WILKINSON) BARKER) KNAUER) LLP

2300 N STREET, NW
SUITE 700
WASHINGTON, DC 20037
TEL 202.783.4141
FAX 202.783.5851
www.wbklaw.com
DAVID H. SOLOMON
202.383.3369
dsolomon@wbklaw.com

October 3, 2007

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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

Dear Ms. Dortch:

The National Association of Broadcasters ("NAB"), by its attorneys and pursuant to 47 C.F.R. § 1.1206, hereby submits this *ex parte* presentation for inclusion in the above-referenced proceeding. Now that NAB and others have had an opportunity to review the voluminous economic analysis that Applicants filed at the close of the pleading cycle, it is clearer than ever that the Commission would be discarding long-standing merger review standards if it approves this merger. Applicants' strategy in this regard has not been subtle; they recognize that following the Commission's legal standards would kill the merger, so they try to kill the standards instead. The Commission's acquiescence to such an approach would be arbitrary and capricious, inconsistent with its own precedent, and set the Commission's merger review process on a risky course.

I. INTRODUCTION

NAB has previously highlighted the unusual procedural posture of this case, in which Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM") (collectively "Applicants") filed their merger application without a detailed evidentiary showing that the proposed transaction is consistent with established Commission precedent, policy, and rules.[1] Applicants instead waited and filed a voluminous Opposition to Petitions to Deny that included, for the first time, an economic analysis that purports to demonstrate that the "overall effect of the merger of Sirius and XM will be procompetitive, *even though the merger will eliminate existing rivalry between the merging firms*," the sole providers of satellite Digital Audio Radio Service

[1] *See* Comments of the National Association of Broadcasters at 1-2 (Aug. 13, 2007) ("NAB Comments").

("satellite DARS").[2] The cornerstone of that economic analysis is the conclusion that the relevant product "market is broader than satellite radio, including other audio entertainment devices, content and services."[3]

The Consumer Coalition for Competition in Satellite Radio ("C3SR") recently submitted the Third Supplemental Declaration of economist and antitrust expert Professor J. Gregory Sidak, evaluating the CRA Report.[4] As discussed below, Professor Sidak demonstrates that the CRA Report fails to prove that the relevant product market should include other audio sources such as local radio, HD radio, IP radio, CD players, cellphones, and iPods. Simply put, the CRA Report, like all other filings in support of the merger, fails to provide any evidence demonstrating that these other audio devices and services constrain satellite DARS pricing, which is the core test for product market definition.[5]

NAB concurs with Professor Sidak's critique of the CRA Report. Under the analytical framework established in the *DOJ/FTC Guidelines*, the relevant product market is determined with reference to those products for which there is cross-elasticity of demand.[6] In other words, the critical question for determining the relevant product market in this instance is whether local radio, HD radio, IP radio, CD players, cellphones, and iPods constrain satellite DARS pricing.[7] By evading this question, the CRA Report is inconsistent with the *DOJ/FTC Guidelines* and directly at odds with long-standing Commission and judicial precedent. Furthermore, the fact that the CRA Report urges the Commission to ignore the *DOJ/FTC Guidelines* and relevant precedent underscores the inevitable conclusion that the proposed merger cannot be granted under existing law.

II. APPLICANTS MAKE NO ATTEMPT TO DEMONSTRATE COMPLIANCE WITH THE *DOJ/FTC GUIDELINES* AND INSTEAD URGE THE COMMISSION TO IGNORE THEM

The definition of the relevant product market is a crucial and highly disputed threshold issue in this case. Parties opposing the merger, including Consumers Union, Consumer Federation of America, and other expert public interest organizations, argue that the relevant

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[2] *See* Joint Opposition to Petitions to Deny and Reply Comments of Sirius Satellite Ratio Inc. and XM Satellite Radio Holdings Inc. ("Opposition"), Exhibit A, CRA International, Economic Analysis of the Competitive Effects of the Sirius-XM Merger at 1 (July 24, 2007) ("CRA Report") (emphasis added).

[3] *Id.*

[4] Third Supplemental Declaration of J. Gregory Sidak (filed by C3SR Oct. 1, 2007) ("Third Supplemental Sidak Decl.").

[5] *See, e.g, id.* ¶¶ 2-3.

[6] U.S. DOJ and FTC Horizontal Merger Guidelines §§ 1.0, 1.11 (Apr. 2, 1992, revised Apr. 8, 1997) ("*DOJ/FTC Guidelines*").

[7] *See id.* § 1.11.

product market is satellite DARS, while Applicants and their supporters argue that the market is all sources of audio entertainment. This dispute ultimately turns on the question of whether the *DOJ/FTC Guidelines* should be applied to this merger. Under the *DOJ/FTC Guidelines*, the relevant product market is determined based upon the reasonable interchangeability of use, or the cross-elasticity of demand, between the product itself and substitutes for it.[8] The cross-elasticity of demand, in turn, is measured by asking "what would happen if a hypothetical monopolist . . . imposed at least a 'small but significant and nontransitory' increase in price" ("SSNIP").[9] Furthermore, "[m]arket definition focuses solely on demand substitution factors – *i.e.*, possible consumer responses. Supply substitution factors – *i.e.*, possible production responses – are considered elsewhere in the Guidelines in the identification of firms that participate in the relevant market and the analysis of entry," but not with respect to product market definition.[10]

NAB's Petition to Deny and related filings demonstrate that, under the *DOJ/FTC Guidelines* and the SSNIP test, the relevant product market for purposes of the Commission's analysis of the proposed merger is satellite DARS.[11] Noted telecommunications economist Professor Stephen S. Wildman concurred that XM and Sirius are the only competitors in a well-defined consumer market.[12] In Professor Wildman's view, the subscription nature of satellite DARS allows XM and Sirius to offer unique services and products, such as commercial-free programming, niche programming and adult-oriented content, that distinguish satellite radio from other audio services and products.[13]

The comments largely confirm that the *DOJ/FTC Guidelines* compel the conclusion that the relevant product market is satellite DARS. For instance, C3SR submitted three previous declarations by Professor Sidak, which provide a detailed economic analysis that confirms that

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[8] *See id.* §§ 1.0, 1.11; *see also Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) ("The outer boundaries of a product market are determined by the reasonable interchangeability of use [by consumers] or the cross-elasticity of demand between the product itself and substitutes for it."); *FTC v. Staples, Inc.*, 970 F.Supp. 1066, 1074 (D.D.C. 1997) ("Interchangeability of use and cross-elasticity of demand look to the availability of substitute commodities, *i.e.* whether there are other products offered to consumers which are similar in character or use to the product or products in question, as well as how far buyers will go to substitute one commodity for another.") (citations omitted).

[9] *DOJ/FTC Guidelines* § 1.11.

[10] *Id.* § 1.0.

[11] *See* Petition to Deny of the National Association of Broadcasters at 11-23 (July 9, 2007) ("NAB Petition to Deny"); National Association of Broadcasters' Response to Comments at 6-16 (July 24, 2007) ("NAB Response to Comments"); National Association of Broadcasters Reply to Opposition at 5-6 (July 31, 2007) ("NAB Reply").

[12] NAB Response to Comments, Exhibit A, Declaration of Steven S. Wildman ¶¶ 13-17.

[13] *Id.* ¶ 15-16.

the SSNIP test leads to the conclusion that the relevant product market is satellite DARS.[14] Numerous other comments concur that other mobile and fixed audio services and products, including local radio, HD radio, IP radio, CD players, cellphones, and iPods, cannot act to constrain satellite DARS pricing.[15] Consumer Groups, for example, point out that satellite radio possesses "a unique bundle of characteristics that clearly distinguishes it from other audio entertainment products."[16] National Public Radio ("NPR"), a program producer for both broadcast radio and satellite DARS, "views the SDARS platform as a different product market with a different audience and, therefore, an opportunity to reach additional listeners."[17]

The CRA Report, on the other hand, is little more than another example of Applicants' efforts to have the Commission discount and disregard the fundamental application of the *DOJ/FTC Guidelines* in order to justify their overly broad definition of the relevant product market.[18] The CRA Report makes no effort to show that these other audio products and services actually constrain satellite DARS pricing. Instead, it dismisses the SSNIP test as inappropriate, arguing that the relevant product market should be evaluated based on the novel concept it defines as "dynamic nature of demand."[19] The CRA Report then concludes that, when viewed through the prism of their concept of "dynamic nature of demand," the "correct relevant market definition for evaluating the impact of this merger is not limited solely to satellite radio, but also includes other audio entertainment products."[20]

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[14] *See* Expert Declaration of J. Gregory Sidak Concerning the Competitive Consequences of the Proposed Merger of Sirius Satellite Radio, Inc. and XM Satellite Radio, Inc. (Mar. 16, 2007) (filed by C3SR Mar. 28, 2007); Petition to Deny of the Consumer Coalition for Competition in Satellite Radio, Exhibit B, Supplemental Declaration of J. Gregory Sidak (filed by C3SR July 9, 2007); Response of the Consumer Coalition for Competition in Satellite Radio, Exhibit A, Second Supplemental Declaration of J. Gregory Sidak (filed by C3SR July 24, 2007).

[15] *See, e.g.,* Comments of American Antitrust Institute in Opposition to Transfer Application at 22-25 (June 5, 2007); Petition to Deny of National Public Radio, Inc. at 10 ("NPR Petition to Deny"); Petition to Deny of Common Cause, Consumer Federation of America, Consumers Union and Free Press at 1-2, 15-19 (July 9, 2007) ("Consumer Groups Petition to Deny"); Comments of Entravision Holdings, LLC at 8-15 (July 9, 2007) ("Entravision Comments"); Comments of John Smith at 3 (July 8, 2007); Joint Petition to Deny of Forty-Six Broadcasting Organizations at 2 (July 9, 2007); Comments of Bert W. King ¶¶ 2, 19 (July 9, 2007); Blue Sky Services Comments at 6 (July 9, 2007).

[16] Consumer Groups Petition to Deny at 1-2, 14-15.

[17] NPR Petition to Deny at 13-14.

[18] *See* Opposition at 56-57; *see also* Harold Furchtgott-Roth, *An Economic Review of the Proposed Merger of XM and Sirius* at 32 (June 27, 2007); Thomas W. Hazlett, *The Economics of the Satellite Radio Merger* at 12-13 (June 14, 2007).

[19] CRA Report at 10.

[20] *Id.*

Moreover, as Professor Sidak's most recent submission demonstrates in extraordinary detail, the CRA Report is based almost exclusively on evidence that is irrelevant under the *DOJ/FTC Guidelines*.[21] As noted, under the *DOJ/FTC Guidelines*, "[m]arket definition focuses solely on demand substitution factors – i.e., possible consumer responses. Supply substitution factors – i.e., possible production responses – are considered elsewhere in the Guidelines in the identification of firms that participate in the relevant market and the analysis of entry."[22] Nevertheless, the CRA Report relies almost entirely on supply-side evidence to support is conclusion that the product market is the broad audio entertainment market.[23] Even the limited demand-side evidence the CRA Report does offer, however, is fundamentally irrelevant to the question of whether other audio services and products, including local radio, HD radio, IP radio, CD players, cellphones, and iPods, constrain satellite DARS pricing.[24] The fact that Applicants make no attempt to define the product market within the framework of the *DOJ/FTC Guidelines* and instead urge the Commission to ignore this framework underscores NAB's point that the proposed merger cannot be granted under existing law.

III. THE COMMISSION SHOULD NOT DEVIATE FROM THE *DOJ/FTC GUIDELINES* HERE

The Commission should not condone Applicants' efforts to misdirect the Commission's analysis of their proposed merger. Neither side here disputes that Commission precedent relies upon the *DOJ/FTC Guidelines* in defining the relevant product and geographic markets as part of the Commission's evaluation of proposed merger.[25] The Commission has consistently and rigorously defined relevant product markets based on the *DOJ/FTC Guidelines*, thereby analyzing reasonable interchangeability of use, applying the SSNIP test, and relying on demand-side evidence in evaluating a wide range of mergers.[26] The Commission confirmed the relevance

[21] *See* Third Supplemental Sidak Decl. ¶¶ 5, 7-8, 10.

[22] *DOJ/FTC Guidelines* § 1.0.

[23] *See* Third Supplemental Sidak Decl. ¶¶ 20-24, 32-33, 38-40, 43-47, 50-51.

[24] *Id.* ¶¶ 26-31, 35-37, 42, 49.

[25] *See, e.g., AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, 22 FCC Rcd 5662, 5675 ¶ 24 nn.85-86 (2007) ("*AT&T/BellSouth Merger Order*"); *Verizon Communications Inc. and MCI, Inc.*, 20 FCC Rcd 18433, 18446 ¶¶ 21-22 nn. 83-84 (2005) ("*Verizon/MCI Merger Order*"); *SBC Communications Inc. and AT&T Corp.*, 20 FCC Rcd 18290, 18303-04 ¶ 21 nn. 83-84 (2005) ("*SBC/AT&T Merger Order*"); *EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation*, 17 FCC Rcd 20559, 20605 ¶ 106 (2002) ("*EchoStar/DirecTV Merger Order*").

[26] *See, e.g., AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5675-76 ¶ 24, 5693 ¶ 58, 5703-04 ¶ 75, 5722 ¶ 111, 5733 ¶ 136, 5738 ¶ 149, 5741 ¶ 159, 5760-61 ¶¶ 201-203, 5771 ¶ 219; *Verizon/MCI Merger Order*, 20 FCC Rcd at 18446 ¶ 21, 18460 ¶ 52, 18465 ¶ 60, 18470 ¶ 69, 18478 ¶ 85, 18490 ¶ 106, 18507 ¶ 138, 18514-15 ¶ 158, 18530-31 ¶¶ 194-196; *SBC/AT&T*, 20 FCC Rcd 18290 at 18303-04 ¶ 21, 18318 ¶ 52,

of the SSNIP test in its March 26, 2007 *AT&T/BellSouth Merger Order*.[27] On the same day, the Commission reiterated the central role of the SSNIP test and recognized as a distinct product market the same satellite DARS market at issue in this case.[28]

The Commission should continue here its long-standing practice and apply the *DOJ/FTC Guidelines*, particularly with regard to the SSNIP test, in determining the relevant product market in this proceeding. The *DOJ/FTC Guidelines* constitute the legal standards by which the Department of Justice and the Federal Trade Commission evaluate whether a proposed merger may have unlawfully anticompetitive effects in violation of section 7 of the Clayton Act.[29] These standards are judicially recognized and are grounded in sound economic reasoning. As the agencies confirmed as recently as March 2006, in declining to alter the *DOJ/FTC Guidelines*:

> The core concern of the antitrust laws, including as they pertain to mergers between rivals, is the creation or enhancement of market power. . . . The Guidelines set forth the analytical framework and standards, *consistent with the law and with economic learning*, that the Agencies use to assess whether an anticompetitive outcome is likely. The unifying theme of that assessment is "that mergers should not be permitted to create or enhance market power or to facilitate its exercise."[30]

The "Guidelines' analytic framework has proved both robust and sufficiently flexible to allow the Agencies properly to account for the particular facts presented in each merger investigation."[31] "[L]eading antitrust practitioners and economists" agree that "*the analytical*

18323 ¶ 60, 18328 ¶ 69, 18336-37 ¶ 84, 18350 ¶ 105, 18365 ¶ 137, 18384-85 ¶¶ 183-185, 18391 ¶ 202; *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20605-09 ¶¶ 106-116.

[27] *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5675 n.85, n.86.

[28] *Annual Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Communications Services*, 22 FCC Rcd 5954, 5964-65 ¶¶ 29-31 (2007) ("In describing relevant markets, we rely on antitrust law, economic theory, and the [*DOJ/FTC Guidelines*]. . . . The [*DOJ/FTC Guidelines*] describe a product market as the smallest group of competing services for which a hypothetical monopoly providers would profitably impose as least a small but significant and non-transitory price increase, presuming no change in the terms of sale of other services."); *id.* at 5973 ¶ 55 (Describing the relevant product market as "satellite audio programming provided to persons within the United States for a fee.").

[29] U.S. DOJ and FTC Commentary on the Horizontal Merger Guidelines, Forward (March 2006), *available at* http://www.usdoj.gov/atr/public/guidelines/215247.htm ("*Merger Guidelines Commentary*").

[30] *Merger Guidelines Commentary*, Introduction (emphasis added).

[31] *Id.* at Forward.

framework set out in the Guidelines is effective in yielding the right results in individual cases and in providing advice to parties considering a merger."[32]

In that regard, courts consistently rely on the *DOJ/FTC Guidelines* to define product markets.[33] Indeed, less than two months ago, in the highly publicized *Whole Foods* decision that allowed (at least for now) a merger to proceed, the court reinforced the central importance of the *Merger Guidelines* in general and the SSNIP test in particular in defining the relevant product market:

> Applying the SSNIP test of the Horizontal Merger Guidelines, the evidence shows that there are many alternatives to which customers could readily take their business if Whole Foods and Wild Oats merged and Whole Foods imposed small but significant and nontransitory price increases – so that such price increases would not be profitable.[34]

Moreover, it bears emphasizing that, in the *Whole Foods* case, the merging companies accepted their burden to show that their view of the relevant product market was justified under the *DOJ/FTC Guidelines* and the SSNIP test.[35] This stands in stark contrast to Applicants' approach to their proposed merger, which is to evade application of the SSNIP test altogether.

Neither Applicants nor their supporters provide a sustainable justification for the Commission to deviate from the *DOJ/FTC Guidelines* and the SSNIP test in this case. The gravamen of their argument is that the SSNIP test should not be used because it would ultimately lead to the rejection of their merger. This circular reasoning is not sufficient to warrant the Commission's departure from prior precedent. Indeed, this case warrants a rigorous product market evaluation under the *DOJ/FTC Guidelines* similar to that the Commission undertook in the closely analogous *EchoStar/DirecTV Merger Order*.[36] Both cases involve substantial and

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[32] *Id.* (emphasis added).

[33] *See* Third Supplemental Sidak Decl. at n.8 (citing *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 120 (D.D.C. 2004); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1108 (N.D. Cal. 2004); *United States v. Sungard Data Systems, Inc.*, 172 F. Supp. 2d 172, 182 (D.D.C. 2001); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 160 (D.D.C. 2000); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d. 34, 46 (D.D.C. 1998); *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001); *CF Indus., Inc. v. Surface Transp. Bd.*, 255 F.3d 816, 823 n.13 (D.C. Cir. 2001); *United States v. Engelhard Corp.*, 126 F.3d 1302, 1304 (11th Cir. 1997); *United States v. VISA U.S.A., Inc.*, 163 F. Supp. 2d 322, 335 (S.D.N.Y. 2001)).

[34] *FTC v. Whole Foods Market, Inc.*, No. 07 Civ. 1021, slip op. at 61 (D.D.C. Aug. 16, 2007) (Public Version), *appeal pending*. *See also id.* at 23 ("The Court looks first at the Horizontal Merger Guidelines.").

[35] *See id.* at 25-31.

[36] *See EchoStar/ DirecTV Merger Order*, 17 FCC Rcd 20559 ¶¶ 106-116.

material evidence offered by opponents of the merger disputing the boundaries of the relevant product market, thereby necessitating a careful Commission analysis of the relevant product market.[37] Indeed, given the strength and depth of the evidence demonstrating that the relevant product market is satellite DARS, any finding to the contrary without a full evidentiary hearing would almost certainly lead to reversible error.[38]

IV. APPLICATION OF THE *DOJ/FTC GUIDELINES* COMPELS THE CONCLUSION THAT THE COMMISSION SHOULD REJECT THE PROPOSED MERGER

As discussed above, the correct application of the *DOJ/FTC Guidelines* necessarily leads to the conclusion that the relevant product market is satellite DARS. It follows that the merger of XM and Sirius, the only two satellite DARS providers, would produce a monopoly in that market. Consequently, the proposed merger would result in higher prices and fewer programming choices for consumers.[39] In sum, the proposed merger would not serve the public interest and therefore the Commission should not approve the merger.[40]

It is particularly telling that Applicants make virtually no effort to meet their evidentiary burden to demonstrate "extraordinarily large, cognizable, and non-speculative efficiencies" that

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[37] *Id.*

[38] *Compare with id.* at 20665 ¶ 289 (designating for hearing, *inter alia*, product market and geographic market issues).

[39] *See, e.g.,* NAB Petition to Deny at 26-32; NAB Response to Comments at 17-20; Consumer Groups Petition to Deny at 42, 44-45; Independent Spanish Broadcasters Ass'n Board Letter on XM and Sirius Merger at 1-2 (dated July 6, 2007, filed July 9, 2007); NPR Petition to Deny at 5; C3SR Petition to Deny at 19; Comments of Bert W. King ¶¶ 56-66; Petition to Deny of the Telecommunications Advocacy Project at 3-6 (July 9, 2007); Comments of Clear Channel Communications Inc. at 5-8 (July 9, 2007). In addition, NAB submitted substantial evidence demonstrating that the proposed merger would pose a significant threat to the important public interests served by localism. *See* NAB Response to Comments at 20-22.

[40] NAB emphasizes that there are also other, entirely separate grounds for the Commission to deny the merger. First, the proposed merger would give the combined entity control of 100 percent of all available satellite DARS spectrum in direct conflict with the Commission's pro-competitive spectrum policy. *See* NAB Petition to Deny at 6-11; Comments of the National Association of Broadcasters at 7-13 (Aug. 13, 2007) ("NAB Comments"). Second, the proposed merger would violate the existing Commission rule prohibiting such a merger, and there is no basis upon which the Commission may waive, modify or repeal that rule. *See* NAB Comments at 5-23; Reply Comments of the National Association of Broadcasters at 1-8 (Aug. 27, 2007) ("NAB Reply Comments").

outweigh the anti-competitive harms associated with the merger.[41] Instead, Applicants offer new programming bundles with prices ranging from $6.99 to $16.99.[42]

Applicants, however, have refused to bind themselves to these new service offerings and new rates, reserving the discretion to change them at any time.[43] Further, Applicants have made no effort to demonstrate that any of these new service bundles are merger-specific benefits, as required by the *DOJ/FTC Guidelines*,[44] other than to pledge that they will *not* offer the new service bundles absent the merger.[45] The CRA Report did not remedy this omission. As Professor Sidak points out, the CRA Report mentions the proposed service bundles only in passing and only at the end of the report.[46] Even then, the CRA Report offers no economic evidence to support Applicants' claim that the service bundles are merger-specific benefits.[47]

Moreover, it is far from clear that the proposed service offerings and pricing plans would provide any real benefits to existing customers.[48] The proposed service offerings will require subscribers to pay more on a per-channel basis for fewer channels in order to exercise limited à la carte options or to access high-value, mass-market programming from both XM and Sirius.[49] In short, Applicants' proposed new service offerings are illusory at best. Consequently, these proposed service offerings simply do not constitute "extraordinarily large, cognizable, and non-speculative efficiencies" that outweigh the anti-competitive harms associated with permitting a merger-to-monopoly in the satellite DARS market.[50]

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[41] *EchoStar/DirecTV Merger Order,* 17 FCC Rcd at 20604 ¶ 102.

[42] Opposition at Exhibits B and C.

[43] *Id.* at 13-14 n.31 ("The companies do not have a predetermined time period during which the new prices will remain in effect. Obviously, consumer and market reaction to the new plans will have to be taken into consideration. . . . [O]ver time, programming and other costs likely will increase and these factors might impact future pricing decisions.").

[44] *DOJ/FTC Guidelines* § 4.

[45] *See* NAB Reply Comments at n.25 and accompanying text. Professor Sidak raises the further question of whether Applicants' apparent agreement *not* to provide satellite radio channels on an à la carte basis absent a merger constitutes an agreement between XM and Sirius not to compete over the pricing and unbundling of currently bundled content in violation of section 1 of the Sherman Act. Third Supplemental Sidak Decl. ¶¶ 94-97.

[46] Third Supplemental Sidak Decl. ¶ 94.

[47] *Id.*

[48] *See* Letter from Larry Walke, NAB, to Marlene H. Dortch, Secretary, FCC (Aug. 8, 2007), Attachment 2, "Where's the Deal? XM/Sirius À La Carte = À La Sham for Consumers."

[49] NAB Comments at 21-22.

[50] *EchoStar/DirecTV Merger Order,* 17 FCC Rcd at 20604 ¶ 102.

Finally, neither the promises offered by the Applicants nor any other proposed conditions aimed at eliminating the anti-competitive harms associated with the proposed merger would be sufficient to protect against such harms. Given their history of pervasive violations of Commission rules and authorizations, Applicants simply cannot be relied on to keep their promises and comply with any regulatory conditions that might be imposed.[51]

V. CONCLUSION

Accordingly, for the reasons set forth above and in NAB's earlier pleadings, NAB submits that the relevant product market for evaluating the proposed merger is satellite DARS. Consequently, approval of the merger would establish a monopoly over that service resulting in higher rates and fewer choices for consumers. Further, Applicants have failed to offer countervailing public benefits that would outweigh the anticompetitive harms resulting from their merger. The Commission therefore should dismiss or deny the pending merger application.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS

By: ________________________
David H. Solomon
J. Wade Lindsay

Marsha J. MacBride
Jane E. Mago
Lawrence A. Walke
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, DC 20036
(202) 429-5300

cc: Chairman Martin
Commissioner Copps
Commissioner Adelstein
Commissioner Tate
Commissioner McDowell
Matthew Berry
Monica Desai

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[51] *See* NAB Petition to Deny at 50-58; NAB Response to Comments at 26-27; NAB Reply to Opposition at 10-11; Entravision Comments at 19-20; Petition to Deny of the National Association of Black Owned Broadcasters, Inc. at 13-14 (July 9, 2007).