



## The CommLaw Group

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September 21, 2007

### Via ECFS

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

***Re: MB Docket No. 07-57***

Dear Ms. Dortch:

On September 19, 2007, an ex parte meeting was held with the following members of the professional staff engaged in consideration of Media Bureau Docket No. 07-57, to wit: Roy Stewart, William Freedman, Marcia Glauberman, and Rosalee Chiara of the Commission's Media Bureau; Jim Bird, Ann Bushmiller and Joel Rabinovitz of the Commission's Office of General Counsel; Bruce Romano of the Commission's Office of Engineering and Technology; and Gardner Foster, David Strickland, Jerry Duvall and Shabnam Javid of the Commission's International Bureau.

The meeting was attended by the following representatives of U.S. Electronics, Inc., New York, New York ("USE"): Messrs. Andrew Lowinger, President and CEO, and Bill Acevedo, Operations Manager, B. Jay Cooper, Deputy Managing Director, Washington, D.C. Office, APCO Worldwide, Inc. and Taj Meadows, Associate, APCO Worldwide, Inc., Washington, D.C. and the undersigned, Senior Partner, Helein & Marashlian, LLC, McLean, Virginia, communications counsel to USE.

In the meeting, Mr. Lowinger provided additional information on the issues USE raised in its Comments filed in the Docket on August 10, 2007 and in its Reply Comments filed August 24, 2007. Mr. Lowinger's information is based on his and his company's first-hand experience with the current impact of the Applicants' (as duopolists) sole sourcing practices on the manufacturing and supply of satellite radio receivers and how that impact would be extended after the merger should the Commission grant the consolidated application.

Relying on his years experience in the design, development, and distribution of network communications devices and the manufacturing process that produces such devices, Mr. Lowinger pointed out that controlling the supply of network access devices through sole sourcing dictated by the network operator will harm consumers and competition.

It was emphasized that the move to control the supply and distribution network by the Applicants as duopolists is already taking place or well on its way there with adverse effects presently being imposed on the public interest. This adverse impact will only become more serious if the merger is approved without conditions imposed.

Concern was also expressed that the public interests at stake in the context of sole sourcing is one that has not been at the center of the debate over the effects of the merger. The debate thus far has centered on the issues raised by the horizontal integration arising from the merger, overlooking perhaps the more important question of the vertical integration that would result from the merger unless properly considered and dealt with by the Commission.

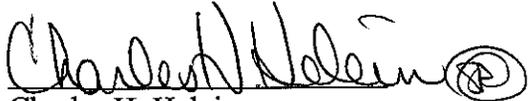
It was made clear that USE was raising its concerns irrespective of how the Commission ultimately rules on the merger. Whether the Commission decides to approve or deny the merger, the point was made that there is a need for conditions, or regulatory requirements, that eliminate the present and protect against the future harms that sole sourcing dictated by the network operator cause. Here, reference was made to the need to apply the open access policies of the Commission, established 50 years ago, in the *Hush-a-Phone* and *Carterfone* decisions and not long thereafter codified in Part 68 of the Commission's rules, and most recently reaffirmed by the Commission as to wireless networks and cable set top converters.

In response to questions, some specific conditions were discussed in the meeting including barring a network provider from directly or indirectly engaging in the manufacture of satellite radio receivers or other digital devices that can access the satellite radio network; barring the network provider from interfering with the design, manufacture or distribution of satellite radio receivers or other digital devices that can access the satellite radio network; barring the network provider from arbitrarily discriminating against any supplier by manipulating its control and knowledge of its network; requiring the network provider to publish and make available information on the technical requirements and specifications of the network, including reasonably advanced notice of any changes; and imposing the FCC's policy that the public has the right to use any device to access and make use of the satellite radio network, consistent with the principles established in the *Hush-a-Phone* and *Carterfone* decisions -- as codified in Part 68 of the FCC's Rules, 47 C.F.R. Part 68.

A question arose about the response the Applicants made to USE's position against sole sourcing and the need to condition the merger as expressed in its Comments and Reply Comments. The answer was that the Applicants have not attempted to rebut these concerns.<sup>1</sup>

Pursuant to Section 1.1206 of the Commission's Rules, this letter is submitted via ECFS for inclusion in the public record of these proceedings, with email copies to those listed below.

Respectfully submitted,

By:   
Charles H. Helein  
Counsel for U.S. Electronics, Inc.

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<sup>1</sup> In the ex parte report filed August 31, 2007 that requested the meeting that was then held September 19, 2007, the Applicants' stated position on imposing conditions on the merger was described as based on the self-serving assertion that USE's Comments (and others as well) seek certain conditions on the merger "because they are clearly designed to advance the companies' business interests to the detriment of consumers ..." Consolidated Reply Comments of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc., MB Docket No. 07-57, at n. 22, p. 6, August 27, 2007. The Applicants' dismissive response to the issue of merger conditions leaves un-refuted the facts on which they are based, and leaves unaddressed the established precedents on which USE relies to support its request for Commission action to condition the merger in furtherance of those precedents and the core public interests they represent.