National Association of NAB BROADCASTERS

David K. Rehr, Ph.D.
President & CEO
1771 N Street, NW • Washington, DC 20036-2800
(202) 429-5449 • Fax: (202) 429-5410
drehr@nab.org

July 25, 2007

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

Re: ***MB Docket No. 07-57***

Dear Mr. Chairman:

To date, the efforts of Sirius Satellite Radio (Sirius) and XM Satellite Radio (XM) to justify their proposed merger have consisted largely of a public relations campaign – slogans over substance, promises without proof. Yesterday, however, Sirius and XM announced a series of pledges designed to dress up the proposed merger-to-monopoly as a benefit to the public. But you can't make a silk purse from a sow's ear.

No matter what promises Sirius and XM may offer, they are not sufficient to overcome the resulting harms to consumers when a monopoly is created by the Commission. In addition, XM and Sirius' track record at the Commission shows that such promises are hollow because in pursuit of their own self-interest, XM and Sirius are willing to bend the law and reinterpret any promises to suit themselves instead of the American public.

In fact, these new concessions are nothing more than a shameless attempt to curry the favor of government regulators. Sirius and XM's proposals add nothing to the inescapable conclusion that the satellite radio market is a separate and distinct market. Under antitrust law, allowing the nation's only two satellite radio providers to merge will create an unlawful monopoly.

Promises Cannot Hide a Monopoly

The relevant market in which Sirius and XM compete is the satellite radio market. This view is endorsed by the findings of independent antitrust experts like the American Antitrust Institute, all of the respected consumer groups on record in this proceeding like the Consumer Federation of America and Consumers Union, and a growing chorus of 80 U.S. Representatives and Senators, including the Chairman of the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights.[1] Even one of Sirius' most important content providers, National Public Radio,

[1] Letter from the Honorable Senator Herb Kohl (D-WI) to Attorney General Alberto R. Gonzalez and Chairman Kevin J. Martin (May 23, 2007). Also, House Judiciary Committee Chairman, Rep. John Conyers, Jr. (D-MI), and House Judiciary Antitrust Taskforce Ranking Member, Rep. Steve Chabot (R-

opposes the merger, and XM's long-time partner Toyota Motors expresses doubts whether the merger is a good idea.[2] Finally, as discussed below, Sirius and XM's position contradicts the Commission's own conclusion.

Sirius and XM appear to have invented the term "audio entertainment market," which they allege is the relevant market, out of whole cloth. Although this term sounds quite weighty, and definitely suits the merger parties' goal of painting the relevant antitrust market broadly, no government body – not the U.S. Department of Justice (DOJ), the Federal Communications Commission, the Federal Trade Commission (FTC), or any court – has ever defined or recognized such a market.[3] Presumably, the Commission is aware that approving the merger will require breaking new ground in antitrust law.

More importantly, the DOJ/FTC Merger Guidelines dictate that the satellite radio market is a separate and distinct market because no other product or service actually constrains the prices or other practices of Sirius or XM. Sirius and XM offer pre-packaged, multi-channel, mobile audio services that are available nationwide. And despite the numerous (largely identical) pro-merger letters that the merger parties' public relations consultants have succeeded in generating, and the nattering voices of self-interested Wall Street analysts and online bloggers, there is simply no existing data or evidence to demonstrate that any other product or service is a competitive substitute, as required under the guidelines.

The merger parties' argument that satellite radio and local radio are interchangeable is nonsense. If the two services were truly substitutable products, why would anyone pay $12.95 per month for satellite radio if they could get what they want for free from local radio stations? The answer is that satellite and terrestrial radio are not substitutable services, but rather complementary services, as the Commission envisioned when it authorized satellite radio a decade ago.[4] Unlike satellite radio, local radio stations, including HD stations, cannot offer hundreds of channels and formats like Sirius or XM; nor can they be heard nationwide. Local radio stations simply cannot and do not compete in the national satellite radio market.

<u>Hollow Promises Will Not Protect Consumers From Monopoly Behavior</u>

Sirius and XM's assertions that a merger will lead to lower prices and more diverse programming contradict both basic economics and the laws of physics. The current competition

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OH), have asked how Commission approval of a the merger could be consistent with the Commission's long-held policy of prohibiting one entity to control all of the spectrum for a particular service. Letter from the Honorable Reps. John Conyers, Jr. and Steve Chabot to Attorney General Gonzalez and Chairman Martin (June 13, 2007). To my knowledge, the merger parties have not responded.

[2] Toyota Motor Corporation Comments in MB Docket No. 07-57 at p.2 ("With a finite bandwidth for both XM and Sirius, it may be difficult for a combined entity to deliver more content while maintaining or even improving audio quality.").

[3] Supplemental Declaration of J. Gregory Sidak at 9-10. In fact, courts that have used the term "audio entertainment market" are usually referencing "pay-per-call services" used for providing adult entertainment over the phone.

[4] Satellite Radio Order, 12 FCC Rcd 5754, 5756 (1997).

between Sirius and XM creates incentives for both companies to keep prices reasonable, while distinguishing each other with diversified channel lineups and exclusive content like Oprah and NASCAR. This is the preferred way in our economy. Indeed, at first blush it appears that some subscribers will pay more, especially if they must buy a new receiver.

For example, the proposed “à la carte” offerings are not truly à la carte, but rather another way of bundling, since subscribers will have to first purchase a package of 50 channels before they are able to select additional single channels, including Sirius’ most popular channels (Howard Stern, the NFL and live college sports) for $5 to $11 more. Also, subscribers choosing the second bundling option will be able to purchase 100 channels on either Sirius or XM, plus 11 from the other system, for $14.99 per month. In other words, subscribers now paying $12.95 for 133 XM channels or 170 Sirius channels will have to pay more for 111 channels. Plus, none of these options will be available for at least a year, and subscribers will be forced to buy a new satellite radio receiver, for an unspecified cost, not to mention the labor cost of replacing the radio currently installed in subscribers’ cars. This does not sound like a consumer benefit.

Moreover, none of these new offerings and prices is guaranteed for any period of time. Sirius and XM are asking the Commission and consumers to take them at their word, which, based on their decade-long broken promise to develop a consumer-friendly interoperable receiver and other rules violations, would probably be a big mistake.

Also, Wall Street may force the companies to abandon their bundling proposal. For example, RBC Capital Markets believes the new proposals may ultimately harm the merged company financially: “In giving the FCC the safeguards that should greatly enhance probability of regulatory approval, potentially lowering average revenue per user, XM and Sirius could also erode operating fundamentals, offsetting merger synergy values.”[5] Investors loathe uncertainty, and based on the merger parties’ past performance before the Commission, as well as the ambiguity and delay inherent in the new proposals, this latest attempt to gain favor for a monopoly may never move past the stage of press releases and filings.

Regardless of their bundling promises, history has already proven that Sirius and XM can and will raise prices and that there will not be any impact on subscribership. Sirius hiked its rates by 30 percent only two years ago and still managed to grow subscription rolls by 84 percent. Given the affect of the rate promises on their overall financial health, it seems inescapable that, notwithstanding the apparent impressions of certain organizations that support the merger,[6] it is only a matter of time before a Sirius/XM monopoly hikes subscriber rates.

<u>No Promised Action Can, In Fact, Provide for a Greater Diversity of Programming</u>

Based on past performance, there is no reason to believe Sirius and XM’s promises that the merger will further program diversity. As envisioned by the Commission, and trumpeted by

[5] Available at <http://siriusbuzz.com/rbc-issues-note-on-sirius-and-xm.php>.
[6] *See, e.g.*, Comments of Women Involved in Farm Economics in MB Docket No. 07-57 at 1-2; Comments of American Values in MB Docket No. 07-57, at 2-3.

Sirius and XM, satellite radio originally held the promise of reaching underserved and niche audiences.[7] However, today there is only one talk channel devoted to African-American issues and one Spanish-language news channel on either service.[8] It is hard to imagine a monopoly Sirius/XM expanding minority programming if they haven't done so as competitors. The merger parties' new offerings may very well leave niche audiences out in the cold.

Sirius and XM's promises of new tiered offerings are also specious because the technical structures of their respective systems will prevent the merger parties from expanding program diversity, or for that matter, maintaining the existing level of diversity. Sirius and XM operate incompatible delivery systems, which prevents Sirius radios from receiving the XM signal, and vice versa. Therefore, any channels that are carried on both systems post-merger will have to fit separately on each system. However, both Sirius and XM already use all of their spectrum capacity for existing channels. This means that if Sirius wants to add XM channels to its line-up post-merger, to create their promised "best of both worlds" package, Sirius will have to drop existing channels on a one-to-one basis. Given that a merged Sirius/XM has no intention of operating dual radio services any longer than necessary, it is a good bet that the deleted services will not be Howard Stern, Major League Baseball or any other programming that is locked into long-term, expensive contracts, but rather programming of interest to niche audiences including minority groups.

Business considerations will surely mean that widely popular, expensive programming is prioritized after the proposed merger, at the expense of niche programming. And given the merger parties' admissions that it will take up to ten years to resolve their incompatibility problems, it will be a long time before the Commission sees the merger bear any fruit in terms of program diversity.

<u>Sirius and XM's Promised "Merger Benefits" and Concessions Are Red Herrings</u>

None of the promised "merger benefits" XM are truly merger-specific, because Sirius and XM could produce the so-called benefits right now without merging if they so desired. In fact, some of the suggested so-called "benefits" are not really benefits at all. For example, they promise to allow XM subscribers to receive some Sirius-exclusive programming, and *vice versa*. However, nothing has ever stopped them from offering this before. Signing exclusive deals with certain content providers was always a matter of pure choice for Sirius and XM that either could undo at any time.

The Commission should not create a monopoly satellite radio provider that it will be forced to regulate and monitor for the foreseeable future. Such an outcome is antithetical to Congressional policy favoring competition over regulation, and the Commission's obligation to distribute the nation's airwaves in a manner that serves the public interest.

[7] Satellite Radio Order, 12 FCC Rcd at 5756.
[8] XM 169 "The Power," and CNN Español (carried on both Sirius and XM). Sirius has no talk channels devoted to African American issues.

Promises Do Not Change Facts – Sirius and XM Can Survive Alone

Notwithstanding the apparent understanding of some merger supporters,[9] it is a myth that Sirius and XM need to merge to keep satellite radio from going under. In repeated statements to Wall Street, Capitol Hill, the Commission, and most importantly, under criminal penalty to the Securities and Exchange Commission, both Sirius and XM have clarified that neither will fail without a merger, and in fact, they will survive and succeed without a merger. Sirius and XM have been coy, however, never suggesting a "failing firm" argument themselves, while not responding to numerous merger supporters who echo concerns that a merger is needed to ensure the continued viability of satellite radio.

In truth, the real beneficiaries of a Sirius/XM merger will not be consumers or programmers, but instead the companies' executives, including Sirius' CEO who earned more than $30 million last year. Although publicly available information shows that both Sirius and XM are performing well ahead of the typical pace for new technology-based services with high initial fixed costs, approving this merger would equate to a government bailout for two companies that have made certain expensive financial missteps. Both Sirius and XM are locked into long-term, expensive contracts with Howard Stern, Martha Stewart, the professional sports leagues and others. Both also have high overhead costs such as the maintenance of expensive satellites, and must service debt on the costs of launching their satellites. Nevertheless, none of these are valid reasons for permitting a merger-to-monopoly to the detriment of American consumers.

Accordingly, NAB respectfully requests that the Commission heed the call of consumers, antitrust experts and local broadcasters by denying Sirius and XM's merger-to-monopoly application.

Sincerely,

David K. Rehr

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

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[9] *See, e.g.*, Comments of Americans for Tax Reform in MB Docket No. 07-57; Comments of the Latino Coalition in MB Docket No. 07-57.