

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the matter of )  
 )  
Consolidated Application for Authority to ) MB Docket No. 07-57  
Transfer Control of XM Satellite Radio )  
Holdings Inc. and Sirius Satellite Radio Inc. )

**COMMENTS**

The WCS Coalition<sup>1</sup>, by its attorneys, hereby submits its comments in response to the Media Bureau’s January 25, 2011 *Public Notice* soliciting comment “on whether to extend, modify, or remove the price cap imposed by the Commission” when it permitted the consolidation of Sirius Satellite Radio Inc. (“Sirius”) and XM Satellite Radio Holdings Inc. (“XM”) into a single entity.<sup>2</sup>

The history of the price cap now under consideration is simple and straightforward. In connection with the 2007 request by Sirius and XM that they be allowed to combine notwithstanding the Commission’s earlier ban on any common ownership of the only two Satellite Digital Audio Radio Service (“SDARS”) licenses, Sirius and XM argued that a variety of audio service offerings, including Internet-based services, compete with SDARS and would discipline the combined company from exercising monopoly power over pricing.<sup>3</sup> The Commission, however, found that there was insufficient evidence to support that claim,<sup>4</sup>

---

<sup>1</sup> Although AT&T Inc. is a member of the WCS Coalition, it did not participate in the preparation of, and does not join in, in these comments.

<sup>2</sup> Media Bureau Seeks Comment On Extension, Modification Or Removal Of Cap On Sirius XM Retail Prices, *Public Notice*, 25 FCC Rcd 540 (2011).

<sup>3</sup> See, e.g. Joint Ex Parte Submission of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc., MB Docket No. 07-57, at 18-19 (filed Nov. 13, 2007).

<sup>4</sup> Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, MB Docket 07-57, *Memorandum*

concluding instead “that the merged firm may have an increased incentive and ability to raise the price of SDARS over a non-transitory period of time.”<sup>5</sup>

Notwithstanding that finding, the Commission approved the proposed combination, reasoning that the imposition of a price cap would protect the public from the market power resulting from the combination.<sup>6</sup> Although Sirius and XM offered to limit price increases for three years, the Commission was fearful that the marketplace would not sufficiently evolve during that period to protect consumers. The Commission thus warned Sirius and XM that “to ensure that no longer-term harms will result from the transaction,” it would seek public comment on whether the price cap regime should be extended six months prior to the expiration of the commitment period, and the Commission conditioned its approval of the merger accordingly.<sup>7</sup>

In recently urging the Commission to permit the price cap to expire on July 28, 2011 as scheduled, the merged company, Sirius XM Radio, Inc. (“Sirius XM”), asserted that its market

---

*Opinion and Order and Report and Order*, 23 FCC Rcd 12348 (2008) (“*Sirius XM Merger Order*”). Most significantly, the Commission concluded that:

While there is other evidence and data in the record that shed some light on the relative substitutability of various audio entertainment services, as well as evidence concerning the product characteristics and prices of the various services that might be included in the relevant product market, this evidence is insufficient in this case for us to delineate the boundaries of the relevant product market with any precision or confidence. Most significantly, it is insufficient for us to quantitatively estimate whether and by how much prices might rise or fall if we were to approve this transaction without a voluntary commitment by Applicants not to raise prices.

*Id.* at 12369.

<sup>5</sup> *Id.* at 12375.

<sup>6</sup> *See id.*

<sup>7</sup> *See id.* at 12376. *See also id.* at 12395. The Commission’s decision to accept an initial three-year limit on price caps was not without controversy. Commissioner Jonathan S. Adelstein, for example, noted in his dissent that “[a]lthough the majority is unable to identify competitors likely to constrain the merged entity’s ability to raise prices, it is unwilling to impose a meaningful price cap for a reasonable period of time.” *Id.* at 12446. *See also id.* at 12443-44 (Dissenting Statement of Commissioner Michael J. Copps).

power now is constrained by Internet-based services, such as Pandora, Rhapsody, Slacker, Lastfm and iheartradio, that can be delivered wirelessly to automobiles, where the majority of consumers listen to Sirius XM.<sup>8</sup> The WCS Coalition certainly believes that, *if sufficient mobile broadband capacity is available to support the wireless delivery of Internet-based services to automobiles*, those services will be perceived as competitive by consumers and Sirius XM's ability to increase prices will be disciplined.

A consumer will only consider Internet-based services as a competitive alternative to Sirius XM if he or she consistently can receive those Internet-based services without disruption (either due to a lack of bandwidth, RF interference, or coverage gaps). As the Commission now considers retention of the Sirius XM price cap, it cannot forget that America is in the midst of a spectrum crisis, with demand for mobile wireless bandwidth outstripping supply.<sup>9</sup> Indeed, the National Broadband Plan recognized the need for the reallocation of 500 MHz of spectrum for broadband within the next 10 years, with 300 MHz between 225 MHz and 3.7 GHz to be made available for mobile use within 5 years.<sup>10</sup> Not surprisingly, the National Broadband Plan called for the Commission to resolve the regulatory issues in WT Docket No. 07-293 and IB Docket No. 95-91 so as to allow Wireless Communications Service ("WCS") licensees to provide mobile broadband service over at least 20 MHz of the 2.3 GHz band, consistent with the WCS mobile allocation adopted in 1996.

---

<sup>8</sup> See Letter to William Lake, Chief, Media Bureau, from Robert L. Pettit, Counsel to Sirius XM, MB Docket No. 07-57 (dated Jan. 20, 2011).

<sup>9</sup> See, e.g. Julius Genachowski, FCC Chairman, Prepared Remarks at International Consumer Electronics Show 2011, Las Vegas NV (Jan. 7, 2011); Julius Genachowski, FCC Chairman, Prepared Remarks at the Spectrum Summit, Washington, DC, "Unleashing America's Invisible Infrastructure" (Oct. 21, 2010).

<sup>10</sup> Federal Communications Commission Omnibus Broadband Initiative, *Connecting America: The National Broadband Plan*, at 75 (2010).

It is ironic that Sirius XM would in this proceeding point to Internet-based services as competitive threats because in WT Docket No. 07-293 and IB Docket No. 95-91, Sirius XM continues to advocate a wide range of rules and policies that will severely limit, if not effectively preclude, the offering of broadband services over WCS as envisioned by the National Broadband Plan.<sup>11</sup> Whether pressing the Commission to limit WCS base station deployment of equipment meeting the Long Term Evolution standard that is increasingly being adopted by carriers in the United States for 4G services, advocating WCS power limits that would preclude a broadband service, pushing for unduly restrictive duty cycle limits, or seeking to impose new interference protection obligations on WCS licensees,<sup>12</sup> Sirius XM has sought at every turn to hamstring wireless broadband. That is hardly surprising. As the WCS Coalition recently noted, “[p]articularly given the competitive threat that mobile broadband-delivered music services like Pandora and Slacker pose to Sirius XM, Sirius XM has every incentive to slow the deployment of WCS base stations if the Commission gives it an opening.”<sup>13</sup>

As the Commission considers Sirius XM’s request to be freed from its price cap, it can and should find that Internet-based audio services have the potential to compete with Sirius XM. But the Commission cannot ignore that Internet-based services will only realize that potential if there is sufficient spectrum that is both available and appropriately regulated to meet the

---

<sup>11</sup> The adverse consequences of adopting Sirius XM’s proposals have been fully explained by WCS interests in those proceedings, and need not be repeated here. *See, e.g.* Opposition of WCS Coalition to Petition of Sirius XM Radio Inc. for Partial Reconsideration and Clarification, WT Docket No. 07-293 and IB Docket No. 95-91 (filed Oct. 18, 2010) (“WCS Coalition Opposition to Sirius XM Petition for Reconsideration”); Opposition of AT&T Inc., WT Docket No. 07-293 and IB Docket No. 95-91, at 2-5 (filed Oct. 18, 2010); Reply of WCS Coalition, WT Docket No. 07-293 and IB Docket No. 95-91 (filed Nov. 1, 2010); Reply of AT&T Inc., WT Docket No. 07-293 and IB Docket No. 95-91 (filed Nov. 1, 2010).

<sup>12</sup> *See* Letter from Michael A. Lewis, Engineering Consultant to Sirius XM, to Marlene H. Dortch, FCC, Secretary, WT Docket No. 07-293 and IB Docket No. 95-91 (filed Feb. 4, 2011).

<sup>13</sup> WCS Coalition Opposition to Sirius XM Petition for Reconsideration at 18.

exploding demand for mobile broadband. The Commission's 2010 *Report and Order and Second Report and Order* in WT Docket No. 07-293 and IB Docket No. 95-91 was a useful first step towards eliminating the regulatory impediments that effectively precluded WCS from delivering Internet-based services to mobile consumers.<sup>14</sup> However, the gains from that decision will be lost (and the National Broadband Plan frustrated) if the rules and policies now being advocated by Sirius XM during the reconsideration phase of WT Docket No. 07-293 and IB Docket No. 95-91 are adopted.

Given this current state of affairs, it would be premature for the Commission to lift the price cap that was put in place to protect consumers against unwarranted Sirius XM price increases. Rather, the WCS Coalition respectfully suggests that the Commission retain the existing price cap on an interim basis, and defer any decision to lift or modify the price cap until the Commission can address the pending petitions for reconsideration in WT Docket No. 07-293 and IB Docket No. 95-91. By first assuring that spectrum will be available for the delivery of Internet-based audio services to automobiles and other places where consumers listen to Sirius XM, the Commission will then be able to lift the price cap without fear of anti-consumer impacts.

---

<sup>14</sup> See Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band, *Report and Order and Second Report and Order*, 25 FCC Rcd 11710 (2010).

Respectfully submitted,

WCS COALITION

By: /s/ Paul J. Sinderbrand  
Paul J. Sinderbrand  
Mary N. O'Connor

Wilkinson Barker Knauer, LLP  
2300 N Street, NW, Suite 700  
Washington, DC 20037  
202.783.4141

Its Attorneys

February 24, 2011