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July 23, 2008

BY ELECTRONIC TRANSMISSION

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
Washington, DC 20554

Re: Notice of Oral Ex Parte Presentation in Connection With the Consolidated Application for Authority to Transfer Control in Connection With the Sirius/XM Merger, as Amended (MB Docket No. 07-57)

Dear Ms. Dortch:

On July 23, 2008, the undersigned of Williams Mullen, and Steven R. Valentine of K&L Gates LLP, representing the Consumer Coalition for Competition in Satellite Radio ("C3SR"), spoke with Commissioner Tate by telephone regarding the above-referenced consolidated application. C3SR reiterated its opposition to the proposed merger of XM Satellite Radio Holdings Inc. ("XM") and Sirius Satellite Radio Inc. ("Sirius"), consistent with C3SR's prior written submissions in this proceeding.

In light of the fact that the Commission is now considering conditions to accompany a merger-approval, C3SR hereby submits certain proposed conditions to address specific consumer harms, which are otherwise unaddressed in the conditions offered by XM and Sirius, or sought by other parties. These conditions (set forth and attached hereto) are intended to supplement the proposed remedies submitted previously by C3SR (June 4, 2008), which among other things, address the misconduct revealed in the Highly Confidential Documents referenced in C3SR's May 27, 2008 *ex parte* submission.

Commercial Time Limits. Currently, XM and Sirius have agreed to a proposed price cap for a three-year period. This condition, standing alone, is completely hollow. By holding the subscription price of satellite radio service constant, the Commission does not necessarily convey any consumer benefit or protection, because Sirius CEO Mel Karmazin has told Wall Street analysts that one of the primary objectives of the merger is to double the

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combined firm's amount of ARPU attributable to advertising.¹ If that occurs, the quality-adjusted price of satellite radio service will increase substantially, even with a three-year price cap.²

Accordingly, C3SR recommends a condition limiting future increases in the amount of commercial time that can be imposed on consumers by the combined firm. Simply put, consumers have spent hundreds of millions of dollars on satellite radio receivers because they value the relatively commercial-free nature of the service. Consumer surveys submitted by C3SR in this proceeding verify this fact. When competition ceases between the only two providers of satellite radio service, there will be no check or restraint on the amount of commercial time subscribers will have to endure. The only other way to avoid this result is to require divestiture of one of the two satellite systems to permit competitive entry.

Consumer Access to Programming. If the merger is consummated, a satellite radio monopoly would have exclusive arrangements with many programmers and program suppliers to the detriment of competition. Consumers benefit from competition in programming, and the merged firm should be prohibited from locking up programming and keeping other audio media from offering consumers the sports, entertainment, news, or music programming, either by Internet or over-the-air radio broadcasting. Consumers benefit from a competitive market in programming, and they will be harmed if a satellite radio monopoly is permitted to lock-out competitors through exclusive programming arrangements and receivers that receive only satellite radio signals. Therefore, C3SR offers two conditions: (1) a condition prohibiting such exclusive programming arrangements, and (2) a condition requiring the deployment of multiplatform radios (AM/FM/HD).

Prohibition Against Exclusive Dealing. Exclusive arrangements between a satellite radio monopoly and consumer electronics distributors and/or retailers; aftermarket consumer electronics equipment manufacturers and/or distributors; and automobile, truck, boat, recreational vehicle and motorcycle retailers, distributors and/or manufacturers must be prohibited to ensure that consumers are afforded the benefits of a competitive marketplace in equipment, and to ensure that such arrangements do not impair the deployment and development of competing technologies, which will benefit consumers. C3SR offers a specific condition that would end all such arrangements on the Merger Closing Date, and prohibit them going forward.

¹ 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>).

² Expert Declaration of J. Gregory Sidak Concerning the Competitive Consequences of the Proposed Merger of Sirius Satellite Radio, Inc. and XM Satellite Radio, Inc., MB Docket No. 07-57 (Mar. 28, 2007).



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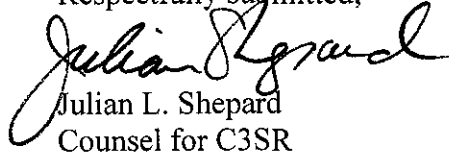
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C3SR does not believe the merger is in the public interest. In order to ameliorate some of the anticompetitive effects and harms to consumers, the Commission should at a minimum adopt these additional conditions; but even these are not sufficient to compensate for the loss of competition. Moreover, all of the proposed conditions, including those now offered by C3SR, will require vigorous enforcement by the Commission, as XM and Sirius have proven unworthy of the Commission's trust, and demonstrated a propensity to violate the Commission's policies and rules over the past decade.

Pursuant to Section 1.1206 of the Commission's Rules and DA 07-1435, this letter is submitted via ECFS for inclusion in the public record of these proceedings, with an email copy to Commissioner Tate.

Respectfully submitted,



Julian L. Shepard
Counsel for C3SR

Attachment

cc: (via e-mail)

Commissioner Deborah Taylor Tate

XM-SIRIUS MERGER: PROPOSED PROGRAM EXCLUSIVITY CONDITION

Suggested Language

- The FCC should include the following condition in the ordering clauses of any decision approving the XM-Sirius merger:

“Effective on the Merger Closing Date, New XM, including any of its affiliates, joint ventures, subsidiaries, and any other entity formerly controlled by Sirius or XM, collectively or separately, and now controlled by New XM, shall not enter into any exclusive arrangements directly or indirectly with any supplier of programming and content, including but not limited, to music, sports, news/public affairs and entertainment programming.”

Rationale

- As a monopoly satellite DARS licensee, a merged XM-Sirius entity would have substantial market power to force programmers to enter into exclusive contracts, thereby significantly limiting other distribution media from being able to compete fairly for such programming.
- Such a ban on exclusive contracts would be similar to the statutory program access provision contained in section 628 of the Communications Act, which prohibits certain exclusive programming contracts.
- The Commission has previously imposed analogous prohibitions on exclusive programming arrangements as conditions on mergers involving large multichannel programming providers:
 - In 2004, the Commission conditioned News Corp.’s acquisition of DirecTV on News Corp.’s commitment not to offer any of its existing or future national and regional programming services on an exclusive basis to any MVPD, and to continue to make such services available to all MVPDs on nondiscriminatory terms and conditions.
 - In approving Comcast’s and Time Warner’s 2006 acquisition of the Adelphia cable properties, the Commission prohibited their regional sports networks from entering into exclusive contracts with any MVPD, and required them to make that programming available to all MVPDs on nondiscriminatory terms.
- For similar reasons, the Commission’s rules prohibit exclusive retransmission consent agreements.

XM-SIRIUS MERGER: PROPOSED PROHIBITION AGAINST EXCLUSIVE DEALINGS WITH MANUFACTURERS, DISTRIBUTORS, AND RETAILERS

Suggested Language

- The FCC should include the following condition in the ordering clauses of any decision approving the XM-Sirius merger:

“Effective on the Merger Closing Date, New XM, including any of its affiliates, joint ventures, subsidiaries, and any other entity formerly controlled by Sirius or XM, collectively or separately, and now controlled by New XM, shall not enter into or maintain any exclusive arrangements directly or indirectly with any: consumer electronics distributors and/or retailers; aftermarket consumer electronics equipment manufacturers and/or distributors; and automobile, truck, boat, recreational vehicle and motorcycle retailers, distributors and/or manufacturers.”

Rationale

- Post merger, New XM will have the ability and incentive to abuse its market power with consumer electronics manufacturers, retailers and distributors, thereby depriving consumers of competitive alternatives to the receiver offerings of a monopoly satellite DARS service and to competitive bundling of equipment and service by retailers.

XM-SIRIUS MERGER: PROPOSED AM/FM/HD RADIO CONDITION

Suggested Language

- The FCC should include the following condition in the ordering clauses of any decision approving the XM-Sirius merger:

“New XM shall certify no later than June 1 of each calendar year that all satellite radio receivers manufactured, designed, or shipped in commerce by New XM or any manufacturer licensed or authorized to manufacture such receivers by New XM, after the Merger Closing Date, have the capability without physical modification to receive both terrestrial analog AM/FM signals, and digital AM/FM signals in accordance with the technical specifications for terrestrial digital radio specified in MM Docket No. 99-325.”

Rationale

- Consumers should not be held hostage to a satellite radio monopoly when they purchase satellite radio service. A multi-platform satellite radio receiver with the capability of receiving AM/FM/HD signals ensures some modicum of protection against abuses of power by the satellite radio monopoly. Consumers who purchase a multi-platform receiver would have the ability and option either to cease their satellite radio subscriptions, or drastically to reduce their satellite radio selections (under the pseudo-a la carte pricing plans promised by XM and Sirius), without incurring the equipment/switching costs required to add AM/FM/HD reception capability to their satellite radio receivers. Consumers deserve such protection when they purchase satellite radio service from a monopoly provider.
- HD radio is still in its infancy and promises consumers many benefits. Because HD radio is currently fighting for access to dashboards and consumer electronics devices, a multi-platform receiver requirement would ensure that New XM does not abuse its market power and impair market access for HD radio providers. Consumers should not be foreclosed from access to audio alternatives such as AM/FM/HD radio by the market power of a satellite radio monopoly or by vehicle manufacturers responding to the incentives of a satellite radio monopoly.
- Protection against consumer stranded investment in satellite radio receivers would be provided by a multi-platform receiver requirement. If subscribers discontinue satellite radio subscriptions, they should not suffer a total loss in the utility of their receivers, especially those that are permanently installed in vehicles. Therefore, each satellite radio receiver that is produced and sold after the Merger Closing Date must have AM/FM/HD capability.

XM-SIRIUS MERGER: PROPOSED CONDITION FOR LIMIT ON COMMERCIAL TIME

Suggested Language

- The FCC should include the following condition in the ordering clauses of any decision approving the XM-Sirius merger:

“Effective on the Merger Closing Date, New XM shall not increase commercial time on any existing channel above the level of commercial time for that channel as of March 20, 2007, the date of the merger applications. For new channels not offered as of March 20, 2007, commercial time shall be limited to the average amount of commercial time for any channel with the same or substantially similar format (*e.g.*, music, talk, sports, or news formats) as of March 20, 2007. XM and Sirius shall provide to the Commission a report on the Merger Closing Date setting forth the Average Revenue Per Unit attributable to commercial advertising for each of its channels as of March 20, 2007, and certify no later than March 20 of each calendar year that commercial time for each channel during the preceding year complies with these limits, including a report setting forth ARPU attributable to commercial advertising for the preceding year for each channel. New XM shall keep records of all commercial time sold and aired on each of its channels, and make such records available to the Commission upon request.”

Rationale

- Consumers have spent hundreds of millions of dollars on satellite radio receivers because they value the relatively commercial-free nature of the service. Consumer surveys submitted by C3SR in this proceeding verify this fact. When competition ceases between the only two providers of satellite radio service, there will be no check or restraint on the amount of commercial time subscribers will have to endure.
- Sirius CEO Mel Karmazin has told Wall Street analysts that one of the primary objectives of the merger is to double the combined firms’ amount of ARPU attributable to advertising. If that occurs, the quality-adjusted price of satellite radio service will increase substantially, even with a three-year price cap.
- A condition limiting future increases in amount of commercial time that can be imposed on consumers by the combined firm is necessary and warranted. The proposed condition seeks to limit commercial time to the level at which it had grown at the time of the merger application.