

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:

XM Satellite Radio Holdings Inc.,

Transferor

and

Sirius Satellite Radio Inc.,

Transferee

Consolidated Application for Authority to
Transfer Control of XM Radio Inc. and
Sirius Satellite Radio Inc.

MB Docket No. 07-57

**JOINT OPPOSITION OF SIRIUS AND XM TO PETITIONS TO DEFER ACTION
FILED BY NAB AND USE**

Sirius Satellite Radio Inc. (“Sirius”) and XM Satellite Radio Holdings Inc. (“XM”), through their attorneys, hereby oppose the Petitions filed by the National Association of Broadcasters (“NAB”) and U.S. Electronics, Inc. (“USE”) to Defer Action on the pending merger applications of XM and Sirius.¹

¹ National Association of Broadcasters’ Petition to Defer Action, *In re XM Satellite Radio Holdings Inc.*, MB Docket No. 07-57 (filed Oct. 9, 2007) (“NAB Petition to Defer”); U.S. Electronics, Inc.’s Petition to Defer Action, *In re XM Satellite Radio Holdings Inc.*, MB Docket No. 07-57 (filed Oct. 12, 2007) (“USE Petition to Defer”). Georgetown Partners has filed an ex parte supporting grant of the the NAB and USE petitions. Written *Ex Parte* Presentation of Georgetown Partners L.L.C. (Oct. 18, 2007). However, the *ex parte* simply asserts that the petitions should be granted without offering any argument justifying this position. As such, the *ex parte* provides no basis for delaying the FCC’s consideration of this matter.

INTRODUCTION AND SUMMARY

Having failed to point to substantive reasons why the Commission should deny the merger applications, NAB and USE now seek to stall the Commission's consideration of them. The Commission should reject these attempts at delay.

NAB requests that the Commission toll its 180-day merger "clock" based on the pending review of a Freedom of Information Act ("FOIA") disclosure decision by the Enforcement Bureau in an entirely separate proceeding. The information, which is already known to the Commission, is covered by a number of separate FOIA exemptions and thus should not be released to the public for use in this or any other proceeding; it also has no relationship to the issues pending before the Commission in the merger docket. In any event, NAB has pursued this matter in the merger docket with unprecedented intensity and has not been impeded in those efforts by the absence of this discrete set of FOIA-exempt documents, which are irrelevant to the merger.

USE echoes NAB's argument and puts forth a scattershot list of others, none of which justifies delay. There is no reason to defer the merger proceeding based on a petition concerning interoperability that is now being reviewed by the Enforcement Bureau. Further, USE's unsupported allegation of a "vertical monopoly" with respect to consumer devices relates to the merits of the merger, and the Commission does not require additional time to consider it adequately. In addition, USE's quibbles concerning the operation of the *ex parte* process in this proceeding are absurd on their face and provide no basis for the Commission to postpone a decision that the merger is in the public interest.

ARGUMENT

I. THE NAB PETITION

A. NAB has not shown that the information at issue is necessary for the Commission's consideration of the merger.

NAB's only proffered reason for stopping the merger clock is so that NAB might be able to supplement the record with four narrow categories of information, the disclosure of which currently is pending review: the names of distributors and equipment manufacturers used by Sirius and XM; the names and titles of Sirius and XM employees compiled by the companies in internal reviews related to the Enforcement Bureau proceedings concerning FM modulators/transmitters used by Sirius and XM subscribers; a detailed description of the varied recollections of current and former XM employees who may have had some knowledge of the repeater issues being reviewed by the Enforcement Bureau; and the redaction of a narrative prepared by Sirius in response to a Letter of Inquiry issued by the Commission.

NAB claims unconvincingly that these records are "central to the Commission's decision regarding whether or not the merger application is in the public interest."² In fact, the Enforcement Bureau rejected that argument, stating "we disagree that there is a compelling public interest in disclosing regarding Sirius' potential rule violations . . . because such information has a direct bearing on the public interest considerations raised in the pending XM/Sirius merger application."³ Instead, the Bureau simply found (erroneously, in the parties' view) that the companies had not adequately demonstrated that these discrete categories of information fell within the statutory exemptions to FOIA.

² NAB Petition to Defer at 2.

³ Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, FCC, to David H. Solomon, Wilkinson, Barker, Knauer, LLP, Counsel for NAB, at 6, File No. EB-06-SE-250 Sirius Records (June 18, 2007) ("FCC FOIA Letter").

NAB makes no serious effort to explain how any of this *particular* information would be relevant to the Commission's consideration of the merger application. Instead, NAB claims without a hint of irony that without the unreleased records, which are already in the Commission's possession, the Commission "cannot make an informed decision regarding whether the Applicants can be relied on to keep their promises and comply with any conditions."⁴ The NAB's citation to the *EchoStar* case in support of this point is inapposite. While the Commission found that EchoStar's "history of past conduct will be taken into account [by the Commission] in assessing the likelihood that potential beneficial conduct will occur in the absence of private economic incentives,"⁵ that decision provides no support for delaying this proceeding pending resolution of NAB's FOIA fishing expedition. Indeed, *EchoStar* did not involve a FOIA application at all, let alone "disclosure of information in an enforcement proceeding for use in an entirely separate licensing proceeding."⁶ Moreover, as the parties have explained in this docket, the *EchoStar* decision underscores the fact that the outstanding allegations of rule violations that are being addressed separately have no bearing on either company's qualifications to hold Commission licenses.⁷

These materials cannot affect the conclusion that Sirius and XM is each a qualified Commission licensee that is sincere in its willingness to offer the various merger-specific benefits described at length in this proceeding. Sirius and XM have already forthrightly

⁴ NAB Petition to Defer at 3-4 (citing *In re EchoStar Commc'ns Corp.*, 17 FCC Rcd 20559, 20579 ¶ 35 (2002)).

⁵ *In re EchoStar* at 20579 ¶ 35.

⁶ FCC FOIA Letter at 6.

⁷ See generally Joint Opposition to Petitions to Deny and Reply Comments of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc., MB Docket No. 07-57, at 98-100 (filed July 24, 2007) ("Sirius-XM Joint Opp."); see also *In re EchoStar* at 20579 (¶ 33) (stating that "[o]utstanding allegations regarding rule violations are best handled in proceedings arising under the affected rule or policy because, in such proceedings, the Commission would have a complete record to review the relevant facts").

acknowledged publicly the material facts and circumstances that led to the enforcement proceedings.⁸ Each company has been working diligently with Commission staff to resolve these issues and to ensure compliance with Commission rules in the future—all of which is a matter of public record.⁹ Revealing trade secret and personal information will not assist the Commission or the public in understanding these facts and will instead only cause harm to those involved.¹⁰

B. There is no Due Process reason to stop the clock.

Contrary to NAB's assertion, the Commission can ensure procedural fairness to all parties without stopping the clock. While the Commission has found that "petitioners to deny generally must be afforded access to all information submitted by licensees that bear upon their application,"¹¹ that standard applies only where the records at issue were submitted as part of the same proceeding.¹² That is not the case here. In fact, as noted above, the Enforcement Bureau specifically determined that the records at issue are *not* relevant to the merger proceeding, and NAB has failed to show otherwise. In contrast, in the cases NAB cites, the Commission

⁸ See, e.g., Application for Review of Freedom of Information Action at 9, FOIA Control No. 2007-235 ("[C]ertain employees were aware of and/or directed the manufacture and distribution of non-compliant equipment").

⁹ Of course, the Commission is already in possession of the information sought by NAB, and is free to review the information sought by NAB in order to confirm that its release would add no relevant information to the record.

¹⁰ Application for Review of Sirius Satellite Radio Inc., FOIA Control No. 2007-325 (filed July 2, 2007); Application for Review of John Does 1 and 2, Present or Former Corporate Officers of Sirius Satellite Radio Inc., FOIA Control No. 2007-325 (filed July 2, 2007).

¹¹ *In re Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24837 ¶ 33.

¹² When the Commission established this standard, it relied on *Bilingual Bicultural Coal. on Mass Media, Inc. v. FCC*, 595 F.2d 621, 634 (D.C. Cir. 1978). In that case, the court reasoned that if the Commission found that it was necessary to inquire into a company's employment practices *as part of a licensing proceeding*, then the results of the Commission's investigation must be made public to ensure that petitioners to deny the license could meaningfully participate. *Id.*

determined that it was necessary to put the information in the public record because Commission had already been considering it as part of its merger determination.¹³

NAB argues that “reliance on extra-record factual evidence without opportunity to the parties to inspect and address [is] denial of due process,” *Ralphy v. Bello*, 569 F.2d 607, 638 n.160 (D.C. Cir. 1977). However, this rule is relevant only to the extent the Commission makes its determination about the merger based on the particular information at issue in the enforcement proceeding—which, as discussed above, is not the case here. Contrary to NAB’s suggestion, the Commission is free to determine whether information is relevant to the merger proceeding without NAB’s input. In *Bilingual Bicultural Coal. on Mass Media, Inc.*, 595 F.2d at 634, the court specifically noted that due process does not require the Commission to give petitioners to deny a right to conduct their own discovery. The Commission already has all the information in its hands and can decide what, if any, information is relevant to the merger proceeding.

C. **The factors the Commission has cited to stop the clock in the past do not apply to this proceeding.**

In past situations where the clock has been stopped, “substantial additional relevant information” was added to the record.¹⁴ Similarly, the clock has been stopped when an agreement that was “central to the analysis” of the merger was changed.¹⁵ Unlike these situations, there is no need for NAB to digest and analyze large amounts of new information; indeed, NAB’s argument seems to be that the clock should be stopped because there is no new

¹³ See *In re Worldcom, Inc.*, 13 FCC Rcd 4527 (1998) (newly submitted information to the merger proceeding); *In re Bell Atlantic N. Z. Holdings, Inc.* 18 FCC Rcd 19738 (2003) (records were the subject of a FOIA request made during the *same* merger proceeding).

¹⁴ *180 Day Clock Stopped In re Verizon Communications, Inc.* 20 FCC Rcd 14727 (2005).

¹⁵ Letter from W. Kenneth Ferree, Chief, Media Bureau, FCC, to James R. Coltharp, Comcast Corp. and Betsy J. Brady, AT&T, *In re Comcast Corp.* MB Docket 02-70 (Sep. 24, 2002).

information in the record. The limited amount of information at issue would not materially alter the arguments that NAB has raised; nor would it impact the showing by Sirius and XM that the conduct at issue in the enforcement proceeding is irrelevant to the merger proceeding.

II. THE USE PETITION

USE's "me too" arguments relating to the FOIA rulings should be rejected for the same reasons that those made by NAB should be rejected. USE's remaining arguments comprise a hodgepodge of unconnected and irrelevant assertions that should also be decisively rejected by the Commission.

First, USE's argument that the Commission should halt the merger proceeding because the Commission has forwarded to the Enforcement Bureau a "Petition for Declaratory Ruling" concerning interoperability requirements as a Complaint is groundless. As an initial matter, the companies have already explained that they have complied fully with the Commission's rules in this regard and any assertions to the contrary fall flat.¹⁶ In any event, as noted above, Commission precedent is clear that such compliance issues can be examined in a separate proceeding and need not impact consideration of the merger.

In addition, USE's lengthy recitation of its prior assertions that the merger could result in a vertical monopoly for satellite radio consumer devices goes to the merits of the merger and provides no grounds for delaying the proceeding. As the parties have noted previously, this argument reflects nothing more than USE's attempts to use the merger to advance its own business interests.¹⁷ USE makes no real effort to explain why the clock must be stopped to consider these points, and merely complains that they have not yet been given sufficient

¹⁶ Sirius-XM Joint Opp. at 95-96.

¹⁷ Consolidated Reply Comments of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc., *In re XM Satellite Radio Holdings Inc.*, MB Docket No. 07-57, at 6-7 n. 22 (filed Aug. 27, 2007).

attention.¹⁸ USE, however, did not make these assertions when comments were filed on the merger itself and instead waited until the rulemaking stage of this proceeding, which pertained only to a discrete procedural issue to which USE's arguments are wholly irrelevant.¹⁹ While the parties will respond to those claims as necessary, they can do so—and the Commission can consider that record—well within the 180-day period.

Finally, USE's assorted complaints about the operation of the *ex parte* process in this proceeding are trivial and stem from USE's misunderstanding of the *ex parte* rules. Sirius's and XM's *ex parte* filings comply with the Commission's disclosure rules—in fact, they are substantially similar to *ex parte* notices filed by a number of parties in the present proceeding, including USE.²⁰ USE's request for an investigation to determine whether XM and Sirius did, in fact, violate the disclosure rules,²¹ is a transparent and dilatory attempt at delaying consideration of the merger.²² USE's further complaint that it has suffered delays in personal access to decision-making personnel at the Commission is equally frivolous. In addition to making numerous filings in this docket, USE has met with three of the Commissioners, legal and policy

¹⁸ USE Petition to Defer at 8.

¹⁹ USE's Comments raising the issue it raises again here were filed with the Commission on August 9, 2007 on only Day 61 of the 180 day clock. Since that filing USE has raised the same argument in Reply Comments and in *ex parte* presentations.

²⁰ See, e.g., Notice of Ex Parte Presentation by USE, *In re XM Satellite Radio Holdings Inc.*, MB Docket No. 07-57 (filed May 4, 2007); Notice of Ex Parte Presentation by NAB, *In re XM Satellite Radio Holdings Inc.*, MB Docket No. 07-57 (filed Aug. 8, 2007); Notice of Ex Parte Presentation by Clear Channel Communications, Inc., *In re XM Satellite Radio Holdings Inc.*, MB Docket No. 07-57 (filed July 27, 2007); Notice of Ex Parte Presentation by Consumer Coalition for Competition in Satellite Radio, *In re XM Satellite Radio Holdings Inc.*, MB Docket No. 07-57 (filed May 1, 2007); Notice of Ex Parte Presentation by Women Impacting Public Policy, *In re XM Satellite Radio Holdings Inc.*, MB Docket No. 07-57 (filed April 9, 2007).

²¹ USE Petition to Defer at 4-5.

²² The Commission likewise should reject out of hand USE's ludicrous (and irrelevant) claim that the short delay in posting of two of its fourteen *ex parte* notices online evidences a policy of selective posting by the Commission. That *two* out of at least 111 total *ex parte* notices filed in this proceeding (and 10,500 records overall) were reported on the Commission's website six business days after they were filed is hardly evidence of "a chilling impression that a pattern of selective posting of *ex partes* has been allowed to creep into the process."

advisors on the staff of Commissioners (sometimes multiple times), as well as Bureau staff members on a number of occasions. The record unequivocally demonstrates that the Commission and its staff have been generously available in person to all parties, including USE.

CONCLUSION

For all the foregoing reasons, the Petitions to Defer should be denied.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

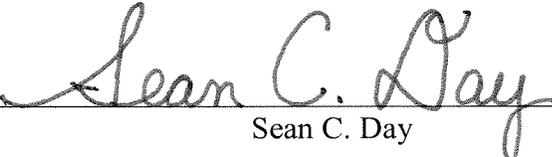
I, Sean C. Day, hereby certify that on October 24, 2007, I caused a copy of the foregoing Joint Opposition of Sirius and XM to Petitions to Defer be mailed via first-class postage prepaid mail to the following:

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