Statement of

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National Association of

NAB

BROADCASTERS

Hearing on the
"XM-Sirius Merger: Monopoly or Competition from New Technologies"

United States Senate
Senate Judiciary Committee
Subcommittee on Antitrust, Competition Policy and Consumer Rights

March 20, 2007

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Good afternoon Chairman Kohl, Ranking Member Hatch, and Subcommittee Members, my name is Mary Quass. I am the President and Chief Executive Officer of NRG Media, which owns and operates 84 local radio stations in seven midwestern states, including Illinois, Iowa, Kansas, Minnesota, Nebraska, South Dakota and Wisconsin. I am also a member of the Board of Directors of the National Association of Broadcasters (NAB), on whose behalf I am testifying today. NAB is a 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.

My message today is a simple one. Free over-the-air radio is embracing the future by investing substantial human and financial capital to complete its transition to digital broadcasting, which will enhance broadcasters' competitiveness and ability to serve local communities and listeners in myriad ways. All local stations ask is for the opportunity to compete in today's digital marketplace. To maintain a competitively level playing field, a government-sanctioned monopoly in satellite radio must be rejected. Approving a merger to monopoly of XM Radio and Sirius Satellite Radio would clearly harm consumers and jeopardize the valuable free over-the-air, advertiser-supported services provided by local radio stations. In addition, the imposition of a new performance tax on digital broadcasts is unjustified and would likely impede the roll out of digital radio.

To Maintain A Fair And Level Competitive Playing Field, A State-Sanctioned Monopoly In Satellite Radio Must Be Rejected

Local radio stations are embracing the future by investing in new technologies, including high definition (HD) digital radio, so that we can continue to compete in a digital marketplace and improve our service to local communities and listeners. All we ask is for the opportunity to compete in this marketplace on a level playing field. Thus, the proposed merger to monopoly of XM Radio and Sirius Satellite Radio must be rejected.

Simply put, XM and Sirius are asking the government to grant them the sole license to the entire 25 MHz of spectrum allocated to satellite radio service. That is a government-sanctioned monopoly with an absolute barrier to entry by any other competitor. A merged satellite radio entity would control almost three hundred channels of radio programming in every local market in this country without any realistic check on its ability to assert market power, notwithstanding possible governmental attempts to impose conditions.

The drawbacks of a monopoly are clear. Monopolists have the ability to raise prices with little constraint and to discriminate. They need not compete to provide top-quality services. Monopoly providers do not respond quickly to consumer wants and needs; as a result, innovation suffers. In short, there is no reason to grant this proposed merger to monopoly in the market for national, multichannel mobile audio programming services.

The Merger Proposes To Create A Monopoly In The Relevant Market

XM and Sirius claim that they are not a monopoly but just one more competitor providing audio services. They would have government officials ignore the fact that a merged XM/Sirius would be the sole licensee of satellite radio spectrum; ignore the fact that no other entity can enter the satellite radio market; and ignore the fact that they would be able to use their position as the sole national provider to hurt local free over-the-air radio stations, which must sell advertising based on the numbers of listeners that they attract. There is no doubt that the effect of the proposed transaction "may be substantially to lessen competition, or to tend to create a monopoly" in the provision of satellite radio services, contrary to antitrust law.[1]

Local stations do not compete in the national market for the multichannel mobile audio services offered only by XM and Sirius. Broadcasters' signals are not nationwide, do not move from one geographic area to another, and are not available only by subscription. Free over-the-air programming, unlike satellite radio programming, must primarily depend on commercial advertising. Even utilizing digital technology, local stations can offer only a few multicast programming streams, in comparison to the hundreds controlled by XM and Sirius. In addition, broadcasters do not – and cannot under existing law and regulation – air certain content offered by subscription satellite radio, particularly content that would invite indecency complaints and enforcement actions.[2] For all these reasons, local terrestrial radio broadcasting is not a substitute for national multichannel satellite radio, and consumers regard these services as distinct.

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[1] Section 7 of Clayton Act, 15 U.S.C. § 18.

[2] For example, XM offers a number of channels labeled "XL" that frequently feature explicit language; these channels include hard rock, heavy metal, punk and hip-hop music and uncensored

Indeed, when initially authorizing satellite digital audio radio service (DARS) in 1997, the FCC recognized that satellite radio, with its national reach, offers "services that local radio inherently cannot provide."[3] For example, unlike local terrestrial radio stations, satellite radio can provide continuous service to the long-distance motoring public and to persons living in remote areas. XM has stated that its nationwide service can reach nearly 100 million listeners age twelve and over who are outside the 50 largest Arbitron radio markets (with the largest number of radio stations). XM also estimates that, of these 100 million listeners, 36 million live outside the largest 276 Arbitron markets and that 22 million people age twelve and older receive five or fewer terrestrial radio stations.[4] Unlike even the most powerful terrestrial radio stations, which can still only reach a mere fraction of American consumers over-the-air, satellite radio can reach all listeners across the country with vastly more channels than any single terrestrial broadcaster. Other media industry observers have agreed that "[s]atellite radio is a national platform," thereby clearly differing from locally-licensed and locally-oriented terrestrial broadcast stations.[5] Simply put, only XM and Sirius compete in this national, multichannel mobile radio market, and they are proposing to form a state-sanctioned monopoly in that market.

From the point of view of a local broadcaster, I think it's clear that only XM and Sirius compete in this market for national multichannel radio services. Assume, for

comedy. Sirius also has a number of "uncut" and "uncensored" channels, including hip-hop, comedy, talk (such as Howard Stern), and Maxim, Cosmo and Playboy radio.

[3] *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service*, 12 FCC Rcd 5754, 5760-61 (1997) (*Satellite DARS Report & Order*).

[4] XM Satellite Radio, Inc., Annual Report (SEC Form 10-K) at 2 (March 15, 2001).

[5] Katy Bachman, *Buyers: Size Not Enough for Sirius/XM Merger*, Media Week (Feb. 26, 2007) (quoting Matt Feinberg, Senior Vice President of Zenith Media).

example, that the merged XM/Sirius were to raise its subscription rate a small amount, such as five percent. After this price increase, would XM/Sirius lose so many subscribers to other providers such as my local stations that the price increase would be unprofitable for the combined company? If not, then free over-the-air radio and other audio services are not substitutes for satellite radio and do not compete in the same market as providers of satellite radio services.

Given the significant differences between a nationwide, multichannel subscription audio service and local, advertiser-supported over-the-air radio service, as detailed above, it is highly unlikely that a consumer currently subscribing to satellite radio would drop their subscriptions and substitute other audio services for satellite DARS if the price of satellite radio were to increase by a small but significant amount, such as five percent or even five-to-ten percent. The parties to the proposed merger have not offered support for the proposition that terrestrial radio or other audio technologies such as Mp3 players would have a disciplining effect on the ability of a combined XM/Sirius to raise prices. In fact, Sirius CEO Mel Karmazin stated in January that Sirius was "open" to higher pricing; that Sirius believed there was "elasticity in our price point," and that prices increases are "a good option for us."[6] If Sirius believed that it could successfully raise its subscription prices, even in the face of competition from XM, then clearly a combined XM/Sirius would feel little if any competitive constraints in increasing subscriber fees. Indeed, Mr. Karmazin has pointed out that in Canada where Sirius has a "significant lead in satellite radio," their service is "priced at a higher price point."[7] This confidence in the

[6] Citigroup 17th Annual Entertainment Media & Telecommunications Conference (Jan. 10, 2007), webcast available at http://investor.sirius.com/medialist.cfm.

[7] *Id*.

ability of satellite radio providers to increase their prices without losing subscribers shows that satellite radio is the relevant product market for any antitrust analysis.

Other evidence suggests that demand for satellite radio services is highly inelastic and would not be significantly lessened by increases in subscriber fees. For instance, there is an extremely low "churn" rate among satellite radio subscribers.[8] This indicates that other audio services are not regarded by consumers as effective substitutes for satellite radio.

Finally, it is instructive to note that when analyzing the comparable proposed merger of EchoStar and DirecTV, the only two providers of satellite television services, the FCC tentatively defined the relevant market as "no broader than the entire MVPD [multichannel video programming distribution] market." However, the FCC found that the product market in question "may well be narrower than that," and might include only the two national satellite television providers, excluding multichannel cable operators and local terrestrial broadcast television stations.[9] Similarly, local terrestrial radio stations should not be regarded as competing in the marketplace for nationwide multichannel satellite radio services.

In sum, it is clear that the proposed merger of XM and Sirius would substantially "lessen competition" or "tend to create a monopoly" in the market for nationwide, multichannel mobile audio programming services, contrary to the Clayton Act. As explained in detail below, a XM/Sirius merger would further violate FCC rules and

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[8] *See, e.g., Howard's way; Satellite radio*, The Economist (Jan. 14, 2006) (churn rate of dissatisfied customers who drop the service is barely 1.5 percent a month for Sirius, which is among the lowest for any subscription business).

[9] *EchoStar Communications Corp.*, 17 FCC Rcd 20559, 20609 (2002).

precedent, congressional policy and established antitrust case law; would result in significant competitive harms without any corresponding public interest benefits; and would reward companies with a history of breaking the rules by granting them a monopoly in the provision of nationwide multichannel audio services.

The Proposed Merger Violates FCC Rules And Precedent, Congressional Policy and Judicial Decisions

The FCC specifically refused to sanction a monopoly when it originally allocated spectrum for satellite radio service in 1997. It chose not to permit a monopoly satellite radio service because "licensing at least two service providers will help ensure that subscription rates are competitive as well as provide for a diversity of programming voices." *Satellite DARS Report & Order*, 12 FCC Rcd at 5786. And, I note, the agency was assuming at that time that each provider would control around 50 channels, not the 282 channels that a united XM/Sirius would have today.

Ironically, the FCC in part based its decision to require multiple satellite radio providers on arguments presented by Sirius. During the FCC's consideration of how many different satellite radio providers it should authorize, Sirius (then called CD Radio) argued strenuously that multiple providers were necessary to "assure intra-service competition," including price competition, and to guarantee a diversity of program offerings.[10] Given these competitive concerns, Sirius explicitly stated that no satellite radio provider should ever be permitted to combine with another provider. *See* CD Radio Comments at 18. Now, only a few years later, Sirius apparently sees no problem with allowing the satellite radio market to become monopolized by a single provider with control over the entire national market.

[10] CD Radio Comments in IB Docket No. 95-91, at 17.

But in fact it would be entirely inconsistent with the pro-competitive satellite radio licensing scheme created by the Commission to now allow XM and Sirius to combine into a monopoly enterprise. At the urging of the parties, including Sirius, the Commission in 1997 explicitly prohibited any such future merger by determining that, "after DARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellite DARS license." *Satellite DARS Report & Order*, 12 FCC Rcd at 5823. There is no basis for reversing that decision now.

In a parallel circumstance, the Commission refused in 2002 to permit a merger of the only two nationwide Direct Broadcast Satellite (DBS) licensees, EchoStar and DirecTV. In rejecting this proposed merger, the Commission found in a unanimous vote that the combination would undermine its goals of increased and fair competition in the provision of satellite television service. The agency also found that the claimed benefits of efficient spectrum use were outweighed by substantial potential public interest harms that might result from the transaction, including reduced innovation, impaired service quality and higher subscription prices. The Commission further stressed that the merger would eliminate a current viable competitor from every market in the country and would result in one entity holding the entire available spectrum allocated to the DBS service.[11]

For precisely the same reasons, XM and Sirius should not be permitted to create a monopoly that would eliminate a viable competitor from every market across the country and that would control all the spectrum allocated to a nationwide satellite service. Such a merger would likely "increase the incentive and ability" of the parties "to engage in anticompetitive conduct." *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20662.

[11] *See EchoStar Communications Corp.*, 17 FCC Rcd 20559, 20562, 20626, 20661-62 (2002) (*EchoStar/DirecTV Merger Order*).

Beyond violating FCC rules and precedent, such a government-sanctioned monopoly would clearly also be inconsistent with congressional policy favoring competition over monopoly, as expressed in the 1996 Telecommunications Act, and with long-standing enforcement of the antitrust laws. Indeed, the courts have held that even mergers to *duopoly* are, on their face, anticompetitive and contrary to the federal antitrust laws.[12] Without question, a merger to *monopoly* would be anticompetitive, inconsistent with antitrust precepts and contrary to judicial decisions.[13]

XM and Sirius Will Be Able To Exercise Virtually Unlimited Market Power In The National Radio Market, To The Detriment Of Consumers

The harms that would result from this proposed merger would be numerous and obvious. Having monopoly status would enable the united XM and Sirius to exert greater pressure on programming suppliers. Eliminating competition in the national mobile radio market would also greatly reduce incentives for the combined XM and Sirius to innovate. A monopolistic market structure is inevitably less innovative than a competitive one, and the consumers of satellite radio service will accordingly fail to benefit from innovations such as new programming services and technical improvements. In fact, when declining to approve the EchoStar/DirecTV merger, the FCC specifically found that the satellite television merger "would likely reduce innovation and service quality." *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20626.

Perhaps most obviously, enjoying monopoly status would permit a merged XM/Sirius to raise subscription prices to the detriment of consumers. Without the

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[12] *See, e.g., FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001).

[13] *See, e.g., FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1081 (D.D.C. 1997) (enjoining merger of two competing office supply superstores where the merger would have left only one superstore competitor in 15 metropolitan areas and only two competing superstores in 27 other areas).

presence of a similarly-situated, direct competitor, a satellite radio monopolist could raise rates without any realistic competitive check on its actions. *See EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20626-29 (lengthy discussion about the "harms that consumers are likely to suffer from the higher prices likely to result" from the proposed satellite television merger). Indeed, the courts have enjoined mergers to monopoly on the grounds that such mergers would allow the combined company "to increase prices or otherwise maintain prices at an anti-competitive level." *FTC v. Staples*, 970 F. Supp. at 1082.

Beyond resulting in rate increases for consumers, the XM/Sirius monopoly would also likely reduce program diversity. As explained by the Commission when authorizing XM and Sirius, competing satellite radio providers would each have incentives to diversify their own program formats, thus providing valuable niche programming. *See Satellite DARS Report & Order*, 12 FCC Rcd at 5762. Without such competition, program diversity would likely be adversely affected, with consumers losing music and talk formats, especially niche ones.

There is also the very real risk that a combined XM/Sirius will use its market power to force content providers, including sports programmers, to deal only with them. If the merger is approved, it may only be a matter of time before the American public can listen to their favorite baseball or college football team by paying whatever monopoly rents a combined XM/Sirius chooses to charge. We've seen it happen with cable, and given the obvious incentives, there is every reason to expect the same thing to happen here. In sum, in a monopoly environment, satellite radio subscribers would pay higher prices for less diverse and less innovative programming.

A combined XM/Sirius could moreover maintain any supra-competitive subscription prices because satellite radio is a closed market. No other entity can enter the national multichannel audio service market. The FCC has not authorized any other licensees to provide satellite DARS. Even in the highly unlikely event that the FCC would in the future allocate additional spectrum to this service to permit entry by new satellite providers, this entry would clearly be insufficient to ameliorate the anticompetitive effects of the proposed merger. For example, the Department of Justice requires that, for potential entry to be considered, it must generally be achieved within two years.[14] This is extremely unlikely in the case of satellite radio, as it took XM and Sirius three to four years from the grant of spectrum by the FCC to commercial availability, including the technically challenging step of launching satellites. Other entry barriers are also very high, including the capital costs (such as the costs of multi-million dollar satellites), programming acquisition costs, and subscriber acquisition costs. Therefore, the threat of entry by other entities will be completely ineffective in constraining short-term (or even long-term) price increases by the combined XM/Sirius.

The anticompetitive effects of the proposed merger are thus enhanced by not merely high, but practically insurmountable, barriers to entry. The courts have consistently rejected mergers where the merging parties were unable to show that reduced competition caused by the merger would be ameliorated by competition from new entrants that could come into the market.[15]

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[14] *See* U.S. Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* at 25-26 (April 8, 1997) (DOJ Merger Guidelines).

[15] *See, e.g.*, *FTV v. Heinz*, 246 F.3d at 717; *FTC v. Staples*, 970 F. Supp. at 1086-87; *FTC v. Swedish Match*, 131 F. Supp.2d 151, 170-71 (D.D.C. 2000).

XM and Sirius Have A Long Track Record Of Breaking The Rules

The government cannot and should not rely on any promises that a united XM and Sirius, as a government-sanctioned monopoly, will not cause harm to consumers. Their past behavior in a number of instances shows otherwise.

First, when initially authorizing satellite radio, the FCC adopted a rule on receiver interoperability that was designed to promote competition by enhancing consumers' ability to switch between DARS providers. *Satellite DARS Report & Order*, 12 FCC Rcd at 5796. Despite a clear FCC directive that their satellite radio systems must include "a receiver that will permit end users to access all licensed satellite DARS systems that are operational or under construction,"[16] no such device is available to consumers today. While both companies certified nearly ten years ago that they would comply with this pro-competition, pro-consumer requirement, neither XM nor Sirius markets a consumer-friendly interoperable device.

Second, both XM and Sirius have violated FCC rules governing the production and distribution of their receiver equipment,[17] which are designed to ensure that these types of devices do not interfere with broadcast radio stations or other licensed spectrum users. As a result of XM and Sirius producing and distributing receiver equipment that violates – and in a number of cases very greatly exceeds – FCC limits on the power levels for such equipment, many listeners to terrestrial radio stations experience "bleedthrough" and receive the XM or Sirius signal without warning through their radios. As has been widely reported, the FCC has received many complaints from both commercial and non-

[16] 47 C.F.R. § 25.144(a)(3)(ii).

[17] 47 C.F.R. Part 15.

commercial listeners who suddenly hear uncensored and unwelcome satellite radio programming on their car radios.[18]

Third, both XM and Sirius have routinely and regularly violated FCC technical rules in connection with their special temporary authority to use terrestrial repeaters. For years XM operated more than 142 repeaters (or 18 percent of all its repeaters) at unauthorized locations and at least 19 of its repeaters without any FCC authorization at all. Even after confessing and seeking the agency's forgiveness for its violations, XM to our knowledge currently continues to operate at least four of its repeaters without any FCC authorization. Also troubling is XM's confession that for years it has operated more than 221 terrestrial repeaters (or 28 percent of all its repeaters) at unlawful power levels. In mid-February, the FCC issued a letter of inquiry to XM about its unlawful repeater network. Sirius has engaged in comparable and other technical violations in connection with its terrestrial repeaters, constructing at least 11 of its repeaters at locations different from what they reported to the FCC, including one in Michigan that is 67 miles away from its reported and authorized location.

Against this backdrop of rule violations, allowing XM and Sirius to create a monopoly in violation of the FCC's anti-merger decision and decades of communications and antitrust policy could simply embolden them to pay even less attention to the rules of the road in pursuit of monopolistic profits.

[18] *See, e.g.*, *A Mystery Heard on Radio: It's Stern's Show, No Charge*, New York Times, January 26, 2007 at A17.

No Marketplace Or Business Conditions Or Any Public Interest Benefits Justify The Risk Of Monopoly

There is no need to risk all these harms by creating this monopoly. Satellite radio is still in its early stages of development. And neither XM nor Sirius is a failing company. From an economic perspective, the classic “shut down” analysis illustrates that a firm will exit an industry when its average variable cost exceeds price, which implies that the last unit sold makes a negative contribution to the firm’s margins. When applied to XM and Sirius, there is no basis to conclude that either company is ready to exit the industry. A review of reports by equity analysts demonstrates that Sirius and XM are currently earning positive margins on their last subscribers. Moreover, as satellite radio penetration rates increase, average variable costs will decrease and thereby generate even larger margins. Thus, there is no basis in economic fact for a failing-firm argument.

In fact, XM does not believe that either itself or Sirius will go out of business if the merger does not occur. In a recent filing with the Securities and Exchange Commission, XM disclosed a set of questions-and-answers regarding the merger prepared for and distributed to its employees. I quote: “Can Sirius and XM succeed as stand-alone companies if the merger is not approved by regulators? **– YES**. That said, we believe a merger is the **preferred** option for Sirius and XM, our shareholders and customers . . . .” Of course Sirius and XM would prefer not to compete with one another, and would prefer to reap the benefits afforded by monopoly status. What company wouldn’t? That’s why the United Stated has and enforces antitrust laws.

Claims that XM and Sirius are weak or failing businesses based on their levels of debt and expenses must be viewed skeptically. It is true that XM and Sirius have had some extraordinary expenses - like the nearly $83 million in stock that Sirius awarded to

Howard Stern in January, on his first anniversary on satellite radio. Indeed, the high costs of locking-up national and regional programming, especially sports programming, on an *exclusive* basis accounts for a great deal of the cost overhead. But, should companies expect a government bailout for questionable business decisions?

Changes in the audio marketplace do not justify this merger either. These changes have encouraged local radio stations to enhance their competitiveness by converting to digital audio broadcasting. But the introduction of new audio products has not prompted terrestrial radio broadcasters to ask for an unjustified government licensed and sanctioned monopoly. For all the reasons described above, monopolies are inherently bad.

Beyond harming consumers, a satellite radio monopoly would have the incentive and the opportunity to engage in unfair competition and anticompetitive practices against other audio service providers, especially local radio broadcasters. For example, after a satellite monopoly restructures (unbundles) its program offerings, as promised, we can expect, based on press reports, that the monopoly will attempt to accelerate the acquisition of new subscribers by offering them a lower-cost point of entry -- likely a basic advertiser-supported tier offered for less than the current $12.95 per month. On its face, such a plan may not sound bad, but of course no introductory price would be locked in and a monopoly provider could easily raise this price at a later time to increase profits at the expense of consumers.

Furthermore, the merger parties' announced intention to go after advertising revenue is plainly problematic when one considers the monopoly status of the merged satellite radio operator. With monopoly rents from subscription service, the satellite radio monopoly would have the incentive and ability to cross subsidize its advertiser-supported channel offerings using the monopoly rents from subscription service, likely resulting in unfair competition in the form of predatory, cut-throat pricing in national advertising markets. In addition, the satellite radio monopoly would not stop at national advertising. The combined terrestrial repeater networks of Sirius and XM under common control would offer substantial opportunities for entry into the local advertising markets by a satellite radio monopoly. The rates for local advertising could be set artificially low with cross-subsidization from monopoly prices. The valuable free, over-the-air service provided by local radio stations – which is entirely advertiser-supported – would be jeopardized by these developments.

The Proposed XM/Sirius Merger Should Be Summarily Rejected

Without question, XM and Sirius will be unable to meet their burden of proof demonstrating the high level of public interest benefits to even consider granting a government-sanctioned monopoly. As an initial matter, "[e]fficiencies almost never justify a merger to monopoly or near monopoly," such as the proposed XM/Sirius merger.[19]

In declining to approve the comparable EchoStar/DirecTV merger, the FCC explained that where "a merger is likely to result in a significant reduction in the number of competitors and a substantial increase in concentration, antitrust authorities generally require the parties to demonstrate that there exist countervailing, *extraordinarily large*, cognizable, and non-speculative efficiencies that are likely to result from the merger." *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20604 (emphasis added). The courts

[19] *FTC v. Heinz*, 246 F.3d at 720, quoting Department of Justice Merger Guidelines, § 4.

have similarly stressed that proof of extraordinary efficiencies is required to rebut the presumption that a merger in a concentrated market (such as the current duopoly market for nationwide, multichannel mobile radio service) will be anticompetitive. *See, e.g.*, *FTC v. Heinz*, 246 F.3d at 720-21. Claims of greater efficiencies must be verifiable through evidentiary showings that are "more than mere speculation and promises about post-merger behavior." *Id*. at 721.

And not only must the parties proposing such a merger show that very significant efficiencies would result, they must show that these efficiencies "would lead to benefits for consumers."[20] Courts, for example, have rejected insufficiently documented claims from merger parties that cost savings resulting from efficiencies would actually be passed on to consumers in the form of lower prices.[21] Thus, unsubstantiated claims about the large cost savings that would result from the XM/Sirius merger are woefully inadequate to justify a combination reducing competition in a concentrated market.

Moreover, to be considered in justifying a merger, claimed efficiencies must be "merger-specific" – that is, they must be ones that neither firm could achieve independently. If the claimed efficiencies are not merger-specific, then "the merger's asserted benefits can be achieved without the concomitant loss of a competitor." *FTC v. Heinz*, 246 F.3d at 721-22. Claims that the merger will allow XM and Sirius to design equipment allowing customers to receive signals from both companies are not merger-specific;[22] there is nothing preventing them from undertaking such a project today except

[20] *United States v. Franklin Electronic Co., Inc*., 130 F. Supp.2d 1025, 1035 (W.D. Wis. 2000).

[21] *See, e.g., FTC v. Swedish Match*, 131 F. Supp.2d at 172; *FTC v. Staples*, 970 F. Supp. at 1090.

[22] *See* Frank Ahrens, *In the Same Orbit, but on Different Planets*, Washington Post, Feb. 21, 2007 at D01 ("Karmazin said a merger would lead to savings by eliminating duplications in

for the fact that they compete to retain customers on the basis of sunk costs in equipment.

Clearly, XM and Sirius will fail to meet their heavy burden of demonstrating the efficiencies and consumer benefits of their proposed merger to monopoly. Rather than producing "extraordinarily large," beneficial efficiencies, the merger, if approved, would seriously impair marketplace competition and cause real harms to consumers. There is no reason to approve a merger that would violate FCC rules and precedent, as well as congressional policy, and would grant a state-sanctioned monopoly to non-failing companies with a long track record of breaking the rules.

Moreover, even if the parties agreed to price regulation to ensure that satellite radio customers do not pay more (for some period of time) after the merger than they did before, such a condition does not justify approval of the proposed merger. Indeed, permitting a merger based on such a condition disregards the very reason the antitrust laws apply to mergers – to ensure that markets are structured in a way to promote competition. The notion that a competitive market structure, which has produced healthy competition between XM and Sirius, should be replaced by a monopoly provider subject to price regulation is antithetical to the purpose and foundation of the antitrust laws and to congressional policy favoring competition over regulation, as expressed in the 1996 Telecommunications Act.

In fact, the FCC did not believe that a national pricing plan was an appropriate solution to the competitive harms likely to be caused by the proposed EchoStar/DirecTV merger. Even assuming such a plan could be an effective remedy for competitive harms (which the FCC found unlikely), the FCC concluded that the pricing plan was

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programming and operations," and that the "companies plan to design equipment to let customers receive signals from both companies, which use different satellite technologies").

inconsistent with the Communications Act and with regulatory policy and goals favoring the replacement of regulation with competition, especially facilities-based competition. *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20663. Because the XM/Sirius merger would "totally eliminate what appears to be a very healthy level of intramodal competition among the two-facilities based" satellite radio providers, it should be rejected, just as the FCC declined to approve the EchoStar/DirecTV merger even with pricing conditions. *Id*.

Local broadcasters fully support competition on a level playing field. When all the factors are considered, the proposed merger of Sirius and XM is simply anticompetitive. It is a monopoly in violation of the antitrust laws. Congress should clearly and expeditiously express its opposition to this merger to both the Department of Justice and the FCC.

The Imposition Of Performance Rights In Sound Recordings For Digital Broadcasts Is Not Justified And Would Likely Impede The Roll Out Of Digital Radio

Local radio broadcasters are currently fully engaged in an exciting transition to digital audio broadcasting (DAB). Radio broadcasters are embracing HD digital radio because it will enable us to better serve our local listeners and communities and to remain competitive in today's digital media marketplace. But we face many challenges as we work toward a successful and timely transition to digital radio.

First, the radio industry – and that means thousands of stations across the country in markets of all sizes – must make the investment in digital technology and begin broadcasting digital transmissions. This effort is well underway, as 1223 HD radio stations are already on the air. HD radio not only offers crystal-clear audio, it also permits the broadcasting of multiple free, over-the-air program streams to bring additional content, including much more local content, to the public within stations' current spectrum. It further allows other services, including wireless data enabling text information, such as song titles and artists or weather and traffic alerts. Even more innovative features are under development, such as program menus giving listeners instant access to a favorite drive time show, news and information, and special music programming. In sum, digital radio will allow broadcasters to improve service to their listeners and to remain a vital and vibrant part of the media landscape of the future.

But beyond thousands of stations converting to digital, the HD radio revolution also involves the consumer electronics industry, the automobile industry and, most importantly, consumers. For consumers to be able to reap the benefits of the digital conversion, the consumer electronics industry must produce a range of all-new digital radio receivers for both the car and the home. Automotive companies will need to offer factory-installed digital HD radio receivers in automobiles across a variety of models and price ranges. Finally, just as with the digital television transition, consumers must be informed about digital radio. To educate consumers and accelerate the successful roll-out, a consortium of top U.S. radio companies created the HD Digital Radio Alliance in 2005, which, among other activities, has created and financed advertising campaigns to increase the public's awareness of this exciting technology and its many benefits.

These challenges to an expeditious and successful roll-out of digital radio would be exacerbated – and the roll-out jeopardized – by the unjustified imposition of new performance rights in sound recordings that some have suggested should be imposed when radio broadcasts in digital. The imposition of a new performance tax on digital radio broadcasting would increase the costs on a nascent technology and discourage radio broadcasters, particularly smaller groups and stations in rural areas, from expending the funds necessary to convert to digital and to inform the public about the benefits of HD radio. Discouraging the conversion to DAB would ultimately impair the ability of local stations to compete in today's marketplace against other digital media. Most importantly, it would not serve the interests of consumers, who would greatly benefit from improved sound quality and new digital services, including multicast services bringing unique and diverse radio programming to local communities.

At the outset, the Subcommittee should know that radio stations already pay hundreds of millions of dollars annually to the composers and publishers of the music they broadcast. With respect to sound recordings and performance rights, NAB urges the Subcommittee to recognize that artists and labels receive invaluable compensation in the form of airtime and exposure. A new performance rights tax on broadcasters is therefore unnecessary and, indeed, counterproductive to the development of new radio services that will benefits consumers and performers alike, who will receive airtime and exposure on a greater number of free programming streams. Certainly members of this Subcommittee do not have to be reminded how very valuable airtime is to getting your message out to the public.

Throughout the history of the debate over sound recording copyrights, Congress has consistently recognized that recording companies reap very significant promotional benefits from the exposure given their recordings by radio stations and that placing burdensome restrictions on performances could alter that relationship, to the detriment of both industries. For that reason, in the 1920s and for five decades following, Congress regularly considered proposals to grant copyright rights in sound recordings, but repeatedly rejected such proposals.

When Congress first afforded limited copyright protection to sound recordings in 1971, it prohibited only unauthorized reproduction and distribution of records, but did not create a sound recording performance right. During the comprehensive revision of the Copyright Act in 1976, Congress again considered, but rejected, granting a sound recording performance right. Congress continued to refuse to provide any sound recording performance rights for another 20 years. During that time, the recording industry thrived, due in large measure to the promotional value of radio performances of their records.[23]

It was not until the Digital Performance Right in Sound Recordings Act of 1995 (DPRA) that even a limited performance right in sound recordings was created. In granting this limited right, Congress stated it "should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries."[24] As explained in the Senate Report accompanying the DPRA, "[t]he underlying rationale for creation of this limited right is grounded in the way the market for prerecorded music has developed, and the potential impact on that market posed by subscription and interactive services – but not by broadcasting and related

[23] *See, e.g.*, S. Rep. No. 93-983, at 225-26 (1974) ("The financial success of recording companies and artists who contract with these companies is directly related to the volume of record sales, which, in turn, depends in great measure on the promotion efforts of broadcasters.").

[24] S. Rep. No. 104-128, at 15 (*1995 Senate Report*); *accord id*. at 13 (Congress sought to ensure that extensions of copyright protection in favor of the recording industry did not "upset[] the long-standing business and contractual relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades.").

transmissions." *1995 Senate Report* at 17.

Consistent with Congress' intent, the DPRA expressly exempted from sound recording performance right liability non-subscription, non-interactive transmissions, including "non-subscription broadcast transmission[s]" – transmissions made by FCC licensed radio broadcasters.[25] Congress made clear that the purpose of this broadcast exemption was to preserve the historical, mutually beneficial relationship between recording companies and radio stations:

> The Committee, in reviewing the record before it and the goals of this legislation, recognizes that the sale of many sound recordings and the careers of many performers have benefited considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting. The Committee also recognizes that the radio industry has grown and prospered with the availability and use of prerecorded music. This legislation should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries.

1995 Senate Report at 14-15.

The Senate Report similarly confirmed that "[i]t is the Committee's intent to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings." *Id.* at 15. In sum, the transition of traditional local radio stations from analog to digital presents no basis to alter fundamentally the long-standing mutually beneficial relationship between the recording and broadcasting industries by imposing a new performance tax on digital broadcasts, when one does not

[25] 17 U.S.C. § 114(d)(1)(A).

exist in analog.

NAB further stresses that this discussion is not intended to minimize legitimate concerns the recording industry may have about the need for copy protection in the digital environment. Rather, it is intended to assist the Subcommittee in understanding why a new performance right for sound recordings is unconnected to those concerns.

Conclusion

Free, over-the-air local radio stations are embracing the future by transitioning to digital broadcasting so as to remain competitively and financially viable and better able to serve their listeners and communities. Congress should assure the maintenance of a level playing field in the audio marketplace by expressing its opposition to a satellite radio monopoly, which would injure consumers and impair the ability of other audio service providers to compete and to serve listeners. The imposition of a new performance tax on digital broadcasts is also unjustified, and would likely impede the roll out of digital radio to the detriment of consumers and local radio stations.