Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
XM Satellite Radio Holdings Inc.,	)	
	)	
Transferor	)	
and	)	MB Docket No. 07-57
	)	
Sirius Satellite Radio Inc.,	)	
	)	
Transferee	)	
	)	
Consolidated Application for Authority to Transfer Control of XM Radio Inc. and Sirius Satellite Radio Inc.	)	

REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB"), by its attorneys, hereby replies to the comments filed by Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc.[1] ("XM") (jointly "Applicants") with regard to the Notice of Proposed Rulemaking in the above-captioned proceeding.[2] The Commission should not waive, modify or repeal the rule prohibiting the two satellite Digital Audio Radio Service ("satellite DARS") licensees from merging.[3] Rather, it should dismiss the merger application for failure to comply with the rule.

[1] Consolidated Comments of Sirius Satellite Radio Inc. and XM Satellite Radio Inc. (August 13, 2007) ("Joint Comments").

[2] *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, Notice of Proposed Rulemaking, FCC 07-119 (rel. June 27, 2007) ("*NPRM*").

[3] *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) ("*Satellite DARS Order*").

The Joint Comments briefly reiterate Applicants' position that the satellite DARS anti-merger prohibition is not a binding rule, but rather is a "policy statement reflecting the [Commission's] understanding of competition in 1997."[4] Nevertheless, the primary thrust of the Joint Comments is that the question of whether the satellite DARS merger prohibition is a binding rule is moot. Applicants reason that "by issuing the *NPRM*, the Commission has full rulemaking authority to repeal or appropriately modify this uncodified 'rule,' and the record compiled in this docket provides compelling justification to do so."[5] Put simply, Applicants argue that a Commission finding that the proposed merger would serve the public interest would necessarily "override" the satellite DARS anti-merger prohibition, thereby justifying modification or repeal of the rule.[6]

No other entities filed substantive comments supporting Applicants' views regarding the merger prohibition. To the contrary, the overwhelming majority of the comments demonstrate that the satellite DARS merger prohibition is a binding rule that should not be waived, modified or repealed.[7]

Applicants' half-hearted arguments that the prohibition is not a rule are not persuasive. Applicants are also wrong to suggest that a Commission finding that the proposed satellite DARS monopoly would serve the public interest would "override" this rule. Applicants elide

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[4] Joint Comments at 3.

[5] *Id.*

[6] *Id.* at 5.

[7] *See* Comments of the National Association of Broadcasters at 5-13 (Aug. 13, 2007) ("NAB Comments"); Comments of National Public Radio, Inc. (Aug. 10, 2007) ("NPR Comments"); U.S. Electronics, Inc. Comments on Notice of Proposed Rulemaking (Aug. 10, 2007); Comments of NextWave Wireless, Inc. (Aug. 13, 2007); Comments of Saga Communications, Inc. Opposing Waiver, Modification or Repeal of Merger Prohibition (Aug. 13, 2007) ("Saga Comments"); Comments of Clear Channel Communications, Inc. (Aug. 13, 2007) ("Clear Channel Comments"); Comments of the Consumer Coalition for Competition in Satellite Radio (Aug. 13, 2007) ("C3SR Comments"); Comments of Entravision Holdings, LLC (Aug. 13, 2007); John Smith Comments Regarding Safeguard Rule Prohibiting Transfer of Control (Aug. 13, 2007).

over the critical facts that the anti-merger prohibition was intended to "'assure sufficient continuing competition *in the provision of satellite DARS service*'"[8] and serves the Commission's long-standing policy prohibiting monopolies in spectrum assigned to particular services.[9] Permitting the only two satellite DARS licensees to merge would be an unprecedented departure from this core pro-competitive spectrum policy.[10] Thus, a finding that the proposed merger would serve the public interest is not sufficient to warrant repeal or modification of the satellite DARS anti-merger rule. The Commission would also have to explain why such an abrupt and unprecedented departure from its long-standing policy of promoting spectrum competition and prohibiting spectrum monopolies is warranted. In this regard, its explanation for any such departure would have to satisfy the Supreme Court's exacting *State Farm* standard.[11]

There is, however, no record support for such an explanation here. As the Commission found in the closely analogous *EchoStar/DirecTV Merger Order*, in which it cited specifically to

[8] NAB Comments at 11 (quoting *Satellite DARS Order*, 12 FCC Rcd at 5823 ¶ 170 (emphasis added)).

[9] *Id.* at 13-17. *See also* Petition to Deny of the National Association of Broadcasters at 4-5 (July 9, 2004) ("NAB Petition to Deny"); National Association of Broadcasters' Response to Comments at 4-6 (July 24, 2007) ("NAB Response to Comments") (citing Comments of Clear Channel Communications at 4-5, 9-10 (July 9, 2007)); Petition to Deny of the National Association of Black Owned Broadcasters, Inc. at 5 (July 9, 2007) ("NABOB Petition to Deny"); Petition to Deny of National Public Radio, Inc. at 4 (July 9, 2007) ("NPR Petition to Deny"); Petition of Primosphere Limited Partnership at 3 (July 9, 2007); Informal Objection of Prometheus Radio Project and U.S. Public Interest Research Group, Media Access Project at 5 (July 9, 2007); Petition to Deny of American Women in Radio and Television, Inc. at 4 (July 9, 2007).

[10] *See* NAB Comments at 13-17; *see also* NPR Comments at 2-4; Saga Comments at 4; Clear Channel Comments at 6-7.

[11] *Motor Vehicle Mfrs Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1982) (citations omitted) ("[T]he revocation of an extant regulation . . . constitutes a reversal of the agency's former views as to the proper course. A 'settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to'. . . . Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.").

satellite DARS,[12] "from the perspective of spectrum policy, the public interest is better served by the existence of a diversity of service providers wherever possible."[13] There is no dispute that it is "possible" to maintain competition in the satellite DARS spectrum, whatever the alleged benefits of the merger may be. Indeed, Applicants have repeatedly stressed their individual economic viability if the Commission prohibits the merger.[14] Moreover, there have been no suggestions that each Applicant's 12.5 MHz of spectrum is insufficient as a technical matter to allow for economically viable satellite DARS service.

The situation here contrasts sharply with the one instance NAB has identified where the Commission deviated from its pro-competition spectrum policy. In that case, the Commission permitted only one Mobile Satellite Service ("MSS") system to use the entire 28 MHz of available L-band spectrum to operate an MSS system.[15] The Commission took this "unique" step because "economical and technical constraints" made "only one mobile satellite system . . . feasible" in the L-band.[16] Uncomfortable with authorizing a spectrum monopoly, however, the Commission required that (1) the spectrum be licensed to a consortium comprised of all qualified

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[12] *Application of EchoStar Communications Corporation (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations)*, 17 FCC Rcd 20559, 20598 ¶ 88 (2002) ("*EchoStar/DirecTV Merger Order*") (citation omitted) ("This Commission has a long-standing policy of promoting competition in the delivery of spectrum-based communications services and has implemented numerous measures to foster entry and ensure the availability of competitive choices in the provisioning of such services. For instance, in the DARS proceeding, the Commission established a licensing approach that provided for two DARS licensees because it determined that more than one DARS licensee was necessary 'to ensure competitive rates, diversity of programming voices, and other benefits of a competitive DARS environment.'").

[13] *Id.* at 20603 ¶ 96. *See also id.* at 20662 ¶ 277 ("[A]pplicants have cited no example where we have permitted a single commercial spectrum licensee to hold the entire available spectrum allocated to a particular service.").

[14] *See* NAB Petition to Deny at 35-36 and the citations therein.

[15] *Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite service for the Provision of Various Common Carrier Services*, 2 FCC Rcd 485 (1987) (subsequent history omitted).

[16] *Id.* at 486 ¶¶ 4, 9, and 10.

and willing applicants and (2) the consortium licensee be regulated as a common carrier.[17] The Commission took these steps notwithstanding the fact that "there appears to be, at least for some MSS services, substitute services available" and that some needs to be filled by MSS "may be met with other technologies."[18]

Moreover, once the Commission subsequently determined that an MSS system in the L-Band was feasible with less spectrum, it modified the consortium's license to limit the consortium to 20 MHz of spectrum across the L-band and made the remaining spectrum available to other MSS applicants.[19] The Commission took these actions promoting further MSS competition even though MSS competition already existed by that point.[20]

In contrast to MSS in the L-band, however, satellite DARS licensees are facing no analogous economic or technical constraints that render competition in their spectrum infeasible. The Commission's actions in the MSS context thus reinforce the degree to which the Commission would be making an abrupt and unprecedented departure from long-standing policy were it now to create a satellite DARS spectrum monopoly.

In addition, separate and apart from the fact that the proposed merger conflicts with the Commission's policy prohibiting spectrum monopolies that underlies the anti-merger rule, the proposed merger would not serve the public interest as Applicants suggest. The record demonstrates that the proposed merger would necessarily result in higher prices and fewer programming choices for consumers in the satellite DARS market, which is characterized by

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[17] *Id.* at 488 ¶ 19 and 490 ¶ 34.

[18] *Id.* at 490 ¶ 34.

[19] *Establishing Rules and Policies for the Use of Spectrum for Mobile Satellite Services in the Upper and Lower L-band*, 17 FCC Rcd 2704 (2002).

[20] *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 17 FCC Rcd 12985, 13026 (2002).

national, mobile, pre-packaged programming that includes out-of-town sports and programming not permitted on broadcast stations.[21] Further, Applicants have failed to demonstrate "extraordinarily large, cognizable, and non-speculative efficiencies" that would outweigh these harms to consumers.[22] While Applicants have presented a series of new pricing and programming offerings, these offerings would provide few, if any, true benefits to subscribers.[23] Also, many of these new offerings would require consumers to purchase new equipment and none of the offerings appear to be permanent; in fact, they can be changed at any time.[24] Moreover, there is no evidence that these new offerings flow directly from and are dependent upon the merger beyond Applicants' blunt refusal to produce the new offerings (or deploy an interoperable radio) unless they are allowed to merge.[25]

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[21] *See generally* NAB Comments at 17-22; NPR Comments at 11-16; C3SR Comments at 4-5. *See also* NAB Response to Comments at 17-20 (citing Petition to Deny of Common Cause, Consumer Federation of America, Consumers Union and Free Press at 42, 44-45 (July 9, 2007)); Independent Spanish Broadcasters Ass'n Board Letter on XM and Sirius Merger at 1-2 (July 9, 2007); NPR Petition to Deny at 5; Petition to Deny of the Consumers Coalition for Competition in Satellite Radio at 19 (July 9, 2007); 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 and Exhibit A, Declaration of Steven S. Wildman.

[22] *See* NAB Comments at 20 (citing *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20604 ¶ 102).

[23] *See* NAB Comments at 20-22.

[24] Joint Opposition to Petitions to Deny and Reply Comments of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. at 13-14 n31 (July 24, 2007) ("Opposition") ("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.").

[25] *See* NAB Comments at 20-21 n78 (citing *Sirius-XM Merger Will Harm Public Radio Programmers, Says NPR*, Public Broadcasting Report (Aug. 3, 2007) ("Sirius said it won't offer channels a la carte to subscribers if the merger isn't approved. 'If the merger was not going to happen, we would have no plans to offer a la carte,' Sirius CEO Mel Karmazin said."); *XM-Sirius A La Carte Would Start By 2008 Holiday Season, Karmazin Says*, Satellite Week (Aug. 6, 2007) ("'That said, if the merger goes through, I'm very positive that we will very, very aggressively go after an integrated chipset' that would at long last make possible the first interoperable XM-Sirius receivers, Meyer said. It would take one to 2-1/2 years after the merger to develop such a chipset, depending on 'what features we decided to put in it,' he said. 'We won't be able to begin that work until it's clear that the merger's approved.'")).

Finally, neither the promised new offerings 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.[26] Indeed, it appears that Applicants cannot even be relied upon to describe accurately their proposed new offerings. Sirius's CEO Mel Karmazin recently described those offerings in a manner that (1) is flatly inconsistent with the Applicants' own filings in this proceeding and (2) appears to have been intended to cast the offerings in an overly favorable light.[27]

In sum, for the reasons set forth above and in NAB's Comments, the satellite DARS merger prohibition is a binding substantive rule barring the proposed merger. The Commission may not waive the rule because waiver would effectively eviscerate the rule.[28] The Commission should not modify or repeal the rule to facilitate the merger because such action would be inconsistent with the spectrum competition policy underlying the anti-merger rule and, in any

[26] *See* NAB Petition to Deny at 50-58, NAB Response to Comments at 26-27 (citing Comments of Entravision Holdings, LLC at 19-20 (July 9, 2007)); NABOB Petition to Deny at 8; NAB Reply to Opposition at 10-11.

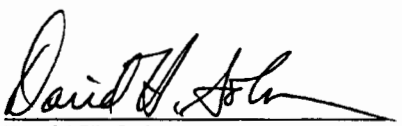
[27] Mr. Karmazin recently described the pricing for the proposed programming offerings as follows: "[N]obody will pay more than $12.95. So assuming you take your packages and build a model, your own choices that you're going to have, no one will pay more than $12.95." Mark Robichaux, *Mel Swings Back at NAB*, Broadcasting & Cable at 4 (Aug. 13, 2007). In fact, however, many of the new offerings *will* cost *more* than $12.95. The Sirius Everything & Select XM and XM Everything & Select Sirius packages are both proposed to cost $16.99, while the Family Friendly & Select XM, Family Friendly & Select Sirius, and À La Carte II packages are all proposed to cost $14.99. *See* Opposition, Exhibits B and C. Similarly, while the proposed À La Carte I plan starts at $6.99, consumers will have to pay an additional $11.00 (a total of $17.99) to get popular play-by-play sports and premium entertainment programming with this plan. *Id.*

[28] *See* NAB Comments at 10-13.

event, the merger would not serve the public interest. Instead, the Commission should dismiss the Merger Application for violation of the Commission's anti-satellite DARS merger rule.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS

By: 

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CERTIFICATE OF SERVICE

I, Sarah D. Gutschow, hereby certify that, on this 27th day of August, 2007, copies of the forgoing Reply Comments of the National Association of Broadcasters were delivered via United States mail, first class postage prepaid, to the following:

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