

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

In the Matter of)
)
Development of Devices Capable of Supporting) MB Docket No. 08-172
Multiple Audio Entertainment Services)

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)¹ hereby submits these reply comments in response to the Notice of Inquiry (“NOI”) in the above-captioned docket.² The Commission seeks input on requiring that satellite radio providers make multifunction devices available, including satellite radios that are also capable of receiving HD Radio services. NAB strongly supports such a requirement as a means of facilitating equitable consumer access to HD Radio technology.

Unsurprisingly, Sirius XM opposes any Commission action that would enable consumers to more conveniently access competing technologies with their monopoly satellite radio services. Sirius XM first argues against Commission intervention because it contends the marketplace is working.³ Sirius XM describes the growth of HD Radio in terms of consumer awareness, and adoption by broadcasters, consumers, and retailers, and offers this as evidence that the HD Radio transition does not need help from the

¹ NAB is a nonprofit trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the Courts.

² *In the Matter of Development of Devices Capable of Supporting Multiple Audio Entertainment Services*, MB Docket No. 08-172, Notice of Inquiry (rel. Aug. 25, 2008) (“NOI”).

³ Comments of Sirius XM Radio Inc., MB Docket No. 08-172 (Nov. 10, 2008) at 4-8, 9-11.

Commission. Sirius XM Comments at 7. Sirius XM then argues that the market for audio receivers is already functioning properly, and in support cites a plethora of multifunction devices that are currently available to consumers. These include devices with some combination of AM/FM tuner, HD Radio technology, MP3 player and/or an iPod port, and others that combine AM/FM, HD Radio services, and MP3 as well as CD and DVD players. *Id.* at 8. Sirius XM also notes that it sells numerous satellite radio receivers that include MP3 players and a recording function, and others that allow internet streaming. *Id.* at 9-10. Given the HD Radio transition's progress, and these equipment options, Sirius XM suggests that it is unnecessary for the Commission to intervene and instead should permit market forces to determine whether Sirius XM should produce satellite radios that receive HD Radio services. *Id.*

However, Sirius XM's own evidence contradicts its position against a Commission rulemaking. If Sirius XM's depiction of the HD Radio transition's progress is accurate, and its characterization of the audio receiver market is realistic, then it stands to reason that at least one multifunction Sirius XM radio with HD Radio capability would be commercially available. Under Sirius XM's reasoning, consumers would demand it and the market would react. Unfortunately, there is no such device among the various multifunctional receivers that Sirius XM describes. This conspicuous absence of even a single satellite radio receiver with HD Radio capability raises serious questions about the openness and competitiveness of the digital audio receiver marketplace and its ability to serve consumers.

The source of the problem lies in Sirius XM's influence and control over the satellite radio receiver market. The Commission itself recognized this situation, noting in the Merger Order that Sirius and XM are closely involved in the "design, manufacture,

and sale” of satellite radios, and control the intellectual property of satellite receivers.⁴ The Commission also stressed that Sirius XM only sells satellite radios that are branded with Sirius XM. Most importantly, Sirius XM subsidizes the retail costs of satellite receivers. Merger Order at ¶ 65. As explained by Beasley *et al.*, these subsidies include incentives, subsidies and commissions to retailers for sales, marketing and distribution efforts.⁵ These payments can take the form of fixed payments, and per-unit and per-subscriber arrangements. Also, Sirius XM has revenue sharing arrangements in which it pays a portion of its subscription revenues to automakers and reimburses them for various costs related to the installation of satellite receivers in cars, such as tools, hardware and advertising expenses. Beasley *et al.* Comments at 8-9. These subsidies are substantial. For example, during the period 2005 to 2007, XM’s costs for these arrangements totaled more than \$500 million, and while figures are unavailable it is probably safe to assume that Sirius’ commitment was similar. *Id.*

Moreover, the merger of Sirius and XM only exacerbates these problems because the Commission’s “open access” condition does nothing to safeguard consumers’ interest in convenient access to alternative technologies.⁶ As Clear Channel explains, this condition is more relevant to preventing restraint of trade among Sirius XM and satellite radio manufacturers than preventing Sirius XM from impeding consumer access to HD Radio services. The voluntary open access restriction does not address the wide array of

⁴ *Applications for Consent to the Transfer of Control of Licenses; XM Satellite Radio Holdings, Inc., Transferor to Sirius Satellite Radio inc., Transferee*, FCC 08-178, Memorandum Opinion and Order and Report and Order (Aug. 5, 2008) (“Merger Order”), at ¶ 65.

⁵ Comments of Beasley Broadcast Group, Inc., MB Docket No. 08-172 (Nov. 10, 2008), at 8-9.

⁶ See, e.g., Comments of Clear Channel Communications, Inc., MB Docket 08-172 (Nov. 10, 2008), at 13-14.

revenue-sharing, subsidies and other arrangements that Sirius XM can exploit to discourage equipment manufacturers, automakers, and retailers from investing in or promoting multifunction satellite radios that can function as HD Radio receivers. Clear Channel Comments at 14. Sirius XM still will be able to provide manufacturers with technical designs and schematics for satellite radio-only receivers, thereby forcing other manufacturers to incur additional expense to design a multifunctional receiver. Beasley *et al.* Comments at 12. Sirius XM could also devote most, if not all, of its promotional budget support to satellite radio-only receivers. Indeed, Sirius XM CEO Mel Karmazin stated before Congress that he would never spend any money subsidizing equipment that includes alternative technologies.⁷ There are no such devices today, and the Commission's open access condition will do nothing to foster the development of any in the future, to the detriment of consumers.

The only step that can promote and protect the public interest in effective consumer choice among multiple audio sources is to mandate the inclusion of HD Radio technology in satellite radio receivers. Such a requirement will help bring HD Radio service to fruition for consumers, and in turn, help ensure the continued viability of free, over-the-air broadcasting in local communities across the country.⁸ The Commission has recognized the public interest benefits and supported HD Radio for many years,⁹ and taking this action is a critical extension of those efforts. Moreover, in approving the

⁷ Comments of iBiquity Digital Corporation, MB Docket No. 08-172 (Nov. 10, 2008), at 6 *citing* Testimony of Mel Karmazin, House Judiciary Committee, Antitrust Task Force (Feb. 28, 007).

⁸ Comments of National Public Radio, MB Docket No. 08-172 (Nov. 10, 2008), at 8; Beasley *et al.* Comments at 12.

⁹ See, e.g., *Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 10344 (2007).

merger of Sirius and XM, the Commission sanctioned a monopoly satellite radio provider with control over all spectrum allocated to this service, contrary to its own long-standing policies and despite clear competitive concerns. Given this, the Commission should now explore requiring the inclusion of HD Radio technology in satellite radios to ensure that consumers have equitable access to alternative audio services and programming.

NAB also notes that the radio industry has made significant investment to develop and implement HD Radio service. The costs of converting a single radio station to digital are approximately \$125,000 to \$150,000, with some conversions costing much more, plus an additional \$75,000 to implement multicast streams. Beasley et al. Comments at 13. Additionally, radio stations through their participation in the HD Digital Radio Alliance have committed almost \$700 million towards efforts to market and promote HD Radio programming. Clear Channel Comments at 5. As a result of these investments, hundreds of radio stations are now offering digital radio services, with greatly improved sound quality and new programming streams. The Commission must act to ensure that consumers have effective access to these innovative services, free of interference by Sirius XM in the receiver marketplace.

In response to Sirius XM's claims that a receiver mandate is anticompetitive because it will increase costs for its equipment,¹⁰ a requirement that satellite radios be capable of receiving HD Radio services will produce economies of scale that ultimately will reduce the costs of both satellite and HD Radio receivers. NPR Comments at 7. iBiquity has further provided the Commission with evidence that, if implemented properly, adding HD Radio technology to satellite radios will have a minimal impact on the cost and design of equipment. It should not affect any important facets of a satellite radio receiver,

¹⁰ Sirius XM Comments at 11-13.

including its size, weight or battery life. iBiquity Comments at 10. Thus, there are no cost reasons for the Commission to refrain from acting to promote the development of consumer-friendly multifunctional receivers, especially in light of the clear incentives and ability of Sirius XM to discourage the manufacture and sale of such receivers.

Finally, Sirius XM also contends that the Commission lacks authority to force Sirius XM to ensure that its manufacturers and vendors include certain technology in their satellite radio receivers. Sirius XM states that the Commission's "regulatory authority over licensees such as Sirius XM does not encompass requiring them to mandate that certain technologies be included in radios." Sirius XM Comments at 18-19. Sirius XM offers no legal support for this conclusion, however, stating cursorily that the Commission has no legal authority over manufacturers who would "shoulder the burden of the proposed regulation," and not Sirius XM. *Id.* at 19.

Contrary to Sirius XM's assertions, the Commission possesses sufficiently broad discretion and authority to impose a wide range of requirements on satellite radio licensees, from programming obligations to receiver requirements.¹¹ Specifically, the Commission previously mandated that Sirius and XM certify that their systems include a "receiver that will permit end users to access all licensed satellite DARS systems"¹² The Commission stated that an interoperable radio would encourage consumer purchases of satellite radios, and promote competition by facilitating subscribers' ability to switch between Sirius and XM. 1997 SDARS Order, 12 FCC Rcd at 5796. The

¹¹ See *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5787-5805 (1997) ("1997 SDARS Order") (imposing, *inter alia*, political programming rules and equal employment opportunity obligations). The Commission relied on 47 U.S.C. §§ 151, 154(i), 301, 303(b), 303(r), 307(a), and 309(a).

¹² 47 C.F.R. § 25.144(a)(3)(ii); 1997 SDARS Order, 12 FCC Rcd at 5796.

Commission reiterated its authority to impose the interoperability receiver mandate only a few months ago when approving the merger of Sirius and XM, and accepted the merged entity's voluntary commitment to finally fully comply. Merger Order at ¶¶ 120 – 124.

The Commission had ample authority and jurisdiction over Sirius and XM as spectrum licensees to impose this obligation, and the same authority and jurisdiction now enables the Commission to require Sirius XM to ensure that satellite radio receivers that incorporate HD Radio technology are manufactured and made commercially available. As shown above, this obligation will serve the public interest by facilitating consumer choice among satellite and HD Radio service. Sirius XM's argument that the Commission lacks authority rings hollow as Sirius and XM never argued that the Commission lacked authority to impose the interoperable receiver requirement.

Requiring that Sirius XM certify the development and commercial availability of multifunction satellite radios capable of receiving HD Radio will promote consumer choice, and in turn competition. Contrary to Sirius XM's view, this would not represent an underserved gift to HD Radio. Sirius XM Comments at 7-8. Instead, the Commission would be giving consumers the choice they deserve, by enabling satellite radio subscribers to easily and conveniently access both HD Radio stations and the local programming they provide and satellite radio services on multifunctional devices.

For the reasons described above, NAB respectfully requests that the Commission launch a rulemaking proceeding exploring the adoption of a requirement that Sirius XM ensure the production and commercial availability of satellite radios that also receive HD Radio services.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430

Handwritten signatures of Jane Mago, Jerianne Timmerman, and Larry Walke.

Jane Mago
Jerianne Timmerman
Larry Walke

December 9, 2008