Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

NATIONAL ASSOCIATION OF BROADCASTERS'
PETITION TO DEFER ACTION

The National Association of Broadcasters ("NAB"), by its attorneys, hereby petitions the Commission to defer action on the pending merger application of XM Satellite Radio Holdings Inc. ("XM") and Sirius Satellite Radio Inc. ("Sirius") (collectively "Applicants"). Specifically, NAB requests that the Commission formally toll its 180-day "time clock" until NAB has a reasonable opportunity to review and supplement the record with certain documents relating to the serious apparent wrongdoing by XM and Sirius "executive and senior-level employees" regarding the operation of FM modulators/transmitters and/or terrestrial repeaters.[1] As discussed

[1] Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, to David H. Solomon, Counsel to NAB, FOIA Control No. 2007-235 – Sirius Records at 4 (June 18, 2007) ("*Sirius Records Order*"); Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, to David H. Solomon, Counsel to NAB, FOIA Control No. 2007-235 – XM Records at 4-5, 7 (June 18, 2007) ("*XM Records Order*").

below, there is a compelling public interest in having these documents considered and evaluated in the context of the merger proceeding.

INTRODUCTION AND SUMMARY

On March 22, 2007, NAB filed a Freedom of Information Act ("FOIA") request seeking records that XM and Sirius submitted to the Commission in connection with various letters of inquiry.[2] The records relate to Applicants' compliance with Commission rules governing FM modulators/transmitters used with their satellite Digital Audio Radio Service ("satellite DARS") systems, and, in XM's case, compliance with Commission rules and authorizations regarding terrestrial repeaters.[3] The Enforcement Bureau (the "Bureau") concluded that certain of these records were not subject to an applicable FOIA exemption and therefore should be available for public inspection (subject to certain redactions).[4] The Bureau's decisions, however, remain subject to various applications for review and the Bureau has not yet released the relevant records.[5]

The records ordered to be released by the Bureau are central to the Commission's decision regarding whether grant of the merger application is in the public interest. At the core of Applicants' assertions that the proposed merger would serve the public interest are a series of

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[2] *See* Letter from David H. Solomon, Wilkinson Barker Knauer, LLP, Counsel to NAB, to Anthony J. Dale, Managing Director, Federal Communications Commission (March 22, 2007).

[3] *Id.*

[4] *See Sirius Records Order*; *XM Records Order.*

[5] *Review of Freedom of Information Action*, FOIA Control No. 2007-235 – XM Records, Application for Review of XM Radio Inc. (filed July 2, 2007); Application for Review of Four Employees of XM Radio Inc. (filed July 2, 2007); Application for Review of Three Employees of XM Radio Inc. (filed July 2, 2007). *Review of Freedom of Information Action*, FOIA Control No. 2007-235 – Sirius Records, Application for Review of Sirius Satellite Radio Inc. (filed July 2, 2007); Application for Review of John Does 1 and 2, Present or Former Corporate Officers of Sirius Satellite Radio Inc. (filed July 2, 2007).

promised new service bundles with new pricing structures.[6] NAB, however, has argued in some detail that Applicants cannot be relied on to keep these promises, in light of their history of violations of Commission rules and authorizations.[7] It is therefore essential that the Commission determine whether it can rely on Applicants to adhere to their promises, both in letter and spirit, as part of its evaluation of the proposed merger. The records the Bureau has ordered to be released go directly to this issue and therefore should be made part of the record of this proceeding.

DISCUSSION

There can be no doubt that, in light of their history of non-compliance, the question of Applicants' reliability is directly relevant to the Commission's review of the proposed merger, separate and apart from basic character qualifications issues. In the *EchoStar/DirecTV Merger Order,* the Commission found that EchoStar's compliance record "suggests a resistance to taking steps to serve the public interest that do not serve the company's view of its own private economic interest[,]" and therefore concluded that EchoStar's "history of past conduct will be taken into account in assessing the likelihood that potential beneficial conduct will occur in the absence of private economic incentives."[8]

In this case, NAB has already presented evidence that Applicants have engaged in a pattern of serious Commission rule violations that "suggests a resistance to taking steps to serve

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[6] *See* Joint Opposition to Petitions to Deny and Reply Comments of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. at ii, 10-19 (July 24, 2007). It is important to note that these promises are not binding in any way; Applicants have said explicitly that they can change any of the offers at issue at any time of their choosing. *Id.* at 13-14 n.31.

[7] Petition to Deny of the National Association of Broadcasters at 50-58 (July 9, 2007) ("NAB Petition to Deny").

[8] *Application of EchoStar Communications Corporation (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations)*, 17 FCC Rcd 20559, 20579 ¶ 35 (2002) ("*EchoStar/DirecTV Merger Order*").

the public interest that do not serve the company[ies'] view of [their] own private economic interest."[9] In fact, the available evidence suggests that at least some of Applicants' violations were intentional and that "employees who were involved in the decision . . . or were aware of potential non-compliance" were "executive and senior-level employees."[10] NAB expects that the additional factual material the Bureau has ordered to be released will shed further light on the nature and scope of the Applicants' malfeasance and the role of senior management.[11] Without that evidence in the record, the Commission cannot make an informed decision regarding whether the Applicants can be relied on to keep their promises and comply with any conditions the Commission may impose, as required by the *EchoStar/DirecTV Merger Order*.

Given the importance of this material to the instant proceeding, NAB has had a reasonable expectation that it would have the opportunity to review the released documents and comment on the impact of the documents on the merger application. The Bureau ordered release of relevant information on June 18, 2007 and, consistent with the expedited procedures governing FOIA requests, parties filed applications for review within 10 (rather than the typical 30) days.[12] NAB filed its opposition on July 17, 2007 and the Commission's rules provide that the Commission "will make every effort to act" on such applications for review within 20

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[9] *Id.*

[10] *See* NAB Petition to Deny 52-58; *Sirius Records Order* at 4; *XM Records Order* at 4-5, 7. *See also* Sirius Satellite Radio Inc., Quarterly Report (Form 10-Q), at 35 (Nov. 8, 2006) ("certain SIRIUS personnel requested manufacturers to produce SIRIUS radios that were not consistent with these rules."); Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, to Patrick L. Donnelly, Executive Vice President and General Counsel, Sirius, File No. EB-06-SE-250 at 3 (Aug. 7, 2006) ("In its response to our June 20, 2006 LOI, Sirius stated that 'a number of Sirius' product management and engineering managers decided in July 2004 to increase emissions levels to be competitive with XM and other products transmitting to car radios, and requested that manufacturers make necessary changes.'").

[11] *See* NAB Petition to Deny at 56 n. 214 ("Those materials will likely shed further light on the violations and the impact on the reliability of the Applicants. NAB will supplement the record as appropriate when it receives those documents.").

[12] 47 C.F.R. § 0.461(h)(4)(i)(1).

working days.[13] Adherence to this procedural schedule would have enabled NAB time to review the released documents and to submit relevant documents as part of this proceeding. With the passage of time, however, it is no longer clear that such an opportunity still exists. NAB therefore urges the Commission to stop the 180-day "time clock" for this merger until such time as NAB receives the records at issue and has an opportunity to supplement the record with relevant material.[14]

Such a delay is necessary for the Commission to ensure procedural fairness and to ensure that any Commission order in this matter will be sustainable on appeal. Relevant case law holds that "petitioners to deny generally must be afforded access to all information submitted by licensees that bear upon their application."[15] Similarly, the Commission will provide a petitioner to deny "an opportunity to file or supplement its petition to deny . . ." where information claimed to be confidential is made available in a licensing proceeding.[16] The Commission has applied this requirement in merger proceedings,[17] as well as in connection with information obtained in

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[13] 47 C.F.R. § 0.461(k). The Commission has expressed "regret" for delays in processing such applications for review and has committed to "process such requests more expeditiously" than it has sometimes done in the past. *See William McConnell*, 18 FCC Rcd 26371, 26376 ¶ 9 (2003).

[14] To the extent the Commission grants any of the applications for review, relevant documents should be made available to NAB in this proceeding pursuant to a protective order.

[15] *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24837 ¶ 33 (1998), *on recon.*, 14 FCC Rcd 20128 (1999) (citing, *inter alia, Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC,* 595 F.2d 621, 634 (D.C. Cir. 1978)).

[16] *Id.* at 24839 ¶ 34. The Commission suggested that the period for such supplementation of the record would generally be 30 days. *Id. See generally Bilingual,* 595 F.2d at 632 ("the FCC must . . . afford petitioners . . . reasonable time in which to comment on or rebut newly submitted evidence . . . . Only under such procedures can petitioning groups be assured the meaningful opportunity to participate mandated by our decisions.").

[17] *Applications of Bell Atlantic New Zealand Holdings, Inc. and Pacific Telecom, Inc.,* 18 FCC Rcd 19738, 19738-9 ¶ 5 (IB 2003). More generally, Commission staff has routinely provided additional time for comment when supplemental information is entered into the record of merger proceedings. *See Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, 13 FCC Rcd 4527, 4528 ¶ 3 (CCB 1998); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses by Adelphia Communications Corp., Time Warner Cable Inc., and Comcast Corp.,* 20 FCC Rcd 11145, 11146 ¶ 3 (MB 2005);

response to a FOIA request that was relevant to a rulemaking proceeding.[18] Moreover, as a general matter, the Commission has often tolled the 180-day clock for various reasons.[19]

This precedent compels the conclusion that a delay in the merger proceeding to allow the release of the documents in question is warranted. NAB has directly raised the issue of the parties' violations in connection with Applicants' reliability. Thus, to the extent the Commission relies on any of Applicants' promises to grant the merger application, it must address NAB's arguments on this point. In doing so, the Commission necessarily will have to rely on the details of the violations and involvement of senior management that are contained in the documents the Bureau has ordered to be released. There is no mechanism other than deferring action in this proceeding that can ensure that the Commission lawfully considers this relevant information in the context of the merger proceeding. Simply put, the Commission cannot in this proceeding rely on information produced in the enforcement proceedings without the parties to this proceeding having an opportunity to review and comment on that evidence. As the D.C. Circuit has recognized "reliance on extra-record factual evidence without opportunity to the parties to inspect and address [is] denial of due process."[20]

Application for Consent to Transfer of Control Filed by AT&T Inc. and BellSouth Corp., 21 FCC Rcd 11490 (WCB 2006).

[18] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 17 FCC Rcd 23658, 23659 ¶ 3 (CGB 2002).

[19] *See* Public Notice, *180-Day Clock Stopped On Consideration of Applications for Consent toTransfer of Control Filed by Verizon Communications Inc. and MCI, Inc.*, 20 FCC Rcd 14727 (WCB 2005); Public Notice, *180-Day Clock Stopped on Consideration of Applications for Consent to Transfer of Control Filed by SBC Communications Inc. and AT&T Corp.*, 20 FCC Rcd 14579 (WCB 2005); Public Notice, *Media Bureau Action; Media Bureau Seeks Comment on Proposed Insulation and Divestiture of AT&T's Interest in Time Warner Entertainment, L.P.*, 2002 FCC LEXIS 3981 (MB 2002); Public Notice, *EchoStar Communications Corporation and Hughes Electronics Corporation Seek FCC Authority to Launch and Operate New EchoStar 1 DBS Satellite*, 17 FCC Rcd 7246 (IB 2002).

[20] *Ralpho v. Bell*, 569 F.2d 607, 638 n.160 (D.C. Cir. 1977) (discussing *Morgan v. United States*, 304 US. 1 (1938) and *Ohio Bell Tel. Co. v. Public Utils. Comm'n.*, 301 U.S. 292 (1937)); *id.* at 628 ("An opportunity to meet and rebut evidence utilized by an administrative agency has long been regarded as a primary requisite of due process."). *See also Garret, Andrews & Letizia, Inc.*, 88 FCC 2d 620, 623-34 ¶ 7

Finally, the Commission must be particularly careful here to ensure that all relevant information is placed in the record and that parties have an opportunity to evaluate it. The proposed merger of XM and Sirius – if granted – would be an unprecedented event in Commission history. Grant of the merger would give a single entity control over the entire spectrum assigned for a particular service, contrary to the Commission's long-standing pro-competition spectrum policy and a Commission rule specifically designed to prohibit such a result in the satellite DARS spectrum.[21] Similarly, grant of the merger would require the Commission, also for the first time, to deviate from long-standing Commission precedent and antitrust law in defining the relevant market and analyzing the competitive effects of the merger.[22] Consequently, the Commission must make every effort to assure itself that it can confidently rely on the Applicants to comply with promises it has made regarding the alleged consumer benefits of the proposed merger before even considering granting such a merger based even in part on such promises.

CONCLUSION

For the reasons set forth above, NAB respectfully requests that the Commission defer action on the XM/Merger application and formally toll the 180-day "shot clock" until such time

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(1981) (If information "is utilized by the agency in its disposition of the case, due process requires that the opposing parties be afforded an opportunity to meet and rebut such evidence.") (citing *Ralpho v. Bell*).

[21] *See, e.g.,* NAB Petition to Deny at 6-11; National Association of Broadcasters' Response to Comments at 4-6 (July 24, 2007); National Association of Broadcasters' Reply to Opposition at 3-4; Comments of the National Association of Broadcasters at 7-13 (Aug. 13, 2007).

[22] *See* NAB Comments at 5-23; Reply Comments of the National Association of Broadcasters at 1-8 (Aug. 27, 2007).

as the Commission releases the documents approved for release in the *Sirius Records Order* and the *XM Records Order.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sarah D. Gutschow, hereby certify that, on this 9th day of October, 2007, copies of the forgoing National Association of Broadcasters' Petition to Defer Action were delivered via U.S. first class mail, postage prepaid to the following:

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