



PUBLIC NOTICE

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MEDIA BUREAU SEEKS COMMENT ON EXTENSION, MODIFICATION OR REMOVAL OF CAP ON SIRIUS XM RETAIL PRICES

MB Docket No. 07-57

Comment Date: February 24, 2011

Reply Comment Date: March 11, 2011

By this Public Notice, the Media Bureau seeks comment on whether to extend, modify, or remove the price cap imposed by the Commission when it approved the applications of Sirius Satellite Radio Inc. (“Sirius”) and XM Satellite Radio Holdings Inc. (“XM” or, jointly, the “Applicants”) to transfer control of the licenses and authorizations they held for the provision of satellite digital audio radio service (or “SDARS”) in the United States.¹ The grant of these applications authorized the merger of Sirius and XM subject to voluntary commitments made by Sirius and XM, as well as other conditions.²

In the *Merger Order*, the Commission accepted the Applicants’ voluntary commitment to cap the retail prices on their basic subscription package and on certain new programming packages that they committed to offer.³ The voluntary commitment stated:

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, recording and publishing industries for the performance of musical works and sound recordings or for device recording fees.⁴

¹ *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).

² Issues upon which the Commission imposed conditions and the entities made voluntary commitments include, among other things, pricing, programming packages, interoperable receivers, and open access for consumer equipment devices. See *Merger Order*, 23 FCC Rcd at 12433-41, Appendix B (Voluntary Commitments), Appendix C (Timeline of Commitments).

³ See *Merger Order*, 23 FCC Rcd at 12395, ¶ 108.

⁴ See *Merger Order*, 23 FCC Rcd at 12394, ¶ 107.

The Commission concluded that this voluntary commitment would mitigate the harm from any post-merger price increases. While some commenters proposed a longer price cap, the Commission imposed the price cap for at least three years after the merger was consummated (*i.e.*, until July 28, 2011).⁵ It also stated that it did not know what the competitive landscape would be like in three years, and committed to review the price cap six months prior to its expiration by seeking public comment on whether the price cap continues to be necessary in the public interest and whether the price cap should be modified, removed, or extended.⁶

Issues for Comment

On January 20, 2011, Sirius XM submitted a letter stating its view that there is no reason to extend or modify the price cap condition, in light of changes in the competitive landscape and practical considerations that it asserts militate against extension.⁷ Sirius XM requests that the Commission allow the price cap to expire at the end of three years. We seek comment on Sirius XM's view that the price cap condition is no longer necessary

Alternatively, we seek comment on whether the public interest would be best served if the price cap condition were extended beyond three years. If a price cap is still necessary, should the price cap be extended in its current form or should it be modified? If it should be extended, for what period of time should it continue? Any commenter who proposes that the price cap be extended is asked to explain why such extension is necessary and would serve the public interest under current market conditions.

Any commenter who proposes that the price cap be modified is asked to propose specific modifications and to explain how its proposals will serve the public interest. If the price cap is extended, should we raise the dollar amount of the price cap to reflect increased costs (*e.g.*, programming costs, labor costs, inflation)? If so, how should the amount be determined? Under the existing price cap, Sirius XM is not permitted to reduce the number of channels in the programming packages subject to the price cap during the three years.⁸ Should we allow Sirius XM to change the number of channels offered under a modified price cap or otherwise alter the structure of its program packaging?

In March 2009, Sirius XM initiated a \$2.99 per month fee for online access to programming and changed the price for subscribers for each additional monthly subscription after the \$12.95 per month basic subscription package from \$6.99 to \$8.99 per month.⁹ In addition, as provided under the price cap, Sirius XM passed through certain copyright payments beginning on July 29, 2009.¹⁰ Should any modified price cap specifically cover the rates charged for online access, additional outlets, or any other fees related to a subscription to Sirius XM's service? Should any changes be made to the permissible pass through of required statutory and contractual payments? If so, what changes should be made and why are such changes necessary under current market conditions? We seek comment on these and any other relevant issues that will allow the Commission to determine whether a price cap on Sirius XM's subscriber rates continues to be necessary and how any extended price cap should operate.

⁵ See *Merger Order*, 23 FCC Rcd at 12394-95, ¶¶ 107-108.

⁶ See *Merger Order*, 23 FCC Rcd. at 12395, ¶ 108. The Commission stated that, although it was not part of Applicants' voluntary commitment, 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. See also *id.* 12428, ¶ 180.

⁷ See Letter from Robert L. Pettit, Counsel for Sirius XM Radio, Inc., to William Lake, Chief, Media Bureau, FCC (Jan. 20, 2011) ("Sirius XM Letter"). The letter is attached to this Public Notice. Sirius XM also questions whether the Commission has authority to extend or modify the price cap condition. *Id.* at 3.

⁸ See *Merger Order*, 23 FCC Rcd at 12395, ¶ 108.

⁹ Sirius XM Radio Inc., *SEC Form 10-K for the Period Ending 12/31/09* (filed Feb. 25, 2010) at 2.

¹⁰ *Id.*

Procedural Matters

This proceeding will be treated as “permit but disclose” for purposes of the Commission’s *ex parte* rules. See 47 C.F.R. §§ 1.1200, 1.1206. As a result of the permit-but-disclose status of this proceeding, *ex parte* presentations will be governed by the procedures set forth in Section 1.1206 of the Commission’s rules applicable to non-restricted proceedings.¹¹

Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission’s Electronic Comment Filing System (ECFS), (2) the Federal Government’s eRulemaking Portal, or (3) by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/> or the Federal eRulemaking Portal: <http://www.regulations.gov>.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission’s Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

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¹¹ 47 C.F.R. § 1.1206.



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January 20, 2011

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VIA ECFS

Mr. William Lake
Chief, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Consolidated Application for Authority to Transfer Control of XM
Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc.,
MB Docket No. 07-57

Dear Mr. Lake:

In approving the merger of Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM," or jointly, the "Applicants"), the Commission accepted the Applicants' voluntary commitment not to raise the retail price of certain satellite radio programming packages for thirty-six months after consummation of the merger.¹ The Applicants consummated the merger on July 28, 2008.² Accordingly, this voluntary commitment ends on July 28, 2011.

The *Sirius XM Merger Order* also stated that six months prior to the expiration of the commitment period, the FCC would seek public comment and then determine whether this price limitation should be modified, removed, or extended.³ As the Commission acknowledged, the concept of a subsequent pricing proceeding and the possibility that the FCC would either extend the price cap or set an entirely new subscription rate were not part of the Applicants' voluntary commitment.⁴

¹ *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12,348, 12,395 (¶ 108) (2008) ("*Sirius XM Merger Order*").

² See Letter from Jennifer D. Hindin to Marlene H. Dortch, Notification of Consummation of Transfer of Control, MB Docket No. 07-57 (filed Aug. 20, 2008). Sirius is now Sirius XM Radio Inc. ("Sirius XM").

³ *Sirius XM Merger Order*, 23 FCC Rcd at 12,395 (¶ 108).

⁴ *Sirius XM Merger Order*, 23 FCC Rcd at 12,395 (¶ 108, n.328) ("Although it is not part of Applicant's voluntary commitment, we are conditioning our approval of the merger on the Commission's ability to modify or extend the price cap beyond three years."). The companies, individually or combined, never acceded to this condition; since it imposed no obligation on them, there was nothing to "accept or reject" in connection with the statement. See 47 C.F.R. § 1.110. Moreover, any appellate challenge at that time to potential future Commission action would likely

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The Commission believed that this review of Sirius XM's rates may be needed because the agency did "not know what the competitive landscape will be like in three years."⁵ However, it is clear that the audio entertainment market is even more robustly competitive today than it was in 2008 when the FCC granted the merger applications. Satellite radio competes for listeners with an expanding array of audio entertainment choices—most of which are available to consumers for free. These choices include terrestrial AM/FM radio, HD radio, iPods and other portable audio devices, and they increasingly include Internet-based services, such as Pandora, Rhapsody, Slacker, Lastfm and iheartradio.⁶ Pandora alone is reportedly available on over 200 devices in addition to the computer.⁷ This competition for audio entertainment is especially acute in vehicles, with several automakers introducing features integrating Internet-based services, further reducing any remaining arguable hurdles to the seamless use of smartphones, iPods and other portable audio devices in vehicles.⁸ In early January 2011, Toyota announced it would introduce "Entune" in its vehicles, an integrated multimedia system designed to compete with Ford's SYNC system and the products introduced by BMW and Mini.⁹ Such marketplace changes confirm precisely what the United States

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have faced significant ripeness and finality issues. See, e.g., *CTLA—The Wireless Ass'n v. FCC*, 530 F.3d 984, 987 (D.C. Cir. 2008) ("The 'basic rationale' of the ripeness doctrine 'is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'") (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)).

⁵ *Sirius XM Merger Order*, 23 FCC Rcd at 12,395 (¶ 108).

⁶ Sirius XM Radio Inc., 2009 SEC Form 10-K (filed Feb. 25, 2010), available at <http://www.sec.gov/Archives/edgar/data/908937/000095012310017181/c96811e10vk.htm> (last visited Jan. 18, 2011).

⁷ Elliot Van Buskirk, "CES 2011: It's a Pandora World After All", Jan. 8, 2011 available at: <http://evolver.fm/2011/01/08/ces-2011-its-a-pandora-world-after-all/> (last visited Jan. 18, 2011).

⁸ Mike Ramsey, "Auto Makers Tie Mobile Networks to In-Car Systems," *Wall St. J.*, Jan. 5, 2011, available at: <http://online.wsj.com/article/SB10001424052748704405704576064080514279232.html?KEYWORDS=Mike+ramsey> (last visited Jan. 7, 2011). See also Press Release, CEA, Ford and Intel Keynotes and Major Product Innovation Launch the 2010 International CES (Jan. 8, 2010), available at <http://www.cesweb.org/news/releaseDetail.asp?id=11864> (last visited Jan. 18, 2011); Paul Leroux, "Automakers Take a Smart Approach to Smartphones," CEA Digital Dialogue, Jan. 6, 2011, available at: <http://blog.ce.org/index.php/2011/01/06/automakers-take-a-smart-approach-to-smartphones/> (last visited Jan. 18, 2011).

⁹ Press Release, Toyota Announces Entune Multimedia System at the 2011 Consumer Electronics Show (Jan. 4, 2011), available at: <http://pressroom.toyota.com/pr/tms/toyota/toyota->

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Department of Justice found when it closed its investigation of the Sirius-XM merger nearly three years ago.¹⁰ In granting its consent to the merger, DOJ identified “competitive alternative services available to consumers” and noted, in particular, that “a number of technology platforms are under development that are likely to offer new or improved alternatives to satellite radio [including] . . . the expected introduction within several years of next-generation wireless networks capable of streaming Internet radio to mobile devices.”¹¹ DOJ’s findings have been confirmed by independent parties in the FCC’s rulemaking regarding HD Radio technology and through subsequent technological developments.¹²

Finally, even if the Commission determined that it had the authority to extend or modify the expiring price cap,¹³ numerous practical considerations

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announces-entune-multimedia-189969.aspx (last visited Jan. 18, 2011). See also Eric A. Taub, “Toyota Puts Entertainment in the Cloud,” *New York Times*, Jan. 20, 2011, at B8.

¹⁰ Department of Justice, *Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.’s Merger with Sirius Satellite Radio Inc.* (press release) (March 24, 2008), available at http://www.justice.gov/opa/pr/2008/March/08_at_226.html (last visited Jan. 18, 2011).

¹¹ *Id.*

¹² The *Sirius XM Merger Order* acknowledged that “[c]omments filed as part of the rulemaking regarding HD Radio technology will help inform [the agency’s] decision regarding the level of competition in the radio market and the continuing need for a price cap.” *Sirius XM Merger Order*, 23 FCC Rcd at 12,395 (¶ 108, n.329). Comments filed by independent parties in this proceeding highlight that “there is adequate competition for Satellite radio from CD, MP3 Audio, Bluetooth Streamed Audio, internet streamed audio and HD radio and that additional regulation is not necessary nor in the best interest of the consumer.” Comments of Ford Motor Company, MB Docket No. 08-172 at 2 (dated Nov. 18, 2010 but posted Nov. 19, 2008). Similarly the Recording Industry Association of America noted that “[c]onsumers today can choose to listen to music by purchasing a CD or digital downloads of music; by listening to music played via satellite radio, analog radio, or webcasting; or through a growing variety of other web-based services that offer consumers sound recordings with varying degrees of interactivity, portability, permanence and sound quality.” Comments of the Recording Industry Association of America, MB Docket No. 08-172 at 1 (filed Nov. 7, 2008). Members of the public agreed “that all forms of Audio Entertainment compete for listenership, regardless of the business model.” Comments of Brian Rayl, MB Docket No. 08-172 at 2 (filed Sept. 11, 2008).

¹³ The FCC has no direct or ancillary authority to regulate satellite radio rates. “As the Supreme Court has recognized, ‘an agency literally has no power to act . . . unless and until Congress confers power upon it.’” *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 398 (D.C. Cir. 2004) (quoting *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986)). The *Sirius XM Merger Order* cited no direct statutory authority for the Commission to regulate satellite radio rates, and there appears to be none. Likewise, there appears to be no underlying basis for the agency to assert ancillary authority to regulate satellite radio rates. 47 U.S.C. § 154(i); 47 U.S.C. § 303(r). See *Am.*



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mitigate against doing so.¹⁴ For example, the price cap was suggested by the applicants for a defined period of time. Government-set rates are something quite different. How would the FCC independently justify setting \$12.95 – or any other particular rate – as the appropriate rate for basic satellite subscriptions? And for what period of time? Moreover, what process would the Commission employ for determining subscription rates or the period of time they would be in effect?

For the foregoing reasons, and, in particular, in light of the increasingly competitive landscape for audio entertainment, there is no need for the Commission to seek to extend or modify the subject rate cap and Sirius XM requests that the FCC take no steps to do so.¹⁵

Sincerely,

/s/ Robert L. Pettit

Robert L. Pettit
Counsel for Sirius XM Radio Inc.

cc: Marcia Glaubergerman

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Library Ass'n v. FCC, 406 F.3d 689, 700 (D.C. Cir. 2005); *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

¹⁴ No precedent appears to exist for the Commission to extend Sirius XM's voluntary merger commitment not to raise rates for three years. The three cases the Commission cited in n. 328 of the *Sirius XM Merger Order* are inapposite for a variety of reasons: in one, the Commission extended its program access rules pursuant to direct statutory authority, and in the other two, the Commission established a framework for relieving applicants of a merger condition earlier than would otherwise have occurred. None of the cases involved extension of a voluntary commitment beyond the parameters that the applicants agreed to.

¹⁵ Since the inception of commercial satellite radio service in 2001, there has been just one basic subscription rate price increase for the XM platform and none for the Sirius platform.