

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

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

**U.S. ELECTRONICS, INC.’
PETITION TO DEFER ACTION**

INTRODUCTION

U.S. Electronics, Inc., (USE), by its attorneys, 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”). USE requests the Commission to formally toll its 180-day “time clock” until the record is supplemented and updated with the facts that are directly relevant to critical issues affecting the public interest determinations and the burden of proof the Applicants must meet to justify a grant of their Consolidated Application and all interested parties have had an opportunity to evaluate those facts and comment on them in the record.¹

¹ The National Association of Broadcasters filed a Petition to Defer on October 9, 2007 (“NAB Petition”) requesting the Commission formally toll its 180-day time clock until that organization has time to review and place in the record comments and documents relating to the Applicants’ rule violations in connection with operation of FM modulators/transmitters and/or terrestrial repeaters. (NAB Petition, 1)

EXECUTIVE SUMMARY

1. On October 9, 2007, USE filed a written *ex parte* identifying several substantive issues that justify the adjustment of the standard 180-day time line.² USE's concerns echo but substantially supplement those raised in the NAB Petition. In particular, USE identified those issues and information that is missing from the record or has not been addressed by the Commission. USE now petitions the Commission for a formal tolling of the 180 days in order to provide adequate time for the Commission to make certain that: (1) the issue of vertical monopoly/integration and its adverse impacts on competition in the retail market and on consumer choice, innovation in product, pricing, design, distribution and other consumer interests is addressed; (2) 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; (3) its *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 (4) should the merger move toward approval it be properly conditioned to protect the public interest.

2. As shown below the record to date is woefully inadequate as respects the above issues. The Commission must ensure that all relevant information is properly placed in the record and that all interested parties have the opportunity to review, evaluate and comment on it. Therefore, the tolling of the 180-day time line is essential to ensure that the Commission's decision is in line with the public's interest and sustainable.

² Letter of Charles H. Helein, Helein & Marashlian LLC, Counsel for U.S. Electronics, Inc. to Chairman Martin and Commissioners Copps, Adelstein, Tate and McDowell (October 9, 2007). ("USE *Ex Parte*").

DISCUSSION

3. 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 the Bureau has developed facts from that investigation. And these facts arguably are directly relevant to the character and candor qualifications of the Applicants as several parties have argued on the record. But, despite the fact that these violations have been under investigation for over a year, and the findings available well before the initial comment date in this proceeding (August 9th), the Bureau's findings have not been released to the public in general and 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 due to the Applicants' opposition thereto and the failure of the Commission to rule on that opposition. *See*, NAB Petition at 2.

4. 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 in this Docket by the petitioner, this issue has been transferred to the Enforcement Bureau and relabeled a complaint.³

5. 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

³ *See*, Petition [of Michael Hartleib] for Declaratory Ruling To Clarify the Lack of Enforcement and Implementation of the Interoperable Mandate FCC Rule 47 CFR Sec. 25.144(a)(3)(ii), June 24, 2007, rec'd FCC Mailroom, July 5, 2007; Letter to Marlene H. Dortch, Secretary, FCC, from Michael Hartleib, June 28, 2007, Notice of *Ex Parte* Presentation, and Letter to Marlene H. Dortch, Secretary, FCC from Michael Hartleib, Notice of *Ex Parte* Presentation, September 14, 2007.

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 subsequent affecting XM' and Sirius' continuing rights to hold their licenses.

6. Ex Parte Compliance. If the *ex parte* rules are not complied with, interested parties will be deprived of facts submitted to decision-making personnel that may be relied on to rule on issues in the proceeding that will affect the merits of the Consolidated Application. The September 27 *ex parte* report of XM and the September 28 *ex parte* report of Sirius do not meet the full measure of disclosure required when reporting on meetings with decision-making personnel. Both of these *ex parte* 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.

7. Undoubtedly, it will require time to investigate whether the September 27 *ex parte* report of XM and the September 28 *ex parte* report of Sirius comply with the rules, and assuming they do not, as appears evident, the Applicants will have to re-file reports and the contents of those

reports evaluated as to their bearing on the issues before the Commission. All of this will require time.⁴ The fact that the Commission has yet to have disclosed on the record facts that have been in its possession for several months (the findings of the Enforcement Bureau on the Applicants' rule violations) only underscores the need to defer the current time clock to ensure that the facts presented in the September 27th and 28th *ex partes* are disclosed in the detail required by the rules.

8. Vertical Monopoly/Network Access. USE filed comments in which it brought to the FCC's attention an issue that was not previously raised in the issues formally presented for comment in this Docket. 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.

9. 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 both OEM (the automotive market for satellite radio receivers) and retail (from major retail chains and outlets to electronic boutiques). 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

⁴ The Commission may ignore the challenge to the Applicants' compliance with the *ex parte* rules. That will not resolve the issue however. It will only establish another ground to challenge any decision of the Commission approving the Consolidated Application.

price equipment to subsidize lower subscription rates rendering Commission oversight of that consumer interest of limited or no benefit.⁵

10. 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 retail level over their so-called audio entertainment "competitors," the iPods, MP3s, Internet, etc. The critical fact is that the merged entity will be the only entity providing satellite radio product to retailers. Absent competitively protective conditions, its control of the product any consumer must buy who wants its unique national multi-channel subscription audio entertainment/information services, provides it with coercive and predatory power not only in the "broader market" it has defined, but also in the submarket that will affect that "broader market." The merged entity can use this power in the horizontal market to discipline and neutralize the competition its self-proclaimed rivals may offer. Retailers, especially small, independent retailers, mom and pop retailers, will either acquiesce or lose their right to sell the merged entity's product. In other words, especially the small retailers can be denied to right to sell satellite radios unless they accept conditions and make concessions dictated by the merged entity. By withholding product, demanding concessions on advertising, shelf space, ad placements, etc., or by forcing abandonment of competitive products, the merged entity will be in a unique position to compromise the competitive environment that would otherwise exist.

11. The power of the merged entity also extends to the automotive industry, by far the more active and extensive market for satellite radio receivers today and the foreseeable future.⁶ At the

⁵ One industry observer makes the facile and counterintuitive argument that if the Applicants intended to use equipment pricing to subsidize subscription pricing, they would already have done so in their existing duopolist roles. Such reasoning ignores the obvious. As veterans of the regulatory process, the Applicants would be the last ones to undercut their unique and unprecedented request to merge into a monopoly by raising subscription prices as duopolists before they filed their Consolidated Application.

outset, it should be emphasized that apart from the issue of sole sourcing as discussed below, there is no “broader market” argument that can be made regarding the auto industry. On the auto industry side of the satellite radio receiver business sole sourcing has been the only method of manufacturing, design and distribution. And it may be taken as a given that the sole sourcing in this market segment accounts in large part, if not exclusively for the fact that satellite radio receivers in autos do not offer the consumer the same features available to retail consumers.

12. In addition, technology in this market segment has not improved despite advances in the technology of chipsets and added new features. Furthermore; simple accessories permit retail consumers to move (via plug & play) their subscription based hardware to other desired locations does not exist in this market segment. Satellite radio receivers in autos are embedded in the vehicles in which they are installed and cannot be removed. Surprisingly, this is the fact even though one of the Applicants at least, XM, has the technology that permits removal of their chipset from compatible hardware. XM has “explained” that its failure to deploy the technology that would allow movement of the receivers is based on its “business model” that requires auto customers opting to include XM satellite radio services in their choice of options to purchase additional hardware and expand their subscriptions only after they have subscribe to XM’s service available in car.

13. While the auto industry is different from the retail industry in that industry members of the former are all large corporations whereas the latter includes businesses of all sizes, the duopolists of today and merged entity of tomorrow have the same coercive and predatory power to leverage their control in the auto market segment as well. It is ironic that those few members of the industry that have commented in favor of the merger appear to ignore or are being kept in

⁶ The market for satellite radio receivers in the auto industry is often referred to as the “OEM market.”

the dark about the danger that sole sourcing presents to their otherwise expressed concerns that their auto customers have the best products and features available to them.

14. The fact that the auto industry has had no experience with a competitive market environment being exposed only to sole sourcing, and that there are only two and will be only one satellite radio network, may explain why some have accepted the Applicants' position line that only by the merger will they be able to offer the auto buying public the best satellite radio equipment available. But nothing could be further from the truth.

15. Like large, medium and small retailers, the "only game in town" power of a merged entity will expose car manufacturers to its "take it or leave it" terms or be excluded from offering the satellite radio option to the car buying public. The ability of the merged entity to exercise such power even over such large companies as the car manufactures can be demonstrated by comparing the difference in market characteristics for other highly popular consumer audio products. For example, if Apple excluded a carmaker from including an iPod interface, the carmaker could add an auxiliary audio input that would allow connection to any other MP3 player as well as to the theoretically excluded iPod via the audio output. There are multiple HD radio hardware providers and receiver options available to consumers as well. In short, carmakers could not be excluded from benefiting from the competitive market that exists for all other audio devices, while they can be for satellite radio if sole sourcing is not prohibited and monitored.

16. USE is gratified that in some of its *ex parte* presentations, certain Commissioners and their staffs have understood the concerns raised by the vertical monopoly/integration issue and that it exists alongside the horizontal monopoly issue. 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.

17. USE also emphasizes 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).

18. The Applicants' answer to these precedents is to ignore them. The Applicants have not in their many *ex parte* presentations, nor in their formal comments, addressed the issue of extending the monopoly to the vertical markets. Instead, they have filed numerous testimonials favoring the merger extolling its claimed benefits to the public, such as increased programming choices, lower prices, sparking a new generation of products with advanced and user-friendly features.⁷

19. These testimonials clearly are not focused on the adverse impact that will occur from the present and future control that will be exercised by a merged satellite radio company over consumer devices needed to access the satellite radio network. Nor do these testimonials reflect an awareness of the national communications policies and precedents that prohibit a network operator's control over consumer choice of the devices by which to obtain the services of the network itself. Electronic retailers and automotive testimonials concentrate on the alleged increase in programming choices and lower prices to obtain these. Whatever merit these may have, they overlook the fact that they and the public they so ardently wish to benefit from the

⁷ See, e.g., the attachment to the October 4, 2007 *ex parte* filed by counsel for Sirius Satellite Radio Inc., a press release entitled "Consumers Will Benefit from Merged Satellite Radio Company Say Leading Consumer Electronic Retailers and Auto Manufacturers."

merger will be captives to the Merged Satellite Radio Company's sole source design, development and supply of receivers and future network access devices.

20. USE has placed in the record of this proceeding the extensive precedents that have established the national policy requiring consumer choice of the means by which to access network services and that concomitantly have precluded network operators from exercising control over and the ability to limit those choices. The Congressional enactment of Section 629, the FCC's implementing regulations and its decisions adopting those regulations and the DC Circuit's decision in *Charter* upholding those regulations and the policies on which they are based are directly relevant and should be held to be affirmatively dispositive of the core issues raised by USE in its Comments and Reply Comments and in its various *ex parte* presentations to the Commission and its staff.⁸

21. On the core issue whether control of network access devices by the network operator is anti-competitive, anti-consumer and contrary to the public interest, the answer is clearly yes.

22. On the core issue of whether vertical monopoly/integration in satellite network operations violates established precedents and law, the answer is clearly yes.

23. On the core issue of whether the network operator's concerns for the protection of its content is valid, the answer is no.

24. On the core issue of whether the network operator's concerns for the protection of its content is sufficient to preclude the competitive commercial availability of network access devices manufactured by unaffiliated entities and sold and distributed at retail by unaffiliated entities, the answer is no.

⁸ See, 47 U.S.C. §629 (1996); 47 C.F.R. §76.1200, et seq. and *Charter Communications Company v. FCC*, 460 F. 3d 31 (D.C. Cir. 2006).

25. The Court's reasoning in *Charter* supports the types of conditions USE seeks to have imposed on the XM/Sirius merger. In the Telecommunications Act of 1996, Section 629, Congress established a national communications policy that requires the competitive commercial availability of network access devices (in this case for cable and satellite networks) and directed the FCC to adopt regulations to implement this policy.

26. In 1998, in response to the Congressional directives of Section 629, the FCC adopted regulations that required cable operators by 2005 to cease their control over and deployment of set-top converters used to access the cable operators services.

27. In April 2003, the FCC undertook to review marketplace developments and called for further comment on the effectiveness of the Commission's regulations on the control and deployment of set-top converters.

28. The cable industry argued that market conditions have changed since the FCC adopted its original ban on cable operator control over converters that warranted the repeal of the FCC's regulations.

29. Opposing the cable operators, the Consumer Electronic Association (CEA) supported continuation of the regulations and argued that there should be no extensions of the implementation deadline because its members wanted to compete in the market for the sale of set top boxes.

30. In March 2005, the FCC adopted an order that maintained the ban on cable operator deployment of integrated set-top boxes, but deferred the effective date of the ban to July 2007 in order to afford cable operators additional time to develop a downloadable security solution that would allow both cable operators and consumer electronics manufacturers to develop a common

software security function without the costs involved with physically separating access and security functions.

31. Cable companies Charter Communications and Advance/Newhouse, along with their trade association, the National Cable and Telecommunications Association (NCTA), challenged the FCC's March 2005 in a petition to review filed with the United States Court of Appeals for the District of Columbia Circuit. (DC Circuit).

32. In August 2006, the DC Circuit, issued its opinion in *Charter Communications v. FCC*, (*Charter*) rejecting the petition and upholding the FCC rule that requires cable operators (as the network providers) to allow and not interfere with the retail sales of set-top converters.

33. Ex Parte Posting Delays. Strict adherence to the *ex parte* rules is the touchstone of fair and impartial decision-making. USE' direct experience and information provided in response to the disclosure of that experience has introduced the appearance of unevenness in adherence to the *ex parte* process. The appearance of unevenness arises because of delays in posting certain *ex parte* filings.

34. An issue of selective or delayed posting of *ex parte* filings has been raised by the handling of USE' *ex parte* filings of September 25, 2007 reporting on meetings with Commissioners Cops and Adelstein. These *ex partes* were not posted on line within the normally applicable time frame of same day or the following business day (the "Sept. 25th *Ex Partes*"). Since then, these *ex parte* reports of USE have appeared on line, and while the exact posting date and time is not available, it is believed that posting ultimately did occur on October 3, 2007.

35. 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 process.

36. Equally disturbing however, is that when it was discovered that the Sept 25th *Ex Partes* had not been posted within the normal cycle of one or two business days, inquiry was made 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 27th and 28th *ex parte* reports filed by XM and Sirius, respectively, only a few days later on September 28th in PDF.

37. Later failures detract from the assurances given USE that these activities were not intentional. For example, USE was informed that the USE’ October 2nd letters informing the offices of the Chairman and Commissioners Tate and McDowell about the failure to post the 25th *Ex Partes* would not be posted because “they did not relate to the merger issues” in the MB 07-57 Docket.

38. And finally, through other interested parties, USE has been informed that other *ex parte* reports have not been routinely or timely posted. Together these circumstances create a chilling impression that a pattern of selective posting of *ex partes* has been allowed to creep into the process.⁹

⁹ The concerns about the evenness of the *ex parte* process might easily be dismissed as mere aberrations in an otherwise inviolate system. But a recent report of the General Accountability Office (GAO) makes it more difficult to dismiss these concerns as isolated deviations from the

39. 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. 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.¹⁰

40. 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 critical facts still not matters of record converts the otherwise laudable purpose of adhering to a standard time line into a rush to judgment, contrary to the high hurdles that the FCC said would have to be met for the applicants to win approval of their proposed merger.

norm. GAO issued 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 sets forth findings 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.

¹⁰ The delayed meetings referred to have been partially rectified by recent schedulings. However, it must be noted that in one case, a meeting will be delayed until the 161st day into the current time clock. Another meeting has yet to be set, but a meeting with a top aide has been set for the 139th day into the time clock.

41. USE requests and submits that the public interest demands that the issues of vertical monopoly/integration and its adverse impact on competition in the retail market and 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.

42. 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 competition in the retail market, consumer choice, favorable pricing, innovation and like-kinded consumer benefits. Therefore, in addition to any other conditions that may be found to help ensure that the merger, if approved, serves the public interest, the 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, as well as the principles established under Section 629 of the Telecommunications Act of 1996, the FCC's implementing rules of Section 629, 76

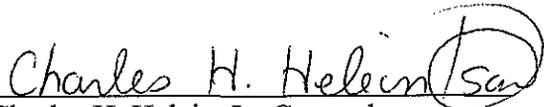
C.F.R. §1200 et seq., and the Court's affirmation of the FCC's implementing regulations in *Charter Communications Company v. FCC*, 460 F.3d 31 (D.C. Cir. 2006); and importantly,

- Be subject to an independent monitor who will ensure compliance with FCC rules and regulations.

43. In conclusion, USE submits that in the face of complex and novel issues, unanswered questions, the inadequacy of the record, and the irregularities in the process that have occurred to date, additional time is required to consider and pass on the Applicants' unprecedented application. Accordingly, USE petitions the Commission to interrupt the running of the 180-day time clock and afford such additional time as is required to ensure that the public interest is served.

Respectfully submitted,
U.S. Electronics, Inc.

By


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October 12, 2007

CERTIFICATE OF SERVICE

I, Sherry A. Reese, hereby certify that, on this 12th day of October, 2007, copies of the foregoing U.S. Electronics, Inc.' Petition to Defer Action were delivered via U.S. first class mail, postage prepaid to the following:

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And were delivered via electronic mail to the following:

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