



# NEWS

News media Information 202 / 418-0500  
Fax-On-Demand 202 / 418-2830  
TTY 202/418-2555  
Internet: <http://www.fcc.gov>  
<ftp.fcc.gov>

Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D. C. 20554

This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC, 515 F 2d 385 (D.C. Circ 1974).

FOR IMMEDIATE RELEASE  
July 28, 2008

Contact: Robert Kenny  
(202) 418-2668

## COMMISSION APPROVES TRANSACTION BETWEEN SIRIUS SATELLITE RADIO HOLDINGS INC. AND XM SATELLITE RADIO HOLDINGS, INC. SUBJECT TO CONDITIONS

On July 25, 2008, the Commission voted to approve the application of Sirius Satellite Radio Inc. (“Sirius”) and XM Satellite Radio Holdings Inc. (“XM”; jointly, the “Applicants”) to transfer control of the licenses and authorizations held by Sirius and XM and their subsidiaries for the provision of satellite digital audio radio service (or “SDARS”) in the United States. The Commission found that grant of the application, with the voluntary commitments made by the Applicants and other conditions, is in the public interest. The transaction will benefit consumers by making available to them a wider array of programming choices at various price points and by affording them greater choice and control over the programming to which they subscribe.

Highlights of the Commission’s action are noted below, followed by details concerning the grant of the application and the separate resolution of certain enforcement matters.

- After reviewing the empirical data available as part of its competitive analysis, the Commission determined there was insufficient evidence in the record to predict the likelihood of anticompetitive harms. It therefore evaluated the application under “worst-case” assumptions, *i.e.*, that the relevant market is limited to SDARS. This approach permitted the Commission to protect consumers from potential adverse effects of the transaction while also allowing the Commission to balance potential harms against potential public interest benefits. The Commission concluded that the merger, absent the Applicants’ voluntary commitments and other conditions, would result in potential harms. With those commitments and conditions to mitigate the harms, however, the Commission found the transaction to be in the public interest. All of the voluntary commitments must continue in effect at least three years after consummation of the merger.
- The Commission accepted the Applicants’ voluntary commitments to:
  - Cap prices for 36 months after consummation of the transaction, subject to certain cost pass-throughs after one year. In addition, six months prior to the end of commitment period, the Commission will seek public comment on whether the cap continues to be necessary in the public interest and will determine whether it should be extended, removed, or modified. The merger approval is conditioned on the Commission’s ability to modify or extend the price cap beyond the three-year commitment period.
  - Offer to consumers, within three months of consummation of the transaction, the ability to receive a number of new programming packages, including the ability to select programming on an a la carte basis.
  - Make available 4 percent of its capacity for use by certain Qualified Entities, and an additional 4 percent of capacity for the delivery of noncommercial educational or

- informational (“NCE”) programming, which will enhance the diversity of programming available to consumers.
- Offer interoperable receivers in the “retail after-market,” *i.e.*, receivers available at retail outlets for installation in consumers’ automobiles or homes, within nine months of consummation of the merger.
  - Refrain from entering into any agreement that would grant an equipment manufacturer an exclusive right to manufacture, market, and sell SDARS receivers. Applicants also commit to refrain from barring any manufacturer from including in any receiver non-interfering hybrid digital terrestrial radio functionality, iPod compatibility, or other audio technology. In addition, Applicants commit to make available the intellectual property needed to allow any device manufacturer to develop equipment that can deliver SDARS.
  - File the applications needed to provide Sirius satellite service to Puerto Rico via terrestrial repeaters within three months of the consummation of the merger.
  - Although the Commission found it unnecessary to impose a condition requiring the inclusion of hybrid digital radio technology in SDARS receivers, it recognized that important questions have been raised about hybrid digital radio that warrant further examination in a separate proceeding. The Commission therefore committed to initiating a notice of inquiry within 30 days after adoption of the merger order to gather additional information on the issues.
  - The Commission reiterated that SDARS licensees are already prohibited, independent of the merger, from using terrestrial repeaters to distribute local content—including both programming and advertising—that is distinct from that provided to subscribers nationwide via satellite.
  - The Commission prohibited the merged entity from entering into agreements that would bar any terrestrial radio station from broadcasting live local sporting events.
  - Concurrent with grant of the application, the Commission repealed the prohibition on the merger of the two SDARS service providers as set forth in the 1997 SDARS Report and Order.<sup>1</sup> For the same reasons that it approved the merger, the Commission concluded that repeal of the rule prohibiting the merger will, on balance, serve the public interest.
  - In separate actions on July 25, 2008, the Commission approved Consent Decrees between it and each of the Applicants. The Consent Decrees terminated the Commission’s investigations into the Applicants’ compliance with the FCC regulations governing FM modulators and terrestrial repeaters. They provide that XM and Sirius will voluntarily contribute approximately \$17.4 million and \$2.2 million, respectively, to the U.S. Treasury and take additional remedial measures.

Action by the Commission, July 25, 2008, by Memorandum Opinion and Order and Report and Order (MB Docket No. 07-57, FCC 08-178). Commissioners Copps and Adelstein dissenting

---

<sup>1</sup> *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd 5754, 5823 ¶ 170 (1997). As described in the Order in further detail, the repeal of this rule was effective on adoption of the Order.

and issuing separate statements. Chairman Martin, Commissioners Tate and McDowell issuing separate statements.

Media Bureau contacts: Marcia Glaubergerman, (202) 418-7046, and Rebekah Goodheart, (202) 418-1438

-FCC-

## APPENDIX

The Applicants' voluntary commitments and other conditions imposed by the Commission are summarized below. They are fully enforceable by the Commission and must continue in effect for a period of no less than three years after consummation of the merger.

### Price Cap

The combined company shall not raise the retail prices for its basic \$12.95 per month subscription package, the a la carte programming packages, and the new programming packages nor reduce the number of channels in either their current packages or new packages for at least 36 months. After the first anniversary of the consummation of the merger, the combined company may pass through cost increases incurred since the filing of the combined company's FCC merger application as a result of statutorily or contractually required payments to the music, recording, and publishing industries for the performance of musical works and sound recordings or for device recording fees. Six months prior to the expiration of the commitment period, the Commission will seek public comment on whether the cap continues to be necessary in the public interest.

### New Programming Packages and A La Carte Options

Within three months of consummation of the merger:

- The first a la carte-capable radios must be introduced in the retail after-market, and the combined company must begin offering a la carte programming.
- The combined company must offer customers the ability to obtain on existing receivers "best of" packages that provide both Sirius and XM programming, as selected by the merged company, at a monthly cost of \$16.99.
- Customers must have the option of choosing a package of "mostly music" programming and a package of news, sports and talk programming at a monthly cost of \$9.99 for each option.
- Consumers must be able to purchase a "family-friendly" version of existing Sirius or XM programming at a cost of \$11.95 a month, representing a credit of \$1.00 per month. Current Sirius customers must also be able to choose a family-friendly version of Sirius programming that includes select XM programming, and current XM customers must be able to choose a family-friendly XM programming option that includes select Sirius programming. This programming will cost \$14.99 per month, representing a credit of \$2.00 per month from the cost of the "best of" programming.

### Interoperable Radio Receivers

The Commission required the combined company to offer for sale an interoperable receiver in the retail after-market within nine months of consummation of the merger.

### Open Access and Hybrid Digital Radio Notice of Inquiry

The merged entity, immediately upon consummation of the merger, will permit any device manufacturer to develop equipment that can deliver the combined company's satellite radio service. Device manufacturers also must be permitted to incorporate in satellite radio receivers any other technology that would not result in harmful interference with the merged entity's network. The merged entity may not prevent such devices from reaching consumers through exclusive contracts or otherwise. Sirius and XM shall provide, on commercially reasonable terms, the intellectual property to permit any device manufacturer to develop equipment that can deliver the merged entity's satellite radio service. The encryption, conditional access, and security technology is embedded in chip sets that can be purchased from third-party manufacturers.

### Third-Party Access to SDARS Capacity

Within four months of consummation of the merger, the merged entity will enter into long-term leases or other agreements to provide a Qualified Entity or Entities rights to four percent of the full-time audio channels on the Sirius platform and on the XM platform, respectively, which currently represents six channels on the Sirius platform and six channels on the XM platform.

### Reservation of Channels for Noncommercial Educational Use

Upon consummation, the combined company must make available four percent of the full-time audio channels on the Sirius platform and on the XM platform, respectively, which currently represents six channels on the Sirius platform and six channels on the XM platform, for NCE programming. Programming provided pursuant to this set-aside requirement must be available to the public no later than six months after the transaction's consummation. In fulfilling this commitment, the combined company shall adhere to the additional requirements set forth in the merger order, including a limitation of one NCE channel per programmer as long as demand for such channels exceeds available supply. The merger order applies to the merged entity the rules governing Direct Broadcast Satellite ("DBS") providers' carriage of noncommercial educational or informational programming set forth in section 25.701(f) of the Commission's rules, 47 C.F.R. § 25.701(f).

### Service to Puerto Rico

Within three months of consummation of the merger, the combined company must file applications with the Commission to provide the Sirius satellite radio service to the Commonwealth of Puerto Rico using terrestrial repeaters and must promptly introduce such service upon grant of permanent authority by the Commission to operate these repeaters.

### Local Programming and Local Advertising

The Commission reiterated that SDARS licensees are already prohibited from using terrestrial repeaters to distribute localized programming and advertising. In addition, considering the importance of local sports programming to terrestrial radio stations, the Commission

prohibited the merged entity from entering into any agreements that would preclude any terrestrial radio station from broadcasting live local sporting events.

### 1997 SDARS Report & Order

When the Commission established SDARS in 1997, it stated that one SDARS licensee could not acquire control of the other SDARS license. The Commission sought comment on whether its language constituted a binding Commission rule and, if so, whether the Commission should waive, modify, or repeal the prohibition in the event it determined that the proposed merger would serve the public interest.

The Commission found that the prohibition is a binding substantive rule, not a mere statement of policy. The Commission can repeal a rule if it decides that doing so would serve the public interest and it complies with rulemaking procedures. For the same reasons that it concluded that the grant of the merger, as conditioned, will serve the public interest, it concluded that repeal of the rule prohibiting the merger will, on balance, serve the public interest.

The Commission's repeal of the merger prohibition and its approval of the merger, with the voluntary commitments and other conditions, were effective on July 25, upon adoption of the order repealing the prohibition and approving the merger. The Commission concluded that the repeal of the merger prohibition is a rule of particular applicability that is not subject to the Administrative Procedure Act's publication requirement and therefore could be effective upon adoption of the order. The Commission also concluded that the prohibition's repeal is not subject to the statutory 30-day waiting period under the Administrative Procedure Act because it relieves a restriction. In addition, the Congressional review procedures of Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 do not apply because repeal of the merger prohibition is not a "rule" within the meaning of the statutory provisions governing Congressional review of agency rulemaking, which exclude from the definition of the term "rule" "any rule of particular applicability," including a rule that approves a merger.

### EEO Obligations

The Commission clarified in the Order that the merged entity must comply with the Commission's equal employment opportunity rules and policies for broadcasters, including periodic submissions to the Commission consistent with the broadcast reporting schedule.