David K. Rehr
President and CEO

July 14, 2008

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

Re: ***XM-Sirius Merger (MB Docket No. 07-57)***

Dear Chairman Martin:

This letter addresses the suggestion by Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM"), the nation's only two satellite radio providers, that a promise to lease four percent of their platforms to a Qualified Entity or Entities is sufficient to overcome the harms that their merger to monopoly would impose on consumers.[1] Plainly, it is not.[2]

The National Association of Broadcasters ("NAB") opposes this alleged remedy because it will do nothing to replace the loss of head-to-head competition between Sirius and XM, or the consumer benefits of that competition (*e.g.*, competitive rates, diverse content, reduced innovation). History shows that such leasing requirements are not effective in achieving their intended goal. Indeed, given the well-documented failure of mandatory leases in other markets like cable TV and local telephone service to produce real and sustained public benefit, it is clear that any lease arrangements between a combined Sirius-XM and a Qualified Entity will benefit only the companies, not the public. Moreover, these lease arrangements will require the Commission's

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[1] Letter from Richard E. Wiley, Counsel for Sirius Satellite Radio Inc., and Gary M. Epstein, Counsel for XM Satellite Radio Holdings Inc., to Ms. Marlene Dortch, Secretary, Federal Communications Commission, MB Docket No. 07-57 (June 16, 2008) ("Sirius/XM Merger Conditions Letter").

[2] Sirius and XM state that four percent currently equates to six channels on Sirius' platform and six channels on XM's platform. Observers may compare this to the approximately nine channels that both Sirius and XM devote to channels that carry adult content and draw their own conclusions concerning the merger parties' programming priorities.

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endless oversight of rates and other leasing terms, especially here, given the merger parties' long track record of Commission rule violations.

Under the Communications Act, the Commission may justify approval of a transaction only if it finds that the public interest benefits of the transaction outweigh the anticompetitive effects. While XM and Sirius suggest that their promises would produce public benefit, the only remedy that would fully and permanently protect consumers from the anticompetitive harms of a Sirius-XM merger is to deny the merger.

The four percent leasing requirement proposed by XM and Sirius is primarily designed to give the appearance of a remedy without any real exposure for the companies. NAB wholeheartedly supports the promotion and expansion of minority control over programming, however the lease of a mere four percent of the combined company's full-time audio channels to a Qualified Entity or Entities is plainly not sufficient to promote that interest or overcome the public harm of the merger in larger part due to the problems associated with enforcing a mandatory leasing scheme.

In fact, no lease arrangement, even of half of Sirius and XM's spectrum, would offer sufficient protection to consumers. Simply put, any mandatory lease will raise more problems than it could ever correct:

- As the lessor, Sirius-XM will maintain control over the delivery channels, and the entire hardware-side of the business. It is inevitable that a monopoly Sirius-XM will improve its system features and services through the deployment of new radios, while some other lessee remains locked into today's receivers. Customers of the lessee will suffer. The evolution of competitive telephone service offers a stark example. As a general matter, competitive telephone carriers ("CLECs") whose operations depended largely on the leasing of network elements from incumbent telephone providers fared much worse than CLECs that were able to provide independent facilities-based service. Similarly, the Commission only last year found it necessary to revisit its policies governing cable leased access arrangements because of complaints that incumbent cable operators have impeded the access of independent programmers. Approving the Sirius-XM merger will force the Commission down a similar road because, just like incumbent telephone and cable companies, a merged Sirius-XM will have every incentive to disrupt and hinder a lessee's service.

- Because a lease arrangement is not a structural remedy that might cure the anticompetitive effects of a Sirius-XM merger by itself, the terms and conditions of a lease will require the Commission's ongoing, endless attention. For example, the Commission will be forced to supervise the price of the lease to ensure that the lessee's customers or vendors are not unfairly disadvantaged. I, for one, cannot imagine why the Commission would want to needlessly enter the business of ongoing rate regulation, never mind the fact that such an approach directly contradicts the 1996 Telecommunications Act and the Commission's long-held policy of favoring competition over regulation. Again, the Commission's decade-long, resource-draining effort to regulate and enforce interconnection agreements should be a frightening case in point.

- The Commission's close, continued oversight of such lease arrangements will be even more important given Sirius and XM's repeated violations of the Commission's rules, which occurred while Sirius and XM were still forced to compete with each other. These violations include: (1) the failure to produce and sell consumer-friendly, interoperable radios; (2) exceeding authorized power levels for FM modulators; and (3) widespread breaches of the terms and conditions of their authority to deploy terrestrial repeaters.

- A channel lease that results in "free" service to the public, as proposed by Georgetown Partners, would trigger the need for a competitive bidding process under Section 309 of the Communications Act. In turn, this process would require the Commission to launch a rulemaking proceeding towards the adoption of a new and different nationwide satellite broadcasting service. The rulemaking would have to ensure fairness in the rates, terms and conditions of the lease, to protect against anticompetitive conduct by Sirius-XM and the lessor.

- The Commission would also have to initiate a proceeding aimed at the terms and conditions on which the lessor could provide service. For example, as a non-subscription based service, would the lessor be subject to additional public interest obligations, like sponsorship identification, localism requirements, EAS, and others? Such an effort could easily mirror what the Commission has endured with respect to cable leased access.

- Most importantly, the Commission must resolve all of these issues, especially the lessee-lessor arrangements, prior to approving the merger. Otherwise, any

lease arrangements would be meaningless as a combined Sirius-XM would have a jump start of months, if not years, over its pseudo-competitor.

Any mandatory lease arrangements will require resource-intensive planning and oversight by the Commission, with no predictable benefit for consumers who will be at the mercy of a monopoly Sirius-XM, especially given the track record of the failure of leasing arrangements. On the other hand, the Commission might consider the suggestions of other groups that advocate for a one-half divestiture of satellite radio spectrum. No other satellite radio spectrum is available, nor will become available any time soon. The barriers to entry to compete with a combined Sirius-XM are virtually insurmountable.

Best wishes.

Sincerely,

David K. Rehr

cc: Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell
Mr. Matthew Berry, General Counsel
Ms. Monica Desai, Chief, Media Bureau
Ms. Helen Domenici, Chief, International Bureau