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

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

COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

I. Introduction

The National Association of Broadcasters ("NAB")[1] hereby submits these comments in response to the Notice of Inquiry ("NOI") in the above-captioned docket.[2] In the NOI, the Commission seeks comment on various proposals regarding multifunction devices, including potential devices capable of receiving both HD Radio and satellite digital audio radio services ("SDARS"). As discussed below, NAB respectfully requests that the Commission amend its rules to require that any satellite radio receiver capable of receiving analog AM/FM radio services must also be capable of receiving HD Radio services.

II. Background

The NOI emanates from the Commission's Order approving the merger of XM Satellite Radio Holdings Inc. ("XM") and Sirius Satellite Radio Inc. ("Sirius") into Sirius XM Radio Inc. ("Sirius XM") in which the Commission imposed several conditions and

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[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").

accepted certain voluntary commitments made by Sirius XM designed to assuage concerns that allowing the only two satellite radio providers to merge would create a monopoly harmful to consumers.[3] Although much of the Merger Order focused on the potential horizontal impact of a united Sirius XM on subscriber rates and content diversity, the Commission also recognized that approving the merger would likely harm the public by increasing Sirius XM's leverage over the vertical market for the manufacture and distribution of satellite radio receivers. Merger Order at ¶ 66.

The Commission noted arguments that a combined Sirius XM would be able to raise its equipment prices without suffering adverse consequences. Merger Order at ¶ 62 n. 186. The Commission also stated that Sirius and XM are closely involved in the "design, manufacturer, and sale" of satellite radios, and control the intellectual property of satellite receivers. *Id*. at ¶ 65. Moreover, the Commission emphasized that Sirius and XM only sell satellite radios that are branded or co-branded with Sirius or XM, and subsidize the retail costs of its radios. As a result, the only manufacturers of satellite radios are contractually beholden to Sirius XM, with no reason to believe that other manufacturers would ever enter the market. *Id*.

The Commission thus concluded that the loss of head-to-head competition between Sirius and XM could depress innovation, and also enable Sirius XM to hinder the development of satellite radios capable of receiving other sources of audio entertainment, most notably HD Radio. *Id*. at ¶ 66. To address these potential anticompetitive effects, the Commission accepted Sirius XM's voluntary commitment to an "open access" approach in which any manufacturer would be permitted to develop

[3] *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").

satellite radio receivers, and have access to Sirius XM's intellectual property for this purpose. Sirius XM also will permit any manufacturer to develop satellite radios that incorporate other technologies, such as HD Radio, so long as it does not cause interference to its satellite radio services. Finally, the Commission prohibited Sirius XM from preventing multifunction devices or their features from reaching consumers through exclusive contracts with manufacturers. *Id*. at ¶ 128.

Given these commitments and conditions, the Commission found it unnecessary at that time to mandate the incorporation of HD Radio technology in satellite radios, as multiple parties had requested. *Id*. at ¶ 127 n. 413. Although the Commission concluded that Sirius XM's commitment to "open access" would be sufficient to protect the public from discrimination by Sirius XM against other audio technologies, *id*. at ¶ 129, it nevertheless decided to explore further the mandatory inclusion of HD Radio technology in satellite radios, and issued the NOI to fulfill this promise.

II. The Commission Should Initiate a Rulemaking Looking Toward the Inclusion of HD Radio Technology in Satellite Radio Receivers

The Commission's reliance on voluntary commitments to "open access" in the Merger Order will not adequately protect and foster competition to Sirius XM by existing and emerging services, as the public interest demands. *See, e.g.*, 47 U.S.C. § 314. Sirius XM is now the sole satellite radio provider, with the market power, contractual relationships and incentives to impede the development of alternative audio services, especially HD Radio. Although still relatively new, HD Radio presents potentially the strongest competitor to Sirius XM, as it offers an increasingly wide variety of mobile, digital quality content in a growing number of local markets across the county. The potential of HD Radio, however, could well be thwarted by Sirius XM's market power as

the only provider of hundreds of satellite radio channels in all local markets in the United States. Therefore, the public interest compels the Commission to protect consumers and safeguard competition by mandating that satellite radio receivers be capable of receiving HD Radio, if they are capable of receiving analog AM/FM radio service.

Although HD Radio is still relatively nascent, it is steadily growing and increasing its market penetration. According to iBiquity, there are approximately 1,800 digital radio stations currently operating, which offer about 935 multicast programming streams. HD Radio services are available in all 50 states, as well as Washington, DC and Puerto Rico. It costs an average of $100,000 to convert a station to digital, which means that to date, the radio broadcasting industry has invested approximately $180 million in HD Radio, plus additional ongoing costs including electricity, maintenance, promotion and on-air personalities. These stations carry full time classical formats, new and local musical artists, Spanish language, bluegrass, alternative, jazz, rhythm and blues, local sports, as well as formats of interest to Asian Americans, gays and lesbians, and other diverse communities.[4] HD Radio services offer real-time traffic and location-based concierge information on movies and weather. ESPN has developed HD Radio-specific content, and CBS has created a NASCAR channel.[5] NPR has developed HD Radio services for the hearing and sight impaired communities. The list of innovative and attractive programming and services goes on and on. In sum, HD Radio enables radio broadcasters to offer dramatically improved sound quality and to creatively diversify their

[4] *See* BIA Financial Network, *Over-the-Air Radio Services to Diverse Audiences – An Update* at 10-16 (April 28, 2008), Attachment E to NAB Comments in MB Docket No. 04-233 (describing the diverse types of programming being offered via multicast signals).
[5] *HD Radio Content See Strong Momentum in New Audio Channels and Breakthrough Data Services*, iBiquity Digital (Sep. 17, 2008), available at <http://www.ibiquity.com/press_room/news_releases/2008/1236>.

content with unique, popular programming. Importantly, this service is available at no additional cost to consumers beyond the cost of the HD capable radio.

With respect to equipment, there are currently about 80 products offered by approximately 40 different manufacturers that incorporate HD Radio technology, including certain automobile OEM receivers and after-market automobile receivers, home and tabletop radios, and iPod docking stations. In early 2008, iBiquity reported that over 300,000 HD Radio receivers were sold during 2007. Portable HD Radio receivers are expected in the near future.[6]

Despite these positive developments, however, HD Radio technology is not available on satellite radio receivers, and to NAB's knowledge, no such device is expected in the near future. This failure to incorporate HD Radio technology impedes consumers' access to digital radio services in local radio markets throughout the country. Especially in light of the Commission's approval of the XM/Sirius merger, and the potential for public harm resulting from that merger, the Commission should now act to safeguard consumer welfare by ensuring that listeners in all local markets can access both satellite radio and terrestrial HD Radio services.

Sirius XM now enjoys exclusive control over the entire swath of spectrum allocated to SDARS -- specifically, 25 MHz of radio spectrum, or more than is allocated to the terrestrial AM and FM bands combined. As the sole provider of satellite radio services nationwide, Sirius XM can deliver approximately 300 channels into every radio market in the country. This monopoly position gives Sirius XM significant influence over satellite radio equipment manufacturers. In the Merger Order, the Commission itself noted that

[6] Joseph Palenchar, *HD Radio to go Portable Via New, Smaller Chipset* (Jan. 28, 2008), available at http://www.twice.com/index.asp?layout=articlePrint&articleID=CA6526388.

Sirius and XM "each are intimately involved with the design, manufacture and sale of SDARS receivers," and that only satellite radios that are branded or co-branded with Sirius or XM are available. Merger Order at ¶ 65. Sirius and XM "own the intellectual property that is necessary for the receivers' manufacture." *Id*. Sirius and XM also "subsidize the retail price of SDARS receivers paid by the consumer," and, "[p]artially because of that subsidy, the only current manufacturers of SDARS receivers are in direct contractual agreements" with Sirius or XM. *Id*.

When the Commission approved the merger, it further cemented Sirius XM's influence over the satellite radio equipment market. *See* Merger Order at ¶ 66 (Commission found that "merger is likely to harm the public interest by allowing one company to gain increased leverage over the terms and conditions of the contracts for the manufacture of SDARS radios"). The merger also strengthened Sirius XM's relationship with the automobile manufacturers, some of whom are board members of Sirius XM.[7] At least 41 major auto and motorcycle manufacturers offer factory installed satellite radio service, compared to only about a dozen that offer HD Radio.[8] The combined Sirius XM is now able to take advantage of its strengthened position to discourage HD Radio's adoption by the automobile makers through contract incentives, promotional assistance and other methods, thereby impeding consumers' access to terrestrial broadcasters' digital audio services.

Specifically, as suggested by iBiquity, Sirius XM could devote a portion of its merger related cost savings to increased commissions to retailers and car dealers for

[7] *See* <http://investor.sirius.com/governance/directors.cfm>.
[8] Letter from Charles E. Biggio, Counsel to the HD Digital Radio Alliance, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 07-57 (Jan. 24, 2008).

their sales of satellite-only radio receivers that exclude alternative services.[9] Retailers would naturally disfavor multifunction satellite radios if this would reduce their compensation, and steer customers toward Sirius XM-only receivers. Also, Sirius XM could devote most if not all of its promotional budget to satellite radio-only receivers. Sirius XM could also subsidize manufacturers' costs of producing satellite radio-only receivers, and not multifunction radios, thereby making it almost impossible for HD Radio to gain a foothold in multifunction radios. iBiquity Letter at 2-3. This action alone would probably cripple the development of multifunction radios.

The open access concept, although a well-intended step in the right direction, does nothing to assuage these concerns. As a monopoly provider of satellite radio in all local markets in the country, Sirius XM has the incentive to hinder the development of competing audio services, including HD Radio, and, as described above, there are still numerous ways for Sirius XM to impede consumers' access to HD Radio programming and services.[10] The only way to safeguard consumers' interests is to ensure the inclusion of HD Radio technology in commercially available satellite radio receivers. This will make satellite and HD Radio services available to consumers on a more equal footing and allow any and all audio programming – whether satellite or terrestrial – to compete for listeners on their merits.

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[9] Letter from Albert Shuldiner, Senior Vice President and General Counsel, iBiquity Digital Corporation, to Marlene H. Dortch, MB Docket No. 07-57 (June 9, 2008) ("iBiquity Letter").

[10] The effectiveness of Sirius XM's voluntary commitment to open access may also be questioned in light of XM's and Sirius' previous failure to make available to consumers interoperable receivers that could access all licensed SDARS systems, as required by FCC rule. 47 C.F.R. § 25.144(a)(3)(ii). Despite the adoption of this rule when satellite radio services were authorized in 1997, the FCC noted in 2008 that "no interoperable radio is currently on the market." Merger Order at ¶ 116. Thus, the FCC was forced to reiterate the requirement for Sirius and XM to make an interoperable receiver commercially available in the Merger Order. *Id*. at ¶ 120.

Under the circumstances presented here, the Commission should require satellite radio receivers be capable of receiving HD Radio services. In 1995, the agency exercised its broad authority to allocate, license and regulate the use of spectrum in the public interest[11] to establish satellite radio services.[12] When establishing specific SDARS licensing and service rules in 1997, the Commission imposed a number of conditions and service requirements on the licensees, including both programming and non-programming related requirements.[13] *See* 1997 SDARS Order, 12 FCC Rcd at 5787-5805 (imposing, *inter alia*, political programming and equal opportunity requirements). The Commission, moreover, in 1997 imposed receiver requirements on Sirius and XM – specifically, that they design a receiver "which would accommodate all satellite DARS providers." *Id*. at 5796. The Commission concluded that promoting receiver interoperability would encourage consumer investment in satellite radio equipment, and of particular relevance to this proceeding, would "promote competition by reducing transaction costs and enhancing consumers' ability to switch between competing DARS providers." *Id*.

The Commission again exercised its authority regarding satellite radio receivers in the Merger Order, where it reiterated this interoperability requirement and obtained Sirius' and XM's commitment to the open access conditions described above. *See* Merger Order at ¶¶ 124, 128 (explaining that these requirements would "promote competition,

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[11] *See* 47 U.S.C. §§ 151, 154(i), 301, 303(b), 303(r), 307(a), 309(a).
[12] *See Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services*, Report and Order, 10 FCC Rcd 2310, 2314 (1995) (concluding that a spectrum allocation for SDARS was in the public interest).
[13] *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 5754 (1997) ("1997 SDARS Order").

protect consumers, and spur technological innovation"). In sum, the Communications Act and the terms of the Merger Order give the Commission broad authority over Sirius XM's offering of satellite radio services, including the development and availability of receivers.

NAB now urges the Commission to exercise this authority to require Sirius XM to incorporate HD Radio technology in any satellite radios that receive analog AM/FM service. Such a requirement would promote competition and protect consumers, just as the Commission's earlier receiver requirements concerning interoperability. This requirement would also clearly promote the government's policy "to encourage the provision of new technologies and services to the public." 47 U.S.C. § 157. Ensuring the production of satellite-HD Radio compatible receivers will help create a level playing field for satellite and HD Radio by making nascent HD Radio services more equally accessible to the public. The manufacture of multifunction receivers is further consistent with the Commission's long-standing efforts to "foster the development of a vibrant terrestrial digital radio service for the public and to ensure that radio stations successfully implement" HD Radio.[14] Obviously, radio stations will be unable to successfully implement HD Radio if many commercially available receivers are not HD Radio compatible. Taking action to promote consumer accessibility to free, over-the-air HD Radio and its high quality and innovative programming and services will clearly serve the public interest.

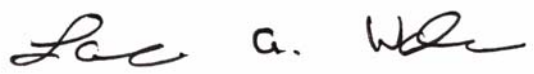
[14] *Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 10344, 10346 (2007).

IV. Conclusion

For the above-mentioned reasons, NAB respectfully requests that the Commission initiate a proceeding proposing the adoption of a requirement that Sirius XM enable any satellite radios that receive AM/FM service to also receive HD Radio.

Respectfully submitted,

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



Marsha MacBride
Jane Mago
Jerianne Timmerman
Lawrence A. Walke

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