DISSENTING STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN

Re: *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, MB Docket No. 07-57.*

Sirius and XM (collectively the "Applicants") currently offer dynamic and competitive audio programming to consumers. Their marketplace competition with each other has undoubtedly contributed to their cutting edge appeal. It also has exacerbated their difficult financial circumstances, as they have competed for compelling programming and driven up the costs for each other dramatically. Partly in response to this one-upmanship, which has improved the quality of programming and benefited consumers, the Applicants have sought to merge rather than compete.

It is precisely because the Applicants provide such a valuable service to consumers that it was critical for the Commission to respond appropriately to their dramatic effort to combine. They both now provide an outstanding service that their subscribers find extremely engaging. They employ creative and innovative talent who put on shows that many of their subscribers cannot easily live without. I truly hope the merged entity succeeds, and maintains its edge, and does not become a fat and happy monopoly.

I was hoping we could achieve a bipartisan consensus that would offer consumers more diversity in programming, better price protection, greater choices among innovative devices and real competition with digital terrestrial radio. Disappointingly, that was not accomplished. Instead, consumers will get a monopoly with window dressing. And, the dream of greater women and minority participation in media will be deferred once again.

It is not just me who considers this a monopoly. On that point, the majority and I do agree. The entire *Order* is appropriately premised on the reality that this is a "merger to monopoly."[1] Rather than accept the Applicants' broad definition of the market, today's *Order* defines the market narrowly and, thus, deliberately endows the Applicants with a monopoly over the entire licensed satellite radio service. To do so, the majority repeals the existing safeguard prohibiting the common ownership of the two satellite radio licenses, and instead relies on nominal conditions.[2] Incredibly, the merged entity will now have *more* spectrum than the AM and FM bands combined. Given the inadequacy of the merger conditions, this decision better serves the Applicants' self-interest rather than the public interest, so I am unable to support it.

The instant order follows in the wake of the Department of Justice (the "DOJ") Antitrust Division's questionable decision to close its investigation of the merger without requiring any conditions.[3] The DOJ explained that it could not find that such a merger would substantially lessen competition, in part, because of a lack of competition between the parties even without the merger. Thus, the DOJ concluded that the merger would not make matters much worse — hardly consolation for consumers.

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[1] *Order* at ¶¶ 47-50.

[2] *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd 5754, 5823 ¶ 170 (1997) (stating, under a subheading entitled "Safeguards", that "[e]ven after DARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellite DARS license[,]" and that "[t]his prohibition on transfer of control will help assure sufficient continuing competition in the provision of satellite DARS service.").

[3] DOJ Press Release, *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.* (Mar. 24, 2008), *available at* http://www.usdoj.gov/opa/pr/2008/March/08_at_226.html.

Ostensibly, the DOJ relied on two key premises in reaching its decision: long-term sole source contracts with automobile manufacturers and the lack of an interoperable radio. Even though the DOJ acknowledged that the Applicants competed on the terms of automotive contracts, including the amount of equipment subsidization, it readily dispensed with this consumer benefit, because many of the sole-source contracts were locked up for extended periods. Further lack of competition between the Applicants was explained by their decision not to bring an interoperable radio to market despite a Commission requirement to do so. It is ironic that the DOJ relied on the Applicants' failure to comply with the interoperability mandate as a justification for the merger. The DOJ also gave the Applicants a pass on the financial interests and corporate directorships held by major automotive manufacturers in the Applicants' businesses and the merged entity's future business. While more analysis is needed, this relationship presents a potential for discrimination against the installation of competitive technologies in the automotive sector going forward.

In contrast to antitrust review, where the DOJ would have borne the burden of proving that the proposed transaction "substantially lessens competition,"[4] the Commission's standard of review requires merger applicants to prove that the transaction will serve the greater public interest, informed by the core values of competition, diversity and localism.[5] Yet, the Applicants have not even provided the Commission with sufficient evidence to perform a structural market analysis that would allow us to and predict the likelihood of competitive harm.

In the *Order*, the majority assumes the "worst-case" scenario, specifically that satellite radio has no real competitors and that the proposed transaction represents a merger to monopoly. In adopting this approach, the majority professes to create a high public interest standard by subjecting the merger application (with the Applicants retaining the burden of proof) to the most exacting scrutiny. Granting the merger under this approach should require significant conditions, proportional to the significant public interest harm assumed, in order to mitigate the extreme concentration of market power. Regrettably, the majority's acceptance of the Applicants' "voluntary commitments" fails to meet this professed prophylactic public interest standard because of gaping loopholes in them.

Price Cap. Though the Applicants have committed not to raise the retail rates on their existing and newly proposed programming packages for three years after the consummation of the merger, the *Order* fails to justify why the three-year period is sufficient and merely adopts the Applicants' terms and conditions. Although the majority is unable to identify competitors likely to constrain the merged entity's ability to raise prices, it is unwilling to impose a meaningful price cap for a reasonable period of time.

Even during the three-year period itself, the merged entity could evade or undermine this consumer protection in several significant respects. The manner in which this condition is crafted suffers from a myopic perception of satellite radio pricing. Retail rates of programming packages constitute only one element in the ultimate price of satellite radio service. The item completely overlooks additional implicit pricing elements of the service, such as equipment subsidies,[6] ancillary services,[7] activation fees,[8]

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[4] 15 U.S.C. § 18.

[5] 47 U.S.C. § 310(d).

[6] *See* "HD Radio" *infra*.

[7] For example, Sirius presently provides an Internet radio service to subscribers for either no additional charge or an additional $2.99 per month, depending on the quality of the audio. Sirius Internet Radio, http://www.sirius.com/siriusinternetradio. XM presently provides a similar, though not identically structured, Internet radio service to subscribers. *See* XM Radio Online, http://xmro.xmradio.com/xstream/index.jsp.

termination fees,[9] and transfer fees,[10] all of which the merged entity could manipulate to undermine the consumer protection intent of the price cap. It also fails to adequately address the concern that the merged entity may have the incentive and ability to raise real prices by reducing content quality, either by increasing advertising or through other means. Sirius Chief Executive Officer Mel Karmazin has stated as much, declaring to investors that the post-merger "advertising line is going to contribute significantly in the future towards [average revenue per user]."[11] Consumers might as well prepare for a barrage of new commercials, because now they will have nowhere else to turn if they want satellite radio service.

Additionally, the merged entity could evade the price cap by siphoning off programming from the capped packages to new and presumably uncapped packages.[12] Indeed, not only do both Applicants already have service clauses to this effect, but they assert that the proposed "programming options … are subject to individual channel changes in the ordinary course of business and, in the case of certain programming, the consent of third-party programming providers."[13] While the decision imposes a floor on the number of channels in the existing and proposed programming packages, the Applicants are left to exploit a loophole to siphon off high-quality channels to unregulated tiers while replacing them with lower cost, and possibly lower quality, channels. Thus, while this approach would maintain the same quantity of channels, it cannot guarantee consumers the same or better quality of programming. Precedent for this type of strategic behavior exists in the previous attempts to regulate cable rates.[14]

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[8] Sirius currently charges a one-time $15.00 fee "to activate, reactivate, upgrade or modify each Satellite Radio Service Subscription." Sirius Terms and Conditions, http://shop.sirius.com. XM charges a similar activation fee of undisclosed amount. XM Customer Agreement, http://www.xmradio.com/about/customer-service-agreement.xmc ("For each XM Radio on your account, we may charge you a fee to activate, upgrade or modify your Radio Services. The addition of premium channels or services, if any, may require an additional activation fee. The fee is payable with your first subscription fee payment.").

[9] Sirius currently charges a $75 termination fee "if you cancel a one-year or longer Subscription during the first year of service." Sirius Terms and Conditions, http://shop.sirius.com. XM charges a termination fee of undisclosed amount. XM Customer Agreement, http://www.xmradio.com/about/customer-service-agreement.xmc ("From time to time, we may offer the Services on an annual or other multi-month commitment basis. In such events, you agree to make payments for Services to be received and that are ordered by you in accordance with the terms of the applicable billing plan that you agree to, including, without limitation, payments of any early termination fees if you terminate your Services prior to the end of such commitment period.").

[10] Sirius currently charges a $75 transfer fee "[i]f you transfer a lifetime Satellite Radio Service Subscription from one Receiver to another or from one person to another." Sirius Terms and Conditions, http://shop.sirius.com. It is unclear whether or not XM charges a similar transfer fee or whether transfer is even permitted. *See* XM Customer Agreement, http://www.xmradio.com/about/customer-service-agreement.xmc.

[11] 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).

[12] Sirius Terms and Conditions, http://shop.sirius.com ("Accordingly, we reserve the unrestricted right to change, rearrange, add, or delete programming, including canceling, moving or adding particular channels, at any time, with or without notice to you."); XM Customer Agreement, http://www.xmradio.com/about/customer-service-agreement.xmc ("XM reserves the right to change programming on either or both [XM Radio Online and XM Radio] Services at any time and without notice, at our sole discretion, including canceling, modifying, moving or adding particular channels, with or without notice to you.").

[13] Letter from Richard E. Wiley, Robert L. Pettit, Wiley Rein LLC, Counsel for Sirius Satellite Radio Inc., and Gary M. Epstein, James H. Barker, Latham & Watkins LLP, Counsel for XM Satellite Radio Holdings Inc., to Kevin J. Martin, Chairman, FCC at 5 (June 13, 2008) ("Applicants' June 13, 2008 Ex Parte").

[14] *See e.g.*, Thomas W. Hazlett, *Shedding Tiers for A La Carte? An Economic Analysis of Cable TV Pricing*, 5 J. Telecomm. & High Tech. L. 253, 258 (Fall 2006) ("The complexities of the video marketplace rendered price

The *Order* provides an explicit loophole to the so-called "price cap" by allowing the merged entity to pass through statutory or contractual programming costs to the consumer one year after the merger is complete.[15] While the genesis of this exception is left unexplained, the winners and losers are apparent. The Applicants benefit by passing the cost on to the consumer. And of course, consumers will be left to find out about these "programming costs" through increases in their bills.

Finally, even assuming the success of the price cap, there is nothing to prevent the merged entity from instantaneously increasing retail prices once it expires. To remedy this oversight, the duration of the price cap period should have been extended beyond three years (correlated with expected entry of sufficient competition to restrain prices) or, in the alternative, presumptively renewed with the merged entity bearing the burden of proving that the restriction is no longer necessary because of competition. Though there is some sort of interim review, the Commission's standard of review and the burdens of proof are left ambiguous.

Programming. While the majority accepts the Applicants' "voluntary commitment" to offer newly defined and a la carte programming packages, the benefits, never mind the merger-specific benefits, of such offerings are far from clear. With respect to the newly defined programming packages, it accepts the Applicants' unjustified assertion that such packages could not be offered absent a merger and summarily finds that such packages present merger-specific benefits.

At its core, the decision rests on the single assumption that new programming packages will increase consumer choice and, therefore, improve consumer welfare. However, the Commission failed to inquire into whether the newly proposed programming packages maximize consumer welfare or even estimate the magnitude of the claimed welfare gain. Does offering consumers more channels for more money or fewer channels for more money per channel create a cognizable public interest benefit? Is it "choice," in any meaningful sense of the word, if the relative value of the offering diminishes? By this logic, a decision to offer one channel at one hundred times the price of the total current package would also increase "choice" and improve consumer welfare. The same is true for the "safety valve" claim, that lower priced options correct the ills of take-it-or-leave-it offers by a monopolist. Would not one less channel for one less cent also create such nominal "choice?"

Even if so, a significant obstacle remains; namely, the exclusivity provisions found in talent contracts prevent the merged entity from offering certain channels, potentially the most popular channels, on both systems. As adopted, the *Order* notes that the Applicants have pledged to seek third party consent to such arrangements and willingly permits the merged entity to pass the cost of such consent directly on to the consumer.

A la carte makes its appearance here without any empirical analysis or any discussion reflective of the controversy surrounding the Commission's own a la carte inquiries.[16] Nor is there any acknowledgment of the effects of a la carte policies on the public interest concern of diversity of programming. Without further analysis, this "voluntary commitment" is, at best, inconsequential to our

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regulation unworkable; when rates were capped by authorities, cable operators and cable networks responded to these constraints by altering the nature, packaging, and quality of video programming services.").

[15] Applicants' June 13, 2008 Ex Parte at 5.

[16] *See* Media Bureau, *Report On the Packaging and Sale of Video Programming Services To the Public* (Med. Bur., Nov. 18, 2004); *see also* Media Bureau, *Further Report on the Packaging and Sale of Video Programming Services to the Public*, (Med. Bur., Feb. 9, 2006) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-263740A1.pdf.

merger review.

Noncommercial and Qualified Entity Channels. The Applicants' commitment to set aside four percent of full-time audio channels for noncommercial educational and informational programming as well as four percent for qualified entity programming is small step in the right direction. There is no explanation, however, as to why these commitments are significant enough to offset the potential public interest harms created by a merger to monopoly.

In terms of noncommercial educational and informational programming, the acquiescence in the Applicants' "voluntary commitment" merely enshrines the status quo. The Applicants currently already offer an equivalent amount of such programming on their combined systems. The voluntary commitment adds nothing to offset the effects of the merger. We should have required substantially more spectrum to be set aside for such public interest programming.

In terms of diverse programming by qualified entities, it is far from clear that a paltry four percent set-aside will be commercially viable. Several commenters have expressed that there is no business case for such a small offering. The decision today rejects the guidance of members of Congress, state Attorneys General, and public interest organizations that have called for a larger spectrum set-aside to ensure competition and diversity in satellite radio service to offset the massive concentration that is being permitted. And, it is left entirely unclear how the qualified entities will be selected, leaving the entire provision unintelligible and unpredictable. "We will determine the implementation details for use of these channels [for qualified entities] at a latter date,"[17] is a clear indication of the Commission's historic pattern of neglecting minority access to the communications industry. Once again, rather than taking a decisive step forward to improve the plight of women and people of color in media, the Commission has taken a step to the side.

Interoperable Receiver. The *Order* characterizes the Applicants' interpretation of the Commission's interoperability requirement as "not unreasonable" to excuse their earlier failure to develop and market interoperable receivers. The Applicants' noncompliance created switching costs for consumers and, thus, limited pre-merger competition between the Applicants. Adding this condition today is virtually meaningless, because the merged entity will have every incentive to offer interoperable devices anyway. The point was to enforce the requirement before, not after, the merger. Doing it now is clearly a case of closing the barn door after the cows got out. At least the *Order* recognizes that this claimed benefit simply cannot be deemed merger-specific.

Open Access. The *Order* uncritically embraces the Applicants' proffered open access scheme,[18] concluding that commercially reasonable, non-discriminatory licensing will effectively mitigate any potential vertical harm from the satellite radio monopoly. However, there is no effective mechanism to deliver a truly open, competitive market. The open access provision should function to ensure competition, innovation, and the delivery of advanced technologies in the satellite radio receiver, and to some extent, the broader audio equipment manufacturing market. By shortsightedly permitting the merged entity to retain control of the design, manufacture and distribution of satellite radio receivers, it allows the merged company to maintain gatekeeper authority over the market. This is letting the fox guard the henhouse. We should have, as I proposed, required an independent laboratory to certify compliance with the technological specifications and quality standards.

[17] *Order* at ¶ 135.

[18] Letter from Richard E. Wiley, Wiley Rein LLC, Counsel for Sirius Satellite Radio Inc., and Gary M. Epstein, Latham & Watkins LLP, Counsel for XM Satellite Radio Holdings Inc., to Kevin J. Martin, Chairman; Michael Copps, Commissioner; Jonathan Adelstein, Commissioner; Deborah Tate, Commissioner; and Robert McDowell, Commissioner, FCC at 2 (July 25, 2008); Applicants' June 13, 2008 Ex Parte at 4-5.

HD Radio. One of the mechanisms the merged company will use to maintain its lock on the equipment market will be through product subsidies. While many consumers will find these beneficial, we should have guarded against the use of them for anticompetitive purposes. While some proposed that we require HD radio technology be incorporated into all new satellite receiver models capable of receiving analog terrestrial radio, I proposed we require it only in subsidized models. That way, if there were truly an open market for devices, as an independent process for certification would have ensured, the market would determine whether to integrate HD radio into the devices. Where the merged company sought to alter market dynamics through subsidies or other mechanisms, it would be prevented from discriminating against competing HD radio technology. Instead, the *Order* allows the merged company to avoid subsidizing models that include HD radio, thus using their market power to thwart the very competition the Applicants cited as justifying the merger.

While I am pleased that the *Order* is explicitly conditioned on compliance with the voluntary commitments, we should have instituted an independent monitor to assist the Commission in reviewing complaints and enforcing even these meager conditions. This is particularly necessary in light of the fact that the Applicants just paid record fines for widespread and flagrant violations of Commission rules over a number of years.

In looking back over the torturous and excessively long period during which this merger was under consideration, one commentator has criticized the commitments as mere "crumbs that have fallen off the table."[19] It is remarkable that the Commission took so long to do so little.

While the *Order* repeats a public interest incantation over and over again, it does little to explain why each particular condition has gone far enough to protect the public interest. With unchecked optimism, the *Order* concludes that the public interest is precisely satisfied by the proffered "voluntary commitments" and other nominal conditions. Because the proposed transaction, as structured, has not been shown to serve the public interest, the merger application should be designated for hearing.

For the foregoing reasons, I dissent.

[19] *See* Jeffrey H. Birnbaum, *Radio Merger Under Fire From Black Lawmakers*, WASH. POST, June 17, 2008, at D01 (quoting Representative Elijah E. Cummings).