Statement of

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President and CEO

Greater Media, Inc.

National Association of
NAB
BROADCASTERS

Hearing on the
"Digital Future of the United States: Part II-
The Future of Radio"

United States House of Representatives
Committee on Energy and Commerce
Subcommittee on Telecommunications and the Internet

March 7, 2007

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Good morning Chairman Markey, Ranking Member Upton and Subcommittee Members, my name is Peter H. Smyth. I am the President and Chief Executive Officer of Greater Media, Inc., which owns and operates 20 local AM and FM radio stations in Boston, Detroit, Philadelphia and New Jersey. I am testifying today on behalf of the National Association of Broadcasters (NAB). NAB is a trade association that advocates on behalf of more than 8,300 free, diverse local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the Courts.

Free over-the-air radio is embracing the future. Like television broadcasters, the radio industry is currently investing substantial time, effort and financial capital to complete its own transition to digital broadcasting. The local radio stations that today keep their communities – and your constituents – informed and connected intend to remain a vibrant part of the media landscape in the 21st century. Innovations such as digital broadcasting will enhance broadcasters' competitiveness and ability to serve local communities and listeners in myriad ways. All local stations ask for is the opportunity to compete in today's marketplace on a level playing field. To maintain a competitively fair marketplace, a government sanctioned monopoly in satellite radio must be rejected.

The Digital Radio Roll-Out Is Well Underway

Today I can report that local radio broadcasters are fully engaged in an exciting transition to digital audio broadcasting (DAB). Why are radio broadcasters embracing high definition (HD) digital radio? In short, because the radio industry sees HD radio as our future – it will enable us to better serve our local listeners and communities and to remain competitive in today's ever-changing 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 1183 digital radio stations are already on the air.

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 and consumers will need to purchase all-new digital radio receivers. New digital radio receivers for both the car and the home have been launched in the marketplace across a range of product and price categories. Just last month, retailers began selling several new HD radio add-on tuners that transform almost any existing car radio into an HD digital radio. A variety of national, regional and online retailers now offer HD radio products, and receivers are currently being manufactured by at least 18 companies. Predictably, as these products have become more widely available from a number of competing sources, prices of HD radio products have fallen significantly, with several receivers now below $200.

The HD radio roll-out is also underway in the automotive sector. BMW has become the first automotive company to offer a factory-installed digital HD radio receiver as an option across its entire 2007 product line. Nine additional automotive brands, representing 49 different vehicle models, are committed to launch the technology within the next few years.

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, including Greater Media, created the HD Digital Radio Alliance in 2005. On the Alliance's one-year anniversary in late 2006, the consortium announced an even greater commitment to informing the public, pledging an additional $250 million for a new advertising campaign to increase the public's awareness of this exciting technology and its many benefits. Hopefully, many of you have heard the announcements promoting digital radio on stations in this market.

HD Radio Enables The Development Of Valuable New Services, Including The Multicasting Of More Diverse Programming, To Better Serve Local Listeners

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. Features available in the future could also include real-time traffic reports broadcast by local stations and visually displayed on a vehicle's navigation system. 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.

I want to stress the diversity of programming that local radio stations already offer to their communities and the opportunities for even greater diversity that digital radio provides. One often misunderstood fact is that, across all radio markets since 1996, the number of general and specific programming formats has increased by 16% and 36.4%, respectively.[1] This growth in programming diversity has included an expansion in the number of stations focusing on news, talk or other informational programming and in the number of stations offering programming specifically designed to appeal to diverse minority and ethnic groups. For example, between 2000 and 2006, the number of news/talk stations increased by nearly 21 percent, and the number of Spanish-language stations grew from 547 to 796, an increase of 45.5 percent. *See BIA Radio Service Study* at 9, 13. As a result, nearly 71 percent of the total population in Arbitron metro areas can access at least four news/talk stations in their markets, with 55.5 percent having access to at least six such stations over-the-air. Over half (50.4 percent) of the Hispanic population in Arbitron markets have over-the-air access to ten or more Spanish-language stations, with more than three-quarters (79.5 percent) having access to six or more Spanish language stations.

The advent of HD radio permits local broadcasters to provide even more diverse services through multicasting additional programming streams. At the end of January 2007, radio stations in 85 markets reaching 80% of the U.S. population had commenced

[1] Mark R. Fratrik, Ph.D., *Over-the-Air Service to Diverse Audiences*, BIA Financial Network (Oct. 23, 2006) (*BIA Radio Service Study*).

the airing of HD2 multicast programming. There are now more than 600 radio stations on the air with HD2 programming that is unique and diverse.[2] For example, in Minneapolis, the HD multicast channels of local radio stations offer a broad range of programming, including classical, classic country, new or young country, blues, alternative, dance, smooth jazz and 80s hits.[3] Five Seattle HD radio stations launched last August, offering roots and blues, world music, all-comedy, live rock and urban adult contemporary.[4] Here in Washington, D.C., multicast channels are airing gospel, classic country, new rock, bluegrass, adult alternative, oldies 50s and 60s, and other program formats. Obviously, radio broadcasters are currently using the multicast capabilities of HD radio to better serve the diverse audiences in their local communities with specialized and niche programming, and this effort will only increase in the future.

My own company, Greater Media, has strongly embraced multicasting. In Boston, for example, all five of our stations have HD2 channels, which offer an eclectic range of formats, including Nothin' But The 70s, Classic Country, Smooth Jazz, and The Over Easy Café, featuring primarily acoustic adult alternative rock. Particularly appropriate for the Boston market, our FM talk station WTKK offers an Irish Channel on its HD2 channel, featuring traditional Irish artists, classic Irish rock legends and more contemporary Irish artists. Similarly, in Detroit our three stations have HD2 channels, offering Deep Trax, More Magic (an adult contemporary format featuring a mix of the 70s and 80s, plus standards and Broadway hits), and Riff2, the second channel of

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[2] Press Release, *HD Digital Radio Alliance Names Next 17 Markets for HD2 Multicasts* (Jan. 22, 2007).

[3] Tony Sanders, *Twin Cities Has Two HD3s on Air*, Billboard Radio Monitor (July 14, 2006).

[4] *Five More Seattle HD Radio Stations Launched*, Puget Sound Business Journal (Aug. 22, 2006).

Detroit's heritage rock station focusing on local music. As an example of its commitment to local music, Riff2 featured an all White Stripes Weekend to celebrate the band's series of hometown concerts. Last month, Riff2 spotlighted the Detroit band The Sirens in conjunction with the release of their new CD.

Without doubt, the radio industry's commitment to multicasting has increased the diversity of programming available to listeners in a wide variety of markets. But beyond digital audio broadcasting, radio stations are utilizing other technologies, particularly the Internet, to improve the quality and variety of the services they offer to consumers. For instance, approximately 2700 radio stations stream their programming on the Internet, enabling listeners to access a different distribution mechanism to obtain the same programming offered over-the-air. According to Bridge Ratings, Internet radio listenership has grown by 26 percent in the past year, and is up to 72 million people monthly, from 45 million at the end of 2005.[5]

Many radio stations, including Greater Media's, utilize Internet-related technologies to offer more programming, information and viewpoints to consumers. For instance, podcasts allow listeners to download selected audio programs to their computers or MP3 players so they can listen when and where they want**.** Our stations offer a variety of podcasts, including sports interviews, artist and band interviews, and podcast versions of our on-air talk and informational programs, with additional behind-the-scenes interviews. Greater Media's radio stations and their on-air personalities also host blogs, where listeners can interact with station personnel and express their opinions about an almost unlimited variety of topics.

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[5] FMQB, *Internet Radio Listenership Up 26 Percent* (Feb. 22, 2007).

In sum, it is clear that new technologies, especially digital audio broadcasting, offer local radio stations extensive opportunities for better serving their listeners and communities. Embracing these technologies is also a necessity, if traditional radio broadcasters are to remain competitive in a digital, multichannel media environment.

The Imposition of Performance Rights in Sound Recordings for Digital Broadcasts is Not Justified and Would Impede the Roll Out of Digital Radio

There has been some suggestion that fees for performance rights in sound recordings should be imposed when radio broadcasts in digital. Such fees would be without justification and would seriously impede the roll out of digital radio. 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 artists, NAB urges the Subcommittee to recognize that artists and labels receive invaluable compensation in terms of airtime and exposure and that a new performance rights tax on broadcasters is unnecessary. Certainly members of this committee 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 right for another twenty years. During that time, the recording industry thrived, due in large measure to the promotional value of radio performances of their records.[6]

It was not until the Digital Performance Rights in Sound Recordings Act of 1995 (the "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."[7] As explained in the Senate Report accompanying the DPRA, "The 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 subscriptions and interactive services – but not by broadcasting and related transmissions."[8]

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]" – transmission[s] made by FCC

[6] *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.").
[7] S. Rep. No. 104-129, 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 relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades.").
[8] *Id.* at 17.

licensed radio broadcasters.[9] 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 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.[10]

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."[11] 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 right in digital broadcasts, when one does not 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. Rather, it is intended to assist the Subcommittee in understanding why a performance right for sound recordings is irrelevant to those concerns.*

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[9] 17 U.S.C. §114(d)(1)(A).
[10] 1995 Senate Report, at 15.
[11] *Id.*

Local Radio Stations Must Be Able to Compete on a Level Playing Field with Satellite Radio to Remain Competitively Viable To Serve Their Listeners And Communities

As radio broadcasters have demonstrated on many occasions, local stations serve the public interest by airing local and national news and public affairs programming and a variety of other locally produced programming that serves the needs and interests of their audiences, including sports, religious and other-community-oriented programming.[12] No other radio service provides this amazing level of service to communities across the county. For us to continue to provide these valuable services, XM and Sirius should not be granted a government sanctioned monopoly that will allow them to engage in unfair business practices without recourse.

Before the 2006 elections, radio stations in markets across the country hosted candidate debates and forums for federal, state and local candidates and offered free airtime and other access to political candidates.[13] Radio broadcasters also provide a wealth of emergency information to their local communities. Through live coverage and the Emergency Alert System (EAS), broadcasters have invested in state-of-the-art equipment to ensure that their local communities have timely access to critical, and often life-saving,

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[12] *See, e.g.*, FCC Broadcast Localism Hearing, Rapid City, SD, Statement of Alan Harris at 2 (May 26, 2004) (three Wyoming radio stations broadcast 72 local newscasts every week, about 40 sportscasts, and a daily public affairs interview program); FCC Broadcast Localism Hearing, Monterey, CA, Statement of Chuck Tweedle at 3 (July 21, 2004) (three Bonneville radio stations in Bay area broadcast more than four hours of locally produced newscasts every week); FCC Broadcast Localism Hearing, San Antonio, TX, Statement of Jerry Hanszen at 2-3 (Jan. 28, 2004) (on a typical day, two small market Texas radio stations broadcast five local newscasts).

[13] *See, e.g.*, NAB, *At Your Service*, Vol. 9, Issue 5 (Aug./Sept. 2006); NAB, *Free Air Times* (Oct. 2006); NAB, *Free Air Times* (Oct. 30, 2006), available at www.nab.org/AM/Template.cfm?Section=Newsletters3&Template=TaggedPage/TaggedPageDisplay.cfm&TPLID=42&ContentID=2607.

information. For example, during Hurricane Katrina broadcasters made extraordinary efforts to air live news coverage and disseminate relief supplies in affected areas, even as the waters rose and station facilities were deluged. Though many stations suffered major damage, through the pooling of resources, planning and pre-positioning of key supplies, stations were able to resume broadcasting as quickly as possible to serve the public. Radio stations aired critical news, weather updates and shelter information, as well as on-air counseling services.[14] Broadcasters have also supported many of the FCC's initiatives to improve EAS, including extending EAS requirements to digital radio and television.

Broadcasters additionally pioneered the *AMBER PLAN: America's Missing: Broadcast Emergency Response*. Named after nine-year-old Amber Hagerman, who was kidnapped and murdered in Arlington, Texas, it was created in 1996 by the Association of Radio Managers with the assistance of law enforcement agencies across the Dallas/Ft. Worth area. Today, with 120 state, local and regional plans, approximately 325 children have been rescued.

Radio broadcasters' commitment to public service and their local communities can be further measured by their tangible community services. In calendar year 2005, the average radio station ran 169 public service announcements (PSAs) per week. This is the equivalent of $486,187 in donated airtime per radio station per year, or a total for all radio stations of $5.05 billion.[15] Sixty-one percent of the PSAs aired by the average radio

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[14] *See, e.g.*, Oral Testimony of Steve Davis, Senior Vice President Engineering, Clear Channel Radio, Inc., Before the FCC's Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, Tr. at 76-86 (Jan. 30, 2006); Scott Fybush, *Call 'em crazy, call 'em heroes – they kept radio going during Hurricane Katrina,* Inside Radio (Aug. 30, 2005).

[15] National Association of Broadcasters, *National Report on Broadcasters' Community Service* (June 2006) (Online available at http://www.nab.org/publicservice) (*2006 Broadcast Community Service Report*).

station during 2005 were about local issues, and 71 percent of radio stations aired local public affairs programs of at least 30 minutes in length every week during the year. *2006 Broadcast Community Service Report* at 5.

Moreover, about 19 out of 20 radio stations reported helping charities and needy individuals, and supported disaster relief efforts in 2005. Radio stations across the country raised approximately $959 million for charity and additional sums for disaster relief. *Id*. Awareness campaigns organized and promoted by local broadcasters covered the full range of issues confronting American communities today, including alcohol abuse, education and literacy, violence prevention, women's health, drug abuse, and hunger, poverty and homelessness. Local stations further supported and organized community evens such as blood drives, charity walks and relays, community cleanups, town hall meetings, health fairs and many others. *Id*. For example, our own JJ & Lynne at Detroit's WCSX have raised over $2.2 million for the Children's Leukemia Fund of Michigan through their "Stone Soup Project," which combines a radiothon fundraiser with a raffle to buy a souped-up classic car. In just one day last month, Dick Purtan, the morning host of WOMC-FM in Detroit, raised a stunning $2,398,783 in his annual radiothon for funds for the homeless and hungry via the Salvation Army's Bed and Bread Program.[16]

Additionally, broadcasters provide a unique community service – when a broadcast station partners with a charitable or community organization, the station not only provides dollars (like other corporate partners), but also a public voice for those organizations. A broadcaster can help an organization make its case directly to local

[16] John Smyntek, *Purtan/Salvation Army Radiothon Passes $2 Million Mark in Spite of Tough Economy*, Detroit Free Press (Feb. 23, 2007).

citizens, to raise its public profile and to cement connections with in local communities. As a trusted source, a broadcaster can help an organization better leverage its fund raising resources and expertise, its public awareness and its educational efforts.

Maintaining this high level of local programming and other services, however, requires radio stations to be economically sound. Only competitively viable broadcast stations sustained by adequate advertising revenues can serve the public interest effectively and provide a significant local presence. As the FCC concluded 15 years ago, the radio "industry's ability to function in the 'public interest, convenience and necessity' is fundamentally premised on its economic viability."[17] Any one concerned about the service of radio stations to their local communities and listeners must necessarily be concerned about these station's abilities to maintain their economic vibrancy in the face of multichannel and other competitors.

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

Simply put, XM and Sirius are asking for a government sanctioned monopoly. But public policy should never allow one entity to acquire state-sanctioned, monopoly control over the entire 25 MHz of spectrum allocated to satellite radio service. If nothing else, the lessons of the original AT&T demonstrate that regulating a monopoly in terms of price and other conditions is no substitute for the competitive marketplace. Here, a merged satellite radio entity would control almost three hundred channels of radio programming accessible in every local market in this country without any realistic check

[17] *Report and Order*, 7 FCC Rcd 2755, 2760 (1992).

on its ability to assert market power, notwithstanding attempts to impose federal conditions.

XM/Sirius claim that they are not a monopoly but just one more competitor to provide audio service. They would have government officials ignore the fact that a merged XM/Sirius would be the sole licensee of satellite 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 stature as the sole national provider to hurt local radio stations who must sell advertising based on the numbers of listeners that they attract.

Local stations do not compete in the national market for multichannel mobile audio services. Broadcasters' signals are not nationwide, do not move from one community to another, and are not available only by subscription. We are not a substitute for satellite radio service. As the FCC recognized when authorizing satellite digital audio radio service (DARS) in 1997, satellite radio offers "services that local radio inherently cannot provide."[18] For example, satellite radio can provide continuous service to consumers traveling long distances in their cars and to persons living in remote areas. Unlike even the most powerful terrestrial radio stations, which can still only reach a small fraction of American consumers over-the-air, satellite radio can reach every listener across the country, and 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

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

stations.[19] 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.

As explained in detail below, a XM/Sirius merger would violate FCC rules and precedent and congressional policy; 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 market for nationwide, multichannel mobile audio services.

The Proposed Merger Violates FCC Rules And Precedent And Congressional Policy

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.

Importantly, 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.[20] Given these competitive concerns, Sirius explicitly stated that no satellite

[19] Katy Bachman, *Buyers: Size Not Enough for Sirius/XM Merger*, Media Week (Feb. 26, 2007) (quoting Matt Feinberg, Senior Vice President of Zenith Media).
[20] CD Radio Comments in IB Docket No. 95-91, at 17.

radio provider should ever be permitted to combine with another provider. *See* CD Radio Comments at 18. Now, only a few years later, Sirius has completely reversed course and professes to see no problem with allowing the satellite radio market to become monopolized by a single provider with control over the entire national market.

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.[21]

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

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.

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.[22] Without question, a merger to *monopoly* would be anticompetitive, inconsistent with antitrust precepts and contrary to judicial decisions.

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 stop agreeing to pay high talent salaries and 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. 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

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

XM/Sirius to raise subscription prices to the detriment of consumers. For example, the FCC recently determined that cable television rates have increased by 93% since enactment of the 1996 Telecommunications Act.[23] The agency has attributed this tremendous increase to the lack of competition from a second cable operator in most communities. The analogy to the XM/Sirius merger is unmistakable. Without the presence of a direct competitor, a satellite radio monopolist could raise rates freely. 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."[24]

Beyond resulting in rate increases for consumers, an 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, networks, and other talent, to deal only with them. In sum, in a monopoly environment, satellite radio subscribers would pay higher prices for less diverse and less innovative programming.

[23] *See Report on Cable Industry Prices*, MM Docket No. 92-266 (rel. Dec. 27, 2006).

[24] *FTC v. Staples*, 970 F. Supp. 1066, 1082 (D.D.C. 1997).

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, both companies have violated an FCC rule on receiver interoperability, 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,"[25] neither XM nor Sirius markets such a consumer-friendly device. And, while both companies certified nearly 10 years ago that they would comply with this pro-competition, pro-consumer requirement, they have not done so.

Second, both XM and Sirius have violated FCC rules governing the production and distribution of their receiver equipment,[26] 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-

[25] 47 C.F.R. § 25.144(a)(3)(ii).

[26] 47 C.F.R. Part 15.

commercial listeners who suddenly hear uncensored and unwelcome satellite radio programming on their car radios.[27]

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 policy could simply embolden them to pay even less attention to the rules of the road in pursuit of monopolistic profits.

[27] *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. 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 <u>exclusive</u> 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 the merger. These changes have, as discussed above, encouraged local radio stations to enhance their competitiveness by converting to DAB. But the introduction of new audio products had 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 $12.99 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 would have the power to 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. Using monopoly rents from subscription service, the satellite radio monopoly would have the incentive and ability to cross subsidize its advertiser-supported channel offerings, likely resulting in unfair competition in the form of predatory, cut-throat pricing in national advertising markets. In addition, the satellite radio monopoly could not be expected to 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

As the FCC explained in declining to approve the comparable EchoStar/DirecTV merger: 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 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.

Clearly, XM and Sirius cannot meet this heavy burden. Rather than producing "extraordinarily large," beneficial efficiencies, the proposed merger, if approved, would seriously impair marketplace competition and cause cognizable 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.

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.

Conclusion

Free, over-the-air local radio stations are embracing the future by transitioning to digital broadcasting. A successful and timely transition to HD radio will help ensure that local radio continues to be competitive and financially viable, and able to serve their listeners and communities with high quality national and local programming, vital emergency information and other services. 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 impair the ability of other audio service providers to compete and to serve consumers.