



## The CommLaw Group

HELEIN & MARASHLIAN, LLC  
1483 Chain Bridge Road  
Suite 301  
McLean, Virginia 22101

Telephone: (703) 714-1300  
Facsimile: (703) 714-1330  
E-mail: [mail@CommLawGroup.com](mailto:mail@CommLawGroup.com)  
Website: [www.CommLawGroup.com](http://www.CommLawGroup.com)

Writer's Direct Dial Number  
703-714-1301

Writer's E-mail Address  
[chh@commlawgroup.com](mailto:chh@commlawgroup.com)

October 9, 2007

### **Filed Electronically via ECFS**

The Honorable Kevin Martin  
The Honorable Michael J. Copps  
The Honorable Jonathan S. Adelstein  
The Honorable Deborah Taylor Tate  
The Honorable Robert M. McDowell  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

***Re: In the Matter of the Consolidated Application for Authority to Transfer Control of XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc., MB Docket No. 07-57 (Merger Docket).***

Dear Mr. Chairman and Commissioners:

On behalf of U.S. Electronics, Inc. New York, New York ("USE"), this written *ex parte* is being submitted to place in the record and to bring to your immediate attention new and unaddressed issues that as of now are not, or do not seem to be, included in the decision-making matrix and that, therefore, require the interruption of the standard time line for scheduled completion of action on the Consolidated Application for Authority to Transfer Control of XM Satellite Radio Holdings Inc. ("XM") and Sirius Satellite Radio Inc. ("Sirius"), MB Docket No. 07-57 (Merger Docket).<sup>1</sup>

The substantive issues that require adjustment of the standard time line are discussed in more detail hereinafter, but for convenience are summarized as follows.

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<sup>1</sup> The standard 180-day time line in this proceeding is now in its 122<sup>nd</sup> day. The decisional timeline can be interrupted and the procedure for informing the public is to change the timeline's color used to depict the passing of days from green to red.

Vertical monopoly/vertical integration of the equipment submarket/network access.

Unresolved issues of Applicants' rule violations.

Unresolved issues of Applicants' compliance with requirement to provide interoperable radios.

Issues raised by the handling of *ex parte* communications.

Issues raised by the release of information on the scheduling of agenda items.

Delays in access to decision-makers

Vertical Monopoly/Network Access. Because of the threat to the public's right to a rich variety of devices by which to access a satellite radio network, USE filed comments in which it brought to the FCC's attention an issue of profound importance which had not previously been raised. The issue concerns the adverse impact of the proposed merger that would result in the monopolization of the sub-market for consumer devices to access the satellite radio network of the merged entity.

In particular, USE has pointed out that the vertical integration of the access device market resulting from the merger would deprive consumers of product choice, innovation in design, functionality and features, would result in higher prices, restricted inventories, and limited distribution alternatives, and have a profound adverse impact on retail. USE has also shown how dominance of the equipment submarket can be used to manipulate profits to the detriment of consumers. For example, while the Commission focuses on ensuring subscription rates are not increased, the merged entity's sole sourcing will allow it to price equipment to subsidize lower subscription rates rendering Commission oversight of that consumer interest of limited or no benefit.

USE is gratified that in some of its *ex parte* presentations, certain Commissioners and/or their staffs have been alerted to the existence of the vertical monopoly or vertical integration issue that exists alongside of the horizontal monopoly issue. And, in some, USE received the impression that the seriousness of the issue was recognized. However, at this juncture, this issue has not been given official attention on the record and it continues to be an issue whose existence and impact has not been opened to direct public comment or analysis.

And finally, USE has argued that such results are in direct violation of the open network access policies that have been extant for over 50 years and which have been codified in Part 68 of the FCC's Rules. Moreover, these policies were codified once again as to cable television set-top converters by Congress in Section 629 of the Telecommunications Act of 1996, 47 U.S.C. §629, the FCC's rules implementing that Congressional directive, 47 C.F.R. §76.1200 et seq., and the Court's affirmation of the FCC's implementing regulations in *Charter Communications Company v. FCC*, 460 F.3d 31 (D.C. Cir. 2006).

Unresolved Rule Violations. The record in this Docket contains no information on the actual status of several rule violations.

Tower and emission violations: The record discloses that the Applicants have violated the Commission's rules on tower/antenna locations and emission standards. These violations have been subject to investigation by the Enforcement Bureau and several parties have argued that these violations reflect on the character and candor qualifications of the Applicants. But, despite the fact that the existence of these violations has been a known fact for over a year, the findings produced by the Bureau's investigation not only have not been released to the public in general but also have not been made a part of the record in this Docket. Disturbingly, the

exclusion of the Enforcement Bureau's findings from inclusion in the record in this Docket is the Applicants' opposition thereto and the failure of the Commission to rule on that opposition.

Interoperable radio violations: Also unresolved is the issue of whether the Applicants violated the Commission's requirement to produce interoperable radios. This issue has been directly presented to the Commission in a separately filed Petition for Declaratory Ruling. But according to *ex parte* filings on this Petition, this issue has been transferred to the Enforcement Bureau and relabeled a complaint. No known rule or decision has been cited as authority for the conversion of this Petition to a complaint. Oddly, no reference appears to have been made to the Commission's general authority to order its processes and procedures to meet the demands of its statutory mission. But even assuming that this authority accounts for the conversion of the Petition to a complaint, the possible substantive harm of doing so is nowhere acknowledged, much less resolved. The harm is that the record in the merger proceeding does not contain an analysis of the issue or how it may bear on the qualifications of the Applicants. Nor is there an analysis of the Applicants' duty to prove by a preponderance of the evidence that the grant of the applications for transfer of control will serve the public interest if, in fact, the actual availability of operational interoperable radios was a required condition subsequently affecting XM's and Sirius' continuing rights to hold their licenses.

Ex Parte Problems. Adherence to the *ex parte* rules appears uneven. The appearance of unevenness arises because of delays in posting certain *ex parte* filings<sup>2</sup> and in the content of some filings.

Posting. First, there appears to be an issue of selective or delayed posting of *ex parte* filings. USE's *ex parte* filings of September 25, 2007, reporting on meetings with Commissioners Capps and Adelstein, were not posted on line within the normally applicable time frame of same day or the following business day (the "Sept. 25<sup>th</sup> *Ex Partes*"). Since then, these *ex parte* reports of USE have appeared on line, and while the exact posting date and time are not available, it is believed that posting occurred October 3, 2007.

Second, when it was discovered that the Sept 25<sup>th</sup> *Ex Partes* had not been posted within the normal cycle of one or two business days, inquiry was made of the staff to determine the reasons for this. Initially, the responses provided for the failure to post in a timely manner were not credible, *e.g.*, it was stated that there were "technical" problems with the system, at first unidentified, but later it was said to be caused because the letters were posted in PDF instead of Word. On the other hand, no technical problems appear to have prevented the timely posting of the September 27<sup>th</sup> and 28<sup>th</sup> *ex parte* reports filed by XM and Sirius, respectively, only a few days later on September 28<sup>th</sup> in PDF.

Third, although later attempts were made to assure USE that the failure to timely post the Sept 25<sup>th</sup> *Ex Partes* was not in any way intentional, the following factors detract from those assurances. First, USE was informed that the USE October 2<sup>nd</sup> letters, informing the offices of the Chairman and Commissioners Tate and McDowell about the failure to post the 25<sup>th</sup> *Ex*

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<sup>2</sup> It may be argued that delays in posting *ex parte* reports are harmless error and simply corrected. But, when time is of the essence, as it is in this proceeding, delay in sharing opinions, facts and arguments with all interested parties is cause for concern and gives the appearance of impropriety. When the *ex partes* that are delayed or not posted are those merely questioning aspects of the merger or raising additional issues and not even in opposition to the merger, there is a heightened sense of concern created about the neutrality of the Commission's processes.

*Partes*, would not be posted because “they did not relate to the merger issues” in the MB 07-57 Docket. Through other sources, USE has been informed that other *ex parte* reports had not been routinely or timely posted and the impression created that a pattern of selective posting was being followed.

Content. In addition to the potential of selective posting of *ex partes*, there is evidence that the Applicants themselves are not complying with the *ex parte* rules when reporting their meetings with decision-making personnel. Reference is made to the September 27 *ex parte* report of XM and the September 28 *ex parte* report of Sirius Satellite Radio Inc. (Sirius). These reports are nearly verbatim and report a wide range of subjects discussed by the highest-ranking executives of both XM and Sirius. However, they appear to violate the specific requirements of the *ex parte* rules by providing a mere listing of topics addressed without describing in any way what was actually discussed about those topics. The danger created is that what was discussed will influence the Commission’s decision without any other parties having any knowledge of the discussions and no opportunity to respond or oppose what was provided in those discussions.

GAO Report. The General Accountability Office (“GAO”) recently released a report entitled, “FCC Should Take Steps to Ensure Equal Access to Rulemaking Information” Report to the Chairman, Subcommittee on Telecommunications and the Internet, Committee on Commerce and Energy, House of Representatives (GAO-07-1046, September 2007). The GAO Report is most disturbing because it alleges that high-ranking officials within the FCC have apparently followed a pattern of uneven treatment in making disclosures that affect the purposes and effectiveness of the Sunshine agenda requirements. If disclosures of this magnitude are handled on a selective basis, it unfortunately lends support to the beliefs that the posting of *ex parte* reports may also be affected by unannounced selective processes.

Delays in Access. USE appreciates the courtesies extended by decision-making personnel to meet with it and its representatives and recognizes that agreeing to such meetings adds to the significant burdens of the responsibilities these personnel must meet. At the same time, scheduling conflicts that result from such responsibilities can lead to less than equal access to all decision-makers. For example, after a meeting with one Commissioner was scheduled, a travel commitment intervened preventing the meeting with the Commissioner. In another instance, a meeting with the top aide of the Chairman had to be postponed for reasons not stated, and has yet to be rescheduled. These are hardly unusual events, but they do point up that, in a rapidly dwindling time line, equal access to decision-makers can suffer. Nevertheless, because USE believes its issues are of great public importance, it will continue to attempt to schedule meetings in the future and hopes to succeed in gaining access to discuss the issues with the ultimate decision-makers equal to other interested parties.

Conclusions – Time Line Must Be Adjusted. The foregoing concerns and disclosures underscore the need for a hard look at the current time line within which to act on this merger. Making any judgment with so many unresolved issues and with newly developing facts now only beginning to surface, converts the otherwise laudable purpose of adhering to a standard time line into a rush to judgment and contrary to the high hurdles that the FCC said would have to be met for the Applicants to win approval of their proposed merger.

USE requests and submits that the public interest demands that the issues of vertical monopoly/integration and its impact on consumer choice, innovation in product, pricing, design, distribution and other consumer interests be addressed, that the Commission complete on-going investigations and disclose its findings on the Applicants’ rule violations and failure to provide interoperable radios before any final decision is made on the merger, that it revisit and ensure

that the *ex parte* rules are working properly, that no favoritism creep into the decisional processes, that time be provided to ensure equal access to all decision-makers, and that, should the merger move toward approval, it be properly conditioned to protect the public interest.

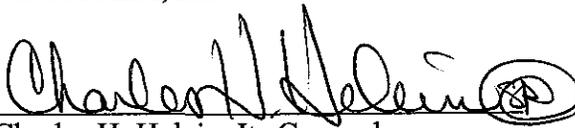
The conditions that need to be imposed are to require open access to the satellite network, to prohibit the merged entity from engaging in manufacturing, design and distribution of satellite receivers other than to provide on a non-discriminatory basis information needed to ensure no harm occurs to the network, that no non-competitive alliances are created post-merger, that assurances are provided in writing that post-merger no efforts are made through HD radio developments or otherwise to put existing radio services at an unfair competitive disadvantage.

In conclusion, USE is concerned that in the face of complex and novel issues, unanswered questions, and the irregularities in the process that have occurred to date, the Commission does not face a challenge that it rushed to judgment. For certain, whatever decision the Commission makes, it will not be sustainable if there is a failure to follow established precedents and the process is not altogether free of the appearance of impropriety.

In accordance with Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, and the Commission's Public Notice dated March 29, 2007 (DA 07-1435), a copy of this letter is being filed in the docket via ECSF.

Respectfully submitted,

U.S. Electronics, Inc.

By:   
Charles H. Helein, Its Counsel

cc: Michelle Carey  
Rick Chessen  
Rudy Briocche  
Amy Blankenship  
Angela Giancarlo