State of Connecticut

RICHARD BLUMENTHAL
ATTORNEY GENERAL

Hartford

July 8, 2008

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: Notice of *Ex Parte* Communication in MB Docket No. 07-57 (Consolidated Application for Authority to Transfer Control of XM Satellite Radio Holdings Inc, and Sirius Satellite Radio Inc.)

Dear Ms. Dortch:

On July 7, 2008, Richard Blumenthal, the Attorney General of Connecticut, Robert McKenna, the Attorney General of Washington, and staff members from the Offices of the Attorneys General of Connecticut, Washington, Iowa, Kansas, Louisiana, Maryland, Missouri, Mississippi, Nebraska, Ohio, Oklahoma, Rhode Island, Tennessee, and Wisconsin ("the States"), met telephonically with FCC Commissioner Michael J. Copps and his Senior Legal Advisor, Rick Chessen, to discuss the States' concerns regarding the proposed merger of XM Satellite Radio Holdings, Inc. and Sirius Satellite Radio, Inc. ("the Parties.") This letter memorializes the States' comments, as provided to Commissioner Copps yesterday.

The States expressed the view that satellite radio service, which reaches the entire nation, is not in direct competition with terrestrial radio, i-pod devices, or entertainment in general. Satellite radio is a unique service. The Parties each control a wide band of the radio spectrum. Allowing one company to control all of the spectrum allocated to the service would be contrary to the public interest. Many of the States believe that this merger application should be DENIED, and that the conditions that have been proposed by the Parties would not adequately mitigate its anticompetitive impact.

As antitrust enforcers and consumer advocates, the States were surprised and disappointed by the U.S. Department of Justice's closing statement in March, in which the Department of Justice stated that it was closing its antitrust investigation without taking action against the proposed two-to-one merger. Regardless of whether the DOJ reached the right conclusion in its economic analysis, the FCC's Public Interest Standard entails a broader, more flexible analysis than an antitrust analysis. The Commission's test involves a balancing of the potential public interest harms against public interest benefits and encompasses concepts beyond competition, such as diversity and localism. Accordingly, the DOJ's conclusion should not dictate the Commission's determination. Many of the States' concerns fall within the FCC's Public Interest Standard.

The States observed that if the Commission approves the transfer, it will be licensing a monopoly in satellite radio service. The Parties have offered a few "voluntary conditions" wherein they seek to mimic the impact of competition for a short period. These were outlined in the Parties' letter dated June 13, 2008 (submitted to the FCC and dated June 16 on the electronic record). Their proposals do not protect or allow any genuine competition in this service.

The States explained their concerns that the "voluntary conditions" proposed by the Parties would be inadequate. The following conditions were discussed by the States:

Mandated leasing. *As a condition precedent to permitting any license transfer*, some of the States advocate that Sirius and XM be required to lease a portion of their satellite systems to another firm that will provide satellite radio service in competition with the Parties. In contrast to the negligible set-asides offered by the Parties for non-commercial educational programming, which would be offered only to Sirius and XM subscribers, the States' leasing proposal would allow for inter-provider competition in some context. These States advocate that the FCC require the Parties to lease a portion of their satellite systems to another firm that will provide satellite radio service *in competition* with XM and Sirius. The States did not advocate any particular firm to provide this service, but were aware that Georgetown Partners has expressed an interest in leasing space and capacity to provide a for-profit satellite radio service. The States urged that any leasing solution be effectuated through an open and transparent environment that solicits proposals from various firms or organizations.

The States stressed that the amount of spectrum leased must be sufficient to offer a commercially viable product in order to generate the anticipated competitive benefits. A minimum of 20% of the channels now allocated to satellite radio service, or 30 channels, should be included in the lease, along with the facilities and services needed to transmit programming to owners of satellite radios.[1] Because of the current lack of interoperable radios, equal amounts of spectrum from each licensee would be necessary to make such services available to the public. The new lessee(s) should be permitted to offer service to the listening public without any subscription fee. The States also urged the Commission to set aside spectrum for programming by not-for-profit firms, for transmission of non-commercial and educational programming, as

[1] The states pointed out that this is less than the 25% divestiture offered by the parties to the proposed DirecTV/Echostar merger. Moreover, as the States noted, Senators Kerry (MA), Cardin (MD), and McCaskill (MO) in their letter of June 27, 2008, pointed to the States' 20% suggestion as a good minimum and suggested that the FCC should consider requiring XM and Sirius to make available as much as 50% of their spectrum.

part of any leasing option. Lease opportunities should also be open to minority and women owned entities.

While not necessarily a sufficient remedy to resolve the States' antitrust concerns, the leasing option would serve the public interest by promoting additional diversity of ownership and voice in satellite radio service, and improving the ability of residents in areas that are currently unserved and underserved by terrestrial radio to receive a wider array of radio programming. It would ensure that people who have chosen not to continue their XM or Sirius subscriptions would have a beneficial use for the radio receiver that they have already purchased. Finally, it would motivate the Parties to compete over innovative programming, and offer packages and pricing at competitive levels.

The States characterized the Parties' voluntary commitments regarding spectrum leasing for a "Qualified Entity" as paltry. The parties have offered to set aside a total of six channels on each system's service, among specified racial or ethnic minorities. This proposal is not adequate, because the number of channels is insufficient to provide any group with a significant presence on satellite radio. It is not clear whether this proposal would even increase the current programming offerings of the Parties. The proposal sets forth no method for selecting how these channels would be allocated among the specified racial or ethnic groups, and excludes women from the definition of "Qualified Entity." The inclusion of minorities and women should be accomplished in an open and transparent process.

<u>Interoperable receivers and integrated HD radio receivers</u>. The States recommended that the Parties should be required to deploy and support interoperable radio receiving equipment that would receive both companies' satellite radio transmissions as well as terrestrial radio's HD radio service promptly. This requirement is essential to achieve the beneficial impact of the Parties' own voluntary conditions, and of the conditions outlined by the States. The Parties have proposed to meet this condition within one year. Knowing that the Parties have been under an FCC Order to produce such equipment since the 1997 Order *In the Matter of Establishment of Rules and Policies for the Digital Audio Radio Satellite Service*, 12 FCC Rcd. 5754 at 5796, para. 103 (March 3, 1997), ("*SDARS Order*"), the States do not believe that such an additional delay is warranted.

It is disturbing that eleven years after the Commission mandated interoperable radio receivers, no such equipment is readily available for the public. The Parties have shifted the majority of their sales from the retail market to the automobile market where, they contend, their merger won't make much difference because consumers today don't really get to choose between their services. The problem we have with this contention is that it is the Parties who are responsible for that lack of choice. Their continued failure to introduce interoperable equipment has denied consumers any on-going and recurring choice between their services. Instead, they have entered into long-term exclusive contracts with car manufacturers to install satellite radios in new cars. The direct consequence of these exclusive contracts is that consumers cannot switch from XM to Sirius without incurring substantial additional cost. Consumers are being denied the choice that the Commission intended. The FCC should prohibit any further exclusive contracts with automobile manufacturers, and prohibit the renewal of any such contracts.

The States urged the FCC to take steps to ensure competitive sources of interoperable equipment and an open device policy. Specifically, they recommended that the Parties be required to make the Intellectual Property freely licensable, and to put it in the market for manufacturers and standards setting bodies. XM and Sirius should not be permitted to extend their market power from satellite radio service to the market for receiving equipment. That would be a distinct disservice to the public interest.

The *SDARS Order* specifically declined to mandate that the SDARS receiver be capable of receiving terrestrial broadcasting formats. Yet, it now appears that such a requirement would enhance spectrum efficiency by enabling the listening public to receive the many digital FM channels now being broadcast. In addition, the roll-out of so many new SDARS receivers seems made to order for increasing the numbers of HD radio receivers. The States support the request to mandate integrating the terrestrial radio format in SDARS receivers. HD Radio could also become a more viable competitor to satellite radio programming.

<u>Illusory Price Constraints</u> The States expressed concern that the rate freeze offered by the Parties is illusory. Not only is it for a short period of time, beginning after approval of a monopoly, but it reserves to the Parties the ability to raises the prices, retroactively, by an indeterminate amount. Therefore, the States do not generally support the price freeze being suggested by the Parties. The States do not believe these short term promised price constraints will offset the harm caused by the loss of competition from a two-to-one merger. Had the Parties actually competed, as contemplated by the *SDARS Order*, they likely would have already introduced many of the features they now offer as their so-called "voluntary conditions," like family-friendly programming, *à la carte* pricing, and lower prices in their competitive efforts to promote and differentiate their services. The States also expressed concern that the Commission's approval of this monopoly to merger could have far-reaching implications in other decisions implicating spectrum allocation.

When the government sanctions a public utility as a natural monopoly it asserts extensive regulatory controls over it, including the nature of services offered to consumers, consumer access to those services, and the prices it may charge – such as with utilities regulated as natural monopolies by the States' public utility commissions and other agencies. Here, in contrast, the Parties seek a monopoly franchise, but the continuous regulation of such matters as price, appropriate return on equity, and stranded cost -- so well known in the regulation of public utilities -- is not on the table. Competition from multiple licensees is far preferable.

The concerns with this merger to monopoly are bi-partisan: numerous senators and congressional representatives, such as Missouri's United States Senators (Kit Bond and Claire McCaskill) have expressed similar competition concerns and have urged for divestiture of up to half the spectrum to remedy this omission and preserve the spectrum for future competition. Nineteen states have expressed their concerns that this merger, as proposed by the Parties, deserves careful consideration by the Commission and would not be in the public interest.[2]

Divestiture is usually the remedy we turn to in addressing a merger in the antitrust context; one always looks to new market entrants, standing in the wings, ready and willing to launch their equipment and programs and come in as self-sufficient competitors. The record reflects that there is interest in satellite radio service on the part of other entities. The States concluded that competition, not a licensed monopoly, is the alternative that would best assure the Public of continued innovation and the lowest prices possible. The States believe consumers are best served by competition because competitive pressure spurs technological innovation, diverse programming, lower prices and creative marketing, all in the interest of consumer benefit and of distinguishing a company's own services. Consumers are best served when companies compete for their business.

Pursuant to Section 1.1206(b) of the Commission's Rules, an original and one copy of this letter are being submitted to the Secretary's office, with a copy to Commissioner Copps and Attorney Chessen. In addition, a copy of this letter is being filed electronically for inclusion in the public record of these proceedings.

Very truly yours,

RICHARD BLUMENTHAL
ATTORNEY GENERAL

cc: The Honorable Michael J. Copps, Commissioner
Rick Chessen, Esq., Sr. Legal Advisor

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[2] Those states are Connecticut, Florida, Iowa, Kansas, Louisiana, Maryland, Mississippi, Missouri, Nebraska, Nevada, North Carolina, (letter to US DOJ copied to Chairman Martin and included in FCC Docket), Ohio, Oklahoma, Rhode Island, Tennessee, Utah, Virginia, (by separate comment), Washington, and Wisconsin.