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January 20, 2011

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VIA ECFS

Mr. William Lake
Chief, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Consolidated Application for Authority to Transfer Control of XM
Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc.,
MB Docket No. 07-57

Dear Mr. Lake:

In approving the merger of Sirius Satellite Radio Inc. (“Sirius”) and XM Satellite Radio Holdings Inc. (“XM,” or jointly, the “Applicants”), the Commission accepted the Applicants’ voluntary commitment not to raise the retail price of certain satellite radio programming packages for thirty-six months after consummation of the merger.¹ The Applicants consummated the merger on July 28, 2008.² Accordingly, this voluntary commitment ends on July 28, 2011.

The *Sirius XM Merger Order* also stated that six months prior to the expiration of the commitment period, the FCC would seek public comment and then determine whether this price limitation should be modified, removed, or extended.³ As the Commission acknowledged, the concept of a subsequent pricing proceeding and the possibility that the FCC would either extend the price cap or set an entirely new subscription rate were not part of the Applicants’ voluntary commitment.⁴

¹ *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12,348, 12,395 (¶ 108) (2008) (“*Sirius XM Merger Order*”).

² See Letter from Jennifer D. Hindin to Marlene H. Dortch, Notification of Consummation of Transfer of Control, MB Docket No. 07-57 (filed Aug. 20, 2008). Sirius is now Sirius XM Radio Inc. (“Sirius XM”).

³ *Sirius XM Merger Order*, 23 FCC Rcd at 12,395 (¶ 108).

⁴ *Sirius XM Merger Order*, 23 FCC Rcd at 12,395 (¶ 108, n.328) (“Although it is not part of Applicant’s voluntary commitment, we are conditioning our approval of the merger on the Commission’s ability to modify or extend the price cap beyond three years.”). The companies, individually or combined, never acceded to this condition; since it imposed no obligation on them, there was nothing to “accept or reject” in connection with the statement. See 47 C.F.R. § 1.110. Moreover, any appellate challenge at that time to potential future Commission action would likely

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The Commission believed that this review of Sirius XM's rates may be needed because the agency did "not know what the competitive landscape will be like in three years."⁵ However, it is clear that the audio entertainment market is even more robustly competitive today than it was in 2008 when the FCC granted the merger applications. Satellite radio competes for listeners with an expanding array of audio entertainment choices—most of which are available to consumers for free. These choices include terrestrial AM/FM radio, HD radio, iPods and other portable audio devices, and they increasingly include Internet-based services, such as Pandora, Rhapsody, Slacker, Lastfm and iheartradio.⁶ Pandora alone is reportedly available on over 200 devices in addition to the computer.⁷ This competition for audio entertainment is especially acute in vehicles, with several automakers introducing features integrating Internet-based services, further reducing any remaining arguable hurdles to the seamless use of smartphones, iPods and other portable audio devices in vehicles.⁸ In early January 2011, Toyota announced it would introduce "Entune" in its vehicles, an integrated multimedia system designed to compete with Ford's SYNC system and the products introduced by BMW and Mini.⁹ Such marketplace changes confirm precisely what the United States

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have faced significant ripeness and finality issues. *See, e.g., CTIA—The Wireless Ass'n v. FCC*, 530 F.3d 984, 987 (D.C. Cir. 2008) ("The 'basic rationale' of the ripeness doctrine 'is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.") (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)).

⁵ *Sirius XM Merger Order*, 23 FCC Rcd at 12,395 (¶ 108).

⁶ Sirius XM Radio Inc., 2009 SEC Form 10-K (filed Feb. 25, 2010), *available at* <http://www.sec.gov/Archives/edgar/data/908937/000095012310017181/c96811e10vk.htm> (last visited Jan. 18, 2011).

⁷ Elliot Van Buskirk, "CES 2011: It's a Pandora World After All", Jan. 8, 2011 *available at*: <http://evolver.fm/2011/01/08/ces-2011-its-a-pandora-world-after-all/> (last visited Jan. 18, 2011).

⁸ Mike Ramsey, "Auto Makers Tie Mobile Networks to In-Car Systems," *Wall St. J.*, Jan. 5, 2011, *available at*: <http://online.wsj.com/article/SB10001424052748704405704576064080514279232.html?KEYWORDS=Mike+ramsey> (last visited Jan. 7, 2011). *See also* Press Release, CEA, Ford and Intel Keynotes and Major Product Innovation Launch the 2010 International CES (Jan. 8, 2010), *available at* <http://www.cesweb.org/news/releaseDetail.asp?id=11864> (last visited Jan. 18, 2011); Paul Leroux, "Automakers Take a Smart Approach to Smartphones," CEA Digital Dialogue, Jan. 6, 2011, *available at*: <http://blog.ce.org/index.php/2011/01/06/automakers-take-a-smart-approach-to-smartphones/> (last visited Jan. 18, 2011).

⁹ Press Release, Toyota Announces Entune Multimedia System at the 2011 Consumer Electronics Show (Jan. 4, 2011), *available at*: <http://pressroom.toyota.com/pr/tms/toyota/toyota->

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Department of Justice found when it closed its investigation of the Sirius-XM merger nearly three years ago.¹⁰ In granting its consent to the merger, DOJ identified “competitive alternative services available to consumers” and noted, in particular, that “a number of technology platforms are under development that are likely to offer new or improved alternatives to satellite radio [including] . . . the expected introduction within several years of next-generation wireless networks capable of streaming Internet radio to mobile devices.”¹¹ DOJ’s findings have been confirmed by independent parties in the FCC’s rulemaking regarding HD Radio technology and through subsequent technological developments.¹²

Finally, even if the Commission determined that it had the authority to extend or modify the expiring price cap,¹³ numerous practical considerations

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announces-entune-multimedia-189969.aspx (last visited Jan. 18, 2011). *See also* Eric A. Taub, “Toyota Puts Entertainment in the Cloud,” *New York Times*, Jan. 20, 2011, at B8.

¹⁰ Department of Justice, *Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.’s Merger with Sirius Satellite Radio Inc.* (press release) (March 24, 2008), available at http://www.justice.gov/opa/pr/2008/March/08_at_226.html (last visited Jan. 18, 2011).

¹¹ *Id.*

¹² The *Sirius XM Merger Order* acknowledged that “[c]omments filed as part of the rulemaking regarding HD Radio technology will help inform [the agency’s] decision regarding the level of competition in the radio market and the continuing need for a price cap.” *Sirius XM Merger Order*, 23 FCC Rcd at 12,395 (¶ 108, n.329). Comments filed by independent parties in this proceeding highlight that “there is adequate competition for Satellite radio from CD, MP3 Audio, Bluetooth Streamed Audio, internet streamed audio and HD radio and that additional regulation is not necessary nor in the best interest of the consumer.” Comments of Ford Motor Company, MB Docket No. 08-172 at 2 (dated Nov. 18, 2010 but posted Nov. 19, 2008). Similarly the Recording Industry Association of America noted that “[c]onsumers today can choose to listen to music by purchasing a CD or digital downloads of music; by listening to music played via satellite radio, analog radio, or webcasting; or through a growing variety of other web-based services that offer consumers sound recordings with varying degrees of interactivity, portability, permanence and sound quality.” Comments of the Recording Industry Association of America, MB Docket No. 08-172 at 1 (filed Nov. 7, 2008). Members of the public agreed “that all forms of Audio Entertainment compete for listenership, regardless of the business model.” Comments of Brian Rayl, MB Docket No. 08-172 at 2 (filed Sept. 11, 2008).

¹³ The FCC has no direct or ancillary authority to regulate satellite radio rates. “As the Supreme Court has recognized, ‘an agency literally has no power to act . . . unless and until Congress confers power upon it.’” *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 398 (D.C. Cir. 2004) (quoting *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986)). The *Sirius XM Merger Order* cited no direct statutory authority for the Commission to regulate satellite radio rates, and there appears to be none. Likewise, there appears to be no underlying basis for the agency to assert ancillary authority to regulate satellite radio rates. 47 U.S.C. § 154(i); 47 U.S.C. § 303(r). *See Am.*

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militate against doing so.¹⁴ For example, the price cap was suggested by the applicants for a defined period of time. Government-set rates are something quite different. How would the FCC independently justify setting \$12.95 – or any other particular rate – as the appropriate rate for basic satellite subscriptions? And for what period of time? Moreover, what process would the Commission employ for determining subscription rates or the period of time they would be in effect?

For the foregoing reasons, and, in particular, in light of the increasingly competitive landscape for audio entertainment, there is no need for the Commission to seek to extend or modify the subject rate cap and Sirius XM requests that the FCC take no steps to do so.¹⁵

Sincerely,

/s/ Robert L. Pettit

Robert L. Pettit
Counsel for Sirius XM Radio Inc.

cc: Marcia Glauberman

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Library Ass'n v. FCC, 406 F.3d 689, 700 (D.C. Cir. 2005); *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

¹⁴ No precedent appears to exist for the Commission to extend Sirius XM's voluntary merger commitment not to raise rates for three years. The three cases the Commission cited in n. 328 of the *Sirius XM Merger Order* are inapposite for a variety of reasons; in one, the Commission extended its program access rules pursuant to direct statutory authority, and in the other two, the Commission established a framework for relieving applicants of a merger condition earlier than would otherwise have occurred. None of the cases involved extension of a voluntary commitment beyond the parameters that the applicants agreed to.

¹⁵ Since the inception of commercial satellite radio service in 2001, there has been just one basic subscription rate price increase for the XM platform and none for the Sirius platform.