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September 25, 2007

Via ECFS

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

Re: MB Docket No. 07-57

Dear Ms. Dortch:

On September 24, 2007, an ex parte meeting was held with Commissoner Jonathan S. Adelstein and Rudy Brioche, the Commissioner's Legal Advisor for Media Issues concerning issues, identified hereinafter, raised by the pending consolidated application of XM Satellite Radio, Inc. and Sirius Satellite Radio, Inc. ("Applicants") for approval to transfer control of licenses and to merge the two companies into a single satellite radio network. The consolidated application is being considered in Media Bureau Docket No. 07-57.

The meeting was attended by the following representatives of U.S. Electronics, Inc., New York, New York ("USE"): Messrs. Andrew Lowinger, President and CEO, Hon. Donald Riegle, Chairman Government Relations, APCO Worldwide, Inc., Washington, D.C. and the undersigned, Senior Partner, Helein & Marashlian, LLC, McLean, Virginia, communications counsel to USE.

In the meeting, additional information was provided on the issues USE raised in its Comments and Reply Comments, information based on first-hand experience with the Applicants' (as duopolists) sole sourcing practices and how, should the Commission grant the consolidated application without addressing these practices, they would adversely affect the public interest.

It was acknowledged that the public interests at risk from sole sourcing had not until now been recognized as a central point in the debate over the effects of the merger. The debate until now has centered on the issues raised by the horizontal integration arising from the merger, overlooking the threat posed by the vertical integration that results from sole sourcing. The issue of vertical integration having been identified, reference was made to the open access policies that the Commission established 50 years ago in its *Hush-a-Phone and Carterfone* decisions and that were later codified in Part 68 of the Commission's rules, and even more recently, reaffirmed by the Commission in regard to wireless networks and cable set top converters.

To address the potential harms arising from the vertical integration sole sourcing creates, merger conditions were proposed and set forth in a briefing memorandum that was provided at the end of the meeting. A copy of that memorandum is attached hereto.

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 (sa)
Charles H. Helein
Counsel for U.S. Electronics, Inc.

cc (via email):
Hon. Jonathan S. Adelstein, Commissioner (jonathan.adelstein@fcc.gov)
Rudy Brioche, Legal Advisor for Media Issues, Office of Commissioner Adelstein (rudy.brioche@fcc.gov)

Ensuring Competition in the Satellite Radio Receiver Market

An XM-Sirius Merger without Adequate Conditions
Will Increase Price, Stifle Innovation and Reduce Choice for Consumers

"Competition in the manufacturing and distribution of consumer devices has always led to innovation, lower price and higher quality." **FCC Chairman Kevin Martin**

Satellite radio receivers are essential hardware for people wanting to access a satellite radio network. The devices, often found in the dashboard of new cars, enable listeners to pick up a signal and access the programming offered by the satellite radio provider. Through competition, consumers benefit from more functional and feature-rich receivers at a lower cost.

While many have focused on how a monopoly could impede competition, increasing subscription costs and reducing content diversity, few have addressed the following question:

Is the public interest served if access to the satellite radio network is restricted to receivers whose development, manufacturing and distribution will be in the sole control of a new monopoly or remain in the control of an existing duopoly?

Restricting Access to the Satellite Network through Sole Sourcing...

Whether it be networks for satellite radio, cable or mobile phone service, sole sourcing eliminates competition among companies that manufacture and distribute the devices that enable consumers to access those networks. Sole sourcing – when a network provider favors one manufacturer or distributor over the others -- results in higher prices, less innovation and limited options.

Sirius and XM already are exploiting their existing duopoly by moving towards exclusive agreements with their respective hardware suppliers. According to Sirius' supplier, Directed Electronics, Inc., Sirius has enlisted DEI as its "exclusive retail hardware partner." It is understood that XM is negotiating an exclusive arrangement with Audiovox, one of its current hardware suppliers. Moving to a single network provider could exacerbate the 'sole sourcing' problem, thereby reducing competition to the detriment of consumers.

. . . Increasing price for consumers

By eliminating competition, through sole sourcing or other means, efficiencies are not always realized, and the savings spurred by such competition do not always reach the consumers.

- Sirius already has demonstrated its inability to pass along to consumers savings based on innovation or efficiencies. For instance, there has been no reduction in the retail price of new generation "plug and play" receivers – even though they are made with improved, less expensive chipsets and share common components with other models, among other things.
- Sirius and XM plan to combine their services and offer an a la carte option that includes channels from both providers. This could require new hardware to receive signals from both companies and possibly new in-vehicle antennas for some existing customers -- an added expense that would likely be borne by all consumers, even those not opting for the a la carte offering.

. . . Stifling innovation and reducing choice for consumers

Sole sourcing enables Sirius and XM to control and dictate the development, manufacture and distribution of receivers. And, it lets them limit the choice of the technology that is built into the receivers.

- By pursuing a sole source philosophy, Sirius and XM could undermine non-favored suppliers and, in the process, stifle the development of new generation satellite radio receivers. In fact, even in today's duopoly, the shift to exclusive hardware providers means competitors already are being prevented from entering the marketplace.
- Sole sourcing effectively limits the incentive to develop innovative hardware because non-favored providers are unable to compete equally against the duopolists' favored providers. As a result, there are fewer choices for consumers. Also, there is an increased risk that quality control problems, production defects or regulatory compliance issues can cripple the network providers' ability to deliver new products.
- One of the first products Sirius introduced under the shift to an exclusive distributor – the S50 – is an example of a dilemma sole sourcing can create for consumers. The S50 had multiple software and hardware problems that resulted in elevated consumer returns and delayed the replacement of the defective units. With competition, consumers would have had the opportunity to replace their S50 or buy other hardware instead.
- When network providers limit available satellite hardware to exclusive manufacturers, new car buyers are deprived of user-friendly features. For instance, earlier store-bought, 'plug and play' receivers allowed users to time shift the broadcasted content or receive alerts notifying them when their favorite content or sports team is playing on another channel. But, new car buyers do not benefit from these features, nor do they have the ability to transport the receiver from the car to the home or office.
- XM currently markets the Passport or Mini Tuner chipset that can be plugged into compatible devices such as portable navigation units and home stereos – turning those devices into XM receivers. If there were competition, and the chipset were widely available, carmakers could potentially spend less installing expensive hardware not ultimately used by many new car purchasers; consumers would not be forced to buy additional subsidized equipment and pay additional subscription fees if they wanted to receive satellite programming outside their new cars; and, service providers could potentially recycle 'free trial' chipsets.
- Through sole sourcing, a network provider can further limit consumer options by withholding adequate supplies of hardware from retailers or by providing supplies that differ in diversity or quality.

Repeating the Past...

As a policy, the Commission looks at an applicant's past practices and its compliance record to determine how the public interest may be affected in the future. The record here shows:

- Both Sirius and XM constructed numerous towers and antennas at unauthorized sites or transmitted above allowable levels;
- Both Sirius and XM have failed to make available an interoperable radio almost ten years after the FCC arguably required them to do so;
- Sirius refused to honor consumer rebates that were offered as part of a 2004 satellite receiver promotion, rejecting a large majority of those that were tendered;
- Sirius not only exceeded FCC emission standards, it also publicly admitted that its own personnel deliberately instructed its manufacturers to exceed the FCC's limits; and,
- Sirius claims that new subscribers to the merged entity will be able to use their existing hardware to access additional channels, yet some existing hardware is incapable of accessing all the content that is currently being disseminated.

Sole Sourcing -- Violating a 50 Year Policy of Open Access...

A merger that results in the service provider restricting network access would fly in the face of 50 years of FCC policy and precedent. In *Hush-a-Phone* and *Carterfone*, the FCC recognized the benefits of allowing consumers the ability to access the network via equipment produced by entities other than the network operator.

In these decisions, AT&T sought to impose a tariff on consumers who wanted to attach certain devices to their network. The FCC struck down the tariff as unreasonable and discriminatory because the devices filled a need and their use did not adversely affect the telephone system.

In fact, the FCC has stated that allowing competition in the hardware markets, or 'open sourcing', has benefited the consumer through "availability of new equipment features, improved maintenance and reliability, improved installation features including ease of making changes, competitive sources of supply, option of leasing or owning, and competitive pricing and payment options."

And, according to FCC Commissioner Michael Copps, 'open sourcing' has "brought consumers the basic freedom to attach any device to the network as long as it causes no network harm. And look at its benefits – fax machines and computer modems are direct descendants of this principle."

The FCC continues to embrace this policy today – relying on it to support open access to the internet, open access to spectrum auctioned to the wireless industry, and most recently open access in the cable set-top market.

What's Needed...

Regardless of whether the merger is approved, Sirius and XM should be required to provide open access to their network for the benefit of all satellite radio listeners. Such a condition is necessary to ensure consumer choice, favorable pricing, and innovation. Among other things, any merged entity should:

- Be barred from directly or indirectly engaging in or interfering with the design, manufacture or distribution of satellite radio receivers or other digital devices that can access the satellite radio network;
- Publish and make available information on the technical requirements and specifications of its network, including reasonably advanced notice of any changes to any qualified and willing partner;
- Not interfere with consumers' access to, or their choice of, devices by which to access the network;
- Comply with rules and regulations that provide for the compatibility of receivers to ensure that the satellite radio-using public has reasonable and non-discriminatory access to the satellite radio network;
- Comply with 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; and importantly,
- Be subject to an independent monitor who will ensure compliance with FCC rules and regulations.

Flip-Flopping on Who the Competition Is...

Today, all bandwidth devoted to satellite radio is shared between XM and Sirius. When this bandwidth was originally sold in 1997, the FCC's rulemaking prohibited the two companies from combining their licenses to promote competition.

At the time, Sirius said that multiple providers would be critical to "assure intra-service competition." And, it argued that diversity in programming would be maintained due to "compelling market-based incentives" to differentiate content.

But, today Sirius has retreated from this position. Instead, Sirius and XM now argue that they are competing with other audio entertainment providers – such as terrestrial radio, Ipods and online streaming audio that did not exist ten years ago.

Even if one were to assume that the market is as large as Sirius and XM now suggest, their ability to engage in sole sourcing as a monopoly would give them significant advantages at the retailer level over their so-called 'competitors'. That is, the merged entity – as the only entity providing satellite radio product to retailers -- would be in a position, absent conditions, to virtually dictate their own terms to retailers to the disadvantage of those 'competitors.'

Interestingly, although Sirius now claims that there is a new and much larger market, that is not how Sirius recently defined the market in litigation in a New York court, where it described XM as its "only rival" and "only competitor in the satellite radio market."

Conclusion...

The public interest imperative is clear -- consumers of satellite radio services are entitled to the same rights as every consumer of any other wireless service and network.

A satellite network provider must be prohibited from limiting the availability of satellite radio receivers to those designed, developed, manufactured and distributed by the provider directly or through its designated suppliers. Such a condition would help to enhance competition, and in the process, benefit consumers through lower prices and more innovation.