

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

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

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 27, 2011**

**Released: July 27, 2011**

By the Chief, Media Bureau:

**I. INTRODUCTION**

1. By this Memorandum Opinion and Order, we find that under present circumstances the record evidence does not support extending beyond its expiration a three-year pricing condition contained in the Commission’s July 25, 2008 decision approving the applications of Sirius Satellite Radio Inc. (“Sirius”) and XM Satellite Radio Holdings Inc. (“XM” or, jointly, the “Applicants” or “Sirius XM”) to transfer control of licenses and authorizations for the provision of satellite digital audio radio service (or “SDARS”).<sup>1</sup>

2. In the *Merger Order*, the Commission accepted the Applicants’ voluntary commitment to implement price caps on certain subscription packages for a period of three years after consummation of the merger, a period that expires on July 28, 2011.<sup>2</sup> In assessing potential harms from the proposed

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<sup>1</sup> *Applications for Consent to the Transfer of Control of Licenses from XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, MB Docket 07-57, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348 (2008) (“*Merger Order*”). On July 28, 2008, the transaction was consummated, and on August 5, 2008, the merged company was renamed Sirius XM Radio Inc. See Letter from Jennifer D. Hinden, Wiley Rein LLP, Counsel, Sirius XM Radio Inc., to Marlene H. Dortch, Secretary, FCC (Aug. 20, 2008).

<sup>2</sup> Specifically, the *Merger Order* states:

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. Applicants voluntarily commit to these price caps for at least 36 months after consummation of the merger. 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 music, (continued....)

merger, the Commission found the record evidence insufficient to define precisely the relevant product and geographic markets.<sup>3</sup> Because the Applicants bore the burden of proving that the proposed license transfers would serve the public interest, the Commission evaluated “potential horizontal competitive harms under assumptions that maximize the likelihood of harm.”<sup>4</sup> The Commission concluded that under worst-case assumptions “the proposed merger is a merger to monopoly,” and “that it is likely that the merged entity will have an increased incentive and ability to raise prices above pre-merger levels.”<sup>5</sup> The Commission found that the Applicants’ price cap commitment would “mitigate the harm from any post-merger price increases.”<sup>6</sup> Because it could not predict what the competitive landscape would be in three years, the Commission committed to seek public comment, six months prior to the price cap’s expiration, “on whether the cap continues to be necessary in the public interest” and then “determine whether it should be modified, removed, or extended.”<sup>7</sup>

3. The Media Bureau initiated this review on January 25, 2011 with the release of a Public Notice seeking comment on whether to extend, modify, or remove the price cap.<sup>8</sup> From those supporting such an extension, the Public Notice asked for specific proposals together with a justification for such proposals. The Public Notice also sought comment on Sirius XM’s January 20, 2011 letter contending that there is no reason to extend or modify the price cap condition, in light of changes in the competitive environment and practical considerations that militate against extension.<sup>9</sup>

4. No specific proposals to extend the price cap condition were submitted in response to the Public Notice. Numerous individual consumers commented, the vast majority stating that the Commission should remove the price cap condition and allow Sirius XM to set the price of its subscription packages in response to market forces.<sup>10</sup> The WCS Coalition submitted comments, asking

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recording and publishing industries for the performance of musical works and sound recordings or for device recording fees.

*Merger Order*, 23 FCC Rcd at 12394, ¶ 107.

<sup>3</sup> *Id.* at 12372, ¶ 47.

<sup>4</sup> *Id.* at ¶ 48.

<sup>5</sup> *id.* at 12374, ¶ 51, 12394, ¶ 105.

<sup>6</sup> *See id.* at 12394-95, ¶¶ 107-108.

<sup>7</sup> *See id.* at 12395, ¶ 108. The Commission conditioned its approval of the merger on the Commission’s ability to modify or extend the price cap beyond three years. *Id.* at 12395, ¶ 108 n.328.

<sup>8</sup> *See Media Bureau Seeks Comment on Extension, Modification or Removal of Cap on Sirius-XM Retail Prices*, MB Docket No. 07-57, Public Notice, 26 FCC Rcd 540 (MB 2011).

<sup>9</sup> *See* Letter from Robert L. Pettit, Counsel, Sirius XM Radio Inc., to William T. Lake, Chief, Media Bureau (Jan. 20, 2011).

<sup>10</sup> These consumers state that they either would drop the service or utilize other audio alternatives if Sirius XM were to raise its prices to a level they would deem unacceptable. *See, e.g.*, Patrick Sharpless Comments at 2 (filed Feb. 24, 2011); John Lynch Comments, at 1 (filed Feb. 23, 2011). *See also* John Smith Comments at 1 (filed Jan. 27, 2011) (noting “competing service[s]: terrestrial radio, Slacker, Pandora, iPod/iPhone, or CDs”); Zafar Sharif Comments at 1 (Feb. 23, 2011); Vincent Brumfield Comments, at 1 (filed Feb. 23, 2011); Dr. Alan Diaz Comments, at 1 (filed Feb. 23, 2011) (stating that “[w]ith a growing number of free alternatives available, consumers have the final say”). Some of the consumers who oppose extension of the price cap are also Sirius XM investors. *See, e.g.*, Dr. Alan Diaz Comments and John Lynch Comments, *supra*.

the Commission to extend the price cap until the Commission addresses pending petitions for reconsideration in the *Part 27 Proceeding*, which established technical rules to allow mobile broadband services in 25 megahertz of the WCS band and to limit interference to WCS bands from adjacent SDARS terrestrial repeaters.<sup>11</sup> Plaintiffs' legal counsel in a civil litigation styled *Carl Blessing et al. v. Sirius XM Radio Inc.* ("Blessing Counsel") also submitted comments.<sup>12</sup> According to Sirius XM, the plaintiffs in the case claim that Sirius XM violates various federal and state statutes in the pass through of performance rights.<sup>13</sup> The Blessing Counsel asked the Media Bureau to review discovery documents from the litigation and pleadings in the case. More recently, however, they acknowledged that they are unable to submit discovery documents because of a court-issued protective order.<sup>14</sup> The Blessing Counsel have not submitted any pleading from the civil case into the record of this proceeding.

## II. DISCUSSION

5. The record before us now does not support extending the price cap condition. Indeed, as discussed below, there is evidence that new competitive alternatives have arisen since 2008. Accordingly, we find no sufficient basis on this record to extend the price cap condition beyond the three-year time period established in the *Merger Order*.<sup>15</sup>

6. The evidence produced during the Commission's merger review was inadequate to support any prediction about whether the Sirius-XM transaction would harm competition. Because the Applicants bore the burden of proof, the Commission assumed all facts against the Applicants and then determined that the proffered conditions would mitigate the presumed harms.<sup>16</sup> Before us now, in contrast, is the question whether to extend a condition that will expire by its own terms if we do not act affirmatively to extend it. No commenter submitted a specific proposal to extend the price cap condition or any evidence to support a conclusion that extending the price cap is necessary.<sup>17</sup> At this juncture, therefore, the record evidence does not provide a basis for concluding that extending the price cap is necessary. Accordingly, we decline to extend it.

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<sup>11</sup> See WCS Coalition Comments at 5 (Feb. 24, 2011) (contending that because the competition between WCS and SDARS for scarce spectrum and related potential interference issues could impair potential mobile broadband competitors to Sirius XM, the Commission should "defer any decision to lift or modify the price cap until the Commission can address the pending petitions for reconsideration in WT Docket No. 07-293 and IB Docket No. 95-91"); see also *Communications Service 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. 85-91, GEN Docket No. 90-357, RM-8610, Report and Order and Second Report and Order, 25 FCC Rcd 11710 (2010) ("*Part 27 Proceeding*").

<sup>12</sup> See Letter from Paul F. Novak, *et al.*, Counsel to Carl Blessing, to William T. Lake, Chief, Media Bureau, FCC at 1 (filed Feb. 24, 2011); Letter from Paul F. Novak, *et al.*, Counsel to Carl Blessing, to William T. Lake, Chief, Media Bureau, FCC at 2 (filed Mar. 3, 2011) ("Blessing Counsel March Letter").

<sup>13</sup> See Sirius XM Reply at 10.

<sup>14</sup> See Blessing Counsel March Letter at 2 (stating that counsel "do not currently envision providing a submission of underlying discovery materials from the Blessing action to the FCC Media Bureau.>").

<sup>15</sup> Because of this decision, we need not address Sirius XM's assertion that the Commission lacks authority to extend the price cap. See Sirius XM Reply at 7.

<sup>16</sup> See *Merger Order*, 23 FCC Rcd at 12366-67, ¶ 35; see also note 4, *supra*; 47 U.S.C. § 310(d).

<sup>17</sup> See ¶ 4, *supra*.

7. Although our decision rests on the lack of evidence to support extending the price cap, we note that the marketplace has evolved since the merger closed, and consumers now have additional audio entertainment choices. The Commission stated when it adopted the price cap that “[w]e do not know what the competitive landscape will be like in three years.”<sup>18</sup> Sirius XM claims that it “faces intense competition from an array of services including AM/FM radio, HD radio, and iPods[,]” as well as smartphone applications (“apps”) that permit consumers to stream Internet-based music services while mobile, including in their automobiles.<sup>19</sup> Indeed, it appears that since the *Merger Order* new audio services have emerged as viable consumer alternatives, including smartphone Internet streaming applications that can be used in mobile environments such as automobiles equipped with user-friendly interfaces. For example, Pandora Media Inc. (“Pandora”), which provides audio services via Internet streaming and smartphone apps, has demonstrated remarkable growth in popularity in the years since the merger.<sup>20</sup> Other examples of apps that have emerged as alternatives since the *Merger Order* include Rhapsody, Slacker, Last.fm, and iheartradio.<sup>21</sup> Ford, Toyota, MINI, GM, Mercedes-Benz, and Hyundai are introducing Internet-based streaming services in their vehicles.<sup>22</sup> In addition, data suggest that HD radio has increased since the merger.<sup>23</sup>

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<sup>18</sup> *Merger Order*, 23 FCC Rcd at 12395, ¶ 108.

<sup>19</sup> See Sirius XM Reply at 2-3.

<sup>20</sup> Pandora introduced the first mobile version of its service primarily for use on cellular phones in May 2007 and the Pandora app for smartphones in July 2008. At the close of fiscal year 2007, Pandora had 10 million registered users. That number grew to 22 million registered users at the end of fiscal year 2008. Pandora now has over 71 million registered users with over 2.6 billion listening hours. See Pandora Media, Inc., *SEC Form S-1*, at 43-44 (filed Feb. 11, 2011) available at <http://www.sec.gov/Archives/edgar/data/1230276/000119312511032963/ds1.htm>.

<sup>21</sup> See Sirius XM Reply at 4 (stating that Rhapsody is streaming on-demand music subscription service that launched in 2009 and offers unlimited access to a library of digital music for a monthly fee; stating that Slacker offers both free and subscription service accessible over the web and on portable devices and has offered the Slacker Radio app since January 2009; stating that Last.fm launched its first app in 2009 and offers free and paid subscription streaming radio and delivers music recommendations; stating that iheartradio delivers AM and FM stations from across the country and exclusive digital stations to subscribers).

<sup>22</sup> See Sirius XM Reply at 4-5; see also SNL Kagan, *HD Radio '11 Update: Automakers Adding More OEMs with Competing Options from Satellite/Internet*, Broadcast Investor: Deals & Finance, Feb. 24, 2011, at 8 (“*HD Radio '11 Auto Update*”) (stating that “Ford, General Motors and Volkswagen vehicle lines shown at CES also will offer on-board entertainment and navigation systems that include HD Radio technology, Bluetooth mobile phone integration, Internet apps including Pandora, USB connectivity, Sirius XM satellite radio, real-time traffic navigation and concierge services”). Audio entertainment options in automobiles have increased since 2008, when Chrysler announced plans to be the first company to provide in-car Internet access that year. See Washington Post, *Chrysler Plans In-Car Web Access This Year*, Mar. 20, 2008 available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/19/AR2008031903447.html>. In addition, since 2008, HD Radio has become available in an increasing number of automobile models. Industry reports indicate that by the end of 2011 OEM HD Radios are expected to be installed at the factory as standard or optional equipment on 109 vehicle models from 17 vehicle brands, compared to seven vehicle models in 2007, 53 vehicle models in 2009, and 80 vehicle models at the end of 2010. See *HD Radio '11 Auto Update* at 8-9. We also note that according to iBiquity Digital Corporation only six automobile manufacturers offered HD Radio receivers on a limited number of models, most as optional equipment, in December 2008. See iBiquity Digital Corporation, Reply Comments, MB Docket No. 08-172 (filed Dec. 9, 2008) at 3.

<sup>23</sup> See, e.g., IBOC Digital Radio Broadcasting for AM and FM Radio Broadcast Stations, available at <http://www.fcc.gov/mb/audio/digital.html> (last visited May 3, 2011) (showing that as of May 3, 2011, 1,636 FM (continued....))

8. We decline the request of Blessing Counsel to extend the deadline for filing comments in this proceeding. We are unable to entertain the request to consider certain litigation discovery documents and pleadings because no such documents were submitted in the record of this proceeding.<sup>24</sup> We also decline the WCS Coalition's request that we wait until resolution of pending petitions for reconsideration in the *Part 27 Proceeding* before addressing the price cap. The WCS Coalition previously raised its concerns about the pending *Part 27 Proceeding* in the context of our review and approval of the merger applications.<sup>25</sup> As the Commission previously found, proposals based on interference concerns were more appropriately addressed in the relevant rulemaking proceeding, and we decline to extend the price cap condition until those issues are resolved.<sup>26</sup> The WCS Coalition's interference concerns are irrelevant or, at best, tangential to the issue of Sirius XM's pricing and accordingly they will be addressed solely in the separate pending *Part 27 Proceeding*.<sup>27</sup>

9. Accordingly, for the reasons set forth above, we find on this record that the evidence does not support at this time the extension of the price cap beyond the period the Commission imposed in the *Merger Order* and the condition will therefore expire on July 28, 2011. Our decision not to extend the price cap does not in any way limit the Commission's ability to take enforcement action for failure to comply with the price cap or any other *Merger Order* condition while it was in effect.

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radio stations notified the Commission that they had commenced digital/analog hybrid operations); *see also In re Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, MM Docket 99-325, Order, 25 FCC Rcd 1182, 1187 n.32 (2010) (demonstrating that at the end of 2008, 1,372 FM radio stations had notified the Commission that they had commenced digital/analog hybrid operations). We note that we do not reach a conclusion on whether other audio services are substitutes to SDARS under traditional antitrust analysis.

<sup>24</sup> Blessing Counsel March Letter at 2. The parties recently stipulated to a settlement agreement that includes an extension of the price cap. *See Settlement Agreement, Blessing v. Sirius XM Radio Inc.*, No. 1:09-cv-10035 (S.D.N.Y. May 13, 2011) (Dkt. No. 96-1). The presiding judge has preliminarily approved the settlement agreement and scheduled a hearing for August 2011. *See Blessing v. Sirius XM Radio Inc.*, No. 1:09-cv-10035 (S.D.N.Y. May 19, 2011) (Dkt. No. 108). Nothing in this order is intended to express any opinion on, or otherwise address, the validity of the allegations at issue in that litigation.

<sup>25</sup> *See* Letter from Paul J. Sinderbrand, Counsel to the WCS Coalition, to Helen Domenici, Chief, International Bureau, FCC and Fred Campbell, Chief, Wireless Telecommunications Bureau, FCC (May 1, 2007); Letter from Paul J. Sinderbrand, Counsel to the WCS Coalition, to Kevin J. Martin, Chairman, FCC (May 30, 2008); Letter from Paul J. Sinderbrand, Counsel to the WCS Coalition, to Marlene H. Dortch, Secretary, FCC (June 10, 2008); Letter from Paul J. Sinderbrand, Counsel to the WCS Coalition, to Marlene H. Dortch, Secretary, FCC (June 13, 2008); Letter from Paul J. Sinderbrand, Counsel to the WCS Coalition, to Marlene H. Dortch, Secretary, FCC (June 16, 2008); Letter from Paul J. Sinderbrand, Counsel to the WCS Coalition, to Marlene H. Dortch, Secretary, FCC (July 22, 2008).

<sup>26</sup> *See Merger Order*, 23 FCC Rcd at 12403-404, ¶ 125.

<sup>27</sup> *See id.*

**III. ORDERING CLAUSES**

10. Accordingly, having reviewed the record in this matter, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 303(r), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), 309, 310(d), that this *Memorandum Opinion and Order* IS ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake  
Chief, Media Bureau