Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications for Consent to the	)	
Transfer of Control of Licenses	)	
	)	MB Docket No. 07-57
	)	
XM Satellite Radio Holdings Inc.,	)	
Transferor,	)	
	)	
to	)	
	)	
Sirius Satellite Radio Inc.,	)	
Transferee	)	

REPLY COMMENTS
ON NOTICE OF PROPOSED RULEMAKING
FCC 07-57
Released June 27, 2007
Submitted by
U.S. Electronics, Inc.

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EXECUTIVE SUMMARY

U.S. Electronics, Inc. (USE) submits its Reply Comments to the Consolidated Comments of Applicants submitted August 13, 2007 in the NPRM issued in this Docket. These Reply Comments also address assertions made by the Applicants in their Joint Opposition filed on July 24, 2007 based on the recognition by the Commission and the Applicants that the two matters are intrinsically related and deal with the same issue of whether the public interest is served by the proposed merger. Applicants assert in their Consolidated Comments that only large businesses would be affected by the rule restricting the combination of the licensees' operations, that the Commission should not be and cannot be constrained by circumstances that ten years ago required the rule restricting the two licenses from becoming one, that the merger will not harm competition in an "audio entertainment service market," that the Applicants are incented to provide public benefits to compete with other audio entertainment providers and that because of the asserted competition, the merged entity will not be able to raise prices or restrict output, lest it lose customers. These assertions in the Consolidated Comments are not however backed up by any hard facts and remain merely assertions. More importantly, hard facts do exist that contradict them.

Small businesses are already being disadvantaged by the Applicants' parallel shifts as duopolists to sole sourcing suppliers for the equipment needed by consumers to access their networks. Small businesses will be further disadvantaged when the duopoly becomes a monopoly and continues this practice.

The Applicants assert that the changed market realities of today make the need for the ban against one licensee acquiring the other unnecessary. But there is no explanation given for the fact that after ten years of duopoly "competition" there is no other comparable nationwide network of any kind offering multi-channel subscription radio services. And the argument is self-serving because it ignores other market realities the Applicants have themselves created, realities that restrict competition and consumer rights.

The Applicants' claim that a merged entity will be incented to provide public benefits to meet competition is self-serving. There is no showing made that a merged multi-channel nationwide subscription radio service will face competition, or if it does, whether it will be effective competition that will force the merged entity to provide public benefits. The argument boot-straps itself because the alleged competition is to occur in a market that the record does not show actually exists – the "audio entertainment market."

The claim that the merged entity will not raise or be able to raise prices lest it lose customers is flawed for several reasons. First, the argument is narrowly focused on only one aspect of the merged entity's operations – the network services. What is ignored is the ability to leverage the monopoly over the network into other market areas (e.g., hardware/equipment) where through cross-subsidization, the merged entity can exact monopoly profits to subsidize keeping its services below cost.

In its Comments, USE advanced arguments and facts that support the application of the Carterfone policies to satellite radio. After reviewing the Consolidated Comments and Joint Opposition, and based on real world experience in dealing with the Applicants as duopolists, it is more than apparent to USE that the Commission cannot permit the merged monopoly to extend such power into other markets, specifically the hardware/equipment market. To prevent this, USE proposes that the Commission implement its Carterfone policies in satellite radio by adopting a tailored ban on manufacturing (and distribution) of the hardware/equipment by the merged entity (or by the duopolists if the merger is not approved). USE relies on the history and precedent not only of the Carterfone case and its progeny, but also on the manufacturing ban and restrictions placed on the Bell Operating Companies (BOCs) as monopoly providers of local telephone exchange networks first instituted in the Modified Final Judgment and then codified by Congress in the Telecommunications Act of 1996.

Based on this precedent, and the empirical evidence gained by its direct experiences in dealing with or knowing about the Applicants' practices regarding the manufacture, distribution and design of satellite radio hardware/equipment, USE proposes restrictions on the merged entity's involvement (or that of the present duopolist licensees if the merger is not approved) in the manufacturing process and, by necessary implication, the distribution and design and development of such hardware/equipment. This approach would allow the merged entity (or the current duopolists) to collaborate in the early phases of the design and development of the hardware to be manufactured; as was done with the BOCs, but any participation in actual manufacturing and/or the ability to control manufacturing would be prohibited. This ban would extend to actual distribution and control of distribution. Identifying reasonable parameters (e.g., protocols, certain software, technical requirements, etc.) required to protect or enhance the satellite radio network would be permitted but would have to be publicly disclosed, as would any changes in such specifications, and access to all would-be providers would be guaranteed. Finally, the Commission must provide that control of the satellite network itself (by a single monopolist or by the duopolists) cannot be leveraged to control and dictate consumer choice of how and with what equipment they access the network and cannot be used to grant undue preferences or accord arbitrary preferential treatment to any manufacturer, distributor or other source of supply.

In the Consolidated Comments, Applicants claim that the record already amply demonstrates that the public interest will be served by the merger. But a cursory analysis of some assertions made by Applicants in their Joint Opposition belies this claim. Claiming that no "merger to monopoly" is possible or involved, the Applicants simply ignore the fact that the first victim of their merger is the competition that exists between themselves not only as to network content and services, but also in such areas as choice of manufacturer for the hardware equipment, in using multiple manufacturers to drive innovation, and in retail incentive offerings that produce lower consumer prices for the equipment needed to access the network.

In claiming that there is no barrier to entry to bolster their no "merger to monopoly" argument, the Joint Opposition appears to intentionally confuse the description of the "market" they allege has no barriers by calling it the "satellite radio market," the "audio entertainment market," and the "audio entertainment services market akin to satellite radio." Regardless of the overall market definition used, the argument ignores the barriers the Applicants have intentionally raised to entry into the hardware/equipment market segment of the overall market by their shift to sole sourcing of product. But it is their burden to prove there are no barriers to entry exist into a properly defined market and its necessary submarkets.

The claim that the record already demonstrates the public interest benefits of the merger is further undercut by Applicants' opposition to any divestiture of their control over the satellite radio spectrum. Claiming that divestiture would harm existing subscribers, and their prior investment, and stifle innovative technologies, the argument simply ignores the Applicants' own failures over ten years to develop a working interoperable radio, that no subscriber need be deprived of service if another entity acquires the divested spectrum, and the parallel actions of the Applicants to stifle innovation themselves by shifting to their sole source policies.

The record not only is far from presenting an air-tight case of the public benefits of the merger, it actually contains credible evidence that regardless of the merger, serious issues have been raised about the Applicants' character and licensee qualifications. Having engaged in deliberate violations of the Commission's FM modulator specifications and the construction of towers and antenna at unauthorized sites, and having themselves acknowledged that ten years ago the Commission "required" the development of an interoperable radio and not just the attempt to do so, the Joint Opposition simply dismisses these violations as unrelated to the record's alleged ample demonstration of the public benefits from the merger. But the record of these violations is not irrelevant to the record in this docket. They raise serious public interest concerns about the practices and management of the proposed merged entity (as they do about the existing licensees). The current record is also devoid of any facts and circumstances surrounding these violations and who within the management of the Applicants were responsible for them. These violations relate directly to this docket and the approval the Applicants seek. They cannot be brushed aside as perhaps might be justified if they did not involve matters directly relating to the very public interest determinations that must be made in this Docket.

In view of the issues addressed and the state of the record today, USE urges the Commission to apply its Carterfone policies to the merged entity, if the merger is approved, and to the duopolists if it is not. The Commission must also adopt reasonable and effective restrictions on the merged entity's or the duopolists' participation in the manufacturing process following the roadmap for such restrictions as laid out by the ban on the BOCs in regard to their monopoly-controlled local exchange networks.

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REPLY COMMENTS SUBMITTED BY U.S. ELECTRONICS, INC.

On behalf of U.S. Electronics, Inc. (USE) these reply comments are submitted in response to the comments submitted on the Notice of Proposed Rulemaking (NPRM) in this Docket released June 27, 2007 and to certain related assertions made by the Applicants in their "Joint Opposition to Petitions to Deny and Reply Comments of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc." filed July 24, 2007 (Joint Opposition).[1]

I. INTRODUCTION

1. In USE' Comments, USE recognizes the Commission's authority to modify and even eliminate the restriction on the Applicants' combining their licenses through merger.[2] USE also

[1] In the interest of a full and complete record, the inherent linkage between the issues specified in the NPRM and the Commission's call for comments on the Consolidated Application itself and given the Applicants' own recognition of the tie between the two, (*see* Consolidated Comments of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. August 13, 2007 at p. 5 "The agency's inquiries with respect to the Consolidated Application and the rulemaking are substantively the same. As the Commission recognizes, [NPRM ¶ 3] the Consolidated Application and the proposed rulemaking involve the same facts viewed through the same standard – namely, whether allowing one entity to hold two licenses promotes the public interest…" and *see,* n. 31, p. 8 ("Consolidated Comments")), USE' reply will refer, to the extent necessary, to certain assertions made in Applicants' Joint Opposition.
[2] Comments of U.S. Electronics, Inc. on NPRM, FCC 07-57, at p. 5 ("USE' Comments").

noted, however, that the Commission's authority to modify or remove the restriction, whether a rule or policy, must be exercised only in accordance with the principles enunciated by the courts for such action.[3]

2. USE' Comments focused on an overlooked issue that is undeniably critical to the public interest evaluation, consumers' "*Carterphone*" rights to access the satellite network with devices and equipment of their own choosing, so long as such choice does no harm to the network itself.[4]

3. USE' Comments alerted the Commission to the fact that as to the satellite radio networks of the Applicants, these rights are already in jeopardy due to the Applicants' on-going practices and intentions – even while they remain separate operating entities.[5] USE' Comments emphasized the need for the Commission to address these concerns and adopt rules that - should it decide to approve the merger – will appropriately restrict the merged entity's involvement in and control over the manufacture of the satellite radio receivers consumers will need to access the satellite radio network of the merged entity.[6]

II. REPLY TO CONSOLIDATED COMMENTS

4. In their Consolidated Comment, the Applicants argue, in part, that the NPRM properly certified that the rulemaking will not have a significant economic impact on small entities since only large business operators would be subject to any ensuing rule.[7] This is not the case,

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[3] *Id.* p. 5-6.
[4] *Id.* at p. 17-24; *see also,* 47 C.F.R. Part 68.
[5] *Id.* at p. 8-11.
[6] USE' Comments pointed out that consumers' open access to the satellite radio network of each Applicant is currently being foreclosed by the practices and plans of each Applicant and warned the Commission that the problem will exist unless corrected, irrespective of the Commission's decision on the merger itself. Should the merger be approved, it must be approved subject to the condition that consumers' rights of access are guaranteed under the *Carterphone* policy. Applicants' plea that the merger not be conditioned in any way (Joint Opposition at p. 100-101) telegraphs a corporate policy that the merged entity will tolerate no restrictions on its operations and practices regardless of public interest considerations.
[7] Consolidated Comments at p. 4-5, n.15.

however, for the business operators that are and will be shut out of the receiver supply market by the Applicants' sole sourcing policies.[8] In the market segment for satellite radio equipment a host of small business enterprises will be affected should the merged entity hand pick its sole source supplier.

5. The Applicants then argue that the Commission should not ignore the market realities and the competitive and technological developments that exist today and should not rely on evidence that existed ten years ago.[9] While the Applicants correctly assume that the FCC will not "adhere blindly to regulations that are cast in doubt by new developments or better understanding of the relevant facts," they also assume the existence of decisionally significant new developments and that the Commission will also agree with them on what are the relevant facts. It is far from evident on this record that the circumstances of this market and its competitive and technological developments have changed relevant to the continuing need for the restriction on combining the Applicants' licenses. On the contrary, in regard to satellite radio receiver manufacture and supply, what has and is changing is that the market is being converted to a single source of supply that is dominated by and intended to be dominated by a single entity. As a result, even today competition in receiver design, innovation and manufacturing is being stifled, and now and in the future technology is being and will be imprisoned by this monolithic approach.

6. The Applicants argue that they have shown that their proposed transaction will serve the public interest "without harming competition in the market for audio entertainment services."[10] When viewed in the broader context of the issues presented by USE in its Comments, this statement is misleading because it ignores the market reality that competition in satellite radio as an "audio entertainment service" is being bottlenecked by the Applicants' elimination of

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[8] *See* USE Comments at p. 8-11.
[9] Consolidated Comments at p. 6.
[10] *Id.* at p. 8.

consumer choice in the devices available to access that service. Given the Applicants' history of FCC violations as duopolist competitors, the best self-enforcing mechanism to prevent future abuse is to ensure a reasonably diverse independent manufacturing sector that is not beholden to or subject to manipulation by the network provider, whether the merged entity or the existing duopolists. Independent manufacturers would not risk violating FCC emission or other technical standards and would be able to resist any efforts by the network provider to coerce complicity in future violations. Indeed, with independence, distributors and manufacturers can assist in ensuring compliance by alerting consumers and the Commission of any problems and by consumers being able to report first hand any problems.

7. The Applicants claim that the merged entity "has every incentive to do so [provide public benefits] given the wide variety of other audio entertainment providers with which it competes (sic)."[11] Yet the other audio entertainment providers with which the merged entity is said to compete do not, or cannot, artificially restrict consumer access to the devices needed to access the audio entertainment services available.

8. The Applicants argue that as a merged entity it will be "unable to raise prices or restrict output without losing customers"[12] and instead, the merged entity will be able to "offer enhanced choice and lower prices."[13] Such assertions are not credible because they are divorced from the Applicants' actual practices of restricting consumer choice to access the network through the move to sole sourcing, which sets the stage for them to raise prices through their exclusive control of the hardware for they can then raise prices.

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[11] *Id.* at p. 9
[12] *Id.*
[13] *Id.*

III. A TAILORED BAN ON MANUFACTURING IS NECESSARY

9. Just as the Commission's long-standing open network access policies have ensured consumer choice, brought the benefits of competition to the public and produced a cornucopia of innovative devices to obtain communications service, similar precedents exist to protect the public from monopoly controlled production. Originating in the Modified Final Judgment,[14] and later codified by Congress in the 1996 Telecommunications Act,[15] reasonable restrictions on a monopoly network provider's control and participation in the manufacture and distribution of network access equipment have benefited the public by maintaining competition, fostering innovation, creating diversity in design, functionality and features and keeping prices low. In order to ensure the same consumer benefits for satellite radio consumers, the Commission must impose appropriate restrictions on the merged entity should the merger be approved and on the existing licensees if the merger is not approved.

10. The dangers to competition that resulted in the ban on the Bell Operating Companies' participation in manufacturing parallel those in the instant case. As the BOCs' monopoly over the local telephone networks would have allowed them to leverage that power into other industry segments, so too will the merged entity's monopoly power over its satellite radio network allow it to leverage that power into other segments of the satellite radio industry. As USE' Comments show, the Applicants are already using their existing duopoly power to extend leverage to the design, development and distribution of satellite radio receivers.[16]

11. The means to leverage monopoly power over industry segments vary. Such power can be used to pay favored manufacturers and/or distributors hidden premiums on their equipment, to

[14] *United States v. AT&T*, 552 F. Supp. 131 (D.C.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).
[15] 47 U.S.C. § 273.
[16] USE' Comments at p. 8-13.

exact monopoly profits in the face of little or no competition, and/or to subsidize markets where, as is the case of satellite radio service pricing, there is political pressure to keep prices low. The merged entity is certain to follow the path of the Applicants as duopolists and deny access to competitive suppliers or discriminate in setting the standards to gain access. Other leveraging devices include foreclosing opportunities of competitors either through direct self-dealing or through the more subtle means of product differentiation, price discrimination, and/or delayed notification of changes in design.

12. As with any monopoly, the major issue is the ability to cross-subsidize. In regulated monopolies the ability to detect, control and eliminate cross-subsidization bedevil the most zealous of regulators. But here, the Applicants seek to be an unregulated monopoly. As such the merged entity could cross-subsidize by shifting costs incurred in competitive areas of its network operations, such as programming, breaking the link between price and cost in the market segments that support competition versus the market (network services) that is monopolized.

13. The Commission should be concerned that cross-subsidization in satellite radio can be facilitated by the manipulation of common or joint costs of operation; that is, costs which cannot be clearly attributed to one operational sector because of the complex interdependence between operating components such as satellite transmission, network configuration, servicing, and equipment functions. The dynamic nature of technological change (sure to continue in many sectors in this corner of the "tech/com" industry) will only intensify going forward. This creates yet an additional opportunity for the costs of manufacturing to be subsumed under the satellite network cost umbrella in ways that are extraordinarily difficult to detect in a timely fashion.[17]

[17] If the merged entity is able to price below its actual manufacturing costs but above apparent manufacturing cost, an ability that would go unchecked because there are no known rules that would require disclosure of these costs, cross-subsidization will disguise and thereby facilitate a form of predatory pricing which would be extremely difficult to detect under antitrust tests for predation.

For example, monopoly returns from cross-subsidization can be hidden in the form of excessive payments to management, labor, or other suppliers, or potential profits might simply be dissipated through waste because sheltered from competitive pressures, thus distorting resource allocation not only in manufacturing but in related input markets as well. Such cross-subsidization would easily frustrate the public interest goal of keeping service rates properly related to costs. The merged entity could delay the release of design information, thereby handicapping competitors in the timely production of new equipment and would be incented to make unnecessary or inefficient changes in service technology to facilitate self-preference to the ultimate detriment of the consumer who pays for what would be needless innovation.

IV. PROPOSED RESTRICTIONS ON MANUFACTURING

14. The Commission and the public are fortunate to have a roadmap on what restrictions need to be imposed to avoid the dangers enumerated above. Section 273 of the Communications Act sets forth the restrictions that should be adopted and tailored to the specific transaction and its implementation that is under consideration.

15. Section 273 permitted collaboration between the BOCs and any manufacturer during the design and development of hardware, software or combinations thereof related to the equipment to be used with their networks.[18] Section 273 further permitted the BOCs to engage in research activities related to manufacturing and to enter into royalty agreements with manufacturers.[19] These permissions appear necessary here in regard to a merged entity's dealings with its manufacturers.

Predatory pricing law has focused almost exclusively on the relationship between price and cost first discussed by Profs. Areeda and Turner in *Predatory Pricing and Related Procedures Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). *See, e.g., Matsushita Elecs. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585 (1986). Profits gained from cross-subsidization could also be used to support other modes of predation, such as excess capacity, and predatory advertising.

[18] 47 U.S.C. § 273(b)(1).

[19] 47 U.S.C. § 273(b)(2).

16. However, there must be an express ban on engaging in either the actual manufacture of the equipment to be used with the satellite radio network or in the ability to control manufacturing. That is, based on current practices, this ban must extend to a ban on engaging in the distribution and/or control of the distribution of such equipment.[20]

17. The BOCs were required to report full and complete information with respect to protocols and technical requirements for connection with and use of their network facilities and to promptly report any material changes or planned changes to such protocols and requirements and the schedule for implementation of such changes and not disclose such information only to those selected by the BOCs.[21] All that is needed here is to require the merged entity to adhere to these same principles modified to fit the particular circumstances of the merged entity's satellite radio network.

18. Next, it is required that competitive equipment suppliers have equal access to the information on protocols and technical requirements for connecting to the satellite radio network.[22]

19. Critical then to the efficacy of the restrictions and the preservation of competition in this segment of the industry, the Commission must expressly provide that the merged entity will not undertake any actions to use its monopoly power over the network to leverage control over the consumers' choice of how and with what equipment they will access the network.[23] The Commission must expressly provide that the merged entity shall not grant any preferences to any manufacturer or distributor by any means.[24] Some examples of how undue preferences can be used in this market come from actual practices of the network licensees. Based on USE'

[20] 47 U.S.C. § 273(d)(1)(B)
[21] 47 U.S.C. § 273(c)(1) and (2)
[22] 47 U.S.C. § 273(c)(3).
[23] 47 U.S.C. § 273(d)(4)(C).
[24] 47 U.S.C. § 273(d)(4)(D).

experience with these practices, the Commission must ban the ability to manipulate chips, parts and the purchasing power of the merged entity's monopoly to unduly favor any distributor or manufacturer.

V. REPLY TO RELATED ASSERTIONS IN JOINT OPPOSITION

20. Assertions were made in Applicant's Joint Opposition that are relevant to and substantively intertwined with the issues raised by the Consolidated Comments.

A. Merger Eliminates Existing Competition Between the Two Applicants

21. In their Consolidated Comments, Applicants devote section III to arguing that the record in this docket "amply demonstrates that the proposed merger is in the public interest."[25] A key tension exists between this assertion and the claims of opponents that the Applicants' proposal will result in a monopoly. The Applicants' argue that the record so far developed in this proceeding demonstrates that this is not a "merger to monopoly."[26] The premise on which this assertion is based is the Applicants' narrowed view that there is only one market involved, but one that they then define in the broad context of "audio entertainment." The Applicants proceed to knock down with ease the "straw man" they have created. While this self-serving approach is predictable, the fact is that the Applicants completely ignore the resulting elimination of the inter-service competition between the two licensees themselves and have not provided the Commission with the whole story, or with a true picture, of the how competition is being eliminated in other markets such as the hardware/equipment market that affects the all important area of consumer access to the sole satellite network that would exist after the merger.

22. The Applicants do not disclose how competition between them has in the past driven product innovation for satellite radio receivers. Historically, Sirius and XM have each employed

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[25] Consolidated Comments at p. 8.
[26] Joint Opposition at p. 35-36.

a distribution model that relied on multiple third-party distributors and manufacturers to design, import, and distribute unique radio receivers and accessories that are compatible with one of the two satellite radio services. These third parties then engaged in intrabrand competition to design top-quality, innovative products for their respective services. At the urging of Sirius and XM, they also competed "externally" to design products that would go toe-to-toe in the marketplace with products compatible with the competing satellite services. The end result for consumers was the actual delivery of and potential for a wide variety of cutting edge product designs.

23. An example of the competition between the licensees that will be eliminated, but which is not addressed by the Applicants is at the retail level, *e.g.*, through dueling rebate offers for satellite radios and accessories, other promotional efforts and competitive product bundling (for instance, selling car kits together with home receivers). Each of these offerings has the net effect of lowering prices to the consumer. A merger between Sirius and XM would eliminate the need for such competitive promotion and marketing at the retail level and thereby reduce incentives for lowering prices for consumers.

24. The question the Commission must answer is how the Applicants can maintain there is no "merger to monopoly" when the merger eliminates (1) the inter-licensee competition that spawned and supported multiple suppliers to engage in intrabrand competition to design top-quality, innovative products and to compete "externally" to design products that would go toe-to-toe in the marketplace with products compatible with the competing satellite services, (2) the need for inter-licensee competition in choosing among manufacturers/distributors, (3) the inter-licensee competition at the retail level through price-lowering incentive offers and (4) the actual delivery of and potential for a wide variety of cutting edge product designs for consumers.

25. Applicants' own actions affirm the validity of these concerns. For example, Sirius is on record as admitting that it considers XM its sole competitor. Knowledge of this arises from a suit against Sirius in New York State Supreme Court, asserting a tortious interference with contract claim.[27] This claim is based on actions taken by Sirius to prevent the Plaintiff from doing business with Kiryung Electronics, Ltd., a Korean manufacturer of, among other items, receivers compatible with the Sirius service. In response to these allegations, Sirius made the following admissions:

- "AGT makes a satellite radio receiver for XM Satellite Radio Inc. ("XM"), Sirius' only competitor in the satellite radio market."[28]
- Sirius' action "was motivated by Sirius' concern about their manufacturer doing business with a competitor closely aligned with their only rival, XM."[29]
- Sirius and AGT are competitors "even as to AGT's plan to market HD radios, because Sirius is in the satellite radio business; it has a single competitor in that business, XM; and AGT distributes receivers for XM."[30]

26. In summary, Applicants' argument that there can be no "merger to monopoly" not only ignores the other markets that are affected by the proposed merger and the merged entity's ability to discipline and control those markets as the Applicants' are currently doing, but also ignores the admission that each of the Applicants is the other's sole competitor (until they announced their intention to merge). If Sirius and XM in other fora acknowledge their singular competitive rivalry, but assert here a far more widely defined market, the credibility of the Applicants' entire position must be called into question. At a minimum, the Applicants, as

[27] *Advanced Global Technology LLC v. Sirius Satellite Radio, Inc.*, Index No. 603680/2006 (N.Y. Sup. Ct.). The record in this case shows that the suit was dismissed on motion and that dismissal is currently on appeal before the Appellate Division, First Department of the New York Supreme Court.
[28] Memorandum of Law in Support of Motion of Sirius Satellite Radio Inc. to Dismiss the Complaint at 2.
[29] *Id.* at p. 4.
[30] Reply Memorandum of Law in Support of Motion of Defendant Sirius Satellite Radio Inc. to Dismiss the Complaint at p. 3.

licensees and as applicants seeking extraordinary relief from the Commission, must be made to address these matters.

27. A corollary to the "no merger to monopoly" argument is the Applicants' assertion that barriers to entry into the "satellite radio market" do not exist, that entry into the "audio entertainment market is already occurring,"[31] and that wireless and satellite-based alternatives do or can support audio entertainment services akin to satellite radio.[32] Whatever merit these assertions have, they are irrelevant to the restrictions currently being applied, and that will be applied by the merged entity, through the sole sourcing of the supply of receivers limiting consumer options for accessing the merged entity's services. Moreover, the Applicants' assertions inappropriately commingle the "satellite radio market" with the "audio entertainment market." They are not the same as shown by the obvious fact that none of the so-called audio entertainment services involve the use of a nationwide satellite delivery system. The Commission must keep in focus that whatever it decides on the relevance of the audio entertainment choices for consumers, these do not in any way cure the current duopolists' arbitrary restrictions on consumer access to satellite radio services.

B. <u>The Spectrum Divestiture Argument Is Disingenuous</u>

28. Applicants assert that a spectrum divestiture would harm consumers (the "public interest") and the Applicants' existing investment in their current satellite platforms (the

[31] *Id.* at p. 82.

[32] *Id.* at p. 83. The Commission will note the flip-flop used by Applicants among the "satellite radio market," the "audio entertainment market" and the "audio entertainment market akin to satellite radio." It would appear to be necessary to evaluate the Applicants' claims that no merger to monopoly would occur only after these three "markets" are defined. A "satellite radio market" would clearly be monopoly controlled by the sole licensee of the entire satellite radio spectrum." Whether the monopoly in that market is ameliorated by the yet to be defined "audio entertainment market" or the "audio entertainment market akin to the satellite radio market" is the burden of the Applicants to establish by a preponderance of the evidence and the duty of the Commission to determine on the record as a whole.

licensees' financial interests).[33] It is argued that divestiture would "make roughly half of the nearly 14 million satellite radios completely inoperable, as currently deployed radios are not capable of receiving the signals of both systems."[34] The argument is not without its irony and contradictions.

29. First, the Applicants ignore their own failure to offer consumers an interoperable radio for over ten years, excusing the failure on the fact that while they claim to have done so, they, in their own discretion and without independent review, determined that the radio they claim to have developed was too expensive and would not be supported by manufacturers.[35] Secondly, the Applicants, at the same time, argue that the merger will promote the public interest by permitting the development of new technologies. Presumably, one such new technology would be an interoperable radio capable of receiving the combined spectrum the merged entity will then control. But this begs the question. What evidence is there that what the Applicants could not achieve in ten years, working in a sense on a "merged" basis (under their joint development agreement), they will now achieve if allowed to merge? The argument amounts to no more than duplicitous arm-twisting.

30. In addition, the 14 million subscribers will not be put out of service if the spectrum is divested, because another entity would undertake the use of that same spectrum and continue to

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[33] *Id.* at p. 87.
[34] *Id.* at p. 88.
[35] Consolidated Application at p. 15-16. Contrast the following statements taken for Sirius' 10-K filed with the Securities and Exchange Commission ("SEC") on March 13, 2006. – "This unified standard is also <u>intended to meet FCC rules that require interoperability of both licensed satellite radio systems</u>." And, "Our FCC license is conditioned on us certifying that our system includes a receiver design that will permit end users to access XM Radio's system. <u>We have signed an agreement with XM Radio to develop jointly a unified standard for satellite radios</u> to facilitate the ability of consumers to purchase one radio <u>capable of receiving both our and XM Radio's services.</u> <u>We believe that this agreement,</u> and our efforts with XM Radio to develop this unified standard for satellite radios, <u>satisfies the interoperability condition contained in our FCC license."</u> (Emphasis added.) The statements are contradictory. The first admits the Applicants were required by the FCC to <u>provide</u> interoperable radios. The second claims that simply executing the Joint Development Agreement and purportedly working with XM satisfied the FCC condition.

provide service in the place of one of the current licensees whose spectrum is divested. The same would happen if another company purchased one of the licensees.

31. The Applicants' argument highlights the benefits to be derived by barring the merged entity from arbitrarily controlling and restricting access to the network by prohibiting control over the design, distribution and manufacture of receivers. Requiring open access to the network by allowing competitive supply of receivers will incent development of interoperable radios and other new technologies. Similarly, divestiture of spectrum allowing a new entrant to compete with the merged entity would enhance the opportunities for technological developments in receivers and other devices. In summary, the claims of the Applicants in section III of the Consolidated Comments that the record demonstrates that the merger is in the public interest must be evaluated in light of a record devoid of any facts, much less consideration of the effects, pro and con, of spectrum divestiture, the development of an alternative licensee or the requirement for separation of provider control over network access.

C. Character and Qualification Issues

32. In opposing the arguments that certain actions of the Applicants raise character and licensee qualification issues, Applicants address the FM modulators investigation.[36] Applicants assert they will continue "to work with the Commission until this matter is resolved completely."[37]

33. It has been admitted that members of the Applicants' staff or one of the Applicant's staff deliberately ordered the manufacture of receivers outside the Commission's express

[36] *Id.* at p. 96. USE was involved in that investigation and responded to data requests issued by the Commission. USE' Comments at Exh. 1.
[37] *Id.*

specifications.[38] Having been caught, and seeking the extraordinary approval of the proposed merger, there is little doubt the Applicants will now "work with the Commission." But this self-serving assertion ignores several issues raised by the conduct of the Applicants.

34. First, a deliberate order to manufacturers to violate the Commission's technical specifications is a sound reason to divest the network monopolist from any direct involvement in the manufacturing process. Second, a deliberate violation that compromises the Applicants' adherence to Commission rules that apply to the very operations the Applicants now seek to merge is not "divorced" from the Commission's consideration of the impact on its decision in this docket, as Applicants argue in their Joint Opposition.[39] While it may be true that the Commission segregates proceedings considering rule violations in other areas of its regulatory duties, this should not be the case here. The violations that occurred relate directly to the licenses now being operated and for which specific approvals of major consequence to the public are at stake. Commission practice in other cases as cited by Applicants divorcing violations for arguably unrelated rules therefore appears to be quite inapposite to this case.

35. Finally, an issue untouched is the identity of those within the Applicants' employ who ordered the manufacture of receivers that did not comply with Commission specifications. Thus far, the persons responsible have not been publicly identified. Nor is it known whether the Commission has identified these persons. The identity of these persons should be determined and disclosed, as their continuing employment relates to the Applicants' qualifications. If the persons are in executive management, the Commission has reason to be even more concerned.

[38] Sirius' 8-K filing with the Securities and Exchange Commission made July 20, 2006, reported – "In connection with our internal review, we discovered that <u>certain Sirius personnel requested manufacturers to produce Sirius radios that were not consistent with the FCC's rules</u>. As a result of this review, we are taking significant steps to ensure that this situation does not happen again, including the adoption of a comprehensive compliance plan, approved by our board of directors, to ensure that in the future our products comply with all applicable FCC rules." (emphasis added).

[39] Joint Opposition at p. 98-99.

The Commission's actions in the past have allowed the corporate entity to remain a qualified licensee so long as the executive found to have violated Commission rules is discharged.[40] The public interest requires no less in this case, especially if the merger is to be approved.

36. Once again, the record relied on by the Applicants to demonstrate that the merger is in the public interest fatally lacks any evidence on the persons responsible for the deliberate violations of the Commission's rules, the full circumstances surrounding that violation or violations, and what, if any, disciplinary action was taken against the perpetrators. Indeed, contrary to the Applicant's assertions, the record cannot be said to establish that the public interest will be served by a merger of entities that have failed to demonstrate on that record that such tactics will not be followed in the future.[41]

VI. CONCLUSION

37. USE urges the Commission to follow what USE refers to as the well-established and recently applied *Carterfone* policies to safeguard consumer access to the satellite network of the proposed merged entity, and if the merger is not approved, to apply it to the two licensees. The principles of and need for the application of these polices applies in either case.

38. USE further urges the Commission to adopt restrictions on the participation of the merged entity or the two licensees in the manufacturing process relying on the approaches taken

[40] *In re TelePrompTer Cable Systems, Inc., Elmira, NY,* 40 F.C.C.2d 1027 (1973).

[41] The Commission would appear to have the duty to include in this record all relevant facts of its investigation of these violations and the persons responsible for them. Only then can the public comment on the facts and determine the impact such conduct has on the public interest benefits or harms of the merger. Moreover, the Commission cannot consider the deliberate violations of the FM modulator specifications in isolation from the other violations concerning antenna construction and the failure to produce a usable interoperable radio. These violations occurred under a duopoly structure, a structure permitted based on the limitations of available spectrum and the bidding process used to award the licenses that created the duopoly. The Commission's grant of licenses where only limited competition is possible will not tolerate its abuse. But as has been shown, the Applicants have already abused their duopoly position, forewarning the Commission that approval of the merger portends the likelihood of abuse of the monopoly that will be created if the merger is approved.

in regard to the Bell Operating Companies to ensure the benefits to competitive supply of satellite receivers and the development of new technologies to use with the satellite radio network(s) after a decision is made on the proposed merger.

Respectfully submitted,

U.S. Electronics, Inc.

By ______________________________
Charles H. Helein
Their Counsel

Helein & Marashlian, LLC
The CommLaw Group
1483 Chain Bridge Road, Suite 301
McLean, VA 22101
703-714-1301
chh@commlawgroup.com