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Federal Communications Commission  
Office of the Secretary

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BEFORE THE

# Federal Communications Commission

In the Matter of	)	<b>Satellite Space Stations</b>
	)	SAT-T/C-20070320-00054
	)	
Sirius Satellite Radio, Inc. and	)	SAT-T/C-20070320-00053
XM Satellite Radio Holdings, Inc.	)	
for Transfer of Control of the FCC	)	<b>Satellite Earth Stations</b>
Authorizations and Licenses	)	SES-T/C-20070320-00380
	)	
	)	SES-T/C-20070320-00379
	)	
	)	MB Docket No. 07-57

To: Office of the Secretary  
Federal Communications Commission

## PETITION TO DENY

Applications of Sirius Satellite Radio, Inc. ("Sirius") and XM Satellite Radio Holdings, Inc. ("XM") for transfer of control and merger with and into XM were filed on March 20, 2007. Mt. Wilson FM Broadcasters, Inc., licensee of radio station KKGQ(FM), Los Angeles, California; KMZT(AM), Beverly Hills, California; and FM translator station K288CS, Kawaihae, Hawaii ("Mt. Wilson"), by and through counsel, hereby petition to deny the Sirius/XM transfer applications. In support thereof, the following is stated:

1. Sirius and XM provide radio programming to the Los Angeles market both by satellite and terrestrial repeaters. Sirius also has filed a request for Special Temporary Authority to operate terrestrial repeaters in Alaska and Hawaii. Consequently, Sirius and XM compete directly with Mt. Wilson in the Los Angeles

market for audience and national advertisers.<sup>1</sup> Sirius also will compete with Mt. Wilson in Hawaii, should the Commission grant the Sirius request for Special Temporary Authority to operate terrestrial repeaters in Hawaii. Consequently, Mt. Wilson has standing to participate in the instant proceeding.

2. The Commission in its June 27, 2007 Notice of Proposed Rule Making primarily focuses on language set forth in the 1997 SDARS Report and Order (Establishment of Rules and Policies for the Digital Audio Radio Satellite Service, 12 F.C.C. Rcd. 5754 (1997) (SDARS Report and Order) as follows:

“Even after DARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellite DARS licensees. This prohibition on transfer of control will help assure sufficient continuing competition in the provision of satellite DARS service.”<sup>2</sup>

Sirius and XM contend that the quoted language is a policy statement, not a binding Commission rule. To the extent that the Commission may consider the language binding, Sirius/XM request a waiver, modification or otherwise alteration of the rule to permit the proposed waiver.

3. The aforesaid Notice of Proposed Rule Making also states that if the Commission “. . . concludes that the transaction would not violate a statute or rule . . . it next will consider whether the transaction could result in public interest harm by substantially frustrating or impairing the objectives or implementation of the Act or

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<sup>1</sup> The “competition” is one-sided; the satellite radio services compete with Mt. Wilson. Conversely, however, Mt. Wilson is not able to effectively compete with the satellite radio services.

<sup>2</sup> SDARS Report and Order, 12 F.C.C. Rcd. at 5823.

related statutes.” Irrespective of whether the language is binding (and Mt. Wilson believes it is), the public interest harm is overtly apparent – a monopoly, one licensee entity controlling all of the spectrum dedicated for satellite radio – thereby adversely affecting diversity and competition.

4. Initially, there were multiple applicants for the satellite radio spectrum. Pragmatically (and based on the Commission’s first-hand experience with spectrum auctions), it is reasonable to presume that the availability of satellite radio spectrum in 2007 would again result in multiple applicants. There can be no legal defensible justification for the FCC to create a monopoly. What may be in the best interest of company “Board Rooms” (profits, more profits and greater profits) is not a justification for abandoning public interest concerns – assuring diversity of ownership and competition. Approving a merger of Sirius and XM can only be condoned if the merger is limited to the broadcast spectrum of either Sirius or XM but not the totality of spectrum utilized by both entities.

5. Patently, grant of the pending transfer/merger applications would negate the Commission’s historical position as to the public interest principle favoring diversity. With respect to the matter of competition, grant of the pending applications would render wholly impossible competition within the satellite radio service.<sup>3</sup> Moreover, while satellite radio competes with terrestrial radio for audience and advertisers in specifically defined local markets through the utilization of multiple

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<sup>3</sup> Whether language cited by the Commission in the Notice of Proposed Rule Making is binding, the language unequivocally expresses Commission intent to “. . . assure sufficient continuing competition in the provision of satellite DARS service.”

channels (effectively separate broadcast stations), terrestrial radio does not and cannot compete with the satellite radio service. No terrestrial broadcaster is permitted by FCC rules to transmit unlimited program channels to the same market area; no terrestrial station has the capability to transmit multiple program channels to an unlimited number of radio markets throughout the United States. More specifically, Mt. Wilson (with one FM station (including HD facilities) and one AM radio station, all serving a single market – Los Angeles) does not and cannot compete with satellite radio services offering hundreds of radio channels in the same Los Angeles market and, obviously, does not and cannot compete with satellite radio services offering hundreds of radio channels to hundreds of different radio markets throughout the United States. Considering all of the relevant facts (differences), the singular fact that terrestrial and satellite radio both offer radio programming does not equate to competition. In short, satellite radio is a nationwide subscription service providing multiple program channels; terrestrial radio is a free service limited by FCC rules to a maximum number of stations in a single market. It is these factors which render the satellite radio service a distinct market for antitrust purposes and a distinct service from the terrestrial radio service.

### Conclusion

6. A monopoly by definition excludes diversity and competition. Making satellite radio spectrum available in an auction proceeding is the appropriate legal response and is consistent with public interest concerns. Granting the pending applications is contrary to the Commission's specific intent in 1997 and will result in the

creation of a legally indefensible monopoly. James Whitcomb Riley is credited with the following statement:

“When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck.”

The term “monopoly” (the “duck”) accurately describes the ultimate result of a grant. The transfer application should be denied and/or granted with a condition prior to closing mandating the return of all licenses of one of the two transferors.

Respectfully submitted

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Dated: July 6, 2007

**CERTIFICATE OF SERVICE**

I, Brenda Chapman, hereby certify that on this 6<sup>th</sup> day of July, 2007, a copy of the foregoing "Petition to Deny" was delivered via first class U.S. mail, postage prepaid or via e-mail where indicated to the following:

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