3, *infra*.

[291] *1997 SDARS Service Rules Order*, 12 FCC Rcd at 5796 ¶ 105.

program diversity, spectrum efficiencies, or other operational efficiencies, the timely commercial availability of an interoperable receiver does not provide a separate public interest benefit, but is necessary if the other potential public interest benefits are to be considered cognizable. Thus, we cannot consider the commercial availability of interoperable receivers to be a merger-specific benefit. Instead, we review this issue in Section VI.B., below. We note, however, that Applicants' voluntary commitment to offer for sale an interoperable receiver in the retail aftermarket within nine months of consummation of the merger will facilitate the realization of other claimed public interest benefits in a timely manner.[292]

4. Operational Efficiencies

99. Applicants claim that the proposed transaction will allow the merged firm to achieve operational efficiencies that will reduce costs, and that those cost savings can be passed on to subscribers in the form of lower subscription rates. The claimed efficiencies include the ability to reduce programming expenses by eliminating duplicative staffing needed for the creation of self-produced music programming; to reduce operational expenses for the infrastructure used to broadcast and transmit satellite radio programming; to reduce marketing and subscriber acquisition costs, including efficiencies due to economies of scale in equipment; to reduce duplicative research and development efforts and accelerate innovation in products and services in the retail and automotive distribution channels; and to achieve operating efficiencies by reducing duplicative general and administrative expenses.[293] Applicants also maintain that, with their proposed merger, they will be able to operate more effectively by adopting the best and most efficient practices of the two companies based on their core competencies.[294]

100. We find that some of the claimed efficiencies, such as some of the reduced operational expenses and claimed scale economies for some equipment design, are not merger specific.[295] However, others of the claimed savings relate to the elimination of duplicate expenses and scale economies which can only be achieved by the combined company.[296] To the extent that any of the claimed efficiencies might be obtainable by other means that would entail fewer anticompetitive effects, the Commission would discount that portion of the claimed benefits.[297]

101. In addition, Applicants have not provided sufficient evidentiary support to estimate the magnitude of many of the claimed efficiencies.[298] Of those efficiencies that might be considered to be

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[292] *See* Section VI.B.3, *infra*.

[293] Application at 17-20. See also Sirius Nov. 16, 2007 Response to Information and Document Request IV at SIRIUS-FCC-IV.000012-000076, for a more detailed description of the claimed savings.

[294] Application at 18-19.

[295] NAB Petition at 45-46 (claiming that the reduction in operational expenses relating to maintaining "distinct broadcast operations infrastructure to facilitate the scheduling, storage, compression, transmission, and uplink of programming and content to Applicants' satellites and terrestrial repeater networks" may not be merger specific because it is not clear whether these savings could not be obtained through other means. (citing Application at 17)). *See* Sirius Nov. 16, 2007 Response to Information and Document Request IV.A-B at SIRIUS-FCC-IV.000048-000049 **[REDACTED]**.

[296] Application at 17-18. *See also, e.g.*, Sirius Nov. 16, 2007 Response to Information and Document Request IV at SIRIUS-FCC-IV.000026-000048. **[REDACTED]**.

[297] Most of the claimed efficiencies that might have been obtainable by other means would also be discounted in our analysis inasmuch as they would not be realized within several years of closing or the claimed savings would relate to a reduction in fixed costs, rather than variable costs.

[298] Mar. 24, 2008 DOJ Press Release at 4 ("It was not possible to estimate the magnitude of the efficiencies with precision due to the lack of evidentiary support provided by XM and Sirius, and many of the efficiencies claimed by the parties . . . were not likely to be realized within the next several years.").

merger specific, some are not expected to be realized within several years of closing.[299] For example, Applicants claim that there will be merger-specific savings in satellite operations, broadcast operations, terrestrial networks, programming and content, customer service and billing, sales and marketing, subscriber acquisition costs, general and administrative costs, product development, and interest expense.[300] Some efficiencies, such as savings from elimination of duplication in non-unique, self-produced music channels, can be realized relatively quickly,[301] but other efficiencies, such as the more efficient use of spectrum through the elimination of the need to broadcast largely duplicative content, can only be realized once interoperable receivers are widespread.[302] Some of the efficiencies related to the satellite fleet and satellite operations would be implemented over a long period of time.[303] These savings are discounted in our analysis to the extent that some of the savings cannot be verified and some of the efficiencies would only be expected to be realized in the distant future.[304]

102. With respect to programming costs, NAB notes that the merged firm would not be able to eliminate some of the most expensive programming due to existing long-term contracts.[305] However, Applicants' claimed savings with respect to programming costs are based largely on eliminating duplication in the overhead and production of similarly formatted channels and improving scale economies in content acquisition.[306] Potential cost savings on content covered by long-term contracts would only be realized as the contracts covering the content come up for renewal.[307]

103. We agree with commenters who express concern that consumers will not benefit from some of the claimed efficiencies, inasmuch as some of the savings relate to a reduction in fixed costs, not

[299] *See* Sirius Nov. 16, 2007 Response to Information and Document Request IV.A-B at SIRIUS-FCC-IV.000006-000007.

[300] Joint Opposition at 26-29. See Sirius Nov. 16, 2007 Response to Information and Document Request IVA-B at SIRIUS-FCC-IV.000012-000076 for a description of the claimed savings.

[301] *See also* Sirius Nov. 16, 2007 Response to Information and Document Request IVA-B at SIRIUS-FCC-IV.000018-000019.

[302] See Sirius Nov. 16, 2007 Response to Information and Document Request IVA-B at SIRIUS-FCC-IV.000086-000087 **[REDACTED]**. *See also* XM Nov. 16, 2007 Response to Information and Document Request IVA-B, Narrative at 25-26 (noting that XM anticipates that **[REDACTED]** million XM single-platform devices will be factory installed in vehicles sold for the period **[REDACTED]**, and are likely to remain in widespread use for **[REDACTED]**. XM also states that the combined company "will need to broadcast a full complement of programming to both the XM and Sirius platforms for many years, including the useful life of the XM satellite constellation." *Id*. at 25).

[303] *See* Sirius Nov. 16, 2007 Response to Information and Document Request IV.A-B at SIRIUS-FCC-IV.000049-000054, **[REDACTED]**.

[304] *See* Sirius Nov. 16, 2007 Response to Information and Document Request IV.A-B at SIRIUS-FCC-IV.0000005-000008, SIRIUS-FCC-IV.000012-000076 for a summary of efficiencies and estimated timing. For example, **[REDACTED]**.

[305] NAB Petition at 45.

[306] Joint Opposition at 27. *See also* Sirius Nov. 16, 2007 Response to Information and Document Request IV.A-B at SIRIUS-FCC-IV.000016-000026, for an analysis of savings that can be realized from the elimination of duplicative programming-related expenses and through economies of scale in content acquisition.

[307] *See* Sirius Nov. 16, 2007 Response to Information and Document Request IV.A-B at SIRIUS-FCC-IV.000023-000026, and SIRIUS-FCC-I.B.001647-001657, XM-I-B-3-00000734, and XM-I-B-3-00003738-00003743. **[REDACTED]**.

variable costs.[308] Applicants engaged an outside consulting firm to evaluate the claimed efficiencies arising from the merger, and the firm concluded that such efficiencies will likely lead to reductions in both marginal and fixed costs, with **[REDACTED]** percent of the claimed annual savings attributed to a reduction in variable costs.[309] We find that, to the extent that **[REDACTED]** percent of these efficiencies lead to a reduction in variable costs, consumers will benefit from those claimed savings. However, only **[REDACTED]** percent of the efficiencies that lead to a reduction in variable costs would likely be realized within the next several years.[310] Thus, the remainder of those efficiencies are speculative. As a result we find that only **[REDACTED]** percent of the claimed efficiencies are likely to be realized within several years of the transaction and could lead to a reduction in variable costs. Accordingly, we find that consumers might benefit from, a small percentage, at most, **[REDACTED]** percent, of the claimed efficiencies.

VI. BALANCING PUBLIC INTEREST HARMS AND BENEFITS

A. General Introduction and Summary

104. As previously noted, under the Communications Act, we must determine whether the "public interest, convenience and necessity will be served" by the granting of the Application.[311] We now employ a balancing process, weighing the potential public interest harms of the proposed transaction that we have found against the potential public interest benefits.[312] Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest.[313] Absent Applicants' voluntary commitments and other conditions, the harms outweigh the potential benefits; the presence of these voluntary commitments mitigates the harms and ensures that benefits are realized. The Application and the record before us make clear that, on balance, the public interest will be served by approval of the Application subject to the voluntary commitments and other conditions that we discuss below. Accordingly, we accept the Applicant's voluntary offer of these commitments with the expectation that Applicants will adhere to each according to its specified terms and within the specified timeframes.[314] These voluntary commitments are fully enforceable by the

[308] NAB Petition at 45, 46, 47.

[309] *See* Sirius Nov. 16, 2007 Response to Information and Document Request IV.A-B at SIRIUS-FCC-IV.000016. **[REDACTED]**.

[310] *See* Sirius Nov. 16, 2007 Response to Information and Document Request IV.A-B at SIRIUS-FCC-IV.000007, SIRIUS-FCC-IV.000016, and SIRIUS-FCC-IV.000060-.000061.

[311] *See* 47 U.S.C. §§ 309(a), (d); 310(d).

[312] *See SBC-AT&T Order,* 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order,* 20 FCC Rcd at 18443 ¶ 16; *Sprint-Nextel Order,* 20 FCC Rcd at 13976 ¶ 20; *News Corp.-Hughes Order*, 19 FCC Rcd at 483 ¶ 15; *Comcast-AT&T Order*, 17 FCC Rcd at 23255 ¶ 26; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20574 ¶ 25. See Section VII.A., *infra*, for discussion of the applicable language in the Commission's *1997 SDARS Service Rules Order*, prohibiting the transfer of control of one SDARS licensee to the other SDARS licensee. As discussed below, the Commission finds that the prohibition set forth in paragraph 170 of the *1997 SDARS Service Rules Order* is a binding substantive rule, and that it is in the public interest to repeal the rule prohibiting the merger.

[313] *See SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13976-77 ¶ 20; *News Corp.-Hughes Order*, 19 FCC Rcd at 483 ¶ 15; *Comcast-AT&T Order*, 17 FCC Rcd at 23225 ¶ 26; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20574 ¶ 25.

[314] Clear Channel suggests that Applicants' voluntary commitments are not enforceable. Letter from Lawrence R. Sidman, Paul Hastings, Counsel for Clear Channel, to Marlene H. Dortch, Secretary, FCC (June 20, 2008) at 2. We disagree. As we state herein, grant of the Application is conditioned on the merged entity's fulfillment of Applicants' voluntary commitments and other conditions. Therefore, the merged entity's compliance with the voluntary commitments is an enforceable condition.

Commission.

B. Applicants' Voluntary Commitments and Other Conditions

1. Price Cap

105. For the reasons given above, we assume that the relevant product market may be limited to SDARS, and therefore that it is likely that the merged entity will have an increased incentive and ability to raise prices above pre-merger levels and that this incentive and ability will grow stronger over time.[315]

106. As discussed above, Applicants have argued, however, that due to the particular nature of demand for satellite radio services, the merged entity will have an incentive instead to lower prices.[316] Several commenters dispute this argument, and instead predict that the merged entity will raise prices. For example, NAB states that SDARS is the relevant market, that the merger will lead to a monopoly, and that demand is relatively inelastic, so that the merged entity will be able to raise prices profitably.[317] C3SR agrees with a narrow product definition, and raises concerns regarding higher prices, foregone benefits from price competition, increased advertising, and lower value overall.[318] Similar concerns are raised by Common Cause,[319] KEI,[320] and AAI.[321]

107. To address concerns about such potential price increases, Applicants have voluntarily committed to cap the retail prices on their basic subscription package and on the new programming packages that they voluntarily commit to offer.[322] Specifically, Applicants voluntarily commit to not raise the retail prices on their basic $12.95 per month subscription package, their a la carte programming package, their "best of both" programming packages, their "mostly music" and their "news, sports, and talk" programming packages, and their discounted family-friendly programming package.[323] Applicants voluntarily commit to these price caps for at least 36 months after consummation of the merger.[324] Notwithstanding the voluntary commitment, after the first anniversary of the consummation of the merger, the combined company may pass through cost increases incurred since the filing of the merger application as a result of statutorily or contractually required payments to the music, recording and publishing industries for the performance of musical works and sound recordings or for device recording fees.[325] The combined company will provide customers, either on individual bills or on the combined company's website, details about the specific costs passed through to consumers pursuant to the

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[315] Applicants dispute a narrow product market definition, arguing instead that satellite radio faces many competitive alternatives. Application at 20-48. We do not have sufficient evidence in the record to conclude definitively that this is the case. *See* Section IV.B.1.a, *supra*.

[316] *See* Application at 10-12. See Section IV.B, *supra*, for further discussion.

[317] NAB Petition at 26-29; *see also* NAB Response to Comments at 17-20.

[318] *See, e.g.*, C3SR Petition at 13-20.

[319] Common Cause Petition at 14-39.

[320] *See generally* KEI Reply.

[321] AAI Comments at 16-29.

[322] Applicants' June 13, 2008 Ex Parte at 5.

[323] *See* Sections V.B.1.a-b, *supra*.

[324] Applicants' June 13, 2008 Ex Parte at 5.

[325] *Id*. *See* Tenn. Att'y Gen. July 3, 2008 Ex Parte at 3.

preceding sentence.[326]

108. We accept this voluntary commitment and conclude that it will mitigate the harm from any post-merger price increases. In addition, Applicants may not reduce the number of channels in either their current packages or their new packages for three years. Some commenters submit that the price cap should be longer than three years, arguing that the potential harms will still remain at the end of the period.[327] We do not know what the competitive landscape will be like in three years. Accordingly, six months prior to the expiration of the commitment period, the Commission will seek public comment on whether the cap continues to be necessary in the public interest. The Commission will then determine whether it should be modified, removed, or extended.[328] We also note that Applicants voluntarily commit to a price cap, not a price freeze, and therefore retain sufficient flexibility to flow through to consumers any cost savings or other efficiencies resulting from the merger.[329]

109. Some commenters argue that a price cap cannot ameliorate the harms that are likely to flow from the merger. CEI, for example, states that price increases are sometimes beneficial for consumers if the resultant overall package is a better deal for consumers, and that fear can prevent companies from instituting price decreases if there is concern that subsequent necessary future increases will cause antitrust action.[330] CEI further argues that intermodal competition (i.e., between SDARS and other technologies) can suffice to discipline the merged company.[331] Common Cause contends that only intramodal competition (i.e., between the existing two SDARS providers) can constrain prices, and thus also concludes that merger conditions cannot ameliorate the harms from the merger. Common Cause therefore opposes merger approval.[332] AAI, referring to the *EchoStar-DIRECTV HDO*, indicates that a price freeze condition would not account for other dimensions of competition, such as quality and

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[326] *Id.*; *see* Letter from U.S. Sens. John F. Kerry, Benjamin Cardin, and Claire McCaskill, to Kevin J. Martin, Chairman, FCC (June 27, 2008) at 2 (recommending that the Commission impose requirements to make pricing transparent and verifiable) ("Sens. Kerry, Cardin, and McCaskill June 27, 2008 Ex Parte"); Tenn. Att'y Gen. July 3, 2008 Ex Parte at 3 (stating that the Commission should not endorse Applicants' proposed methods of disclosing rate increases because it could be viewed as a preemption of states' existing consumer protection laws).

[327] *See, e.g.*, Letter from Gigi B. Sohn, Pres., Public Knowledge, to Marlene H. Dortch, Secretary, FCC (June 18, 2008) ("Public Knowledge June 18, 2008 Ex Parte"); Letter from U.S. Rep. Edward J. Markey, Chairman, House Subcommittee on Telecommunications and the Internet, to Kevin J. Martin, Chairman, FCC (July 15, 2008) at 2 (recommending that the Commission adopt a six-year price freeze) ("Rep. Markey July 15, 2008 Ex Parte").

[328] *Cf. Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17795-96 ¶ 5 (2007); *see also Adelphia Order*, 21 FCC Rcd at 8276 ¶ 164; *News Corp.-Hughes Order*, 19 FCC Rcd at 555, 576 ¶¶ 179, 227. Although it is not part of Applicants' voluntary commitment, we are conditioning our approval of the merger on the Commission's ability to modify or extend the price cap beyond three years. We also are conditioning our approval of the transaction on the merged entity's continuing adherence to the other commitments and conditions, as specified herein, which continue indefinitely.

[329] Comments received as part of the rulemaking regarding HD Radio technology will help inform our decision regarding the level of competition in the radio market and the continuing need for a price cap. *See* Section VI.B.4, *infra*.

[330] CEI Comments at 13.

[331] *Id.* at 6-8, 15.

[332] Common Cause Petition at 46-48.

innovation, and that it would not allow possible price reductions resulting from SDARS competition.[333] NAB argues that the merged companies cannot be counted on to comply with any conditions, that pricing conditions are of dubious legality, and that approving the merger would contravene the Commission's preference for intramodal competition.[334]

110. We reject these arguments. As stated elsewhere in this document, on balance we find that with the voluntary commitments by Applicants and the other conditions we impose, the benefits of the merger outweigh the potential harms. Because SDARS is in a mode of growing penetration so as to reach profitability, the merged entity will have sufficient incentive to improve quality and innovate for the foreseeable future. Despite this incentive, **[REDACTED]**.[335] Because we do not have sufficient record evidence to conclude that the relevant market includes any other entities than Applicants themselves, we cannot rely upon intermodal competition post-merger to discipline prices. However, Applicants' voluntary commitment will prevent any harm that might result from a possible price increase, if it were intramodal competition that prevented the price increase before the merger.[336] As far as non-compliance is concerned, if NAB or any party has evidence of such behavior, it may file a complaint with the Enforcement Bureau.

2. New Programming Packages and A La Carte Options

111. As discussed in Section VI.B.2., several commenters express concerns about whether the potential competitive harms of the merger can be mitigated by a condition requiring Applicants to offer new programming and a la carte packages.[337] NAB and others state that the effectiveness of such a condition would depend on the array of channels to be included in the package, the attractiveness of the structure to customers, the pricing of the packages, the duration of the offering, the likelihood of changes after the expiration of any short-term conditions, whether equipment prices will increase to offset lost revenue, and whether there will be more advertising-supported programming to offset lost revenues.[338] NAB also raises concerns about the types of programs that will be available in each type of package; whether customers will have to "buy through" a larger basic package before getting combined premium programs at a higher price; what channels will be dropped (reducing consumer choice); and, if no channels are dropped, what kind of audio degradation consumers will face.[339] CFA asserts that the merged entity will likely cite "exclusive programming agreements" as a reason for not including their best programming in particular packages.[340] C3SR questions whether customers will be able to migrate

[333] AAI Comments at 29-30.

[334] NAB Response to Comments at 25-28.

[335] *See, e.g.,* Sirius Mar. 4, 2008 Response to Information and Document Request at SIRIUS-FCC-SUPP.000214-000216, SIRIUS-FCC-SUPP.000311, and SIRIUS-FCC-SUPP.000393; XM Mar. 3, 2008 Response to Information and Document Request at XM-S-0000140-0000158 and XM-S-0000869.

[336] We reject NPR's proposed condition to place the merged entity under Title II common carrier regulation. NPR Petition at 21-22. Applicants' voluntary commitments that we accept in this Order ameliorate the potential harms of this merger adequately, at a much lower cost and with less intrusiveness into the market.

[337] NAB Petition at 37-38; NPR Comments at 19; Common Cause Petition at 42-43; CFA Supp. Comments at 4; C3SR Reply at 17-21, 23.

[338] NAB Petition at 37-38.

[339] *Id*. at 40.

[340] CFA Supp. Comments at 4-5.

between packages and channel selections.[341]

112. In order to address these concerns, Applicants have voluntarily committed to cap current prices and offer a la carte and new programming packages. The merged firm will maintain the current or proposed prices for each their existing and proposed product offerings (including regular, as well as premium channels), for a term of at least thirty-six (36) months after consummation of the merger. In addition, six months prior to the expiration of the commitment period, the Commission will seek public comment on whether the cap continues to be necessary in the public interest. The Commission will then determine whether it should be modified, removed, or extended. This cap on prices will protect consumers while they enjoy the immediate benefits of a la carte pricing options.[342] Applicants have voluntarily committed to introduce the first a la carte-capable receivers in the retail after-market and to begin offering a la carte programming within three months of the consummation of the merger.[343] We find that Applicants' voluntary commitments will mitigate the potential harms identified by NAB and others and will provide a merger-specific benefit to consumers.

3. Interoperable Radio Receivers

113. Section 25.144 of the Commission's rules sets forth the licensing provisions for SDARS systems.[344] As part of these provisions, each applicant for an SDARS license must certify that its system "includes a receiver that will permit end users to access all licensed satellite DARS systems that are operational or under construction."[345] As the Commission stated when it adopted this rule, such receiver interoperability would "at the very least" permit consumers "to access the services from all licensed satellite DARS systems."[346] The Commission stated that a receiver interoperability requirement was an alternative to mandating a specific receiver standard, concluding that a more flexible certification approach would promote innovative system design.[347] In October 1997, the International Bureau granted each Applicant's application to provide SDARS, "subject to certification … that its final user receiver design is interoperable with respect to [the other SDARS provider's] system final design."[348]

114. Since authorization in 1997, Applicants have twice filed letters with the Commission regarding their compliance with the Commission's receiver interoperability rule. By letter dated October 6, 2000, Applicants stated their "continued compliance" with the receiver interoperability rule and described their efforts towards making available interoperable receivers to the public.[349] Applicants noted

[341] C3SR Reply at 23.

[342] *See* Section VI.B.1.

[343] Applicants' June 13, 2008 Ex Parte at 2.

[344] 47 C.F.R. § 25.144.

[345] 47 C.F.R. § 25.144(a)(3)(ii).

[346] *1997 SDARS Service Rules Order*, 12 FCC Rcd at 5797 ¶ 106.

[347] *Id.* at 5795 ¶ 102. The Commission also stated that receiver interoperability would encourage consumer investment in SDARS equipment, would create economies of scale necessary to make SDARS receiving equipment affordable, and would promote competition by reducing transaction costs and enhancing consumers' ability to switch between competing SDARS providers. *See id.* at 5796 ¶ 103.

[348] *See 1997 XM Radio Authorization Order,* 13 FCC Rcd at 8851 ¶ 54; *1997 Sirius Authorization Order*, 13 FCC Rcd at 7995 ¶ 57.

[349] Letter from John R. Wormington, Sr. Vice Pres., Eng. and Operations, XM and Robert D. Briskman, Exec. Vice Pres., Eng., Sirius, to Magalie Roman Salas, Secretary, FCC at 2, transmitted by Letter from Jennifer D. Hindin, Wiley Rein & Fielding, Counsel for Sirius, to Magalie Roman Salas, Secretary, FCC, IBFS File No. SAT-LOA-19900518-0003 (Oct. 6, 2000) ("XM/Sirius Oct. 6, 2000 Letter"). These efforts included plans to develop (continued….)

that they "do not control the actual manufacture, distribution and sale of receivers," but instead license their receiver technology to radio manufacturers.[350] As a result, they stated that they rely on such manufactures to produce SDARS receivers, as well as on automakers to install receivers and on retailers to market receivers for installation in existing vehicles.[351]

115. By letter dated March 14, 2005,[352] Applicants reiterated that they had complied with the Commission's interoperability rule "by including interoperable radios in their respective system designs."[353] They claimed that they had designed and licensed receiver systems with common components capable of receiving Sirius or XM programming, although not both simultaneously, and that they had invested nearly $5,000,000 in a joint venture aimed at "combining XM's and Sirius's proprietary chipsets into a compact and efficient device capable of receiving both services."[354] They emphasized, however, that "the availability of interoperable radios … will depend in large part on factors outside of the control of either XM or Sirius, including consumer demand for interoperability and the willingness of manufacturers to manufacture, distribute, market and sell interoperable radios after carefully weighing the integration, qualification, costs and efficiency considerations."[355]

116. We note that each of Applicants subsidizes the manufacture and sale of receivers in various ways. Applicants state, however, that there is little incentive for each to subsidize the cost of interoperable receivers – as is done with single-system receivers – because of uncertainty whether the subsidy would be recouped since the purchaser might not subscribe to that particular Applicant's service.[356] Applicants state that the absence of subsidization has limited the interest of manufacturers in producing and distributing such interoperable receivers.[357] As a result, no interoperable radio is currently on the market.

117. Commenters in this proceeding disagree whether Applicants' efforts to date comply with the Commission's provisions regarding radio receiver interoperability. Applicants argue that the interoperability requirement mandates that an interoperable receiver be designed, but does not require the production, distribution, marketing, or sale of such a receiver, which Applicants claim is outside of their

(Continued from previous page)
interoperable chipsets capable of receiving both services and an agreement to introduce interim radios that would include a common wiring harness, head unit, antenna, and an interchangeable trunk-mounted box containing processing elements for both company's signals. *Id.* at 4.

[350] XM/Sirius Oct. 6, 2000 Letter at 3.

[351] *Id*.

[352] Letter from William Bailey, Sr. Vice Pres., Reg. and Gov't Affairs, XM and Patrick L. Donnelly, Exec. Vice Pres. and Gen. Counsel, Sirius, to Thomas S. Tycz, Chief, Sat. Div., Int'l Bur., FCC (Mar. 14, 2005) at 1 ("XM/Sirius Mar. 14, 2005 Letter"). This letter responded to a request from the International Bureau to the Applicants to provide "the current status of their efforts to develop an interoperable receiver" and "a clear timeframe for making such an interoperable receiver available to the public." *See XM 2005 Authorization Order*, 20 FCC Rcd at 1625 ¶ 12.

[353] XM/Sirius Mar. 14, 2005 Letter at 1.

[354] *Id*. at 1-2. Applicants stated that they expected that a prototype for this type of interoperable radio would be completed in 2005. *Id.* at 2.

[355] *Id*. at 2-3.

[356] Application at 16.

[357] *Id*. In addition, Applicants state that automobile manufacturers have not opted to include interoperable receivers in their vehicles. *Id.*

control.[358] Relying on their October 6, 2000 and March 14, 2005 letters, Applicants maintain that they have complied with the receiver interoperability requirement by designing an interoperable receiver.[359] Other commenters contend that Applicants have not satisfied the receiver interoperability requirement contained in the Commission's rules.[360] For example, NAB asserts that the receiver interoperability provision requires both the development and the public availability of an interoperable receiver and that, in any event, the design process for an interoperable receiver is not complete.[361] Another commenter claims that existing receivers made available to the public are already capable of interoperability, despite claims by Applicants to the contrary.[362]

118. In addition, C3SR filed a letter on May 27, 2008, alleging that Applicants have not been truthful or candid in their representations regarding compliance with the Commission's receiver interoperability requirement.[363] C3SR states that documents submitted by Applicants demonstrate that instead of complying with the interoperability requirement, Applicants **[REDACTED]**.[364] In particular, C3SR claims that the documents show that Applicants concealed the **[REDACTED]**.[365] C3SR states that the documents also demonstrate **[REDACTED]**.[366] C3SR urges the Commission to designate the merger applications for hearing and to commence an investigation into whether Applicants lacked candor in their representations to the Commission in the Merger Applications and whether the merger is contrary to the public interest because it furthers a conspiracy to restrain trade.[367] In the alternative, if the Commission does not designate the applications for hearing or investigate further, C3SR requests that the Commission impose certain remedies in response to the alleged misconduct, including disgorging profits resulting

[358] *See* Joint Opposition at 95-96.

[359] Application at 15-16 (citing to the XM/Sirius Mar. 14, 2005 and Oct. 6, 2000 Letters).

[360] Blue Sky Reply at 2-3; Common Cause Petition at 45-46; NABOB Petition at 13-14; King Comments at ¶¶ 8, 82-84; Letter from U.S. Rep. Mike Doyle, to Kevin J. Martin, Chairman, FCC (May 30, 2007) at 1.

[361] NAB Petition at 54 (quoting XM's SEC Form 10-K for the year ended Dec. 31, 2006 (stating "[w]e have signed an agreement with SIRIUS Radio to develop a common receiver platform combining the companies' proprietary chipsets, but the companies have not completed the final design of an operational radio using this platform."); s*ee also* Letter from Jane E. Mago, Sr. Vice Pres., and Gen. Counsel, Legal and Reg. Affairs, NAB, to Marlene H. Dortch, Secretary, FCC (June 27, 2008); Memorandum from David H. Solomon, Wilkinson Barker Knauer, LLP, to David K. Rehr, Pres., NAB at 7-9, transmitted by Letter from Larry Walke, Assoc. Gen. Counsel, Legal & Reg. Affairs, NAB, to Marlene H. Dortch, Secretary, FCC (Apr. 6, 2007) ("NAB Apr. 6, 2007 Ex Parte, Solomon Memo"); The Proposed Sirius-XM Merger White Paper, the Carmel Group, to NAB, Att. at 7, transmitted by Letter from Larry Walke, to Marlene H. Dortch, Secretary, FCC (July 3, 2007) ("NAB July 3, 2007 Ex Parte, Carmel White Paper").

[362] Michael Hartleib argues that many of the XM and Sirius radios in service today are capable of receiving "either/or" service and signals via a firmware update to the receivers. Letter from Michael Hartleib, to FCC at 4; *see also* Hartlieb Apr. 22, 2007 Petition at 4.

[363] Letter from Julian L. Shepard, Williams Mullen, Counsel for C3SR, to Marlene H. Dortch, Secretary, FCC at 3-8, transmitted by Letter from Julian L. Shepard, Williams Mullen, Counsel for C3SR, to Jamila Bess Johnson, Med. Bur., FCC (May 27, 2008) ("C3SR May 27, 2008 Ex Parte").

[364] C3SR May 27, 2008 Ex Parte at 1.

[365] *Id.* at 5-6. C3SR states that the documents also show that Applicants **[REDACTED]**. *See id.* at 7.

[366] *Id.* at 7.

[367] Letter from Julian L. Shepard, Williams Mullen, Counsel for C3SR, to Marlene H. Dortch, Secretary, FCC (June 4, 2008) at 2.

from the alleged FCC rule violations,[368] restitution to the public,[369] an order requiring the adoption of a corporate compliance plan,[370] and divestiture of one of the existing satellite systems.[371]

119. Applicants respond that they have fully complied with the Commission's interoperability requirement and that the documents cited by C3SR simply reflect the substantial efforts that Applicants have taken in developing an interoperable receiver.[372] They acknowledge building and developing a prototype of an interoperable receiver through a Joint Development Agreement, but have not taken the ultimate step of bringing such an interoperable radio to market.[373] Applicants deny that interoperable receivers designed under the Joint Development Agreement could be sold at **[REDACTED]** since the cost cited in the documents cited by C3SR included **[REDACTED]**.[374] Applicants state that the cost did not include **[REDACTED]**, and that existing receivers sold by Applicants are available at prices significantly less than **[REDACTED]**.[375] Applicants also state that the documents cited by C3SR reflect only the aspirations of one person who was directed to develop interoperable technology – not to evaluate the distribution or sale of interoperable radios – and that the views did not represent the views of

[368] *Id.* at 2-3. C3SR argues that the merged entity should be required to disgorge profits accrued as a result of **[REDACTED]** including treble damages for such actions. C3SR estimates the penalties would be in excess of $250,000,000. *Id.* at 3.

[369] *Id.* at 2-4. C3SR requests that the merged entity should be required to reimburse the public for the misconduct C3SR alleges, in the form of a monetary restitution (including interest) to the Federal treasury to compensate for the loss of spectrum auction revenue value resulting from the lack of interoperable radios in the market. C3SR argues that the auction revenues received by the Federal government as a result of the SDARS auction were lower than they would have been had the spectrum been auctioned without the interoperability requirement. *Id.* at 2-3. C3SR estimates the difference in value of approximately $267 million, and argues this amount should be required as payment from the merged entity, along with eleven years of interest on this sum. *Id.* at 4. C3SR further argues that the merged entity should be required to compensate consumers directly by providing all subscribers with a new interoperable radio device, "with comparable quality and features to replace each non-interoperable satellite radio purchased in commerce," at no charge, and to provide interoperable replacement units or refunds to consumers who purchased more than one non-interoperable receiver. *Id.*

[370] *Id.* at 2-3. C3SR argues that the merged entity should be required to adopt a compliance plan within 30 days of consummation requiring the merged entity to ensure truthfulness and accuracy in future communications with the FCC and permanently dismissing all officers, directors, and employees of Applicants who participated in, knew of, or conspired concerning the alleged violations of the FCC rules.

[371] *Id.* at 4-5. C3SR requests that the merged entity be required to divest itself of one of the two satellite licenses in order to "restore full competition to the SDARS market." *Id.* at 4. C3SR further states that as part of the divestiture, the merged entity should be required to cease exclusive agreements with programmers, retailers, and manufacturers, adhere to temporary restrictions on price increases and advertising limits, and abide by new program access requirements to be developed and adopted by the Commission in order to permit a new SDARS competitor with programming to be competitive with the merged entity in the short term. *Id.* at 4-5.

[372] Letter from Robert L. Pettit, Counsel for Sirius, and Gary M. Epstein, Counsel for XM, to Marlene H. Dortch, Secretary, FCC, transmitted by Letter from Jennifer D. Hindin, Wiley Rein LLP, to Marlene H. Dortch, Secretary, FCC (June 6, 2008) ("Applicants' June 6, 2008 Ex Parte").

[373] *Id*. at 3.

[374] *Id.* at 6.

[375] *Id.* (stating that a Sirius satellite radio is available nationwide for approximately $29, and that the most expensive comparable Sirius and XM radios cost less than $170).

Applicants.[376] Furthermore, Applicants claim that C3SR's pleading is procedurally and substantively deficient and should be dismissed.[377]

120. We conclude that Section 25.144(a)(3)(ii) requires Applicants to make an interoperable receiver commercially available. As stated above, the rule requires each applicant to "[c]ertify 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."[378] The rule's reference to "a receiver that will permit end users to access all licensed satellite DARS systems" also indicates that consumer availability is required,[379] as end users cannot use a receiver that is not commercially available. The Bureau's references in 1997 to Sirius's expressed "commitment to work with all interested parties to insure that the SDARS receivers will permit customers to access both systems,"[380] and in 2005 to the need for Sirius and XM to identify "a clear timeframe for making such an interoperable receiver available to the public,"[381] also support this interpretation. The 1997 condition that "final user receiver design" be interoperable[382] merely reflects the recognition that Sirius and XM still were designing receivers at the time: the Bureau did not intend (nor did it have authority) to modify the rule to require only the design of an interoperable receiver.[383]

121. Notwithstanding the rule's express language requiring that end users have access to receivers that can access all licensed satellite DARS systems, we do not believe that Applicants' interpretation of the receiver interoperability mandate as a design requirement was unreasonable, under the circumstances. As indicated above, Applicants do not manufacture or distribute SDARS receivers, and the 1997 condition requires that "final user receiver design" be interoperable. Further, the Commission did not explicitly require them to assure consumer availability of an interoperable receiver or require that all SDARS receivers sold in interstate commerce be interoperable. Moreover, the Commission never specified a deadline for compliance.

122. Based on our examination of the record, we are also not persuaded that C3SR's filing raises a substantial and material question of fact that requires a hearing before the Commission can make

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[376] *Id.* at 5, 7. Applicants also provide an affidavit from the author of the documents cited by C3SR which states that the documents "did not, and were not intended to, reflect the business judgment of Sirius or XM, and they were never endorsed or otherwise adopted by Sirius or XM." *Id.*, Decl. of Michael DeLuca at ¶ 2.

[377] Specifically, Applicants claim that C3SR's pleading was a *de facto* petition to deny that was not filed within the requisite 30-day period after public notice of acceptance of Applicants' merger applications. Applicants' June 6, 2008 Ex Parte at 8-9. Applicants also assert that the filing is substantively deficient because it does not contain a showing supported by affidavit by a person with personal knowledge, but instead relies on "speculative statements and surmised interpretation." *Id*. at 9-10 (citing 47 U.S.C. § 309(d)(1)).

[378] 47 C.F.R. § 25.144(a)(3)(ii).

[379] *1997 SDARS Service Rules Order*, 12 FCC Rcd at 5797 ¶ 106 ("[A]t the very least, consumers should be able to access the services from all licensed satellite DARS systems and our rule on receiver inter-operability accomplishes this.").

[380] *1997 Sirius Authorization Order*, 13 FCC Rcd at 7990 ¶ 42.

[381] *2005 XM Authorization Order*, 20 FCC Rcd at 1625 ¶ 12.

[382] *1997 XM Authorization Order*, 13 FCC Rcd at 8851 ¶ 54; *1997 Sirius Authorization Order*, 13 FCC Rcd at 7995 ¶ 57.

[383] *See 1997 Sirius Authorization Order*, 13 FCC Rcd at 7990 ¶ 42.

the required public interest determination in this proceeding.[384] First, neither the references to **[REDACTED]** nor the information that the documents reveal as to the joint venture company's activities reflect a lack of candor.[385] Contrary to C3SR's argument, the requirement that Applicants make an interoperable receiver commercially available was not "unambiguous," as the above analysis indicates, and the general language of the joint venture agreement does not cast significant doubt on Applicants' contention as to how they interpreted that requirement.[386] In addition, we perceive no discrepancy between the representations in Applicants' March 14, 2005 letter to the Commission concerning the status of their joint venture activities and later documents cited by C3SR, a presentation to the joint venture board and several "white papers" discussing potential means of distributing interoperable receivers.[387] As C3SR acknowledges, there is a time lag between the documents, and in any event we are not persuaded that Applicants had a duty under Section 1.65 of the Commission's rules to disclose an internal presentation or "white papers" prepared by the joint venture that did not reflect the companies' actual business plans or conclusions.[388]

123. C3SR urges the Commission to bring the documents in question to the attention the Department of Justice, the antitrust enforcement authority, arguing that they warrant antitrust investigation under Section 1 of the Sherman Act.[389] **[REDACTED]** Further, we are not persuaded that the documents cited by C3SR otherwise provide sufficient support for their allegations. The documents reflect **[REDACTED]**.[390] These estimates do not reflect that Applicants could have made an interoperable receiver available to the mass market, without any subsidy, at a cost comparable to that of commercially available Sirius and XM receivers. As Applicants point out, **[REDACTED]**.[391] C3SR also maintains that the documents reflect **[REDACTED]** does not contradict Applicants' representations that the mass market availability of interoperable radios depends in large part on factors outside of their control.[392] Finally, although C3SR characterizes Applicants' decisions not to make an interoperable receiver commercially available in 2006 and 2007 as improper, the documents are consistent with Applicants' rationale in the Merger Application that making an interoperable receiver commercially available would not make economic sense for them.[393] **[REDACTED]**; there is no evidence that

[384] *See Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998). In light of our conclusion here, we need not address Applicants' claims that C3SR's pleading is procedurally deficient and should be dismissed.

[385] C3SR May 27, 2008 Ex Parte at 4-6 (citing Sirius Nov. 16, 2007 Response to Information and Document Request I.B. at SIRIUS-FCC-I.B.003104; Sirius Apr. 10, 2008 Response to Information Request at SIRIUS-FCC-SUPP.001051-001052, 001060-001061, 001087).

[386] *See* Sirius Nov. 16, 2007 Response to Information and Document Request I.B. at SIRIUS-FCC-I.B.003104-003139.

[387] *See* C3SR May 27, 2008 Ex Parte at 4, n.16, Exh. 3, XM/Sirius Mar. 14, 2005 Letter; *see also* Sirius Apr. 10, 2008 Response to Information Request, SIRIUS-FCC-SUPP.001048-001090.

[388] C3SR May 27, 2008 Ex Parte at 5; 47 C.F.R. § 1.65.

[389] C3SR May 27, 2008 Ex Parte at 3.

[390] Sirius Apr. 10, 2008 Response to Information Request at SIRIUS-FCC-SUPP.001061-001071; SIRIUS-FCC-SUPP.001078-001080.

[391] Applicants' June 6, 2008 Ex Parte at 6-7.

[392] Sirius Apr. 10, 2008 Response to Information Request at SIRIUS-FCC-SUPP.001060-001070; 001084-001089.

[393] Application at 15-16; Joint Opposition at 21-22.

Applicants ever had a business plan for mass market deployment.[394] **[REDACTED]**[395] Under the circumstances, there is not a substantial question of fact as to whether the companies' decisions not to go forward, in order to avoid creating the perception of such a change, were improper.

124. Applicants have voluntarily committed that the combined entity will offer for sale an interoperable receiver in the retail aftermarket within nine months of the consummation of the merger.[396] As a result, subscribers who already have purchased non-interoperable receivers will be able to transition to a receiver that has the ability to receive either of the complete programming offerings that the merged entity will offer without having to purchase two separate receivers. In light of this voluntary commitment, we dismiss a complaint filed by Michael Hartleib that seeks enforcement of the interoperability mandate.[397] We conclude that Applicants' voluntary commitment to establish a deadline to ensure the commercial availability of an interoperable receiver will enable and expedite realization of the full benefits of the merger, such as more efficient use of the SDARS spectrum.[398] We also find this commitment satisfies the request of commenters that commercial deployment of interoperable receivers by the merged entity be prompt and subject to a stringent timeline.[399]

125. We believe that the merged entity will adhere to this voluntary interoperability commitment and bring its system into compliance with the Commission's interoperability rule, despite commenters' views to the contrary.[400] Applicants' voluntary interoperability commitment is clear in its scope and deadline for implementation, which should remove any uncertainty as to what is necessary for compliance.[401] We decline to impose the additional receiver filtering requirements advocated by NextWave Wireless ("NextWave").[402] We observe that the Commission previously has declined to adopt SDARS receiver standards.[403] Furthermore, the issue underlying NextWave's proposal (that is, the potential for interference between SDARS licensees and adjacent terrestrial wireless services) is the subject of a pending rulemaking proceeding, and any filtering obligations are best addressed in the

[394] Sirius Apr. 10, 2008 Response to Information Request at SIRIUS-FCC-SUPP.001061-001072.

[395] *Id*. at SIRIUS-FCC-SUPP.001060, 001088.

[396] Applicants' July 25, 2008 Ex Parte at 2. Applicants also voluntarily commit to make available, immediately after the merger, the design and the specifications for an interoperable radio available for license to equipment manufacturers. *Id*.

[397] Michael Hartleib states that if the Commission does not approve the merger, then the Commission must enforce the interoperability mandate. Michael Hartleib July 5, 2007 Petition for Declaratory Ruling at 5.

[398] *See* Section V.B.3, *supra*.

[399] *See* Tenn. Att'y Gen. July 3, 2008 Ex Parte at 3.

[400] NAB Apr. 6, 2007 Ex Parte, Solomon Memo at 7-9; NAB July 3, 2007 Ex Parte, Carmel White Paper at 7; NABOB Petition at 13-14; Letter from Lawrence R. Sidman, Paul Hastings, Counsel for Clear Channel, to Kevin J. Martin, Chairman, FCC (July 18, 2008) at 1-2 (proposing that the Commission require applicants to separately maintain and operate assets and businesses until remedial actions are complete and that it reserve the right for the Commission to appoint a third party to oversee compliance with the interoperability requirement).

[401] Although Applicants previously argued that interoperability has no relevance to the merger and should be addressed through traditional enforcement procedures, see Joint Opposition at 98-99 (citing *Adelphia Order*, 21 FCC Rcd at 8306 ¶ 240*; SBC-Ameritech Order*, 14 FCC Rcd at 14950 ¶ 571), we note that the precedents that they cite are distinguishable because SDARS receiver interoperability presently is not the subject of another proceeding before the Commission, and the issue relates entirely to the parties before the Commission in the merger proceeding.

[402] Letter from Jennifer M. McCarthy, Vice Pres., Reg. Affairs, NextWave, to Marlene H. Dortch, Secretary, FCC (June 18, 2008) ("NextWave June 18, 2008 Ex Parte").

[403] *1997 SDARS Service Rules Order*, 12 FCC Rcd at 5795 ¶ 102.

context of that proceeding.[404]

4. Open Access

126. As discussed in more detail in Section IV.B.2., USE proposes, as a condition to the merger, that the merged entity provide open access of the technical specifications of its devices and network so that receiver manufacturers may choose the receivers they develop for consumers.[405] USE claims that this condition will prevent a potential vertical monopoly in the manufacturing and distribution of satellite receivers and the merged entity from increasing the cost of equipment paid by consumers.[406] MAP and other commenters support USE's request.[407] Senator Christopher S. Bond and U.S. Representatives John Dingell and Edward Markey also support a condition that would allow any device manufacturer to develop SDARS equipment.[408] They support a condition that would allow device manufacturers to incorporate additional technology in receivers such as HD Radio technology, iPod ports, and Internet connectivity, so long as the technology would not harm the merged entity's network.[409] Finally, Reps. Dingell and Markey propose that the Commission bar the merged entity from entering into exclusive contracts that would, for example, prohibit the inclusion of HD Radio chips or iPod compatibility in satellite radio receivers.[410]

127. iBiquity Digital Corp. ("iBiquity")[411] requests that we condition the merger on mandating that the merged entity require manufacturers to include HD Radio™ technology for digital AM and FM radio in all satellite receivers containing analog AM or FM radio technology.[412] Other commenters

[404] *See Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band; Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 22123 (2007) (*"2007 SDARS Second Further Notice"*).

[405] *See* USE Reply at 8.

[406] USE Jan. 15, 2008 Ex Parte at 1.

[407] Letters from Parul P. Desai & Andrew Jay Schwartzman, MAP, and Michael Calabrese, New America Foundation, to Marlene H. Dortch, Secretary, FCC (Jan. 29, 2008, Feb. 27, 2008, Mar. 4, 2008, and Mar. 24, 2008); Letters from Gigi B. Sohn, President, Public Knowledge, to Marlene H. Dortch, Secretary, FCC (Mar. 4, 2008 and May 20, 2008); Letter from Alex Nogales, President and CEO, National Hispanic Media Coalition, to Marlene H. Dortch, Secretary, FCC (May 8, 2008) at 1; Letter from State Att'y Gens. Robert McKenna (Washington) and Richard Blumenthal (Connecticut), to Marlene H. Dortch, Secretary, FCC (May 8, 2008) at 1 ("Att'y Gens. May 8, 2008 Ex Parte").

[408] Letter from U.S. Reps. John D. Dingell and Edward J. Markey, to Kevin J. Martin, Chairman, FCC (May 1, 2008) at 2 ("Reps. Dingell and Markey May 1, 2008 Ex Parte"); Letter from U.S. Sen. Christopher S. Bond, to Kevin J. Martin, Chairman, FCC (June 4, 2008) at 1 ("Sen. Bond June 4, 2008 Ex Parte").

[409] Reps. Dingell and Markey May 1, 2008 Ex Parte at 2; Sen. Bond June 4, 2008 Ex Parte at 1.

[410] Reps. Dingell and Markey May 1, 2008 Ex Parte at 2.

[411] iBiquity is the "developer and licenser of HD Radio technology, which is transforming AM and FM broadcasting with vastly increased number of channels, drastically improved sound quality and an array of new data services." iBiquity, http://www.ibiquity.com/index.php. We note that in 2002, the Commission formally selected IBOC technology developed by iBiquity as the technical format that will permit AM and FM radio broadcasters to introduce digital operations efficiently and rapidly. *See Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, First Report and Order, 17 FCC Rcd 19990, 19990 ¶ 1 (2002) ("*DAB First Report*").

[412] Letter from Robert A. Mazer, Vinson & Elkins, Counsel for iBiquity, to Marlene H. Dortch, Secretary, FCC at 1 (May 1, 2008) ("iBiquity May 1, 2008 Ex Parte").

support the HD Radio condition.[413] iBiquity argues that HD Radio compatibility is necessary because post merger, the merged entity will be in a stronger position to restrict iBiquity's sale of HD Radio receivers and because it will have more cash to fund subsidies and incentives that could prevent the growth of the HD Radio technology.[414] For original equipment manufacture ("OEM") receivers, iBiquity proposes that the condition become effective within three years, and for all other satellite receivers, within one year.[415] Applicants object to iBiquity's proposed condition as an unnecessary intrusion on their business plans. In addition, Applicants argue that it will harm satellite radio's ability to compete in the audio entertainment market.[416] Pioneer also opposes iBiquity's proposal, explaining that it would "limit

[413] Sens. Kerry, Cardin, and McCaskill June 27, 2008 Ex Parte; Letter from U.S. Reps. Betty McCollum, Collin Peterson, Timothy Walz, James Oberstar, and Keith Ellison, to Kevin J. Martin, Chairman, FCC (June 27, 2008) ("Reps. McCollum, Peterson, Walz, Obertar, and Ellison June 27, 2008 Ex Parte"); Att'y Gens. May 8, 2008 Ex Parte at 2; Rep. Markey July 15, 2008 Ex Parte at 1-2; Letter from U.S. Sen. Ted Stevens, to Kevin J. Martin, Chairman, FCC (July 15, 2008); Letter from U.S. Rep. Baron P. Hill, to Kevin J. Martin, Chairman, FCC (July 21, 2008); NPR Petition at 20-21. NPR suggests that the condition could encourage HD Radio deployment and consumer access to the technology, and may mitigate the merged entity's ability to increase prices or reduce the quality of service. *Id*. New ICO Satellite Services G.P. ("ICO"), the developer of an advanced hybrid service capable of providing wireless voice, data, video, and Internet services on mobile and portable devices, also requests that the Commission impose a condition prohibiting the merged entity from entering into exclusive agreements with automobile manufacturers that "have the effect of limiting the ability of other entities to provide competitive products or services." New ICO Comments at 2. Similarly, Slacker, Inc., which is developing a nationwide personal audio service, also requests that the Commission prohibit all current or future exclusive contracts between SDARS and car manufacturers. Slacker Comments at 3. As discussed herein, Applicants have agreed to not take any action that would prevent the inclusion of other audio technology in SDARS receivers, which resolves New ICO's and Slacker's concerns. Slacker also requests that the Commission prohibit car manufacturers from sitting on the board of directors of the merged entity. *Id*. We believe that Applicants' voluntary commitments resolve Slacker's primary concerns, and thus, we do not find it necessary to regulate the selection of board members for the merged entity.

[414] Letter from Robert A. Mazer, Vinson & Elkins, Counsel for iBiquity, to Marlene H. Dortch, Secretary, FCC (Dec. 20, 2007) at 1; Letter from Robert A. Mazer, Vinson & Elkins, Counsel for iBiquity, to Marlene H. Dortch, Secretary, FCC (Mar. 20, 2008) at 1; Letter from Robert A. Mazer, Vinson & Elkins, Counsel for iBiquity, to Marlene H. Dortch, Secretary, FCC (June 9, 2008) at 2. The HD Digital Radio Alliance agrees, explaining that the availability of HD Radio as a factory installed or factory authorized option in automobiles and other vehicles is very limited. Letter from Charles E. Biggio, Wilson Sonsini Goodrich & Rosati, Counsel for the HD Radio Alliance, to Marlene H. Dortch, Secretary, FCC (Jan. 24, 2008) at 2.

[415] iBiquity May 1, 2008 Ex Parte at 1. iBiquity also requests that the Commission require the merged entity to annually certify its compliance with the condition. *Id*. Earlier in this proceeding, iBiquity also proposed that the Commission require the merged entity to terminate all exclusive arrangements and, prospectively, that the Commission prohibit exclusive arrangements with suppliers, retailers, and vehicle manufacturers that could preclude the inclusion of HD Radio technology. Letter from Robert A. Mazer, Vinson & Elkins, Counsel for iBiquity, to Marlene H. Dortch, Secretary, FCC at 2 (Dec. 20, 2007) ("iBiquity Dec. 20, 2007 Ex Parte"). iBiquity reconsidered its position, however, stating that it does not believe that simply banning exclusive arrangements would ensure HD Radio technology would be included in SDARS receivers or would provide for a competitive landscape for terrestrial and satellite radio services. iBiquity May 1, 2008 Ex Parte at 2; iBiquity Jun. 9, 2008 Ex Parte at 1. iBiquity explains that its concern is focused not on formal contractual arrangements, but on existing business arrangements favoring satellite companies. *Id*. iBiquity argues that the merged entity "would have greater leverage to use these business relationships to disadvantage terrestrial digital radio." iBiquity May 1, 2008 Ex Parte at 2. iBiquity also does not support USE's open device proposal, arguing that it would not effectively ensure the distribution of HD Radio receivers to create a level playing field. Letter from Robert A. Mazer, Vinson & Elkins, Counsel for iBiquity, to Marlene H. Dortch, Secretary, FCC at 1 (June 6, 2008); iBiquity June. 9, 2008 Ex Parte at 1, 2.

[416] Joint Opposition at 101, n.358.

the breadth of radio product offerings to consumers, limit which radio component suppliers' products be designed into radios, have the effect of decreasing AM/FM tuning performance, unnecessarily increase costs to consumers uninterested in HD Radio and interfere with the useful and healthy free market mechanisms extant in radio electronics purchases."[417] Pioneer also argues that iBiquity's proposed phase-in periods do not provide sufficient time for typical design cycles for either retail or OEM receivers. Pioneer states that design cycles for retail equipment last from 18 to 24 months and OEM design cycles last significantly longer than the three years suggested by iBiquity.[418]

128. In response to the concerns raised by commenters, Applicants have voluntarily committed to comply with certain open access conditions.[419] First, the merged entity, immediately after consummation of the merger, will permit any device manufacturer to develop equipment that can deliver the combined entity's satellite radio service. Device manufacturers also must be permitted to incorporate in satellite radio receivers any other technology that would not result in harmful interference with the merged entity's network, including HD Radio technology, iPod ports, Internet connectivity, or other technology. This principle of openness would serve to promote competition, protect consumers, and spur technological innovation. In addition, we believe that it is not enough simply to require the open development of satellite radio devices. To ensure that consumers have unfettered access to these devices, we will prohibit the merged entity from preventing such devices, and any features such devices might contain, from reaching consumers, through exclusive contracts or otherwise. We find that it would be contrary to the public interest, for example, to permit the merged entity to bar HD Radio chips or iPod compatibility from inclusion in a manufacturer's satellite radio device, whether that device is freestanding or installed in an automobile. Applicants shall provide, on commercially reasonable terms, the intellectual property to permit any device manufacturer to develop equipment that can deliver the merged entity's satellite radio service. The encryption, conditional access, and security technology is embedded in chip sets that can be purchased from third party manufacturers.

129. We conclude that Applicants' voluntary commitments and other conditions address many of the commenters' concerns.[420] As we discussed in Section IV.B.2., the merger may provide the merged

[417] Letter from Adam Goldberg, Vice President, Gov. and Indus. Affairs, Pioneer North America, Inc., to Marlene H. Dortch, Secretary, FCC (May 28, 2008); *See also* Letter from Adam Goldberg, Vice Pres., Gov. and Indus. Affairs, Pioneer North America, Inc., to Marlene H. Dortch, Secretary, FCC at 2 (June 6, 2008) ("Pioneer Jun. 6, 2008 Ex Parte").

[418] Pioneer Jun. 6, 2008 Ex Parte at 1; *see also* Letter from Richard M. Lee, Exec. Dir., Satellite Radio Servs., General Motors Corp. and David W. Danzer, Grp. Vice Pres., Strategic and Product Planning, Toyota Motor Sales, USA, Inc., to Marlene H. Dortch, Secretary, FCC (July 10, 2008) at 1-2 (opposing an HD Radio mandate because no agreements between XM and the automobile manufacturers currently prohibit their ability to offer HD Radio and any mandate to do so would distort the normal incentives to cost reduce and improve the HD Radio product).

[419] Applicants' June 13, 2008 Ex Parte at 3; Applicants' July 25, 2008 Ex Parte at 2,3.

[420] *See* Letter from Donald W. Riegle, Jr., Chairman, Gov't Relations, APCO Worldwide, to Kevin J. Martin, Chairman; Michael Copps, Commissioner; Jonathan Adelstein, Commissioner; Deborah Tate, Commissioner; and Robert McDowell, Commissioner, FCC (June 19, 2008); Letter from Charles H. Helein, Helein & Marashlian, LLC, Counsel for USE, to Marlene H. Dortch, Secretary, FCC (June 25, 2005). APCO and USE claim that Applicants' open access voluntary commitments are inadequate to promote competition or to spur technological innovation. For instance, they object to the right of the merged entity to require licensees to comply with its technical and quality assurance standards and tests, claiming that such in-house test will allow the merged entity to pick and choose among manufacturers based on its own standards, without oversight. APCO and USE ask that the Commission impose an open access condition immediately following approval of the merger, require independent certification testing and monitoring of compliance, prohibit the merged entity from setting prices for receivers, and prohibit it from manufacturing, selling, leasing, or distributing receivers; *see also* Sens. Kerry, Cardin, and McCaskill June 27, 2008 Ex Parte at 2 (seeking enforcement of the open access commitment); Letter from Gigi B. Sohn, President, (continued….)

entity with the ability and incentive to contract with fewer manufacturers to save on subsidies or other development and distribution costs. Such action would potentially reduce consumer choice for SDARS receivers and diminish current features or future innovations. Pursuant to Applicants' voluntary commitment, the merged entity will offer additional entities the option to license the intellectual property rights necessary to design and develop SDARS equipment. In addition to bringing more choices of receivers directly to consumers, this voluntary commitment may allow additional parties to directly negotiate with automobile makers, ultimately to the benefit of consumers. Given Applicants' open access voluntary commitment to allow additional parties to develop and design SDARS equipment and not to bar the inclusion of audio technology, including HD Radio technology, we conclude that discrimination by the merged entity is not likely to cause a public interest harm that warrants the imposition of additional conditions.

130. Though we are unpersuaded a case has been presented on this record of a merger-specific harm to HD Radio not remedied by the voluntary commitments and other conditions, we do believe important questions have been raised that warrant further examination in a separate proceeding. To this end, the Commission commits to initiating a notice of inquiry within 30 days from the adoption date of this Order to gather more information on issues including, but not limited to:

- Whether HD Radio chips or any other audio technology should be included in all satellite radio receivers;
- Whether satellite radio capability or any other audio technology should be included in all HD Radio receivers;
- The cost to auto manufacturers of including HD Radio chips;
- The cost to radio manufacturers of including HD Radio chips;
- Consumer demand for HD radio;
- The amount and type of programming available on HD Radio today, and that projected to be available over the next 3 years; and
- Whether the FCC has jurisdiction to mandate inclusion of HD Radio, satellite radio, or other audio technology.

While we do not adopt iBiquity's proposed condition in this Order, we note that our actions today do not diminish our commitment to the HD Radio technology. We continue to believe that HD Radio is an important technological development that enables terrestrial radio stations to deliver better audio fidelity, more robust transmission systems, and the possibility of new auxiliary services.[421]

5. Third-Party Access to SDARS Capacity

131. *Overview*. Several commenters propose that the merger be conditioned on Applicants leasing a certain amount of their channel capacity to non-affiliated programmers.[422] The proposals

(Continued from previous page)
Public Knowledge, to Marlene H. Dortch, Secretary, FCC (July 15, 2008) at 1 (seeking a 60-day time period for Applicants to comply with voluntary commitments, running from approval of the Application); Letter from Robert A. Mazer, Vinson & Elkins, Counsel for iBiquity, to Marlene H. Dortch, Secretary, FCC (July 25, 2008). We find that Applicants' voluntary commitments address our concerns.

[421] *See DAB First Report,* 17 FCC Rcd at 19991 ¶ 3. Throughout the proceeding, the Commission articulated its objective "to foster the development of a vibrant terrestrial digital radio service for the public and to ensure that radio stations successfully implement DAB." *DAB Second Report*, 22 FCC Rcd at 10346 ¶ 2. *See* Letter from Anne Lucey, Sen. Vice Pres. for Reg. Policy, CBS Corp., to Marlene H. Dortch, Secretary, FCC (July 24, 2008) (urging the Commission to initiate a rulemaking on access to HD Radio technology).

[422] *See* Prometheus Comments at 5; Letter from Parul Desai, Media Access Project, Counsel for Prometheus, to Marlene H. Dortch, Secretary, FCC (Mar. 27, 2008) at 1 ("Prometheus Mar. 27, 2008 Ex Parte); TAP Petition at 7; (continued….)

advanced by the commenters include two related, but functionally distinct, mechanisms for permitting third parties to access to the SDARS system. Some commenters recommend adopting a mechanism similar to the Commission's cable leased access regulations,[423] while others propose a system akin to the Open Video System ("OVS") whereby a certain percentage of the total system capacity would be leased on a long-term basis to a third party. Although Applicants have asserted that such conditions are unnecessary,[424] they have voluntarily committed to enter into long-term leases with one or more third parties for use of a percentage of the combined entity's capacity.[425] We find that Applicants' voluntary commitment to provide such leases directly serves the public interest and will further the Commission's goals of fostering competition and diversity on the SDARS platform.

132. *Leased Capacity to Single Entity*. Georgetown Partners, LLC ("Georgetown") proposes a long-term capacity leasing mechanism somewhat similar in function to the Commission's rules governing Open Video Systems in the multichannel video programming distribution ("MVPD") context.[426] Georgetown proposes that the Commission condition the grant of the merger on Applicants leasing "at least 20 percent of the merged entities' total licensed bandwidth capacity, as measured in megahertz, … on an exclusive basis to an entity that is totally independent of and unaffiliated with Sirius or XM."[427] Such a condition, Georgetown argues, would provide alternative access to satellite radio and counteract the merged entity's monopoly over the SDARS service.[428] Georgetown would require that the lease be consummated before the merger closes, would require the lease term to be coterminous with Applicants' FCC licenses, and would require certain other conditions to ensure the quality of the lessee's service on Applicants' system.[429] The proposed service would compete with that of Applicants by offering advertising-supported programming available to any consumer with a satellite radio receiver at no cost, regardless of whether the listener is a subscriber to Applicants' service.[430] The terms of the lease, under Georgetown's plan, would be privately negotiated between Applicants and the lessee and would be

(Continued from previous page)
Entravision Comments at 22; Letter from Chester C. Davenport, Managing Dir., Georgetown, to Marlene H. Dortch, Secretary, FCC (Oct. 18, 2007) at 3-5 ("Georgetown Oct. 18, 2007 Ex Parte"); Letter from David R. Siddall, Paul Hastings, Counsel for Georgetown, to Kevin J. Martin, Chairman; Michael Copps, Commissioner; Jonathan Adelstein, Commissioner; Deborah Tate, Commissioner; and Robert McDowell, Commissioner, FCC (Nov. 20, 2007) at 6-7 ("Georgetown Nov. 20, 2007 Ex Parte").

[423] *See* 47 C.F.R. §§ 76.970-977; *see also* Communications Act, § 612 (47 U.S.C. § 532).

[424] Letter from Robert L. Pettit, Wiley Rein LLP, Counsel for Sirius, to Kevin J. Martin, Chairman; Michael Copps, Commissioner; Jonathan Adelstein, Commissioner; Deborah Tate, Commissioner; and Robert McDowell, Commissioner, FCC (Nov. 13, 2007), Att. Joint Ex Parte Submission at 11-13 ("Applicants' Nov. 13, 2007 Ex Parte"); Joint Opposition at 100.

[425] Applicants' June 13, 2008 Ex Parte at 3.

[426] *See* 47 C.F.R. § 76.1500, *et. seq*. Under the Commission's rules, OVS operators are required to open access to a percentage of the system capacity for use by non-affiliated third parties for competing OVS services. 47 C.F.R. § 76.1503.

[427] Letter from David R. Siddall, Paul Hastings and Andrew G. Berg, Sonnenschein Nath & Rosenthal, LLP, Counsel for Georgetown, to Marlene H. Dortch, Secretary, FCC (Mar. 17, 2008) at 2 ("Georgetown Mar. 17, 2008 Ex Parte"); *see also* Letter from David R. Siddall, Sonnenschein Nath & Rosenthal LLP, Counsel for Georgetown Partners, to Marlene H. Dortch, Secretary, FCC (July 10, 2008) (claiming that Sirius' allocation of capacity to the Backseat TV service demonstrates that the merged firm could allocate 20 percent of its capacity for this purpose) ("Georgetown July 10, 2008 Ex Parte"); *see also* n.499, *infra*.

[428] Georgetown Mar. 17, 2008 Ex Parte at 3.

[429] *Id*. at 2.

[430] *Id*.

submitted to the DOJ and the Commission for approval.[431] Finally, should it be the lessee, Georgetown commits to complying with the "Commission's indecency provisions as applied to broadcasters."[432] Other commenters filed in support of a third-party leased access condition.[433]

133. *Leased Access Model*. Prometheus and Entravision each propose that the Commission apply a leased access regime patterned after the system used in cable television. Prometheus does not provide specific mechanisms for implementing leased access, but rather advocates generally that Applicants be required to "provide a reasonable amount of capacity at true market rates for commercial programming, over which [Applicants] would not exercise any editorial control."[434] Such a system would "offer to those who feel that satellite service is the preferred programming platform an opportunity to make use of it."[435] Applicants originally opposed the third-party leased access proposals advanced by Prometheus and Entravision and argued that they are counter to the public interest.[436]

134. *Discussion*. Though Applicants originally opposed the third-party access proposals described above, Applicants submitted a voluntary commitment to enter into long-term leases or other agreements to provide a Qualified Entity[437] or Entities rights to 4 percent of the full-time audio channels on the Sirius platform and on the XM platform, respectively (which currently represents six channels on the Sirius platform and six channels on the XM platform), and to enter into such leases within four

[431] *Id*. at 2-3. We note that its request for DOJ approval of leases is moot considering that the DOJ closed its investigation of the transaction without further action. *See* Mar. 24, 2008 DOJ Press Release.

[432] Georgetown Mar. 17, 2008 Ex Parte at 2. Georgetown has also agreed to facilitate the distribution of additional leased channel capacity dedicated to non-commercial and educational use, as advanced by MAP and Public Knowledge. Letter from Chester Davenport, Managing Dir., Georgetown, to Kevin J. Martin, Chairman, FCC (May 13, 2008) at 1-2 ("Georgetown May 13, 2008 Ex Parte"); *see also* Letter from Andrew J. Schwartzman and Parul Desai, MAP, and Gigi B. Sohn, Public Knowledge (May 14, 2008) (concurring with Georgetown's May 13, 2008 proposal). *See also* Section VI.B.6, *infra*. Georgetown commits to "work with MAP, PK, and other appropriate parties to establish a structure suitable for selection among eligible programmer applicants if more apply than the FCC designated capacity for educational non-commercial channels can accommodate" and, at Georgetown's expense, accept delivery of the non-commercial leased program streams, encode the programming, and deliver it to the merged entity for broadcast. *See* Georgetown May 13, 2008 Ex Parte at 2.

[433] *See* TAP Petition at 7 (stating Applicants "might be required to convey control over some portion of its bandwidth – such as one quarter (6.25 MHz) – and to provide an independent minority competitive provider carriage services."); *see also* Letter from U.S. Rep. Sanford D. Bishop, Jr., to Kevin J. Martin, Chairman, FCC (Nov. 7, 2007) at 1; Letter from U.S. Rep. Edolphus "Ed" Towns, to Kevin J. Martin, Chairman, FCC (May 5, 2008) at 1; Letter from U.S. Rep. Bobby L. Rush, to Kevin J. Martin, Chairman, FCC (May 6, 2008) at 1; Letter from State Att'y Gens. Douglas F. Gansler (Maryland), Richard Blumenthal (Connecticut), Marc Dann (Ohio), and Rob McKenna (Washington), to Kevin J. Martin, Chairman, FCC (Apr. 24, 2008) at 2; Letter from U.S. Rep. G. K. Butterfield, to Kevin J. Martin, Chairman, FCC (Apr. 15, 2008) at 1; Letter from U.S. Reps. Albert R. Wynn, Lacy Clay, G.K. Butterfield, Elijah Cummings, Bennie Thompson, and David Scott, to Kevin J. Martin, Chairman, FCC (Nov. 9, 2007) at 1-2; Letter from U.S. Rep. Corinne Brown, to Kevin J. Martin, Chairman, FCC (Nov. 9, 2007) at 1; Letter from U.S. Rep. Gregory W. Meeks, to Kevin J. Martin, Chairman, FCC (May 19, 2008) at 1.

[434] Prometheus Comments at 5. Prometheus also states its preference to lease channels on a per channel basis, where the combined entity would hold an auction to allocate the channels, and that the FCC separately license the leasees and treat the service as a broadcast service. Prometheus Mar. 27, 2008 Ex Parte at 1.

[435] Entravision Comments at 22.

[436] Joint Opposition at 100.

[437] A "Qualified Entity" includes any entity that is majority-owned by persons who are African American, not of Hispanic origin; Asian or Pacific Islanders; American Indians or Alaskan Natives; or Hispanics.

months of the consummation of the merger.[438] Applicants further voluntarily commit that, as digital compression technology enables the combined company to broadcast additional full-time audio channels, the combined company will ensure that 4 percent of full-time audio channels on the Sirius platform and the XM platform are reserved for a Qualified Entity or Entities, provided that in no event will the combined company reserve fewer than six channels on the Sirius platform and six channels on the XM platform.[439] The Qualified Entity or Entities will not be required to make any lease payments for such channels, and the combined company will not be involved in the selection of the Qualified Entity or Entities.[440] The combined company will have no editorial control over these channels.[441]

135. We find that Applicants' voluntary commitment to provide leased channel capacity to other programmers addresses the concerns voiced by Media Access Project, Public Knowledge, and others who contend that the consolidation of the SDARS service to a single provider will harm programming diversity.[442] We further find that Applicants' voluntary commitment is consistent with the Commission's stated goals to promote diversity as described in the recently adopted Diversity Order, which took steps to promote diversity in the broadcasting context and solicited comment on additional

[438] Applicants' June 13, 2008 Ex Parte at 3.

[439] *Id*.

[440] *Id.*

[441] *Id*.

[442] *See* Letter from Andrew J. Schwartzman, MAP, to Marlene H. Dortch, Secretary, FCC (June 18, 2008) at 1 (stating that MAP and Public Knowledge prefer that an independent party select unaffiliated minority programmers, and that the percent of channels to be set aside should be based on a percentage of channel capacity, and not on a percentage of live channels); Letter from William H. Kling, Pres. and CEO, American Public Media, to Kevin J. Martin, Chairman, FCC (June 20, 2008) at 2 (advocating that Applicants set aside 25 percent of total SDARS spectrum for non-commercial public service channels, minority broadcasters, and emergency services) ("APM June 20, 2008 Ex Parte"); Letter from David R. Siddall, Sonnenschein Nath & Rosenthal LLP, Counsel for Georgetown Partners, to Marlene H. Dortch, Secretary, FCC (June 27, 2008) at 1-2 (stating that Georgetown Partners, Entravision, and TSG Capital Group are not interested in providing programming and facilities with only 4 percent of channels offered for commercial leased access, and that an advertiser-supported service available to all owners of SDARS receivers would be preferred); Sens. Kerry, Cardin, and McCaskill June 27, 2008 Ex Parte at 1-2 (arguing that setting aside 4 percent is inadequate to ensure a viable competitor, and instead suggesting that leasing 20 percent to 50 percent is necessary, along with a transparent and competitive process for the leasing arrangement); Letter from U.S. Sen. Amy Klobuchar, to Kevin J. Martin, Chairman, FCC (June 27, 2008) (urging the Commission to require Applicants to set aside more than 8 percent of channels); Reps. McCollum, Peterson, Walz, Obestar, and Ellison June 27, 2008 Ex Parte at 1 (advocating 25 percent set-aside of total SDARS spectrum for non-commercial public service channels, minority broadcasters, and emergency services); Letter from Gigi B. Sohn, President, Public Knowledge and Andrew Jay Schwartzman, President and CEO, MAP, to Kevin J. Martin, Chairman, FCC (July 10, 2008) at 5 (proposing that the Commission appoint an independent "Monitor Trustee" to oversee enforcement of voluntary commitments); Letter from Albert H. Kramer, Dickstein Shapiro LLP, Counsel for The Word Network, to Marlene H. Dortch, Secretary, FCC (July 11, 2008) at 1 (proposing that Qualified Entities include not-for-profit entities offering programming designed to respond to the minority community) ("The Word Network July 11, 2008 Ex Parte"); Rep. Markey July 15, 2008 Ex Parte at 2 (recommending that the set aside be based on total capacity rather than specifying a set number of channels so that advances in digital capacity and service offerings do not diminish the impact of the set-aside limit); Letter from U.S. Rep. G.K. Butterfield, to Kevin J. Martin, Chairman, FCC (July 21, 2008) (supporting a 15 percent set aside for minority controlled programming); Letter from U.S. Rep. Bennie G. Thompson, to Kevin J. Martin, Chairman, FCC (July 22, 2008); Letter from U.S. Rep. Yvette D. Clarke, to Kevin J. Martin, Chairman, FCC (July 23, 2008); Letter from U.S. Rep. Elijah E. Cummings, to Kevin J. Martin, Chairman, FCC (July 23, 2008).

ways to increase minority involvement in the communications industry.[443] Commenters have raised concerns, however, about the mechanics of the channel lease administration and allocation.[444] We will determine the implementation details for use of these channels at a later date.

6. Reservation of Channels for Noncommercial Educational Use

136. Public Knowledge and Prometheus argue that if the Commission determines that the merger is in the public interest, the merged entity should be required to reserve a percentage of channel capacity for noncommercial educational or informational programming.[445] The commenters suggest that the Commission use the Direct Broadcast Satellite ("DBS") public interest obligations[446] as a model for implementation of the same obligations for SDARS. Applicants have committed to voluntarily make capacity available for this purpose.[447] We find that Applicants' voluntary commitment will help maintain a platform for diverse voices post-merger and, as a result, we find that it serves the public interest.

137. *Proposals by Commenters.* Prometheus and Public Knowledge each propose that the merger, if approved, be subject to a condition that a certain percentage of the merged entity's channel

[443] *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922 (2008).

[444] *See, e.g.*, Sens. Kerry, Cardin, and McCaskill June 27, 2008 Ex Parte at 1-2 (arguing for the creation of a transparent and competitive process for the leasing arrangement); Letter from Andrew J. Schwartzman, MAP, to Marlene H. Dortch, Secretary, FCC (June 18, 2008) at 1 (expressing preference that an independent party select unaffiliated minority programmers); Letter from Gigi B. Sohn, President, Public Knowledge and Andrew Jay Schwartzman, President and CEO, MAP, to Kevin J. Martin, Chairman, FCC (July 10, 2008) at 5 (proposing that the Commission appoint an independent "Monitor Trustee" to oversee enforcement of voluntary commitments); The Word Network July 11, 2008 Ex Parte at 1 (discussing the need for an entity independent of Applicants to administer the allocation of channels for minority programmers); Letter from Jose Luis Rodriguez, CEO, HITN, to Kevin J. Martin, Chairman, FCC (July 11, 2008) (advocating that the minority set-aside be reserved for stations managed and controlled by minority members); Letter from Jeneba Jalloh Ghatt, Counsel to AlphaStar, to Kevin J. Martin, Chairman, FCC (Jul. 16, 2008) at 1 (advocating that an independent entity administer leased capacity); Letter from U.S. Reps. Charles Gonzalez, Hilda Solis, Ed Towns, and Bobby Rush, to Kevin J. Martin, Chairman, FCC (July 18, 2008) (proposing that if a financial institution is selected to oversee leasing commitments, then the Commission should ensure that the entity "has a proven history of and experience with minority lending and business operations," and that it has no financial interest in the selection process. They also urge the Commission to provide potential lessees with adequate time to develop business plans and raise capital and recommend that the Commission prohibit the merged entity from dropping existing minority programming channels in order to allocate channels for new minority-owned channels).

[445] Public Knowledge proposes that the merged entity reserve 5 percent of channel capacity and Prometheus proposes a 4 percent reservation. Public Knowledge Comments at 2; Letter from Gigi B. Sohn, Pres., Public Knowledge, to Marlene H. Dortch, Secretary, FCC (Feb. 20, 2008), Att., Memorandum Regarding Set Aside Conditions at 1-2 ("Feb. 20, 2008 Ex Parte Letter"); Prometheus Comments at 5.

[446] *See* 47 C.F.R. § 25.701.

[447] Applicants' June 13, 2008 Ex Parte at 3. The Applicants' June 13, 2008 Ex Parte setting forth the Applicants' voluntary commitments states that this capacity will be made available for "programming within the meaning of 47 C.F.R. § 25.701(f)(2) of the DBS set aside rules." *Id*. We note that the cited definition defines a "Qualified Programmer" but does not define or describe specifically the programming that will be provided. Consistent with our approach in the DBS context, therefore, we interpret the Applicants' voluntary commitment to mean that Applicants will make available capacity to programmers that satisfy the definitions contained within 47 C.F.R. § 25.701(f)(2).

capacity be reserved for noncommercial educational programming.[448] Public Knowledge proposes the following four requirements to implement an SDARS noncommercial channel reservation requirement. First, similar to the DBS rule, Public Knowledge asserts that the merged company should allocate only one channel per qualified programmer unless all other requests for access have been granted in order to increase program diversity.[449] It also argues that any noncommercial channels already carried by SDARS should not count toward the reservation requirement and that "qualifying programmers currently on either service should not be eligible" for reserved channels.[450] Second, Public Knowledge proposes that all subscribers of the merged company should get access to all of the noncommercial programming on the reserved channels at no additional charge. Public Knowledge clarifies its proposal to mean that the 5 percent reservation should be based on the entire service offering and not on a reduced package that might be offered on an a la carte basis.[451] Third, as in the DBS context, the merged entity should not exercise any editorial control over the noncommercial programming, although it may select from among qualified applicants when demand exceeds capacity. Fourth, only national and local educational programming suppliers would be eligible for carriage on the reserved channels. Although in the DBS rules only national programmers are eligible, Public Knowledge urges the Commission to expand eligibility to local noncommercial entities. It states that this would permit low power radio stations and other local entities to have access to satellite radio audiences which Public Knowledge claims would in turn further the Commission's goal of promoting localism.

138. Applicants initially opposed the imposition of public interest obligations, asserting that their services "provide[] a tremendous range of public interest and educational content . . . because such programming is attractive to consumers."[452]

139. *Background: Public Interest Obligations in The SDARS and DBS Contexts.* When the Commission adopted licensing and service rules for SDARS in 1997, it considered imposing public interest obligations on the licensees.[453] Commenters in the proceeding cautioned against impeding the introduction of a new service with rapidly changing technology.[454] The Commission concluded that SDARS licensees should be subject to Equal Employment Opportunity requirements as well as certain political broadcasting rules.[455] The Commission declined, however, to impose additional public interest programming obligations on SDARS, but reserved the right to do so at a later date, "[i]f additional public interest obligations are found to be warranted."[456] This included a specific reservation of a future right to "adopt rules similar to those Congress enacted for DBS providers, including a 4-7 percent set-aside of

[448] Prometheus Comments at 5; Letter from Alex Curtis, Dir. of Policy, New Media, Public Knowledge to Marlene H. Dortch, Secretary, FCC (Dec. 7, 2007) at 1-2; APM June 20, 2008 Ex Parte at 1-2 (seeking a reservation of 25 percent of the combined entity's radio spectrum).

[449] Public Knowledge Feb. 20, 2008 Ex Parte, Att. at 1-2.

[450] *Id.* at 2.

[451] For example, under a 5 percent reservation, if the merged company offers 200 channels, each subscriber would receive 10 channels of noncommercial programming regardless of his or her particular subscription package. Public Knowledge Feb. 20, 2008 Ex Parte, Att. at 2; Public Knowledge June 18, 2008 Ex Parte at 1.

[452] Joint Opposition at 101-02.

[453] *1997 SDARS Service Rules Order*, 12 FCC Rcd at 5789-92 ¶¶ 85-93.

[454] *Id*. at 5789-90 ¶¶ 86-89.

[455] *Id.* at 5792 ¶ 92.

[456] *Id*. at 5792 ¶ 93.

capacity for noncommercial educational and informational programming."[457]

140. Applicants' voluntary commitment to make capacity available for noncommercial educational and informational programming is similar to the DBS public interest rules.[458] These rules were mandated by the Cable Television Consumer Protection and Competition Act of 1992 ("*1992 Cable Act*"),[459] which directed the Commission to impose public interest obligations on DBS providers, including a requirement to reserve a percentage, between 4 and 7 percent, of channel capacity for noncommercial educational or informational programming.[460] In implementing this statutory mandate, the Commission adopted a 4 percent reservation requirement[461] and elaborated on the definition of entities qualified to be carried on the reserved channels.[462] We concluded that in order to qualify for carriage, an entity must be noncommercial with an educational mission.[463]

141. *Discussion.* We find that Applicants' voluntary commitment to set aside 4 percent of their capacity for NCE programming mitigates the potential harm to program diversity and is consistent with the Commission's expectation, first stated in 1997, that diverse public interest programming would be available on the SDARS platform. Eleven years ago, when the Commission considered whether to impose such conditions on the nascent SDARS service, the Commission was persuaded by the parties' argument that "public interest programming obligations [were] not necessary to ensure diverse public oriented programming" because "the economic and distribution structure of satellite DARS makes it good business to offer programming that regular broadcasters would not offer absent incentives."[464] At that time, the Commission agreed that market forces produced by the robust competition between two SDARS competitors would ensure that listeners would receive noncommercial educational and public interest programming on the SDARS service. In the absence of such competitive forces post-merger, we find the potential harm to programming diversity greater than was the case in 1997.

142. Applicants have voluntarily committed to set aside 4 percent of the full-time audio channels for noncommercial educational and informational programming on both Sirius's and XM's current systems, a figure that currently represents six channels on each platform.[465] We accept Applicants' voluntary commitment. We find that this commitment addresses commenters' concerns and will promote diversity. To ensure that the commitment is implemented in a fair and efficient manner, we adopt additional requirements based on regulations implementing the DBS public interest requirement.[466] We are aware that "attractive" programming is not necessarily the same as "profitable" programming, particularly where it concerns programming of an educational and informational nature. While we

[457] *Id.* (citing 47 U.S.C. § 335).

[458] 47 C.F.R. § 25.701.

[459] *See* Cable Television Consumer Protection and Competition Act of 1992 ("*1992 Cable Act*"), Pub. L. No. 102-385, 106 Stat. 1460 (1992) (*codified at* 47 U.S.C. § 335).

[460] *See* 47 U.S.C. § 335(b)(1).

[461] *See Implementation of Section 25 of the Cable Television and Consumer Protection Act of 1992, Direct Broadcast Satellite Public Interest Obligations*, Report and Order, 13 FCC Rcd 23254, 23285 ¶ 74 (1998) ("*DBS PI Order*").

[462] *See DBS PI Order*, 13 FCC Rcd at 23286-92 ¶¶ 76-90. *See also* 47 C.F.R. § 25.701(f)(2).

[463] *DBS PI Order*, 13 FCC Rcd at 23290 ¶ 86.

[464] *SDARS Service Rules Order*, 12 FCC Rcd at 5789 ¶ 86 (citing comments filed by Digital Satellite Broadcasting Corp. and American Mobile Radio Corp).

[465] Applicants' June 13, 2008 Ex Parte at 3.

[466] 47 C.F.R. § 25.701(f).

acknowledge and expect that the merged company must behave in a profit-maximizing manner in order to operate as a successful commercial enterprise, we have a counterbalancing obligation to protect the public's interest in diverse programming choices. Accordingly, we find that the proposed set-asides are justified in order to balance the risk of harm to programming diversity and the amount and quality of noncommercial educational and informative public programming available via SDARS post-merger.[467] In addition, we find that the burden on the merged company as a result of this voluntary commitment will not prohibit the merged entity from realizing the benefits of the merger. Moreover, Applicants state in their pleadings that the merged company will eliminate a number of channels that offer substantially duplicative programming in order to free up channel capacity for other formats and services.[468] We expect that the consolidation of Applicants' merged channel offerings in this way will free a significant amount of capacity, a small portion of which can be reallocated for noncommercial services pursuant to Applicants' voluntary commitment.

143. As the Commission did in the context of imposing public interest obligations on DBS providers, we limit the number of channels that can be initially allocated to a single noncommercial programmer.[469] In adopting the DBS rules, the Commission was concerned that access to noncommercial channels not be dominated by a few national educational program suppliers and concluded that limiting the capacity for any one programmer will increase the development of quality educational and informational programming for carriage on the set aside channels.[470] The Commission also found that the limitation would provide an opportunity for carriage of programming that might not otherwise be available, including programming targeting traditionally underserved audiences.[471] We believe that these same concerns hold true for the merged entity. Accordingly, the merged entity will not be permitted to initially select a qualified programmer to be carried on more than one of its reserved channels. After all qualified entities seeking access to the reserved channels have been offered carriage, the merged entity may allocate an additional channel to a programmer without having to make further efforts to find other qualified programmers to fill the NCE set-aside channels.

144. In determining how many channels must be made available at any point in time in fulfillment of Applicants' commitment to set aside 4 percent of their full-time audio channels for this purpose, the merged entity shall use the method specified in section 25.701(f)(1) of the Commission's rules.[472] Specifically, the number of full-time audio channels shall be determined annually by calculating, based on measurements taken on a quarterly basis, the average number of channels available for audio programming on all satellites licensed to the provider during the previous year.[473] In addition, as provided in the regulations implementing the DBS set-aside, Applicants may use this reserved capacity for any purpose until such time as it is used for NCE programming.[474] We agree with Public Knowledge that the number of reserved channels must be based on total system capacity and not on the number of channels in any particular service package. Public interest channels must be made available to all

[467] *See* The Word Network July 11, 2008 Ex Parte at 1 (proposing that not-for-profit entities offering programming to minority audiences qualify for NCE set asides).

[468] Application at 12-14.

[469] *See DBS PI Order*, 13 FCC Rcd at 23302 ¶ 116.

[470] *Id*.

[471] *Id*.

[472] 47 C.F.R. § 25.701(f)(1). *See also DBS PI Order*, 13 FCC Rcd at 23282-84 ¶¶ 69-71.

[473] *See* 47 C.F.R. § 25.701(f)(1).

[474] *Id*.

subscribers at no additional charge.[475] With respect to noncommercial programming already carried by one or both of the SDARS licensees, we disagree with Public Knowledge that this programming never be counted as qualified for carriage on the reserved channels. The merged entity has the discretion to choose among programmers, and those noncommercial entities already carried should not be penalized for prior successful relationships with SDARS licensees.

145. As in the DBS context, the merged entity may not exercise editorial control over the programming on the reserved channels but may chose between qualified programmers when demand for capacity exceeds channel supply. With respect to Public Knowledge's suggestion that local as well as national programmers are qualified for carriage, the merged entity could choose a local programmer but must not use its terrestrial repeater network to originate local programming or local advertising that is not carried on its satellites.[476] In other words, any noncommercial programming on the reserved channels, like all other SDARS programming, must be carried by satellites that reach customers nationwide. The merged company may charge noncommercial programmers no more than 50 percent of the direct costs of making the channel available for access, although they may charge such programmers less than 50 percent.[477] As in the DBS context, direct costs may not include those related to the construction, launch, or general operation of the satellite, nor can they include marketing costs, general administrative costs, or similar overhead costs of the SDARS provider or the revenue it might have lost if it could have offered the channels to a commercial programmer.[478]

146. The merged entity shall reserve discrete channels and offer these to qualified programmers at consistent times to fulfill this reservation requirement.[479] In addition, the merged company must comply with the public file requirements of section 25.701(f)(6) of the Commission's Rules, 47 C.F.R. § 25.701(f)(6). Finally, the merged entity shall make NCE channel capacity available upon consummation of the transaction, and programming provided pursuant to this set-aside requirement must be available to the public no later than six months after the transaction's consummation.[480]

7. Service to Alaska, Hawaii, and Puerto Rico

147. Applicants have committed voluntarily to file applications with the Commission, within three months of the consummation of the merger, to provide the Sirius satellite radio service to the Commonwealth of Puerto Rico using terrestrial repeaters and to promptly introduce such service upon grants of permanent authority by the Commission to operate these repeaters.[481] We find that the public interest would be served by Applicants' voluntary commitment to provide service to Puerto Rico. We also strongly encourage the merged entity to expand service to Alaska, Hawaii, the U.S. Virgin Islands, and other territories of the United States, where technically feasible and economically reasonable to do so.

148. In this proceeding, we have received comments urging the Commission to expand the

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[475] *See DBS PI Order*, 13 FCC Rcd at 23285 ¶ 74. *See also American Distance Education Consortium,* Declaratory Ruling and Order, 14 FCC Rcd 19976 (1999) (ruling that reserved channels must be made available to subscribers in all parts of the country).

[476] *See* Section VI.C.2, *infra*.

[477] 47 C.F.R. § 25.701(f)(5). *See also DBS PI Order*, 13 FCC Rcd at 23306-09 ¶¶ 126-34 .

[478] *See DBS PI Order*, 13 FCC Rcd at 23306-08 ¶¶ 126-30.

[479] *See* 47 C.F.R. § 25.701(f)(5). *See also DBS PI Order*, 13 FCC Rcd at 23282 ¶ 68.

[480] *See* 47 C.F.R. § 25.701(f)(7). *See also DBS PI Order*, 13 FCC Rcd at 23309 ¶ 136.

[481] Applicants' June 13, 2008 Ex Parte at 4.

SDARS geographic coverage requirements as a condition on approving the merger.[482] In particular, commenters noted that although there was an expectation that access to SDARS would grow alongside technological advances, this has not been the case for consumers in Alaska, Hawaii, U.S. Virgin Islands, Puerto Rico, and the outlying territories of the United States.[483] Thus, commenters have requested that access by all consumers in the United States be a central tenet of the Commission's merger review.[484]

149. Our rules governing the provision of SDARS requires that each applicant for an SDARS license demonstrate that its system will, at a minimum, provide service throughout the 48 contiguous United States ("full CONUS").[485] Under existing rules, there is no obligation that SDARS licensees provide service beyond full CONUS.[486] Thus, Applicants' voluntary commitment to provide the Sirius satellite radio service to Puerto Rico will expand SDARS service beyond existing coverage requirements.[487]

150. We decline to require expansion of the SDARS licensees' geographic service area beyond this voluntary commitment. Based on the record in this proceeding, we conclude that service outside full CONUS by the existing SDARS satellite networks is not technically feasible or economically reasonable at this time. Although Applicants state that the Sirius satellite network is capable of serving Puerto Rico and southeastern portions of Alaska using its current three-satellite NGSO orbital

[482] Letter from Members of the Outlying Areas Senate Presidents Caucus, to Kevin J. Martin, Chairman, FCC (May 19, 2008) at 1-2 ("OASPC May 19, 2008 Ex Parte") (observing the lack of SDARS service to, among others, Guam, Northern Mariana Islands, and American Samoa); Letter from U.S. Rep. Luis G. Fortuño, to Kevin J. Martin, Chairman, FCC (Jan. 18, 2008) at 1 ("Rep. Fortuño Jan. 18, 2008 Ex Parte") (opposing the merger "[U]ntil such time that exclusion of Puerto Rico and other noncontiguous United States jurisdictions from coverage area of satellite radio ceases."); Letter from Chairman José E. Serrano of the Subcommittee on Finance Services and General Gov't Communications on Appropriations, to Kevin J. Martin, Chairman, FCC (Sept. 19, 2007) ("Rep. Serrano Sept. 19, 2007 Ex Parte") (asking the Commission to consider requiring Applicants to provide equal access to SDARS service to Alaska, Hawaii, Puerto Rico, and other U.S. Territories); Senate Resolution 3392, Commonwealth of Puerto Rico, October 1, 2007 (expressing opposition to the merger "until the exclusion of Puerto Rico and other jurisdictions not contiguous to the United States from the mandatory coverage area of said service, ceases.").

[483] Rep. Serrano Sept. 19, 2007 Ex Parte at 1 (noting that in 10 years since adopting the SDARS service rules, SDARS still is not available outside of full CONUS); Senate Resolution 3392, Commonwealth of Puerto Rico, October 1, 2007; OASPC May 19, 2008 Ex Parte at 2 ("Many technological advances have occurred during the decade since the FCC first authorized satellite radio systems . . . with the result that today there exists no legitimate excuse for subjecting any United States jurisdiction to arbitrary exclusion from satellite radio services.").

[484] Rep. Serrano Sept. 19, 2007 Ex Parte 2; Rep. Fortuño Jan. 18, 2008 Ex Parte at 2; OASPC May 19, 2008 Ex Parte at 2 (requesting that the Commission condition grant of merger on all American jurisdictions receiving satellite radio services within two years).

[485] 47 C.F.R. § 25.144(a)(3)(i) (requiring Applicants to demonstrate that its system will, at a minimum, serve the full CONUS).

[486] When adopting this rule, the Commission considered, but ultimately rejected, a proposal to require SDARS licensees to provide 50-state coverage, or 50-state plus Puerto Rico/Virgin Islands coverage. After reviewing the record, the Commission observed that 50-state coverage was not mandatory for satellite services at that time and that a service area beyond full CONUS might not be practical for first generation SDARS systems. *1997 SDARS Service Rules Order*, 12 FCC Rcd at 5794 ¶ 99.

[487] In light of Applicants' voluntary commitment to provide service to Puerto Rico, Rep. Fortuño states that he no longer objects to the proposed merger. Letter from U.S. Rep. Luis G. Fortuño to Kevin J. Martin, Chairman, FCC (June 25, 2008).

configuration and satellite design,[488] satellite coverage does not extend to the rest of Alaska or Hawaii due to technical limitations, such as low elevation angles[489] and requirements for high power over CONUS.[490] Applicants also state that **[REDACTED]**.[491] We nevertheless strongly encourage the merged entity to include service to Alaska, Hawaii, the U.S. Virgin Islands, and other territories of the United States as part of future applications to launch and operate SDARS satellites, where such service is technically feasible and economically reasonable.

C. Other Issues

1. Spectrum Givebacks

151. We decline to impose a condition requiring Applicants to divest a portion of their spectrum. Some commenters argue that, for the merger to serve the public interest, the merged entity must surrender up to half of its assigned spectrum in order to allow a new competitor to enter the market for SDARS.[492] Applicants, however, assert that the Commission should reject any proposals that involve divestiture of a portion of the combined entity's spectrum post-merger because such divestiture is unnecessary and would undermine the public benefit of the merger.[493] Other commenters join Applicants

[488] Sirius Nov. 16, 2007 Response to Information and Document Request III.G, Narrative at 49-50, n.11 (Response to Interrogatory Question III.G. requesting that Sirius "describe what factors went into the selection of the geographic coverage areas for the satellite network, as well any technical, economic, other considerations that limit the ability of the Sirius satellite network to serve US state and territories outside the contiguous United States." Sirius Information Request at 4).

[489] To provide a high quality of service and signal diversity, SDARS satellites usually need to be at a reasonable elevation angle above the horizon. When the angle of elevation is too low, mountainous terrain and buildings may obstruct the sight lines to the satellite blocking the signal. In addition, with a low angle of elevation atmospheric attenuation and electrical noise would also degrade the quality of service.

[490] Sirius Nov. 16, 2007 Response to Information and Document Request, Narrative at 50 ("Coverage was not extended to all of Alaska and/or Hawaii due to both technical limitations (need to keep high power density in primary service areas combined with low look angles in Alaska/Hawaii) and relatively low population densities in those states that limit the economic benefits of extending the coverage.") The original application for Sirius' network indicates that coverage for Puerto Rico and Alaska is at a lower power level than full CONUS coverage. *See Application of Satellite CD Radio Inc. for Minor Modification of License to Construct, Launch and Operate a Non-Geostationary Satellite Digital Audio Radio Service System*, IBFS File No. SAT-MOD-19981211-00099 (filed Dec. 11, 1998).

[491] XM Nov. 16, 2007 Response to Information and Document Request, Narrative at 33-41. (Response to Interrogatory Question III (G) requesting XM to "describe what factors went into the selection of the geographic coverage areas for the satellite network, as well any technical, economic, other considerations that limit the ability of the XM satellite network to serve US state and territories outside the contiguous United States." XM Information Request at 4).

[492] *See, e.g.*, Mt. Wilson Supp. to Petition at 2 (arguing the merger can be condoned only if the merged entity is limited to the allocated spectrum of one of Applicants); King Reply at ¶ 42 (stating that unless Applicants use one of the bands for expanded service, they should not be allowed to keep both bands if the merger is approved); Sen. Bond June 4, 2008 Ex Parte at 1 (requesting that the Commission require the merged entity to divest part of its spectrum); NPR Petition at 21; Blue Sky Comments at 7; Prometheus Comments at 5; Letter from U.S. Sens. Olympia J. Snowe and Claire McCaskill, to Kevin J. Martin, Chairman, FCC (May 21, 2008) at 2 ("Sens. Snowe and McCaskill May 21, 2008 Ex Parte).

[493] Joint Opposition at 87-88 (arguing divestiture is unnecessary because (1) there is sufficient spectrum available for new competition to enter the audio entertainment market, including those using satellite technology; (2) requiring one of the companies to divest its spectrum would make half of the 14 million satellite radios completely inoperable because the current receiver equipment cannot receive the signals of both companies; and (3) reducing (continued….)

in opposing spectrum divestiture as a condition to the merger.[494] For the reasons set forth below, we agree with Applicants that the public interest would not be served by requiring the merged entity to divest completely a portion of SDARS spectrum.

152. Applicants each use 12.5 MHz to deliver content to receivers, and transmit data streams by three separate data paths: two time-diverse satellite paths and a terrestrial repeater path.[495] Although these data streams are redundant, the redundancy of the signals, along with onboard digital signal processing, ensures that the listener experiences minimal outages.[496] Any divestiture of spectrum by Sirius would require an overhaul of the network and would require Sirius to replace all of its current user receivers.[497] A partial divestiture of spectrum by XM would also require an overhaul of the network, although XM could divest approximately 6.25 MHz without requiring XM to replace all customer radios.[498] The reduced bandwidth, however, would significantly reduce the number of channels and the quality of service for existing XM customers. Furthermore, in addition to the harm to existing SDARS customers from a partial divestiture, it is not clear to us that a new competitor would have sufficient spectrum to emerge as a significant competitor to the newly merged entity, nor is it clear that a new SDARS operator could overcome the regulatory and business hurdles required to offer service.

153. We also considered alternative methods that would permit a new SDARS operator in the spectrum.[499] We have determined, however, that each method has drawbacks that would make it

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available spectrum would limit the combined company's ability to realize merger-specific efficiencies, including the potential for expanded programming choices and additional services).

[494] NextWave June 18, 2008 Ex Parte at 1 (arguing that spectrum divestiture by the merged entity could negatively impact the ability of terrestrial wireless services in adjacent spectrum bands to coexist with licensees in the SDARS band).

[495] Sirius Nov. 16, 2007 Response to Information and Document Request, Narrative at 37.

[496] Unlike a broadcast radio band, where re-licensing of any single station will not affect other stations, the individual channels in an SDARS system exist only at the studio and in the user's receiver. Between these two locations, the data from all of the channels are combined into a single data stream with the number of bits allocated to any one channel varying on an instant-by-instant basis.

[497] The Sirius network transmits the data in three data streams of approximately four MHz each. Sirius Nov. 16, 2007 Response to Information and Document Request, Narrative at 37. We conclude that Sirius could not eliminate any one of the three 4 MHz data paths without significantly increasing the likelihood of dropouts. Similarly, Sirius could not reduce the size of its individual 4 MHz data path and offer fewer channels to its customers, because the user receivers and many other network components – including the receivers, terrestrial repeaters and space stations themselves – only recognize a data stream of approximately 4 MHz and would not recognize a stream of a different size.

[498] Unlike Sirius, XM divides each of its three data streams into two duplicative streams, for a total of six segments. *See* XM Nov. 16, 2007 Response to Information and Document Request, Narrative at 29. Thus, XM transmits the data for all its programming in six 1.8 MHz data streams: four time-diverse satellite bands (S1A, S2A, S2B and S1B) and two terrestrial repeater bands (TA and TB). *See* XM Nov. 16. 2007 Response to Information and Document Request, Narrative at 17, 29. XM could divest approximately 6.25 MHz by divesting either the "A" bands (S1A, S2A, TA) or the "B" bands (S1B, S2B and TB) without requiring XM to replace existing subscriber radios.

[499] WCS Coalition questions whether Sirius is authorized to provide its Backseat TV service and urges the Commission to prohibit Sirius from launching the service until the Commission has implemented WCS rules. Letter from Paul J. Sinderbrand, Wilkinson Barker Knauer LLP, Counsel for the WCS Coalition, to Helen Domenici, Chief, International Bureau, FCC and Fred Campbell, Chief, Wireless Telecommunications Bureau, FCC (Apr. 17, 2007) at 1-2. *See also* Letter from David R. Siddall, Sonnenschein Nath & Rosenthal LLP, Counsel for Georgetown, to Kris Monteith, Chief, Enforcement Bureau, FCC (July 10, 2008). The Enforcement Bureau is (continued….)

infeasible for a new SDARS operator to offer service. Requiring the merged entity to transfer the space and ground infrastructure of either Sirius or XM to a new SDARS operator might allow the new operator to begin service without the delays of building a new satellite network from scratch.[500] However, we believe that the cost of purchasing these assets would be prohibitively expensive for a new operator to enter the market in the near term.[501] For these reasons, we reject Primosphere's request for a condition to require the merged entity to enter into an agreement whereby Primosphere could deliver programming by means of the existing SDARS satellite systems.[502]

2. No Local Programming or Local Advertising

154. Terrestrial broadcasters contend that the merger will harm their ability to provide free over-the-air local programming. For example, NAB contends that Applicants will increase the amount of advertisements via their services after the merger is consummated,[503] and that the loss of even a small amount of advertising revenue to the merged entity would be "devastating" to local radio stations and would force them to reduce local programming.[504] Clear Channel requests that the Commission prohibit the merged entity from carrying local programming and local advertising.[505]

155. As stated above, we find that record before us now does not show that the merger will necessarily harm the ability of local broadcasters to air locally oriented programming.[506] In addition, we note that Applicants operate terrestrial repeaters pursuant to grants of special temporary authority that restrict the use of repeaters to the simultaneous retransmission of the complete programming, and only that programming, transmitted by the satellite directly to SDARS receivers.[507] Thus, SDARS licensees are already prohibited, independent of the merger, from using terrestrial repeaters to distribute localized content that is distinct from that provided to subscribers nationwide via satellite. We note that the

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reviewing the issues raised by Georgetown regarding the Sirius Backseat TV service and will address those issues separately.

[500] Primosphere Petition at 3-4 (proposing that the Commission require the merged entity to enter into an agreement with Primosphere to allow it to use a portion of the SDARS spectrum to begin delivering programming to consumers).

[501] *See, e.g.*, C3SR Petition at 12-13 (asserting that for a new entrant to establish itself in the market, it would take about five years and potentially billions of dollars).

[502] Primosphere Petition at 3-4; Primosphere Reply at 3.

[503] NAB Petition at 32-33 (arguing that the lower-priced a la carte and tiered service offerings proffered by the merged entity would likely be advertiser-supported).

[504] NAB Response to Comments at 21-22. *See also* McGannon at 6-7 (observing that broadcasters primarily rely on local advertising dollars); Letter from Lawrence R. Sidman, Counsel for Clear Channel, to Marlene H. Dortch, Secretary, FCC (Mar. 5, 2007), Att. at 1-2 (arguing that the spectrum advantage of SDARS – 300 channels vs. a limit of 8 channels for terrestrial station owners in the largest markets – would allow a merged company to lock up quality programming and to siphon off national and local advertising revenue).

[505] Clear Channel June 20, 2008 Ex Parte at 2; *see also* Sen. Bond June 4, 2008 Ex Parte at 2 (stating "it is vital that the new satellite radio company reaffirm its position as a national service only"); *see also* Sens. Snowe and McCaskill May 21, 2008 Ex Parte at 1.

[506] *See supra*, Section IV.C.2.

[507] *See, e.g., Sirius STA Order*, 16 FCC Rcd at 16780 ¶ 18. In addition, in the pending rulemaking proceeding to develop rules for the operation of SDARS terrestrial, repeaters the Commission has tentatively concluded that the origination of local programming from SDARS repeaters would be inconsistent with the allocation of the spectrum. *See 2007 SDARS Second Further Notice,* 22 FCC Rcd at 22141 ¶ 55 (citing *1997 SDARS Service Rules Order*, 12 FCC Rcd at 5812 ¶ 142).

prohibition on local content remains in effect and prohibits Applicants from distributing local programming as well as local advertising.[508] In light of the importance of local sports programming to terrestrial radio stations, we prohibit the merged entity from entering into any agreements that would preclude any terrestrial radio station from broadcasting live local sporting events. Entities concerned about Applicants' compliance with these mandates may file complaints with the Commission, which will act promptly to enforce the prohibitions.

VII. COMPLIANCE WITH COMMUNICATIONS ACT AND COMMISSION'S RULES AND POLICIES

A. 1997 SDARS Report & Order

156. In 1997, the Commission established the SDARS service and determined that there would be two initial SDARS licenses, sold at auction to different parties. The *1997 SDARS Service Rules Order* contained the following paragraph:

> *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 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.[509]

157. The 2007 SDARS NPRM sought comment on whether this language in the *1997 SDARS Service Rules Order* constitutes a binding Commission rule and, if so, whether the Commission should waive, modify, or repeal the prohibition in the event it determines that the proposed merger would serve the public interest.[510] Commenters expressed conflicting views on these issues. Applicants maintain that this language is a policy statement under the Administrative Procedure Act ("APA"), rather than a binding Commission rule because it was not codified in the Code of Federal Regulations.[511] Specifically, they claim that it is "merely a policy statement reflecting the Commission's view, based on the evidence available in 1997, that two satellite radio licensees were needed to have enough competition in the audio entertainment market."[512] Other parties argue that the prohibition is a binding rule. They contend that the Commission intended to impose a binding legal prohibition on merger by the satellite DARS licensees, that it was adopted in a notice and comment rulemaking proceeding, and that it was published in the Federal Register.[513]

158. We find that the prohibition is a binding substantive rule, not a mere statement of policy. The prohibition is expressed in clear, specific, and unequivocal language; was characterized by the

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[508] *See* Applicants' July 25, 2008 Ex Parte at 2.

[509] *1997 SDARS Service Rules Order*, 12 FCC Rcd at 5823 ¶ 170 (this language is found under the subheading "Safeguards").

[510] *2007 SDARS NPRM*, 22 FCC Rcd at 12018 ¶ 1; *see also* June 8, 2007 Public Notice, *infra* n.1.

[511] Application at 50.

[512] *Id*. To the extent that the Commission considers the above-quoted language in the *1997 SDARS Service Rules Order* to be a binding rule prohibiting the proposed transfer of control, Applicants requested that the Commission waive, modify, or otherwise alter it to the extent necessary to permit the proposed merger. *Id*. at 51-52.

[513] NAB Comments at 3-4; NPR Comments at 4-9; Clear Channel Aug. 13, 2007 Comments at 3-5.

Commission in the *1997 SDARS Service Rules Order* as a "prohibition"; and leaves no room for the exercise of agency discretion (unless it is waived, modified or repealed). Recent decisions distill the D.C. Circuit's attempts to distinguish between rules and policy statements into two related lines of analysis:

> One line of analysis focuses on the effects of the agency action. *See Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (stating that the court should consider whether the agency action (1) "impose[s] any rights and obligations," or (2) "genuinely leaves the agency and its decisionmakers free to exercise discretion") (internal quotations omitted); *see also, e.g., Troy Corp. v. Browner*, 120 F.3d 277, 287 (D.C. Cir. 1997); *Am. Bus. Ass'n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980). The second line of analysis focuses on the agency's expressed intentions. *See Molycorp., Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999) (stating that the court should consider " (1) the Agency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency"); *see also, e.g., Am. Portland Cement Alliance v. EPA*, 101 F.3d 772, 776 (D.C. Cir. 1996).[514]

The ultimate focus of both analytic approaches is "whether the agency action binds private parties or the agency itself with the 'force of law.'"[515]

159. The plain language of the relevant paragraph in the *1997 Report and Order* binds both private parties and the Commission itself with the force of law. First, it removes the Commission's discretion to approve one satellite DARS licensee's acquisition of control of the other, absent repeal of the prohibition, by stating in advance that such an acquisition will not be permitted.[516] Second, the use of the words "will not be permitted" and "prohibition" strongly suggests that the Commission intended this to be a binding rule.[517] Indeed, it is difficult to imagine words that would have a more mandatory connotation than those used here.

160. Applicants assert that "the real dividing point between binding regulations and general statements of policy is publication in the Code of Federal Regulations, which the [APA] authorizes to contain only documents which 'having general applicability *and legal effect*,' and which the governing regulations provide shall contain only 'each Federal *regulation* of general applicability and current or future effect.'"[518] The D.C. Circuit, however, has refused to place such weight on the publication factor.

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[514] *CropLife America v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003) ("*CropLife*"); s*ee also Wilderness Soc. v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006) ("*Wilderness Soc*."); *General Elec. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002) ("*General Elec*.").

[515] *CropLife*, 329 F.3d at 883 (quoting *General Elec.*, 290 F.3d at 382).

[516] *Cf. Wilderness Soc*., 434 F.3d at 595 (internal agency policy did not read as a set of rules "as a whole" because it "lacks precision in its directives, and there is no indication of how the enunciated policies are to be prioritized"); *Brock v. Cathedral Bluffs Shale Oil Co*., 796 F.2d 533, 538 (D.C. Cir. 1986) ("*Brock*") (language in published enforcement policy did not establish a binding rule where it was "replete with indications that the Secretary retained his discretion to cite production-operators as he saw fit").

[517] *See Community Nutrition Inst*., 818 F.2d at 947 ("mandatory, definitive" language included in an FDA action level, which informs food procedures for the permissible levels of contaminants, "clearly reflects an interpretation of action levels as presently binding norms"); *Cf. Brock*, 796 F.2d at 538 ("We have … given decisive weight to the agency's choice between the words 'may' and 'will.'").

[518] Applicants' Comments to NPRM at 3-4, n.11 (quoting *Wilderness Soc.*, 434 F.3d at 596).

As it has said, "[i]n none of the cases citing the distinction … has the court taken publication in the Code of Federal Regulations, or its absence, as anything more than a snippet of evidence of agency intent."[519] In contrast, the D.C. Circuit has given decisive weight to mandatory language.[520] The publication factor is of even less significance here than in other cases because the prohibition at issue here applies to only two entities and those two entities were very familiar with the *1997 SDARS Service Rules Order*, making it less necessary to codify the prohibition.

161. For the foregoing reasons, we conclude that the prohibition on merger in the *1997 Service Rules Order* is a binding rule. Therefore, we must address the question raised in the Notice whether we should waive, modify, or repeal the prohibition in order to permit the proposed merger.[521]

162. First, we disagree with Applicants that it is appropriate to waive the prohibition in order to permit the merger.[522] As a number of commenters note,[523] it is well established that "[t]he function of a waiver is not to change the general standard, a matter for which the opportunity for general comment is a prerequisite under the Administrative Procedure Act, but to justify an ad hoc exception to that standard in a particular case."[524] Here, the prohibition against merger applies only to the two Applicants; it has no application beyond this proceeding. Thus, grant of a waiver clearly would eviscerate the rule and for that reason is not appropriate here.

163. We can, of course, repeal a rule if we decide that doing so would serve the public interest and we comply with rulemaking procedures.[525] In this proceeding, we repeal the prohibition on merger set forth in paragraph 170 of the *1997 SDARS Service Rules Order*. We find above that approval of the merger, subject to Applicants' voluntary commitments and the other conditions, will benefit consumers

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[519] *Health Ins. Ass'n of America, Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994). *See also Community Nutrition Inst.*, 818 F.2d at 947 n.8 (FDA action levels for contaminants were binding rules despite non-publication in the Code of Federal Regulations). Even in *Wilderness Soc*., the case quoted at length by Applicants, the court focused on publication in the C.F.R. and the Federal Register as a means of discerning agency intent, not for purposes of establishing a bright-line distinction between binding rules and policy statements. *See*, *e.g*., *Wilderness Soc*., 434 F.3d at 596 ("*Failure* to publish in the Federal Register is indication that the statement in question was *not* meant to be a regulation since the [APA] requires regulations to be so published. The converse, however, is not true: *Publication* in the Federal Register does *not* suggest that the matter published *was* meant to be a regulation.") (emphasis in the original).

[520] *See Brock*, 796 F.2d at 538; *see also General Elec*., 290 F.3d at 383 ("the mandatory language of a document alone can be sufficient to render it binding").

[521] *See 2007 SDARS NPRM*, 22 FCC Rcd at 12019-21 ¶ 3.

[522] Application at 51.

[523] *See, e.g*., NAB Comments at 10-13; NPR Comments at 10.

[524] *Authority to Construct and Operate an Automated Maritime Telecom. System*, 3 FCC Rcd 4690, 4692 (1988). *See also Am. Trucking Ass'n, Inc. v. FHA*, 51 F.3d 405, 414 (4th Cir. 1995) ("Commonly understood, administrative 'waivers' are a mechanism 'to seek out the "public interest" *in particular, individualized* cases.' They are not a device for repealing a general statutory directive." (quoting *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (emphasis added)); *WAIT Radio*, 418 F.2d at 1159 ("The court's insistence on the agency's observance of its obligation to give meaningful consideration to waiver applications emphatically does not contemplate that an agency must or should tolerate evisceration of a rule by waivers."). *Cf. WITN-TV v. FCC*, 849 F.2d 1521, 1525 (D.C. Cir. 1988) ("The waiver concept does not serve in this context, for petitioner's plea … is in essence one for agency reconsideration of existing policy.").

[525] 5 U.S.C. § 553. *See, e.g*., *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14857-60 ¶¶ 4-11 (2005) (eliminating rules after notice and comment rulemaking).

by making available to them a wider array of programming choices at various price points and affording them greater choice and control over the programming to which they subscribe, and that those benefits exceed the harms identified above. For the same reasons, we conclude that repeal of the rule prohibiting the merger will, on balance, serve the public interest.[526]

B. Enforcement Matters

164. NAB and other commenters argue that Applicants each have a "history of ignoring" the Commission's rules and the Commission therefore cannot reasonably rely on a merged XM-Sirius entity to comply with any regulatory conditions that might be imposed.[527] In particular, NAB makes two specific allegations concerning Applicants' marketing of FM modulators and use of terrestrial repeaters, which are discussed below.

165. First, NAB asserts that Applicants violated the Part 15 equipment rules intended to ensure that the modulators[528] in their satellite radio receivers do not interfere with broadcast radio stations.[529] Consequently, NAB states, listeners to noncommercial[530] radio stations may not only receive interference, but may also receive "signal bleed" that results in their hearing on their vehicle radios unwanted satellite radio programming.[531] NAB adds that "[i]t is a matter of record that these violations were apparently intentional on Sirius's part."[532]

166. Second, NAB alleges that XM violated the Commission's technical rules in constructing and operating its network of terrestrial repeaters.[533] XM's repeater violations, NAB states, include operation of 19 repeaters without any FCC authorization; construction and operation of at least 125 repeaters at unauthorized locations; operation of at least 221 repeaters at power levels in excess of its authorization; and installation of more than 80 of its repeaters at heights that exceeded authorized

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[526] We reject the arguments opposing repeal of the rule prohibition in Sections IV, V, and VI.B, *supra*, for the same reasons that we reject commenters' arguments opposing the merger. *See*, *e.g*., NAB Comments at 13-23; NAB Reply at 3-8; NPR Comments at 11-20.

[527] NAB Petition at 50-51; *see also* NAB Response to Comments at 10; NABOB Petition at 13-14; USE Petition at 13-14; Entravision Comments at 19-20; Letter from U.S. Rep. Nancy Boyda to Kevin J. Martin, Chairman, FCC (Apr. 5, 2007) at 1; Letter from U.S. Reps. F. James Sensenbrenner, Jr. and Gene Green, to Kevin J. Martin, Chairman, FCC (June 18, 2007) at 2. In addition, Blue Sky questions whether Applicants meet the "citizenship, character … and other qualifications" test set forth in Section 308(b) of the Act, 47 U.S.C. § 308 ("All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station."). Blue Sky Comments at 6-7; Blue Sky Reply at 1-3.

[528] Many portable satellite radio receivers have built-in FM modulators or transmitters, which are designed to permit users to listen to satellite radio over a car radio on unused FM frequencies. Such modulators must comply with the Commission's Part 15 technical requirements and receive an equipment certification prior to marketing. *See* 47 C.F.R. §§ 15.3(o), 15.201, 15.239.

[529] NAB Petition at 55.

[530] Noncommercial radio stations are more likely to receive interference from FM modulators because FM modulators are typically set to operate on vacant channels near the lower end of the FM band, where noncommercial stations frequently operate.

[531] NAB Petition at 55.

[532] *Id*. (citing Sirius's *SEC Form 10-Q for the Quarterly Period Ended September 30, 2006* at 35).

[533] *Id*. at 56.

levels.[534] In addition, NAB asserts that XM continued the unauthorized operations even after the violations came to its attention.[535] NAB states that Sirius has engaged in analogous, although less extensive, repeater violations.[536]

167. In response, Applicants assert that they take their obligations and responsibilities as FCC licensees seriously.[537] According to Applicants, the allegations raised by NAB and others do not bear on their qualifications as Commission licensees or cast doubt on their willingness to comply with merger-specific conditions.[538] Regarding the FM modulators, Applicants state that they have cooperated fully with the Enforcement Bureau in its investigations into whether some of their receivers were non-compliant with Commission regulations and that all newly produced receivers are fully consistent with applicable regulations.[539] In addition, Applicants indicate that both companies voluntarily disclosed their terrestrial repeater variances to the Commission in October 2006 after taking unilateral actions to bring many of those variances into compliance, that no party has experienced interference as a result of the repeater variances, and that both companies have been working diligently with Commission staff to resolve issues concerning their repeaters.[540]

168. Applicants argue that the Commission has repeatedly rejected the notion that outstanding allegations of rule violations that can be addressed through the normal enforcement procedures have any bearing on a licensee's qualifications.[541] Rather, Applicants state, the Commission has made clear that "'typically it will *not* consider in merger proceedings matters that are the subject of other proceedings before the Commission.'"[542] Applicants assert that NAB's allegations relate entirely to issues that have been brought to the Commission's attention and the agency is addressing these matters through its traditional enforcement procedures.[543] Therefore, Applicants conclude that the issues raised by NAB have no relevance to the Commission's review of the merger.[544]

169. We agree that the issues concerning Applicants' apparent misconduct in connection with the manufacture, importation, marketing and distribution of modulators for their services and the construction and operation of various of their terrestrial repeaters are troubling. We have, however, fully investigated these matters and, after extensive discussions with the parties and careful consideration of the record, concluded that settlement of these issues by consent decrees was in the public interest. As we noted in the Orders adopting the Consent Decrees:

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[534] *Id*. at 56-57.

[535] *Id*. at 57.

[536] *Id.* at 56 (citing Sirius Supplemental Information, IBFS File Nos. SAT-STA-20061013-00121, 20061013-00122 (April 26, 2007), and Request of Sirius for Special Temporary Authorization Regarding Digital Audio Radio Service Terrestrial Repeaters, IBFS File Nos. SAT-STA-20061013-00122 (Nov. 17, 2006)). Additionally, as stated above, NAB argues that both Applicants have violated the SDARS receiver interoperability rule. NAB Petition at 52.

[537] Joint Opposition at 94.

[538] *Id*.

[539] *Id*. at 96.

[540] *Id*. at 97-98.

[541] *Id*. at 98.

[542] *Id*. (quoting *SBC-Ameritech Order*, 14 FCC Rcd at 14950 ¶ 50 (emphasis added)).

[543] *Id*. at 99.

[544] *Id*.

> We do not come to this conclusion easily. The apparently intentional nature of some of the violations … and the apparent involvement of certain XM [and Sirius] personnel in these violations are very troubling. Indeed, the ability and willingness to conform one's conduct to the requirements of the Commission's rules are central to the qualifications of any Commission licensee. We must balance our concern, however, against the public's interest in the continued availability and viability of [the companies'] satellite radio service and the impact on the public and other licensees that [the companies'] violations precipitated. These considerations, taken together with the rigorous oversight and reporting obligations and substantial voluntary contribution[s] prescribed in [the] Order[s] and the Consent Decree[s], persuade us that settlement of these matters would best serve the public interest.[545]

170. The Consent Decrees terminated the agency's investigations into Applicants' compliance with the Commission's regulations governing FM modulators and the terms of their authorizations for their terrestrial repeaters. The Consent Decrees also provide that Applicants will each make a substantial voluntary contribution to the U.S. Treasury, implement certain remedial measures with respect to radio receivers with built-in FM modulators in the hands of subscribers, and implement comprehensive compliance plans to ensure the companies' future compliance with the Commission's regulations. In addition, XM agrees, within a period of 60 days from the effective date of the Consent Decree, to shut down 50 variant terrestrial repeaters and to bring another 50 repeaters into compliance with the specifications that they were originally authorized or cease operating them. Sirius can return to operation two of its repeaters, which varied slightly from what they were originally authorized to do, and may return to operation another nine repeaters that varied significantly from their original authorization, provided they are first brought into compliance with what they were originally authorized to do.

171. The compliance plans in the Consent Decrees are extensive and involve the appointment of a dedicated FCC Compliance Officer, with explicit equipment design and certification authority and responsibility, the development and implementation of recurring and enduring compliance training programs, and the development and use of detailed guidelines governing equipment design and certification and the implementation of any changes to the Applicants' terrestrial repeater networks. Applicants also are subject to continuing reporting obligations that will serve to ensure that the Commission is informed on an ongoing basis of all developments relevant to the companies' compliance with the Consent Decrees. Except with respect to their training obligations, which continue indefinitely, the Consent Decrees will continue in effect for a period of five years.

172. In light of these and other provisions in the Consent Decrees and our consideration of the record as a whole, we concluded that our investigations raised no substantial and material questions of fact as to whether Applicants possess the basic qualifications, including those related to character, to hold or obtain any Commission license or authorization. In this connection, we note that NAB does not assert that Applicants lack the requisite qualifications to hold or obtain FCC licenses or authorizations. Moreover, while one commenter, Blue Sky Services, questions whether Applicants meet the "citizenship, character … and other qualifications" test set forth in Section 308(b) of the Act,[546] our conclusions in the settlement proceedings, as detailed above, directly address and adequately dispose of this contention.

173. Finally, to the extent that NAB and various commenters argue that the Commission cannot rely upon a merged XM-Sirius entity to comply with any regulatory conditions given Applicants'

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[545] *Sirius Consent Decree Order* at ¶ 3; *XM Consent Decree Order* at ¶ 3.

[546] Blue Sky Comments at 6-7; Blue Sky Reply Comments at 1-3. *See* 47 U.S.C. § 308(b) ("All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station.").

past history of non-compliance with Commission rules, we disagree.[547] We are conditioning our approval of the merger transaction on the merged entity's compliance with Applicants' voluntary commitments. We will rigorously monitor Applicants' compliance with the conditions of the Consent Decrees and the conditions specified herein and believe that the mechanisms put in place in those Decrees will fully serve to ensure compliance on an ongoing basis. Moreover, we will not hesitate to take prompt and effective enforcement action if these conditions are not satisfied.[548]

174. *EEO Obligations.* In the *1997 SDARS Service Rules Order* the Commission determined that "satellite DARS licensees must comply with the Commission's equal employment opportunity requirements."[549] We reiterate that decision here. When SDARS services were initially licensed, the Commission had a pending rulemaking proposing revision to its EEO rules; the Commission decided that licensees in the SDARS services would be required to comply with the then-current rule and any changes adopted when the rulemaking is completed.[550] Thus, we clarify here that the merged entity must comply with the Commission's EEO broadcast rules and policies, including periodic submissions to the Commission consistent with the reporting schedule established for broadcast licensees.[551]

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[547] NAB argues that the violations are "directly relevant to the Commission's review of the proposed merger, separate and apart from basic character qualifications issues," because they cast doubt on the reliability of Applicants' voluntary commitments. NAB Petition to Defer Action in MB Docket No. 07-57 (filed Oct. 9, 2007) at 3. *See* NAB Petition at 55-58. NAB points to the Commission's recognition in *EchoStar* that the merger applicant's history of past conduct should be "taken into account in assessing the likelihood that potential beneficial conduct will occur in the absence of private economic incentives." *EchoStar Communications Corp.*, 17 FCC Rcd at 20579 ¶ 35. In that case, however, "one of the prime subjects of the alleged prior misconduct," EchoStar's failure to adhere to its must-carry obligations, "l[ay] at the heart of the realization of the proffered public interest benefits claimed to flow from the merger - provision of additional local-into-local service pursuant to the must-carry rules." *Id.* Here, in contrast, none of Applicants' technical rule violations pertain specifically to their voluntary commitments. One of the commitments does concern the receiver interoperability mandate, which we conclude above was violated by Applicants. For the reasons discussed above, however, we do not believe that their interpretation of the mandate as a design requirement was unreasonable in light of all of the circumstances. Therefore, we are not persuaded that their violation of the mandate should be taken into account in considering the likelihood of fulfillment of their commitment to make an interoperable receiver commercially available within one year of the consummation of the merger.

[548] *See SBC-Ameritech Order*, 14 FCC Rcd 14712, 14749-50 ¶ 571 (1999) (relying on SBC's voluntary commitments aimed at opening its local markets to competition in concluding that the public interest benefits of the proposed merger would outweigh the public interest harms, notwithstanding commenters' arguments that SBC had "history of vigorously resisting competition in its existing monopoly markets.").

[549] *1997 SDARS Service Order*, 12 FCC Rcd at 5791 § 91 ("The rationale behind these requirements is a belief that a licensee can better fulfill the needs of the community, whether local or national, if it makes an effort to hire a diverse staff, including minorities and women.").

[550] *Streamlining Broadcast EEO Rules and Policies,* Order and Notice of Proposed Rulemaking, 11 FCC Rcd 5154 (1996); *see also Lutheran Church- Missouri Synod v. FCC,* 141 F.3d 344 (D.C. Cir. 1998), *pet. for reh'g denied*, 154 F.3d 487, *pet. for reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998); *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, Report & Order, 15 FCC Rcd 2329 (2000); *MD/DC/DE Broadcasters' Association v. FCC,* 236 F.3d 13, *rehearing denied,* 253 F.3d 732 (D.C. Cir. 2001), *cert. denied* 122 S. Ct. 920 (2002); *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Second Report and Order and Third Notice of Proposed Rulemaking, 17 FCC Rcd 24018 (2002) ("*2002 Broadcast EEO Order*").

[551] *2002 Broadcast EEO Order*, 17 FCC Rcd at 24062-69 ¶¶ 139-64. SDARS licensees therefore must refrain from discrimination in employment practices and engage in the same recruitment, outreach, public file, website posting, record-keeping, reporting, and self-assessment obligations required of broadcast licensees, consistent with Commission Rule 73.2080, 47 C.F.R. § 73.2080, the policies set forth in the *2002 Broadcast EEO Order*, and any (continued….)

VIII. PROCEDURAL MATTERS

A. Petitions and Motions Addressing Various Other Issues

175. Various entities request the Commission to delay its decision on Applicants' proposed merger or to designate the Application for hearing. NAB filed a Petition to Defer Action urging the Commission to suspend its merger review until the Enforcement Bureau releases documents responsive to a Freedom of Information Act request filed by NAB.[552] NAB asserts that the documents, which pertain to Applicants' compliance with Commission rules governing the operation of FM modulators and terrestrial repeaters, are central in determining whether Applicants can be relied upon to adhere to promises made in their Application.[553] In addition, USE asks the Commission to suspend its review to allow adequate time for the Commission to: (1) address adverse effects of vertical integration; (2) disclose its findings on compliance matters, including Applicants' failure to provide interoperable radios; (3) ensure that its ex parte rules are being followed; and (4) condition the merger should it be approved.[554] USE also submitted filings arguing that the Commission should designate the Application for hearing because of material issues of fact regarding whether the public interest is served by the vertical integration that would occur with a merger and whether the information furnished in the Application is accurate and complete.[555] The Leadership Conference on Civil Rights argues that the Commission should delay its final decision until it has had more time to assess the potential impact of a merger on media ownership diversity.[556] We believe we have adequately addressed the issues relevant to this merger review and find that no further delay is warranted.[557]

176. Primosphere Limited Partnership ("Primosphere") has a pending Application for Review seeking authority to operate two satellites in the SDARS spectrum if the Commission approves this

(Continued from previous page)
other Commission EEO policy as explained in Public Notices, case decisions, or other items. This includes creating annual EEO public file reports and posting them on the company website and filing the same EEO reporting forms with the Commission used by terrestrial broadcasters (*e.g.*, FCC Form 396 and 397) on the same schedule, notwithstanding the differences in license terms for broadcast stations and satellite facilities. In addition, we clarify that SDARS licensees also will be subject to the same random audits as broadcast licensees and all the same investigation and enforcement provisions including, but not limited to, audits for cause, reporting conditions, and forfeitures. *2002 Broadcast EEO Order*, 17 FCC Rcd at 24066-67 ¶¶ 153-58.

[552] NAB Petition to Defer Action at 1.

[553] *Id.* at 1-4.

[554] USE Petition to Defer Action at 3-16.

[555] USE Petition to Designate Application for Hearing at 1-3; *see also* USE Motion to Designate and for Summary Decision at 1-3 (arguing that Applicants effectively conceded that material factual issues are in dispute by not opposing USE's designation petition).

[556] Letter from Wade Henderson, President and CEO, Nancy Zirkin, Vice President/Dir. of Public Policy, and Mark Lloyd, Chairman, Media/Telecom. Task Force, Leadership Conference on Civil Rights, to Kevin J. Martin, Chairman, FCC (July 27, 2007) at 1.

[557] NAB also requests that we make public certain documents that Applicants have submitted as confidential pursuant to our Protective Orders. Letter from David H. Solomon, J. Wade Lindsay, Wilkinson Barker Knauer, LLP, Counsel for NAB, to Marlene H. Dortch, Secretary, FCC (June 3, 2008). Consumers Union and Consumer Federation of America make a similar request. Letter from Chris Murray, Consumers Union, Dr. Mark Cooper, CFA, to Marlene H. Dortch, Secretary, FCC (July 9, 2008). We will consider their requests for public disclosure separately pursuant to the terms of the Protective Orders and our regulations, 47 C.F.R. §§ 0.459, 0.461. We note that NAB already has reviewed these documents, as has the Commission, and that other parties have done so or had the opportunity to do so pursuant to our Protective Orders.

merger. Primosphere filed a motion to consolidate its proceeding with the XM-Sirius review.[558] We do not believe these two proceedings need to be linked, and we therefore deny Primosphere's motion. Primosphere filed a petition simultaneously with its motion, in which it attempts to preserve its request for SDARS spectrum in the event the Commission dismisses its Application for Review. We need review Primosphere's issues in only one proceeding. We therefore deny Primosphere's petition without prejudice to its Application for Review.

B. Final Regulatory Flexibility Certification

177. Pursuant to the Regulatory Flexibility Act,[559] the Commission certifies that the outcome of this rulemaking will not have a significant economic impact on a substantial number of small entities. This rulemaking affects SDARS providers. SDARS provides nationally distributed subscription radio service. Currently, only two operators hold licenses to provide SDARS service, XM and Sirius, which requires a great investment of capital for operation. Because SDARS service requires significant capital, we believe it is unlikely that a small entity as defined by the Small Business Administration would have the financial wherewithal to become an SDARS licensee.

C. Final Paperwork Reduction Act Analysis

178. This document does not contain new or modified information collections subject to the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

D. Additional Information

179. For additional information on this proceeding, please contact Marcia Glauberman or Rebekah Goodheart, Industry Analysis Division, Media Bureau, at (202) 418-2330.

IX. ORDERING CLAUSES

180. Accordingly, having reviewed the applications and the record in this matter, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 303(r), and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), 310(d), that this *Memorandum Opinion and Order and Report and Order* and the rule modifications included herein ARE ADOPTED, and that the Consolidated Application for Authority to Transfer Control of various Commission licenses and authorizations held by Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc., and the associated supplemental application,[560] ARE GRANTED subject to the condition that Applicants fulfill the voluntary commitments as set forth in Appendix B, which is incorporated by reference into this *Memorandum Opinion and Order and Report and Order*, as well as the additional conditions set forth herein.

181. IT IS FURTHER ORDERED that the above grants shall include authority for XM and Sirius consistent with the terms of this *Memorandum Opinion and Order and Report and Order* to acquire control of any license or authorization issued for any station during the Commission's consideration of the Application or the period required for consummation of the transaction.

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[558] Primosphere Motion to Consolidate at 1-2; *see also* Primosphere Petition at 3 (addressing the same issues as its Application for Review).

[559] *See* 5 U.S.C. § 605(b).

[560] *See supra* n.1.

182. IT IS FURTHER ORDERED that Applicants are required to comply with the Commission's broadcast EEO rules and policies set forth in 47 C.F.R. § 73.2080.

183. IT IS FURTHER ORDERED that pursuant to sections 4(i), 4(j), and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 310(d), that the Petitions to Deny filed by American Women in Radio and Television; Common Cause, Consumer Federation of America, Consumers Union, and Free Press; Consumer Coalition for Competition in Satellite Radio; Forty-Six Broadcasting Organizations; Mt. Wilson FM Broadcasters, Inc.; The National Association of Black Owned Broadcasters, Inc.; National Association of Broadcasters; National Public Radio, Inc.; and The Telecommunications Advocacy Project ARE DENIED except to the extent otherwise indicated in this *Memorandum Opinion and Order and Report and Order* .

184. IT IS FURTHER ORDERED that pursuant to Sections 4(i), 4(j), and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 310(d), that the Petition for Declaratory Ruling filed by Michael Hartlieb IS DENIED.

185. IT IS FURTHER ORDERED that pursuant to Sections 4(i), 4(j), and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 310(d), that the Petitions to Defer Action filed by National Association of Broadcasters and U.S. Electronics, Inc. ARE DENIED.

186. IT IS FURTHER ORDERED that pursuant to Sections 4(i), 4(j), and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 310(d), that the Motion to Consolidate and the Petition filed by Primosphere Limited Partnership ARE DENIED.

187. IT IS FURTHER ORDERED that pursuant to Sections 4(i), 4(j), and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 310(d), that the Petition to Designate Application for Hearing and the Motion to Designate and for Summary Decision filed by U.S. Electronics, Inc. ARE DENIED.

188. IT IS FURTHER ORDERED that this *Memorandum Opinion and Order and Report and Order*, including the repeal of the rule prohibiting one SDARS licensee from acquiring control of the other SDARS licensee, SHALL BE EFFECTIVE upon adoption.[561]

[561] *See* 47 C.F.R. § 1.4(b)(3). Repeal of the merger prohibition in the Commission's *1997 SDARS Service Rules Order* is a rule of particular applicability that is not subject to the Administrative Procedure Act's publication requirement, 5 U.S.C. § 552(a)(1)(D); see supra, ¶ 162 ("the prohibition against merger applies only to the two Applicants; it has no application beyond this proceeding."), and may be effective on adoption under the Commission's rules. 47 C.F.R. §§ 1.4(b)(3), 1.103. Further, the prohibition's repeal is not subject to the statutory 30-day waiting period under the Administrative Procedure Act because it "relieves a restriction." 5 U.S.C. § 553(d)(1). In addition, the Congressional review procedures of Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801, *et seq*., do not apply here because repeal of the merger prohibition is not a "rule" within the meaning of 5 U.S.C. § 804(3)(A) (excluding from the definition of the term "rule" "any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefore, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing").

189. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Memorandum Opinion and Order and Report and Order*, including the Final Regulatory Flexibility Analysis Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Licenses to be Transferred

The Consolidated Application filed by XM and Sirius includes applications pertaining to the Commission authorizations and licenses listed below. They are separated below by the type of authorization or license, and, within each category, listed by licensee/registrant name, application file number, call sign, and/or other service-specific information, as appropriate. Interested parties should refer to the Consolidated Application for a more detailed listing of the authorizations or licenses. Each of Applicants' subsidiaries or affiliates may hold multiple authorizations or licenses of a particular type.

Part 25 – Satellite Communications

File No.	Licensee/Registrant	Call Signs
Satellite Space Stations		
SAT-T/C-20070320-00054	XM Radio Inc.	S2118 S2119 S2616 S2617[1]
SAT-T/C-20070320-00053	Satellite CD Radio, Inc.	S2105[2] S271
Satellite Earth Stations		
SES-T/C-20070320-00380	XM Radio Inc.	E000158 E000724 E040204

[1] The following applications for special temporary authority (either pending or in effect) to operate terrestrial repeaters are associated with the XM Radio Inc. space stations: SAT-STA-20010712-00063; SAT-STA-20020311-00049; SAT-STA-20020815-00153; SAT-STA-20030325-00056; SAT-STA-20030409-00076; SAT-STA-20031112-00371; SAT-STA-20031219-00373; SAT-STA-20050307-00056; SAT-STA-20050601-00113; SAT-STA-20050712-00145; SAT-STA-20061002-00114; SAT-STA-20061013-00119;SAT-STA-20061013-00120; SAT-STA-20061114-00138; SAT-STA-20061211-00147; SAT-STA-20070205-00026; SAT-STA-20070222-00036; SAT-STA-20070222-00037; SAT-STA-20070330-00059; SAT-STA-20070628-00091; SAT-STA-20070628-00093; SAT-STA-20070706-00095; SAT-STA-20070706-00096; SAT-STA-20071012-00140; SAT-STA-20071105-00148; SAT-STA-20071219-00178; SAT-STA-20080117-00026; SAT-STA-20080303-00056; SAT-STA-20080429-00094; SAT-STA-20080430-00095; SAT-STA-20080522-00111; SAT-STA-20080701-00139, and SAT-STA-20080724-00146.

[2] The following applications for special temporary authority (either pending or in effect) to operate terrestrial repeaters are associated with the Satellite CD Radio, Inc. space stations: SAT-STA-20010724-00064; SAT-STA-20020222-00028; SAT-STA-20020312-00029; SAT-STA-20020312-00048; SAT-STA-20020827-00162; SAT-STA-20020827-00248; SAT-STA-20030411-00075; SAT-STA-20030827-00299; SAT-STA-20031106-00370; SAT-STA-20031219-00369; SAT-STA-20040623-00119; SAT-STA-20040623-00122; SAT-STA-20050301-00053; SAT-STA-20050601-00114; SAT-STA-20060623-00067; SAT-STA-20061013-00121; SAT-STA-20061013-00122; SAT-STA-20061107-00131; SAT-STA-20061107-00132; SAT-STA-20061107-00133; SAT-STA-20061107-00135; SAT-STA-20061207-00145; SAT-STA-20061208-00146; SAT-STA-20070327-00057; SAT-STA-20070710-00097; SAT-STA-20070719-00104; SAT-STA-20070928-00135; SAT-STA-20071213-00174; SAT-STA-20071220-00179; SAT-STA-20080131-00034; SAT-STA-20080314-00071; SAT-STA-20080530-00116; SAT-STA-20080530-00117, and SAT-STA-20080728-00151.

In addition, Satellite CD Radio (Sirius) has a pending application to modify its NGSO space station constellation (Call Sign S2105) by launching and operating FM-6, which will eventually replace Sirius' two existing space stations, FM-1 and FM-2. IBFS File No. SAT-MOD-20080521-00110.

SES-T/C-20070320-00379	Sirius Satellite Radio Inc.	E040363 E060276 E060277 E990291
SES-T/C-20070625-00863	Sirius Satellite Radio Inc.	E060363

Part 90- Wireless License

File No.	Licensee	Call Sign
0002948781	Sirius Satellite Radio Inc.	WPTX369

Part 5- Experimental License

File No.	Licensee	Call Sign
0004-EX-TC-2007	XM Radio Inc.	WB2XCA

APPENDIX B

Voluntary Commitments

June 13, 2008

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Consolidated Application for Authority to Transfer Control of XM Radio Inc. and Sirius Satellite Radio Inc.,
MB Docket No. 07-57

Dear Chairman Martin:

The record in the above-referenced proceeding provides clear evidence that the merger of Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM") will benefit consumers and should therefore be approved promptly and without conditions. Sirius and XM have demonstrated that consumers will benefit substantially and the public interest will be served by approval of this transaction. The Commission should not impose conditions in this proceeding that will have the effect of reducing these public interest benefits.

Nevertheless, this letter is to inform you that, if the merger is approved, the combined company will implement the voluntary commitments listed below. These commitments are being made to further demonstrate that the merger is in the public interest and in the interest of facilitating the speediest possible approval of the merger by the Commission.

Programming.

1. A La Carte Programming: The combined company will offer the following a la carte programming options:

   - 50 Channels will be available for $6.99 a month and will allow consumers to choose either 50 Sirius channels from approximately 100 Sirius channels or 50 XM channels from approximately 100 XM channels. Additional channels can be added for 25 cents each, with premium programming priced at additional cost. However, in no event will a customer subscribing to this a la carte option pay more than $12.95 per month for this programming.

   - 100 Channels will be available on an a la carte basis for $14.99 a month. This a la carte option will allow Sirius customers to choose from the Sirius programming line-up and some of the best of XM's programming, and XM customers to choose from the XM programming line-up and some of the best of Sirius' programming.

Within three months of the consummation of the pending merger, the first a la carte-capable radios will be introduced in the retail after-market and the combined company will commence offering a la carte programming.

2. "Best of Both" Programming: Within three months of the consummation of the pending merger, the combined company will offer customers the ability to receive the best of both Sirius and XM programming. Current XM customers will continue to receive their existing XM service, *and* be able to obtain select Sirius programming. Likewise, current Sirius customers will continue to receive their existing Sirius service, *and* be able to obtain select XM programming. This "best of" programming will be the same "best of" programming included as part of the 100 Channel A La Carte offering, and will be available at a monthly cost of $16.99.

3. Mostly Music or News, Sports and Talk Programming: Within three months of the consummation of the pending merger, customers will have the option of choosing an option of "mostly music" programming. Subscribers will also be able to choose an option of news, sports and talk programming. Each of these programming options will be available on existing satellite radios at a cost of $9.99 per month.

4. Discounted Family-Friendly Programming: Within three months of the consummation of the pending merger, consumers will be able to purchase a "family-friendly" version of existing Sirius or XM programming at a cost of $11.95 a month, representing a credit of $1.00 per month. Current Sirius customers will also be able to choose a family-friendly version of Sirius programming that includes select XM programming, and current XM customers can choose a family-friendly XM programming option that includes select Sirius programming. This programming will cost $14.99 per month, representing a credit of $2.00 per month from the cost of the "best of" programming.

These programming options were previously described in the companies' July 24, 2007 joint filing and are subject to individual channel changes in the ordinary course of business and, in the case of certain programming, the consent of third-party programming providers.

Public Interest and Qualified Entity Channels. The combined company will set aside 4 percent of the full-time audio channels[1] on the Sirius platform and on the XM platform, respectively, which currently represents six channels on the Sirius platform and six channels on the XM platform, for noncommercial, educational and informational programming within the meaning of 47 C.F.R § 25.701(f)(2) of the DBS set aside rules.

In addition, within four months of the consummation of the merger, the combined company will enter into long-term leases or other agreements to provide a Qualified Entity or Entities[2] rights to four percent of the full-time audio channels on the Sirius platform and on the XM platform, respectively; which again currently represents six channels on the Sirius platform and six channels on the XM platform. As digital compression technology enables the company to broadcast additional full-time audio channels, the

[1] "Full-time audio channels" mean the aggregate number of channels of music, news, sports, entertainment or audio programming broadcast on a continuous basis, 24 hours a day, seven days a week, plus part-time channels aggregated on a full-time equivalent basis, on the Sirius platform or the XM platform, as the case may be.

[2] A Qualified Entity includes any entity that is majority-owned by persons who are African American, not of Hispanic origin; Asian or Pacific Islanders; American Indians or Alaskan Natives; or Hispanics.

combined company will ensure that four percent of full-time audio channels on the Sirius platform and the XM platform are reserved for a Qualified Entity or Entities; provided that in no event will the combined company reserve fewer than six channels on the Sirius platform and six channels on the XM platform.

The Qualified Entity or Entities will not be required to make any lease payments for such channels. The combined company is willing not to be involved in the selection of the Qualified Entity or Entities. The combined company will have no editorial control over these channels.

Equipment. The merged company will permit any device manufacturer to develop equipment that can deliver the company's satellite radio service. Device manufacturers will also be permitted to incorporate in satellite radio receivers any other technology that would not result in harmful interference with the merged company's network, including hybrid digital (HD) radio technology, iPod ports, internet connectivity, or other technology. This principle of openness will serve to promote competition, protect consumers, and spur technological innovation. Within one year following the consummation of the merger, the combined company shall offer for license, on commercially reasonable and non-discriminatory terms, the intellectual property it owns and controls of the basic functionality of satellite radios that is necessary to independently design, develop and have manufactured satellite radios (other than chip set technology, which technology includes its encryption and conditional access keys) to any bona fide third party that wishes to design, develop, have manufactured and distribute subscriber equipment compatible with the Sirius system, the XM system, or both. Chip sets for satellite radios may be purchased by licensees from manufacturers in negotiated transactions with such manufacturers. Such technology license shall contain commercially reasonable terms, including, without limitation, confidentiality, indemnity and default obligations; require the licensee to comply with all existing and applicable law, including the rules and regulations of the Federal Communications Commission and applicable copyright laws of the United States; and require the licensee and qualified manufacturer to satisfy technical and quality assurance standards and tests established by the combined company from time to time and applicable to licensees and qualified manufacturers. Further, the merged company will not execute any agreement or take any other action that would bar, or have the effect of barring, a car manufacturer or other third party from including non-interfering HD radio chips, iPod compatibility, or other audio technology in an automobile or audio device. Each licensee shall be responsible for, and bear all costs associated with, the design, development, manufacturing, including parts procurement, logistics, warranty, sales, marketing, and distribution of such satellite radios.

Service to Puerto Rico. Within three months of the consummation of the merger, the combined company will file the necessary applications to provide the Sirius satellite radio service to the Commonwealth of Puerto Rico using terrestrial repeaters and will, upon grant of the necessary permanent authorizations, promptly introduce such satellite radio service to the Commonwealth.

Interoperable Receivers. Within one year of the consummation of the merger, the combined company will offer for sale an interoperable receiver in the retail after-market.

Rates. The combined company will not raise the retail price for its basic $12.95 per month subscription package, the a la carte programming packages described in paragraph 1 of this letter, and the new programming packages described in paragraphs 2, 3 and 4 of this letter for thirty six months after consummation of the merger. Notwithstanding the foregoing, after the first anniversary of the consummation of the merger, the combined company may pass through cost increases incurred since the filing of the combined company's FCC merger application as a result of statutorily or contractually required payments to the music, recording and publishing industries for the performance of musical works and sound recordings or for device recording fees. The combined company will provide customers, either on individual bills or on the combined company's website, specific costs passed through to consumers

pursuant to the preceding sentence.

If you have any questions, please do not hesitate to contact us.

Sincerely,

Richard E. Wiley Robert L. Pettit
Counsel for Sirius Satellite Radio Inc.

Gary M. Epstein James H. Barker
Counsel for XM Satellite Radio Holdings Inc.

cc: Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell

July 25, 2008

The Honorable Kevin J. Martin
The Honorable Michael J. Copps
The Honorable Jonathan S. Adelstein
The Honorable Deborah Taylor Tate
The Honorable Robert M. McDowell
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Consolidated Application for Authority to Transfer Control of XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc., MB Docket No. 07-57

Dear Mr. Chairman and Commissioners:

The record in the above-referenced proceeding provides clear evidence that the merger of Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM") will benefit consumers and should therefore be approved promptly and without conditions. Sirius and XM have demonstrated that consumers will benefit substantially and the public interest will be served by approval of this transaction. The Commission should not impose conditions in this proceeding that will have the effect of reducing these public interest benefits. Sirius and XM have already agreed, in a June 13, 2008 letter, to implement voluntary commitments that leave no doubt that this merger is in the public interest.[1]

Nevertheless, this letter is to inform you that, if the merger is approved, the combined company will implement the voluntary commitments described below, which supplement or clarify the voluntary commitments described in the companies' June 13, 2008 letter. As with the prior voluntary commitments, these commitments are being made to further demonstrate that the merger is in the public interest and in the interest of facilitating the speediest possible approval of the merger by the Commission.

Satellite Radio Terrestrial Repeater/WCS Proceedings. The Commission first commenced a proceeding to establish rules for satellite radio terrestrial repeaters in 1997.[2] The successor to that original proceeding is still pending.[3] Sirius and XM have participated at every step of those proceedings in good-faith; the companies have submitted thousands of pages of pleadings,

[1] *See* Letter to Kevin J. Martin, Chairman, FCC from Richard E. Wiley, Counsel to Sirius and Gary M. Epstein, Counsel to XM, MB Dkt. No. 07-57 (filed June 16, 2008) ("Voluntary Commitments").

[2] *Establishment of Rules and Policies for the Digital Audio Radio Service in the 2310-2360 MHz Band*, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5754 (1997).

[3] *Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band, Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, WT Docket No. 07-293, IB Docket No. 95-91, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 22 FCC Rcd 22123 (2007).

several engineering studies and even proposed rules.[4] Sirius and XM believe that testing with FCC oversight can quickly bring these proceedings to a conclusion. Accordingly, the combined company will commit to provide the Commission whatever assistance it requests to allow the Commission to oversee such testing and resolve these proceedings by the end of 2008.

Interoperable Receivers. Sirius and XM clarify that immediately after the merger, the combined company will make the design and the specifications for an interoperable radio available for license to equipment manufacturers in accordance with the companies' commitment contained in Sirius' and XM's June 13, 2008 *ex parte* letter. Moreover, within nine months of the consummation of the merger, the combined company will offer for sale an interoperable receiver in the retail after-market. This accelerates the companies' previous voluntary commitment to do so within one year.

Local Programming and Advertising. Sirius and XM have committed, and reiterate their commitment, not to originate local programming or advertising through their repeater networks.[5]

Copyright Royalty Payments. In accordance with the Copyright Act, both Sirius and XM pay millions of dollars in royalties in connection with their public performance of sound recordings.[6] The combined company's a la carte and other programming proposals were not intended, and are not anticipated, to reduce revenue from copyright royalty payments. They were designed to provide more choice and lower prices and hopefully increase revenue, which should have a positive effect on copyright royalty payments to artists and record companies.

Rates. Sirius and XM clarify that the combined companies' June 13, 2008 "Rates" voluntary commitment establishes a price freeze lasting thirty-six months for the combined company's basic $12.95 per month subscription package, the a la carte programming packages described in paragraph 1 of the June 13, 2008 letter, and the new programming packages described in paragraphs 2, 3, and 4 of the June 13, 2008 letter, except for a pass through of certain cost increases. This does not affect any FCC authority to review this price freeze prior to its expiration.

Equipment Non-Exclusivity. Sirius and XM have not entered into any agreement that would bar, or have the effect of barring, a car manufacturer or other third party from including non-interfering HD radio chips, iPod compatibility, or other audio technology in an automobile or audio device. Sirius and XM have not entered into any agreement to grant, or that has the effect of granting, a device manufacturer an exclusive right to manufacture, market and sell equipment that can deliver the company's satellite radio service. Following the consummation of the merger, the combined company will not enter into any agreement that grants, or that would have the effect of granting, a device manufacturer an exclusive right to manufacture, market and sell equipment that can deliver the company's satellite radio service. This supplements XM's and Sirius' June 13, 2008 voluntary commitment. Sirius and XM also clarify their June 13 letter that they will provide, on commercially reasonable terms, the intellectual property "to permit any device manufacturer to develop equipment that can deliver the company's satellite radio

[4] Neither Sirius, XM nor, to the knowledge of the companies, the FCC has ever received an interference complaint from a WCS licensee relating to a satellite radio terrestrial repeater.

[5] *See Sirius Satellite Radio Inc.*, DA 01-2171, ¶¶ 10-11 (Sept. 17, 2001); *XM Radio Inc*., DA 01-2172, ¶¶ 10-11 (Sept. 17, 2001).

[6] 17 U.S.C. §§ 106(6); 114(d)(2); 114(f)(1).

service." The encryption, conditional access and security technology is embedded in chip sets that can be purchased from third party manufacturers.

***Public Interest Channel Set Asides*.** To clarify the commitment contained in Sirius' and XM's June 13, 2008 letter, Sirius and XM will not select a programmer to fill more than one non-commercial, educational or informational channel on each of the Sirius and XM platforms as long as demand for such channels exceeds available supply.

If you have any questions, please do not hesitate to contact us.

Sincerely,

/s/ Richard E. Wiley
Richard E. Wiley
Counsel for Sirius Satellite Radio Inc.

/s/ *Gary M. Epstein*
Gary M. Epstein
Counsel for XM Satellite Radio Holdings Inc.

APPENDIX C

Timeline of Commitments[1]

* Immediately upon consummation of the merger:

- The combined company must offer for license, on commercially reasonable and non-discriminatory terms, the intellectual property it owns and controls of the basic functionality of satellite radios that is necessary to independently design, develop and have manufactured satellite radios (other than chip set technology, which technology includes its encryption and conditional access keys) to any bona fide third party that wishes to design, develop, have manufactured and distribute subscriber equipment compatible with the Sirius system, the XM system, or both. In addition, Applicants will not bar, by agreement or otherwise, a car manufacturer or other third parties from including non-interfering HD Radio chips, iPod compatibility, or other audio technology in an automobile or audio device. Therefore, Applicants are prohibited from taking any action that would thwart, hinder, or obstruct any receiver manufacturer, automobile manufacturer, or chip manufacturer from including HD Radio technology in SDARS receivers. We note that this commitment serves to prohibit Applicants from entering into exclusive contracts with parties that control the chip set and encryption technology.

- The combined company shall not raise the retail price for its basic $12.95 per month subscription package, the a la carte programming packages, and the new programming packages nor reduce the number of channels in either their current packages or new packages for at least 36 months. Six months prior to the expiration of the commitment period, the Commission will seek public comment on whether the cap continues to be necessary in the public interest. The Commission will then determine whether it should be modified, removed, or extended. After the first anniversary of the consummation of the merger, the combined company may pass through cost increases incurred since the filing of the combined company's FCC merger application as a result of statutorily or contractually required payments to the music, recording and publishing industries for the performance of musical works and sound recordings or for device recording fees.

- The combined company must make available 4 percent of the full-time audio channels on the Sirius platform and on the XM platform, respectively, which currently represents six channels on the Sirius platform and six channels on the XM platform, for noncommercial educational and informational programming provided by programmers that satisfy the qualifications set forth in 47 C.F.R § 25.701(f)(2) of the DBS set aside rules. Programming provided pursuant to this set-aside requirement must be available to the public no later than six months after the transaction's consummation. In fulfilling this commitment, the combined company shall adhere to the additional requirements set forth in the Order.

[1] We also are conditioning our approval of the transaction on the merged entity's continuing adherence to the other commitments and conditions, as specified herein, which continue indefinitely. The descriptions of the commitments and timeframes identified in this Appendix C are for informational purposes only and are not necessarily exhaustive. The Order, which incorporates the voluntary commitments set forth in Appendix B, specifies the precise terms and timeframes of the conditions adopted. Should there be any omissions in this Appendix or inconsistencies between this Appendix and the Order, the language in the Order will prevail.

* Within three months of consummation of the merger:

  - The first a la carte-capable radios must be introduced in the retail after-market and the combined company must begin offering a la carte programming.

  - The combined company must offer customers the ability to receive the best of both Sirius and XM programming at a monthly cost of $16.99.

  - Customers must have the option of choosing an option of "mostly music" programming and an option of news, sports and talk programming at a monthly cost of $9.99 for each of these programming options.

  - Consumers must be able to purchase a "family-friendly" version of existing Sirius or XM programming at a cost of $11.95 a month, representing a credit of $1.00 per month. Current Sirius customers must also be able to choose a family-friendly version of Sirius programming that includes select XM programming, and current XM customers must be able to choose a family-friendly XM programming option that includes select Sirius programming. This programming will cost $14.99 per month, representing a credit of $2.00 per month from the cost of the "best of" programming.

  - The combined company must file applications with the Commission to provide the Sirius satellite radio service to the Commonwealth of Puerto Rico using terrestrial repeaters and must promptly introduce such service upon grants of permanent authority by the Commission to operate these repeaters.

* Within four months of consummation of the merger:

  - The combined company must enter into long-term leases or other agreements to provide a Qualified Entity or Entities rights to 4 percent of the full-time audio channels on the Sirius platform and on the XM platform, respectively, which currently represents six channels on the Sirius platform and six channels on the XM platform. As digital compression technology enables the company to broadcast additional full-time audio channels, the combined company must ensure that 4 percent of full-time audio channels on the Sirius platform and the XM platform are reserved for a Qualified Entity or Entities; provided that in no event will the combined company reserve fewer than six channels on the Sirius platform and six channels on the XM platform.

* Within nine months of consummation of the merger:

  - The combined company must offer for sale an interoperable receiver in the retail after-market.

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN

Re: *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.*

The applications of XM and Sirius satellite radio to merge did not present the Commission with an easy case. When the Commission originally issued each company its license, the Commission determined that it would not be in the public interest for the same company to hold both licenses. Yet that is exactly what XM and Sirius asked to do.

I said at the time that the two companies announced their intent to merge that I thought they had a high hurdle to meet if they wanted to prove that the transaction would be in the public interest. It has taken some time, but I do believe that with the essential voluntary commitments they have made, the parties have met this burden.

In particular, I commend the parties for committing to offer consumers more choice and flexibility in how they purchase channels. I have long believed that consumers should be able to buy and pay for only those channels that they want. Such a free market approach to programming – whether its music or television – would benefit consumers through lower prices and more control. Consumers will be able to enjoy the best of programming on both services and pick and choose channels at lower prices. With these options as well as the companies' agreement not to raise prices for three years, consumers should be better off as a result of this merger.

I am pleased that the parties have committed to offering consumers, for the first time, with a specific percentage of diverse programming. The two companies have agreed to dedicate eight percent of their channels -- 24 channels in total -- to minority and public access programming. This will create greater opportunities for more voices to be heard on satellite radio, covering the issues that are important to those communities that may have traditionally been ignored in the past.

I also support the parties' commitment to an open technical standard that will allow for a competitive market to develop for radios that carry the satellite radio signals. Any device manufacturer will be able to develop satellite receivers and to incorporate other technology, such as HD radio, iPod ports, and Internet connectivity so long as it will not result in harmful interference with the merged company's network.

Finally, I support the Commission soon issuing a notice of inquiry to gather more information about whether HD chips or any other audio technology should be included in all satellite radio receivers.

In conjunction with this merger, I directed Commission staff to negotiate a Consent Decree resolving the two companies' numerous violations regarding the placement and technical properties of their radios and repeaters. I believed these violations to be significant, and was unwilling to support proposed fines that I did not believe held the companies accountable for their disregard for the Commission's rules. I am pleased that the companies eventually agreed to fines collectively totaling approximately $19.6 million. The Commission will continue to monitor the combined company to ensure that it operates in the public interest and in accordance with all of our rules.

DISSENTING STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: *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.*

The majority's own findings provide a compelling case for rejecting this merger:

(1) We must assume that this is a merger to monopoly;[2]
(2) The merged company will possess the incentive and ability to impose monopoly price hikes on consumers;[3]
(3) Consumers will need protection for the foreseeable future because (a) the merged company's incentive and ability to impose monopoly price hikes will only grow over time,[4] and (b) the emergence of another satellite radio competitor is unlikely;[5] and
(4) The pricing restrictions imposed on the merged company will expire in three years.[6]

The inescapable logic of the majority's findings is that by 2011 satellite radio subscribers will face monopoly price hikes by a company with the incentive and ability to impose them.[7] No one has been able to explain to me how this could possibly serve the public interest.[8]

The majority's argument is that it can stack up enough "conditions" on the merged entity—spectrum set-asides, price controls, manufacturing mandates, etc.—to tip the scale in favor of approval. In essence, the majority asserts that satellite radio consumers will be better served by a regulated monopoly than by marketplace competition. I thought that debate was settled—as did a unanimous Commission in 2002 when it declined to approve the proposed merger between DirecTV and Echostar:

> In essence, what Applicants propose is that we approve the replacement of viable facilities-based competition with regulation. This can hardly be said to be consistent with either the Communications Act or with contemporary regulatory policy and goals, all of which aim at replacing, wherever possible, the regulatory safeguards needed to ensure consumer welfare in communications markets served by a single provider, with free market competition, and

[2] *See* Order at ¶¶ 47-50 (finding that the Commission must presume that satellite radio constitutes a single, national product market, and that "the proposed merger is a merger to monopoly").

[3] *Id.* at ¶¶ 5, 50.

[4] *Id.* at ¶¶ 54, 104.

[5] *Id.* at ¶¶ 5, 49.

[6] *Id*. at ¶ 107. The majority's statement that the FCC will review the price cap before the three-year period expires is little more than a fig leaf. It permits the majority to imply that it is not leaving consumers completely unprotected in 2011, while leaving all of the difficult decisions to a future Commission. That Commission will scarcely appreciate the Hobson's choice we are bestowing on them: let the price caps expire in the face of a monopoly provider or impose a new system of rate regulation on an industry that has never had one in the past.

[7] The price cap adopted by the majority permits certain costs to be passed through to consumers even during the three-year period. To the extent that occurs, even the three-year price controls could prove illusory.

[8] None of the remaining conditions address this fundamental consumer harm and I therefore do not address them at length. I would note, however, that many of them are chock-full of holes and/or limitations that could render them meaningless.

> particularly with facilities-based competition. Simply stated, the Applicants' proposed remedy is the antithesis of the 1996 Act's "pro-competitive, de-regulatory" policy direction.[9]

That preference for competition is why the Commission has almost never permitted a single commercial licensee to hold all of the spectrum allocated to a particular service, and why (until today) the Commission required that there always be at least two satellite radio licensees. I understand why the companies would prefer to escape the rigors of competition. What I cannot understand is why the majority thinks consumers will be better off without it.

Some may say that the majority isn't really permitting a merger-to-monopoly because satellite radio is part of a larger audio entertainment market that includes iPods, terrestrial radio, and a plethora of new technologies that everyone "knows" are just around the corner. But that is not the majority's position. The majority finds that no one has proved that the relevant product market includes anything other than satellite radio and that competitive entry is unlikely for the foreseeable future. So the majority itself takes the argument away.

Others may say that whether the combined entity is a monopoly is beside the point because one or both of them would not survive anyway—so there's no harm in letting them merge. But the merging companies do not seek approval on the basis of financial distress and the majority makes no findings in that regard. So this claim is not before us. I have said many times that I am willing to consider mergers where financial viability is at stake. But that's not this merger. We must assume that the marketplace can support two financially viable competitors.

I have said from the outset that approving this merger would be a steep climb for me. It proved to be just that. In the end, after cutting through all the heat and noise and lobbying this proceeding has generated, we are left with the unshakable reality of a merger-to-monopoly in a market that could sustain competition. I can find no precedent or public interest justification for that outcome. I dissent.

[9] *Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation; and EchoStar Communications Corporation*, 17 FCC Rcd 20559, 20665 (2002).

DISSENTING STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN

Re: *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.*

Sirius and XM (collectively the "Applicants") currently offer dynamic and competitive audio programming to consumers. Their marketplace competition with each other has undoubtedly contributed to their cutting edge appeal. It also has exacerbated their difficult financial circumstances, as they have competed for compelling programming and driven up the costs for each other dramatically. Partly in response to this one-upmanship, which has improved the quality of programming and benefited consumers, the Applicants have sought to merge rather than compete.

It is precisely because the Applicants provide such a valuable service to consumers that it was critical for the Commission to respond appropriately to their dramatic effort to combine. They both now provide an outstanding service that their subscribers find extremely engaging. They employ creative and innovative talent who put on shows that many of their subscribers cannot easily live without. I truly hope the merged entity succeeds, and maintains its edge, and does not become a fat and happy monopoly.

I was hoping we could achieve a bipartisan consensus that would offer consumers more diversity in programming, better price protection, greater choices among innovative devices and real competition with digital terrestrial radio. Disappointingly, that was not accomplished. Instead, consumers will get a monopoly with window dressing. And, the dream of greater women and minority participation in media will be deferred once again.

It is not just me who considers this a monopoly. On that point, the majority and I do agree. The entire *Order* is appropriately premised on the reality that this is a "merger to monopoly."[1] Rather than accept the Applicants' broad definition of the market, today's *Order* defines the market narrowly and, thus, deliberately endows the Applicants with a monopoly over the entire licensed satellite radio service. To do so, the majority repeals the existing safeguard prohibiting the common ownership of the two satellite radio licenses, and instead relies on nominal conditions.[2] Incredibly, the merged entity will now have *more* spectrum than the AM and FM bands combined. Given the inadequacy of the merger conditions, this decision better serves the Applicants' self-interest rather than the public interest, so I am unable to support it.

The instant order follows in the wake of the Department of Justice (the "DOJ") Antitrust Division's questionable decision to close its investigation of the merger without requiring any conditions.[3] The DOJ explained that it could not find that such a merger would substantially lessen competition, in part, because of a lack of competition between the parties even without the merger. Thus, the DOJ

[1] *Order* at ¶¶ 47-50.

[2] *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd 5754, 5823 ¶ 170 (1997) (stating, under a subheading entitled "Safeguards", that "[e]ven after DARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellite DARS license[,]" and that "[t]his prohibition on transfer of control will help assure sufficient continuing competition in the provision of satellite DARS service.").

[3] DOJ Press Release, *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.* (Mar. 24, 2008), *available at* http://www.usdoj.gov/opa/pr/2008/March/08_at_226.html.

concluded that the merger would not make matters much worse — hardly consolation for consumers.

Ostensibly, the DOJ relied on two key premises in reaching its decision: long-term sole source contracts with automobile manufacturers and the lack of an interoperable radio. Even though the DOJ acknowledged that the Applicants competed on the terms of automotive contracts, including the amount of equipment subsidization, it readily dispensed with this consumer benefit, because many of the sole-source contracts were locked up for extended periods. Further lack of competition between the Applicants was explained by their decision not to bring an interoperable radio to market despite a Commission requirement to do so. It is ironic that the DOJ relied on the Applicants' failure to comply with the interoperability mandate as a justification for the merger. The DOJ also gave the Applicants a pass on the financial interests and corporate directorships held by major automotive manufacturers in the Applicants' businesses and the merged entity's future business. While more analysis is needed, this relationship presents a potential for discrimination against the installation of competitive technologies in the automotive sector going forward.

In contrast to antitrust review, where the DOJ would have borne the burden of proving that the proposed transaction "substantially lessens competition,"[4] the Commission's standard of review requires merger applicants to prove that the transaction will serve the greater public interest, informed by the core values of competition, diversity and localism.[5] Yet, the Applicants have not even provided the Commission with sufficient evidence to perform a structural market analysis that would allow us to and predict the likelihood of competitive harm.

In the *Order*, the majority assumes the "worst-case" scenario, specifically that satellite radio has no real competitors and that the proposed transaction represents a merger to monopoly. In adopting this approach, the majority professes to create a high public interest standard by subjecting the merger application (with the Applicants retaining the burden of proof) to the most exacting scrutiny. Granting the merger under this approach should require significant conditions, proportional to the significant public interest harm assumed, in order to mitigate the extreme concentration of market power. Regrettably, the majority's acceptance of the Applicants' "voluntary commitments" fails to meet this professed prophylactic public interest standard because of gaping loopholes in them.

Price Cap. Though the Applicants have committed not to raise the retail rates on their existing and newly proposed programming packages for three years after the consummation of the merger, the *Order* fails to justify why the three-year period is sufficient and merely adopts the Applicants' terms and conditions. Although the majority is unable to identify competitors likely to constrain the merged entity's ability to raise prices, it is unwilling to impose a meaningful price cap for a reasonable period of time.

Even during the three-year period itself, the merged entity could evade or undermine this consumer protection in several significant respects. The manner in which this condition is crafted suffers from a myopic perception of satellite radio pricing. Retail rates of programming packages constitute only one element in the ultimate price of satellite radio service. The item completely overlooks additional implicit pricing elements of the service, such as equipment subsidies,[6] ancillary services,[7] activation fees,[8]

[4] 15 U.S.C. § 18.

[5] 47 U.S.C. § 310(d).

[6] *See* "HD Radio" *infra*.

[7] For example, Sirius presently provides an Internet radio service to subscribers for either no additional charge or an additional $2.99 per month, depending on the quality of the audio. Sirius Internet Radio, (continued….)

termination fees,[9] and transfer fees,[10] all of which the merged entity could manipulate to undermine the consumer protection intent of the price cap. It also fails to adequately address the concern that the merged entity may have the incentive and ability to raise real prices by reducing content quality, either by increasing advertising or through other means. Sirius Chief Executive Officer Mel Karmazin has stated as much, declaring to investors that the post-merger "advertising line is going to contribute significantly in the future towards [average revenue per user]."[11] Consumers might as well prepare for a barrage of new commercials, because now they will have nowhere else to turn if they want satellite radio service.

Additionally, the merged entity could evade the price cap by siphoning off programming from the capped packages to new and presumably uncapped packages.[12] Indeed, not only do both Applicants already have service clauses to this effect, but they assert that the proposed "programming options … are subject to individual channel changes in the ordinary course of business and, in the case of certain programming, the consent of third-party programming providers."[13] While the decision imposes a floor on the number of channels in the existing and proposed programming packages, the Applicants are left to exploit a loophole to siphon off high-quality channels to unregulated tiers while replacing them with lower cost, and possibly lower quality, channels. Thus, while this approach would maintain the same quantity of channels, it cannot guarantee consumers the same or better quality of programming.

(Continued from previous page)
http://www.sirius.com/siriusinternetradio. XM presently provides a similar, though not identically structured, Internet radio service to subscribers. *See* XM Radio Online, http://xmro.xmradio.com/xstream/index.jsp.

[8] Sirius currently charges a one-time $15.00 fee "to activate, reactivate, upgrade or modify each Satellite Radio Service Subscription." Sirius Terms and Conditions, http://shop.sirius.com. XM charges a similar activation fee of undisclosed amount. XM Customer Agreement, http://www.xmradio.com/about/customer-service-agreement.xmc ("For each XM Radio on your account, we may charge you a fee to activate, upgrade or modify your Radio Services. The addition of premium channels or services, if any, may require an additional activation fee. The fee is payable with your first subscription fee payment.").

[9] Sirius currently charges a $75 termination fee "if you cancel a one-year or longer Subscription during the first year of service." Sirius Terms and Conditions, http://shop.sirius.com. XM charges a termination fee of undisclosed amount. XM Customer Agreement, http://www.xmradio.com/about/customer-service-agreement.xmc ("From time to time, we may offer the Services on an annual or other multi-month commitment basis. In such events, you agree to make payments for Services to be received and that are ordered by you in accordance with the terms of the applicable billing plan that you agree to, including, without limitation, payments of any early termination fees if you terminate your Services prior to the end of such commitment period.").

[10] Sirius currently charges a $75 transfer fee "[i]f you transfer a lifetime Satellite Radio Service Subscription from one Receiver to another or from one person to another." Sirius Terms and Conditions, http://shop.sirius.com. It is unclear whether or not XM charges a similar transfer fee or whether transfer is even permitted. *See* XM Customer Agreement, http://www.xmradio.com/about/customer-service-agreement.xmc.

[11] Investor Presentation, Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. (Feb. 20, 2007) (transcript *available at* http://www.sec.gov/Archives/edgar/data/908937/000095012307002469/y30604be425.htm).

[12] Sirius Terms and Conditions, http://shop.sirius.com ("Accordingly, we reserve the unrestricted right to change, rearrange, add, or delete programming, including canceling, moving or adding particular channels, at any time, with or without notice to you."); XM Customer Agreement, http://www.xmradio.com/about/customer-service-agreement.xmc ("XM reserves the right to change programming on either or both [XM Radio Online and XM Radio] Services at any time and without notice, at our sole discretion, including canceling, modifying, moving or adding particular channels, with or without notice to you.").

[13] Letter from Richard E. Wiley, Robert L. Pettit, Wiley Rein LLC, Counsel for Sirius Satellite Radio Inc., and Gary M. Epstein, James H. Barker, Latham & Watkins LLP, Counsel for XM Satellite Radio Holdings Inc., to Kevin J. Martin, Chairman, FCC at 5 (June 13, 2008) ("Applicants' June 13, 2008 Ex Parte").

Precedent for this type of strategic behavior exists in the previous attempts to regulate cable rates.[14]

The *Order* provides an explicit loophole to the so-called "price cap" by allowing the merged entity to pass through statutory or contractual programming costs to the consumer one year after the merger is complete.[15] While the genesis of this exception is left unexplained, the winners and losers are apparent. The Applicants benefit by passing the cost on to the consumer. And of course, consumers will be left to find out about these "programming costs" through increases in their bills.

Finally, even assuming the success of the price cap, there is nothing to prevent the merged entity from instantaneously increasing retail prices once it expires. To remedy this oversight, the duration of the price cap period should have been extended beyond three years (correlated with expected entry of sufficient competition to restrain prices) or, in the alternative, presumptively renewed with the merged entity bearing the burden of proving that the restriction is no longer necessary because of competition. Though there is some sort of interim review, the Commission's standard of review and the burdens of proof are left ambiguous.

Programming. While the majority accepts the Applicants' "voluntary commitment" to offer newly defined and a la carte programming packages, the benefits, never mind the merger-specific benefits, of such offerings are far from clear. With respect to the newly defined programming packages, it accepts the Applicants' unjustified assertion that such packages could not be offered absent a merger and summarily finds that such packages present merger-specific benefits.

At its core, the decision rests on the single assumption that new programming packages will increase consumer choice and, therefore, improve consumer welfare. However, the Commission failed to inquire into whether the newly proposed programming packages maximize consumer welfare or even estimate the magnitude of the claimed welfare gain. Does offering consumers more channels for more money or fewer channels for more money per channel create a cognizable public interest benefit? Is it "choice," in any meaningful sense of the word, if the relative value of the offering diminishes? By this logic, a decision to offer one channel at one hundred times the price of the total current package would also increase "choice" and improve consumer welfare. The same is true for the "safety valve" claim, that lower priced options correct the ills of take-it-or-leave-it offers by a monopolist. Would not one less channel for one less cent also create such nominal "choice?"

Even if so, a significant obstacle remains; namely, the exclusivity provisions found in talent contracts prevent the merged entity from offering certain channels, potentially the most popular channels, on both systems. As adopted, the *Order* notes that the Applicants have pledged to seek third party consent to such arrangements and willingly permits the merged entity to pass the cost of such consent directly on to the consumer.

A la carte makes its appearance here without any empirical analysis or any discussion reflective of the controversy surrounding the Commission's own a la carte inquiries.[16] Nor is there any

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[14] *See e.g.*, Thomas W. Hazlett, *Shedding Tiers for A La Carte? An Economic Analysis of Cable TV Pricing*, 5 J. Telecomm. & High Tech. L. 253, 258 (Fall 2006) ("The complexities of the video marketplace rendered price regulation unworkable; when rates were capped by authorities, cable operators and cable networks responded to these constraints by altering the nature, packaging, and quality of video programming services.").

[15] Applicants' June 13, 2008 Ex Parte at 5.

[16] *See* Media Bureau, *Report On the Packaging and Sale of Video Programming Services To the Public* (Med. Bur., Nov. 18, 2004); *see also* Media Bureau, *Further Report on the Packaging and Sale of Video Programming Services* (continued….)

acknowledgment of the effects of a la carte policies on the public interest concern of diversity of programming. Without further analysis, this "voluntary commitment" is, at best, inconsequential to our merger review.

Noncommercial and Qualified Entity Channels. The Applicants' commitment to set aside four percent of full-time audio channels for noncommercial educational and informational programming as well as four percent for qualified entity programming is small step in the right direction. There is no explanation, however, as to why these commitments are significant enough to offset the potential public interest harms created by a merger to monopoly.

In terms of noncommercial educational and informational programming, the acquiescence in the Applicants' "voluntary commitment" merely enshrines the status quo. The Applicants currently already offer an equivalent amount of such programming on their combined systems. The voluntary commitment adds nothing to offset the effects of the merger. We should have required substantially more spectrum to be set aside for such public interest programming.

In terms of diverse programming by qualified entities, it is far from clear that a paltry four percent set-aside will be commercially viable. Several commenters have expressed that there is no business case for such a small offering. The decision today rejects the guidance of members of Congress, state Attorneys General, and public interest organizations that have called for a larger spectrum set-aside to ensure competition and diversity in satellite radio service to offset the massive concentration that is being permitted. And, it is left entirely unclear how the qualified entities will be selected, leaving the entire provision unintelligible and unpredictable. "We will determine the implementation details for use of these channels [for qualified entities] at a latter date,"[17] is a clear indication of the Commission's historic pattern of neglecting minority access to the communications industry. Once again, rather than taking a decisive step forward to improve the plight of women and people of color in media, the Commission has taken a step to the side.

Interoperable Receiver. The *Order* characterizes the Applicants' interpretation of the Commission's interoperability requirement as "not unreasonable" to excuse their earlier failure to develop and market interoperable receivers. The Applicants' noncompliance created switching costs for consumers and, thus, limited pre-merger competition between the Applicants. Adding this condition today is virtually meaningless, because the merged entity will have every incentive to offer interoperable devices anyway. The point was to enforce the requirement before, not after, the merger. Doing it now is clearly a case of closing the barn door after the cows got out. At least the *Order* recognizes that this claimed benefit simply cannot be deemed merger-specific.

Open Access. The *Order* uncritically embraces the Applicants' proffered open access scheme,[18] concluding that commercially reasonable, non-discriminatory licensing will effectively mitigate any potential vertical harm from the satellite radio monopoly. However, there is no effective mechanism to deliver a truly open, competitive market. The open access provision should function to ensure

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to the Public, (Med. Bur., Feb. 9, 2006) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-263740A1.pdf.

[17] *Order* at ¶ 135.

[18] Letter from Richard E. Wiley, Wiley Rein LLC, Counsel for Sirius Satellite Radio Inc., and Gary M. Epstein, Latham & Watkins LLP, Counsel for XM Satellite Radio Holdings Inc., to Kevin J. Martin, Chairman; Michael Copps, Commissioner; Jonathan Adelstein, Commissioner; Deborah Tate, Commissioner; and Robert McDowell, Commissioner, FCC at 2 (July 25, 2008); Applicants' June 13, 2008 Ex Parte at 4-5.

competition, innovation, and the delivery of advanced technologies in the satellite radio receiver, and to some extent, the broader audio equipment manufacturing market. By shortsightedly permitting the merged entity to retain control of the design, manufacture and distribution of satellite radio receivers, it allows the merged company to maintain gatekeeper authority over the market. This is letting the fox guard the henhouse. We should have, as I proposed, required an independent laboratory to certify compliance with the technological specifications and quality standards.

HD Radio. One of the mechanisms the merged company will use to maintain its lock on the equipment market will be through product subsidies. While many consumers will find these beneficial, we should have guarded against the use of them for anticompetitive purposes. While some proposed that we require HD radio technology be incorporated into all new satellite receiver models capable of receiving analog terrestrial radio, I proposed we require it only in subsidized models. That way, if there were truly an open market for devices, as an independent process for certification would have ensured, the market would determine whether to integrate HD radio into the devices. Where the merged company sought to alter market dynamics through subsidies or other mechanisms, it would be prevented from discriminating against competing HD radio technology. Instead, the *Order* allows the merged company to avoid subsidizing models that include HD radio, thus using their market power to thwart the very competition the Applicants cited as justifying the merger.

While I am pleased that the *Order* is explicitly conditioned on compliance with the voluntary commitments, we should have instituted an independent monitor to assist the Commission in reviewing complaints and enforcing even these meager conditions. This is particularly necessary in light of the fact that the Applicants just paid record fines for widespread and flagrant violations of Commission rules over a number of years.

In looking back over the torturous and excessively long period during which this merger was under consideration, one commentator has criticized the commitments as mere "crumbs that have fallen off the table."[19] It is remarkable that the Commission took so long to do so little.

While the *Order* repeats a public interest incantation over and over again, it does little to explain why each particular condition has gone far enough to protect the public interest. With unchecked optimism, the *Order* concludes that the public interest is precisely satisfied by the proffered "voluntary commitments" and other nominal conditions. Because the proposed transaction, as structured, has not been shown to serve the public interest, the merger application should be designated for hearing.

For the foregoing reasons, I dissent.

[19] *See* Jeffrey H. Birnbaum, *Radio Merger Under Fire From Black Lawmakers*, WASH. POST, June 17, 2008, at D01 (quoting Representative Elijah E. Cummings).

STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE

Re: *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.*

In my two years at the Commission, few decisions have been more difficult than the one before us today. As a strong supporter of free-markets and limited government regulation, I am predisposed to allow private companies the autonomy to make business decisions without the heavy hand of government regulation. By law, we are required to review this merger application because it involves the transfer of a radio license, and more specifically, the Commission's rule against one SDARS licensee holding both SDARS licenses. Our consideration necessarily presents unique and complex challenges because of the infancy of the satellite radio market, the past actions of the two companies, and the potential public interest benefits that would accrue from the merger. In approaching this analysis, I thought it more prudent to first address the multiple violations committed by the Applicants over the past five years, and then consider the merger application. The forfeitures imposed against these companies, in combination with the strict compliance plan they will submit to, convince me that it is now reasonable to consider and approve the merger application. With the sluggish economic outlook and the Dow Jones Industrial Average closing down almost 100 points in mid-July, compounding this environment with a negative regulatory decision could greatly harm both companies and, more importantly, their subscribers. While the FCC is only a tiny piece of the economic puzzle, I believe it is our responsibility to contribute to a vibrant, healthy marketplace within those sectors under our purview.

In order to fulfill my statutory obligations, and appropriate due diligence, I met repeatedly with both SDARS companies, their top management, consumer groups, members of Congress, minority broadcasters, terrestrial broadcasters from all across the country, religious, noncommercial, and public interest broadcasters, automobile manufacturers, previous SDARS bidders, investors, public citizens, mayors, local community leaders, state attorneys general-- and then there were the nearly 15,000 formal and informal comments the Commission received. My personal office received hundreds of phone calls from individual citizens and organizations in at least 30 states. It seems that every segment of society has an interest in this merger—I even hear about it at the grocery store and when I open my local newspaper. I believe that everyone involved knows that I have listened to all sides openly and equally, and weighed their arguments thoughtfully.

In the end, I voted to approve this merger because I believe that the free terrestrial broadcast radio industry that has been part of the fabric of our country will not only survive, but flourish in this new digital age, and competition from satellite radio will continue to challenge local broadcasters to deliver the type of high-quality, local product they have delivered for the last hundred years. If you don't believe me, look at those who have staked their businesses on the future of terrestrial radio and its reach to 95% of the radio-listening market, like Rush Limbaugh who recently signed an eight-year, $400 million deal with Clear Channel.

Section 310(d) of the Communications Act requires parties seeking to transfer a license to demonstrate that the proposed transaction will serve the "public interest, convenience, and necessity." The Commission weighs the potential public interest benefits against the potential harms. The Applicants have the burden of proving that the proposed transaction, on balance, serves the public interest by a preponderance of the evidence. While my remaining concerns are many, I find that the Applicants have shown that this merger, with the voluntary conditions and concessions, and the previously agreed upon consent decree for their violations, on balance, will serve the public interest.

I. ENFORCEMENT

From the beginning, it was imperative to me that before I could review the merger application, the Commission must take enforcement action, either by entering into a consent decree or otherwise resolving the pending violations. I believe that the agreement that was reached appropriately penalizes the companies, with minimal impact on their subscribers. The almost $20 million these parties will pay is a reflection of the seriousness of the violations. Thus, the forfeitures and the compliance plans the parties will be subjected to are an appropriate form of retribution, rehabilitation, and reconciliation.

The parties before the Commission today have knowingly violated a number of Commission rules and guidelines. For this reason, I felt it was necessary to resolve the issues through enforcement action first, and then proceed to consider the merger application. XM has agreed to pay $17,394,375 and Sirius has agreed to pay $2,200,000 million for violating modulator and terrestrial repeater rules. In addition, both companies have entered into consent decrees that mandate strict compliance with certifications, reporting requirements, and penalties associated with future violations. Specifically, they have agreed to hire compliance officers whose primary responsibility will be to ensure compliance with FCC rules. They will adopt a Procedural Guide for satellite radio receivers, establishing step-by-step procedures that employees must follow in connection with testing and obtaining FCC certification for new receivers. They will adopt a Repeater Change Guide, which will establish procedures to be followed before *any* changes can be made to the terrestrial repeater network. They will shut down, or bring into compliance, 100 repeaters and all others will be processed according to standard FCC guidelines. I find this compliance plan, in conjunction with the monetary forfeitures, sufficient to allow me to consider the merger application.

II. PRO-CONSUMER

With daily rumblings about a possible recession - and nearly universal consensus that we are in a pattern of economic slowdown - good economic policy from our government is more important than ever. It is not the job of the FCC to prop up failing companies. However, it is our job to support efficient and affordable radio communications. Section 7(a) of the Telecommunications Act says, "[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public." The Commission aims to ensure audio options that provide lower prices, and unique choices such as “family friendly programming” tiers. Through this Order we ensure that for at least three years consumers will see a price cap on every price tier and package that the merged entity offers. The FCC will revisit the need for this price cap six months prior to its expiration.

III. CONCENTRATION OF SPECTRUM/SET-ASIDES

Since this merger was first proposed, I have continued to voice concern regarding the concentration of 25MHz of spectrum in the hands of a single entity. Divestiture, which I initially proposed to both parties, is impractical, if not impossible, and would result in almost certain disruption of service to millions of subscribers. It could have resulted in disruption of service possibly lasting several years as the Commission attempted to create rules and consumers migrated from one SDARS system to the other. Therefore I recognize the practical necessity of reversing the Commission’s 1997 rule barring either party from holding both SDARS licenses.

Thus, the purposes of spectrum divestitures are to at least some degree accomplished by the set-aside requirements we adopted. Four percent of all channels on both systems must be set aside for non-commercial educational programming, and four percent must be set aside for use by “qualified entities” such as minority broadcasters. Only one programming channel per programmer will count towards the set-aside. This will promote a greater diversity of voices, and grant complete editorial control to other programmers and owners. Public interest groups, while pushing for an even greater number of set-aside channels, have applauded this condition. The FCC will determine the appropriate process for selecting programmers to occupy set-aside channels. The Applicants will not be part of this process.

IV. PRICE CAP

Because SDARS is a relatively new service, and prices have remained constant, it is difficult to anticipate how a merger will affect future prices. The parties have agreed to a three year price cap on the services they currently offer. This is not a sufficient fix to prevent the anticompetitive pricing schemes that could arise as a result of this merger. Thus, the Order imposes a review by the Commission before the lifting of the price cap in three years. At that time the merged entity will have the burden of demonstrating to the Commission that lifting the price cap will not result in the merged entity raising and holding prices at a level they could not otherwise maintain, but for the lack of competition in the satellite radio market.

V. HD CHIP

As a lifelong champion of the music industry and local broadcasters, I am sympathetic to the needs of the HD radio industry and promises it holds as another audio choice for consumers. However, many commenters, particularly those in the automobile industry oppose a government mandate requiring inclusion of HD chips in all radios, and the resulting increase in cost. HD radio is already in cars manufactured by BMW, Mercedes, Land Rover, Mini Cooper, Hyundai, Rolls Royce, and Jaguar. In 2009, it will also be available from Volvo and Ford. I do not believe the record of performance by this nascent technology supports a mandate for inclusion of the HD chip in every satellite radio. I do, however, support the Order's prohibition on any attempts by the Applicants to bar, by agreement or otherwise, a car manufacturer or other third party from including HD radio chips, iPod compatibility, or other audio technology. The merged entity must provide open access. In fact, I demanded that the technical specifications be available immediately, rather than in a year, as originally proposed.

In considering this difficult issue, I consulted the auto industry, where satellite radio has established a strong foothold. Without exception, the auto manufacturers I spoke with urged the Commission to forbear from imposing an HD chip requirement. Their estimate of the cost per car was, on average, two, three, or four times the cost suggested by iBiquity. With this level of disparity in information, it is impossible to do a proper cost-benefit analysis. Additionally, at a time when the auto industry is struggling, it would be unreasonable to require them to assume a cost, or, even worse, pass a cost on to their consumers, for a technology that has not yet proven the strength of consumer demand.

Thus, I believe the proper path for the Commission to take is to review the issue, along with the price cap, in three years. In addition, we will launch a Notice of Inquiry to examine what the resulting costs would be and whether HD should be mandated. In the interim, I encourage the HD radio industry to find new and innovative incentives to offer car manufacturers to include their technology in automobiles, just as other technologies have done, to increase their uptake and adoption, perhaps including an innovative revenue-sharing model.

VI. RIAA

Of the many concerns that were brought to my attention throughout this process, one of the most disturbing to me, as a life-long resident of Nashville- Music City- was the potential threat to the music industry. XM and Sirius, unlike terrestrial broadcasters, pay million of dollars in royalties to the record labels whose music they play. This is an important source of income for labels and musicians. With the adoption of new non-music tiers, concerns were raised about a potential reduction in revenue to the music industry. However, even the "News, Sports and Talk" tier includes music channels, such as Radio Disney, which will result in royalty payments. In addition, I requested, and XM and Sirius have provided, assurances that it is not their intent to do anything to decrease royalties through gamesmanship of these new programming tiers. Their primary business has been, and will continue to be, music—not news and sports. In fact, the impetus for these decisions is just the opposite—increasing revenues is

mutually beneficial for both parties. I will continue to monitor the effects of this transaction on the music industry and anticipate the parties will work with the Commission to protect this important source of revenue for America's music industry.

VII. TIERED CHOICES

As a long-time supporter of family-friendly media choices, I shared the concern of many commenters regarding the level of coarse programming on satellite radio. I associated myself with the comments of Senator Brownback who said, "Both XM and Sirius prominently feature sexually explicit programming that is highly inappropriate and contributes to the increasing coarseness of American society." (Letter of June 28, 2007). With this in mind, I was pleased to see the parties offer to provide a "Family-Friendly" tier of programming, a less expensive alternative to their full lineup of channels that will not include any indecent or profane content. I was also pleased to see that they have a tier available that allows consumers to choose any 50 or 100 channels they wish to receive from the entire programming lineup. This, too, will allow parents the option of removing those channels they find offensive or inappropriate for their family. Finally, the "News, Sports, and Talk" tier will be free from much of the content parents may not wish their children to hear. Just as in the video industry, I believe that keeping inappropriate content on subscription services that consumers must invite into their homes, and pay for, such as satellite radio and cable television, serves the public interest.

VIII. LOCAL PROGRAMMING/ADS

Many broadcasters contacted the Commission regarding the merged entity's threat to local programming and advertising. Because local advertising revenue traditionally accounts for over 70% of radio revenues, it is critical to local broadcaster's business model. The original licenses, and this Order, unambiguously prohibit local programming- including local advertising. Likewise, the parties have agreed that they do not now, nor do they intend to, air local programming. This Order specifically finds that they must refrain from airing any local programming or advertising whatsoever over terrestrial repeaters or future technologies. All programming aired by the merged entity will be available strictly on a nationwide basis. This is yet another area where the FCC will be carefully monitoring the compliance of the companies. Parties that feel a violation of this prohibition has occurred are encouraged to contact the Commission and file a complaint.

IX. OPEN ACCESS

At my request, the parties agreed to make the technical specifications for their equipment available immediately, rather than in a year, as originally proposed. Third parties will be able to access the technology necessary to produce satellite radio receivers for sale at retail and to automobile manufacturers sooner. Thus, competition in the satellite radio equipment market should begin to emerge in upcoming months.

X. COMPLIANCE PLAN

As part of the consent decree the parties have agreed to a strict compliance plan, which includes the following:

- Hire FCC Compliance Officer responsible for ensuring future compliance with Act and Commission rules;
- Adopt Procedural Guide establishing procedures for testing, certifying and making modifications to satellite radio receivers and Repeater Change Guide establishing procedures for making any changes to terrestrial repeater network;

- Conduct audits of randomly selected satellite radio receivers to ensure compliance with FCC requirements;
- Establish an FCC Compliance Training Program for all employees who engage in activities subject to FCC regulation;
- Provide notices to subscribers offering various technical fixes to non-compliant radio receivers at no cost to subscriber via its website, subscriber newsletter and automated telephone response;
- Broadcast on-air notices to subscribers regarding non-compliant radio receivers;
- Turn off or bring into compliance 100 terrestrial repeaters, and send the others to FCC's International Bureau for processing;
- Replace non-compliant radio receivers returned by consumers for repair or warranty claims with compliant devices; and
- Submit periodic compliance reports to FCC.

In addition, the parties will be subject to a combined forfeiture of approximately $20 million. All future violations will be subject to the maximum monetary penalties, and will be considered in light of these past violations.

CONCLUSION

In conclusion, I voted to approve this merger in light of the many public interest benefits, such as the three year price cap, lower-priced tiers, the family-friendly programming tier, the set-aside for diversity, the set-aside for non-commercial, educational programming, the ban on agreements to prevent HD radio or other audio technologies from being integrated into satellite radios, the prohibition on intentionally reducing revenues paid to musicians and record labels, and the prohibition on exclusive contracts for sports programming.

I will continue to encourage the merged entity to work with the WCS licensees toward resolution of the rules regarding interference issues in the WCS band. In the absence of an industry agreement, I will encourage my colleagues to adopt rules in the near future. I hope we can soon resolve this issue which has been outstanding for ten years.

The FCC will oversee the compliance of these two companies, and I personally intend to follow up with the merged entity, and the FCC's Enforcement Bureau, to assure they are fulfilling the terms of the enforcement and merger agreements. The Commission will seek to ensure that the merged entity uses the spectrum it has been allocated efficiently, as one of our country's most important public resources. The Commission will also ensure that the spectrum is used in a way that serves the public interest by enhancing diversity and giving voice to minority and noncommercial broadcasters.

STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

Re: *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.*

I am pleased to support this merger and look forward to the consumer benefits that will result from the combination of XM and Sirius.

Competition in the audio market has grown substantially in the past few years. Barely one generation removed from AM and FM radio and vinyl albums, we now have a still vibrant AM/FM dial, full of music, news and talk radio of all stripes, HD radio with its multicast streams of content, mp3 players, Internet radio and much more. When discussing this merger, it is important to keep in mind that satellite radio – both XM and Sirius combined – comprises only five percent of that audio marketplace.

Despite these highly-competitive market realities, this merger order is one of the most heavily-conditioned in FCC history. With the obligations we have imposed, and those that the companies have voluntarily undertaken, the combined company, post-merger, will offer several new, attractively priced programming packages for consumers, will open up opportunities for noncommercial educational programmers and minority-owned programmers to gain carriage on the satellite radio platform, and will create opportunities for competition in the satellite radio equipment market, so that consumers can enjoy more choices.

I am also pleased that we have resolved the enforcement issues regarding terrestrial repeater and radio equipment violations admitted by XM and Sirius. As the consent decrees demonstrate, the Commission takes such rule violations seriously and will carefully examine the ongoing compliance of the combined company with our regulations.