

**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)	

**REPLY OF U.S. ELECTRONICS, INC.
TO JOINT OPPOSITION TO PETITION TO DEFER ACTION**

U.S. Electronics, Inc. (“USE”), by its attorneys, submits its Reply to the “Joint Opposition of Sirius and XM to Petitions to Defer Action Filed by NAB and USE” (“Joint Opposition”).

INTRODUCTION

USE’s Petition to Defer Action (“Petition”) seeks a temporary stopping of the 180-day “time clock” in order to provide the Commission with a record that will comply with the exacting standards required by law (1) to approve any transfer of control application,¹ (2) to justify either a revocation or waiver of a published rule or policy,² and (3) to provide a factual basis and reasoned analysis of alternative regulatory methods that will accomplish the demands

¹ See Notice of Proposed Rulemaking, MB Docket 07-57, FCC 07-119, rel. June 27, 2007 at ¶ 3.

² *Id.* ¶ 2.

of the public interest in ways superior to that proposed by the Applicants.³ USE advances this request to ensure that the Commission has adequate time to consider a fully developed record. As described below, there is important information missing from this record. USE urges the Commission to look beyond the dismissive characterizations and tone of the Applicants' Opposition to consider whether there is any reason *not* to take more time to make sure that all the relevant facts are in and have been adequately examined by the Commission and the Commission's staff. The 180-day clock is, after all, a timeline that is intended only to serve as a guideline for the Applicants' convenience. Tolling it to ensure proper consideration of the public interest strikes a balance between the private and the public interests and one the Commission should readily make.

This is especially so where the transfer requires upending an express condition (1) imposed when the licenses being transferred were first awarded, (2) which the Applicants each willingly accepted when their respective licenses were granted, (3) which has been extant for over a decade, and (4) whose elimination would consolidate the public's scarce, unique and valuable frequency spectrum under the control of one entity eliminating the only direct competition in providing a nationwide, subscription-based, multi-channel broadcast radio service using specifically allocated radio spectrum.⁴

³ See Comments of USE on NPRM, August 9, 2007 at i, n. 1, citing *Fox Television Stations v. FCC*, 489 F.3d 444, 456-457 (hereinafter, "USE Aug. 9 Comments").

⁴ The record of the Applicants' efforts to meet the burden of proof they alone bear can be summarized as having filed the Consolidated Application and declared it to be in the public interest, the battle has been joined, their victory self-evident and they may now quit the field victorious save only for the Commission's bestowal of the laurel leaves by granting its unconditioned approval.

Legal Standard

Missing from Applicants' Joint Opposition is any legal justification for a denial of USE's Petition. First, under the Communications Act, no license may be transferred, assigned, or disposed of in any manner except upon a finding by the Commission that the "public interest, convenience and necessity will be served thereby." 47 USC § 310(d). Then, "[a]mong the factors that the Commission considers in its public interest inquiry is whether the applicant for a license has the requisite "citizenship, character, financial, technical, and other qualifications." *Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation*, 17 FCC Rcd. 20559, 20577, 2002 WL 31364465, *9 (2002). And, to determine whether or not the transfer is in the "public interest" the Commission must obtain "full information" as defined for example in *Mester v. U.S.*, 70 F. Supp. 118 (E.D.N.Y. 1947), *affirmed*, 332 U.S. 749, 68 S.Ct. 70, *rehearing denied*, 332 U.S. 820, 68 S. Ct. 150. "Full information" means anything and everything that does or may affect the Commission's determination as to whether the merger is in the public's interest. *Id.* ("[I]n empowering the Commission to decide whether the transfer is in the public interest, ... section [310] provides for such determination 'after securing full information.' No specification is made limiting the source from which such information is to be derived. 'Full information' would encompass anything and everything which would or might affect the Commission's decision as to whether or not the public interest would be served." (Emphasis added.))

The Commission has often tolled the 180-day decisional clock, a fact that the Applicants acknowledge. Joint Opposition at 6. But in their attempt to escape having the Commission toll this decisional clock, Applicants ignore the reality of the poor condition of the record and instead rely on the obvious tactic of trying to impugn USE's motives for filing its Petition. USE's

Petition is not intended simply to delay the merger. Rather, USE's Petition sets forth un-refuted facts and arguments that, without tolling the decisional clock, the Commission will not have in this record -- the "full information" it is required to have -- to determine whether the merger is in fact in the public's interest. As succinctly stated by the Commission when it stopped the clock in the Verizon-MCI transfer proceedings, the 180-day clock -

represents a good faith undertaking by the Commission to complete action on assignment and transfer of control applications within a certain timeframe and a means to keep interested parties informed of the progress of those applications. The clock carries with it no procedural or substantive rights or obligations but merely represents an informal benchmark by which to evaluate the Commission's progress. Although the Commission seeks to meet the 180-day benchmark, we note that the Commission retains the discretion to determine whether, in any particular review proceeding, events beyond the agency's control, the need to obtain additional information or the interests of sound analysis constitute sufficient grounds to stop the clock.⁵

The Commission should exercise its discretion and stop the clock because it does not have the "full information" it requires to render a valid decision.

The Vertical Integration/Monopoly Issue Has Not Been Addressed

Applicants acknowledge that USE's vertical monopoly allegation of serious harms to the public "relates to the merits of the merger, and the Commission does not require additional time to consider it adequately." Joint Opposition at 2. USE submits that precisely because the issue of these harms relates to the merits of the merger, the Commission must, in order to conduct a meaningful and defensible public interest analysis, accord itself additional time to do so for the following reasons.

The vertical monopoly issues in this case have been carefully briefed by USE. USE has introduced substantial evidence into the record on this issue, including facts known to it through

⁵180 day Clock Stopped In re Verizon Communications, Inc., 20 FCC Rcd 14727 (2005).

direct experience⁶ and by presenting legal, economic and practical analyses of the attendant harms caused by vertical monopolies in satellite radio and other industry segments.⁷ The Applicants have not challenged USE's evidence, have not answered USE's arguments and have not attempted to provide countervailing precedents to the large body of precedents that support USE's concerns on this issue. Having chosen to ignore the vertical monopoly issue, while acknowledging that the issue affects the merits of the merger, coupled with its contention that the Commission is able to consider it within the current 180-day time frame, the Commission should conclude that the Applicants have conceded the issue on the merits. Finding that the Applicants have conceded the issue, it remains only for the Commission to impose conditions on the merger (should it decide to approve it) that eliminates the Applicants' ability to engage in a vertical monopoly. Even so however, to ensure that the issue is properly treated and rooted in reasoned decision making, important dispositive information still is needed in the record.

Just last week, USE asked the Commission to issue a request for additional information to the Applicants.⁸ USE identified twenty categories of information, many relating directly to the vertical monopoly issue, and all seeking information that is uniquely in the control and possession of the Applicants. Only with the answers to these questions, and perhaps others, will the Commission be assured that the record contains the information required to ensure that the issue is competently addressed and the public interests involved are comprehensively analyzed.

⁶ See e.g., USE Aug. 9 Comments at ii, n. 2 and ¶¶ 12-24.

⁷ *Id.* at ¶¶ 35-55; See e.g., Notices of Ex Parte Meetings reported in Letter to Marlene H. Dortch, Secretary of the Commission from Charles H. Helein, Counsel for USE, October 23, 2007; Letter to Marlene H. Dortch, Secretary of the Commission from Charles H. Helein, Counsel for USE, September 21, 2007; Letter to Marlene H. Dortch, Secretary of the Commission from Charles H. Helein, Counsel for USE, September 21, 2007; See Notice of Ex Parte, Letter to Chariman Martin and Commissioners Copps, Adelstein, Tate and McDowell, October 25, 2007 attaching "Free My Phone" article by Walter S. Mossberg, *Wall Street Journal*.

⁸ See, Letter to Michelle Carey, Senior Legal Advisor, Chairman Martin, October 25, 2007.

These are reasons enough to strike the balance against the convenience of the Applicants and in favor of enough time to build a proper record on this important issue.⁹

**No Evidence Has Been Introduced
Establishing The Merger's Public Interest Benefits**

The issue of vertical monopoly is not the only reason the Commission should stop the 180-day clock. The Applicants repeatedly claim throughout their pleadings and in their *ex parte* filings that the “merger is in the public interest”. However, Applicants have not provided hard evidence of this claim. Rather, Applicants have filled the record with expressions of support by individuals, companies and organizations. Reliance on statements in support of the merger by individuals and organizations without any evidence of whether these were solicited or unsolicited by the Applicants, and without evidence of the ability of these “supporters” to understand, let alone evaluate, the merger, is hearsay and not evidence.

Similarly, Applicants’ promises of future benefits, such as ala carte services and pricing is not evidence. Even conceding these may be publicly beneficial, the Applicants have ignored challenges that they have not provided supporting documentation or demonstrated on the record their actual capability to provide these.¹⁰ And while several commenters have claimed that in effect the Applicants have invented the “audio entertainment market,” the Applicants have offered no factual support that such a market exists or has ever been recognized by any reputable economic, business or judicial authority. They have not, for example, provided a cogent legal

⁹ The Applicants have not in any of their *ex parte* presentations, or in their formal filings, addressed the issue of combining their proposed network (horizontal) monopoly with monopoly control over the consumer equipment (vertical) market. See discussion at USE’s Petition to Defer at 8-9.

¹⁰ Applicants apparently fail to see the irony in their willingness to embrace ala carte services and pricing while refusing to accept the need for open access. In both cases, the purpose is to empower the consumer to exercise greater choice in how it uses the services being offered, to control the prices it pays for those services and the option to pay only for services of particular appeal.

analysis of how such a market is or should be defined. On the contrary, opposing economic/antitrust experts have provided an extensive critique that the position of Applicants on this issue stands both economic and antitrust precedents on their heads.¹¹

While it is certain the Applicants would disagree, their own case would, nonetheless, benefit from extending the clock and allowing the Applicants' time to provide information to support the Consolidated Application. To the extent they reject such an opportunity, it would be a reasonable inference that either they are overly optimistic about the strength of their case, or that the Commission will apply a far more lenient standard in judging the merits of this merger than is consistent with USE's understanding of the requirements for approval of such applications.

Isolating Information on the Applicants' Compliance Record Is Improper

Applicants label as "groundless" USE's argument that the clock should be stopped until the facts regarding their compliance with the interoperability requirement are determined and made part of the record. The only support offered however is the Applicants' typical bootstrap assertions that "the companies have already explained that they have complied fully." Joint Opposition at 7. But the Commission's public interest determination must rely on a fully developed record, not on the Applicants' self-affirmations. This is especially so where, contradicting their own assurances, the Applicants have admitted that there are no interoperable

¹¹ See "Third Supplemental Declaration of J. Gregory Sidak" filed by the Consumers for a Competitive Satellite Radio Coalition, October 9, 2007. It does not take an expert to see the weakness in Applicants' argument that a nationwide, multi-channel, subscription based audio broadcast service employing unique radio spectrum available to no other entity is not in competition with devices that also provide audio services, no matter how many such devices there may be. As one industry analyst put it recently – "They [iPods, Internet radio, etc.] are as dissimilar as a movie theater is to a TV in someone's living room... While there is a proliferation of other audio devices, satellite radio is relatively unique." Maurice C. McKenzie, analyst with Signal Hill Capital Group, Baltimore, Maryland, quoted in the *Washington Post*, October 26, 2007, "XM Loss Deepens in 3rd Quarter; Subscriptions Up," by Kim Hart, Staff Writer.

radios available to the public and have acknowledged that though they were required to make such radios available to the public, they have not.¹²

Nor should the Commission be persuaded that these compliance concerns are not relevant to the public interest analysis that must accompany the license transfers proposed here. The Applicants' compliance with the interoperability requirement is an express condition on the grant of the licenses they now seek to transfer. Examining Applicants' compliance with this requirement in a separate proceeding would not be proper because their compliance with this requirement is directly applicable to this proceeding.¹³

Observance of Proper Administrative Process

Applicants dismiss USE's concerns about the observance of proper administrative process as a "transparent and dilatory attempt at delaying consideration of the merger." Joint Opposition at 8. The Commission should reject this characterization. USE's process concerns are raised because only a fair and open process can ensure a sound result. In weighing USE's request for additional time by staying the 180-day clock, the Commission ought to balance the conveniences that the clock mechanism affords to the Applicants against the damage to all interested parties and due process itself if the request for additional time is not honored. In this light, the request for staying the clock is a modest one that protects against downside risk of irreparably damaging the propriety of the process and thereby the integrity of the result.

¹² See quotation from Sirius' 10-K filed with the SEC on March 13, 2006 to the effect that "interoperability of both licensed satellite radio systems" was required by FCC rules. USE Reply Comments, at 13, n. 35, August 24, 2007.

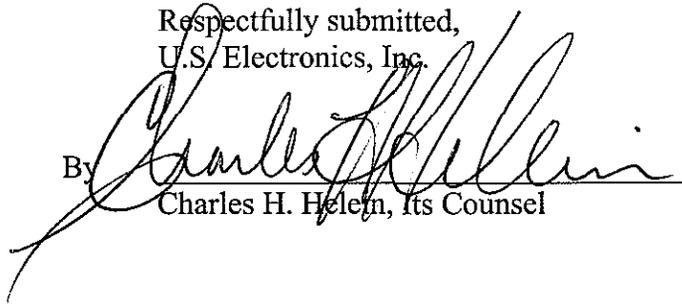
¹³ *Id.* at 15.

CONCLUSION

The Commission has the obligation to obtain "full information" on the record under the requirements of Section 310 of the Act and it has fully recognized and embraced that obligation. The Commission has recited its concomitant duty to obtain evidence of the public interest benefits of any proposed transfer of control and has expressly advised the Applicants that it is their burden of proof to prove that the merger serves the public interest by a preponderance of the evidence submitted on the record. This record not only does not contain evidence of the benefits of the merger, it contains evidence that critical issues remain unaddressed and unexplored and therefore lack the full information required to be in the record. The Commission appears to have itself recognized the questionable condition of the record by indications that it will seek further information from the Applicants. Learning of this intent, based on its direct experience and knowledge of the market, USE has offered a list of areas on which information should be obtained.¹⁴ But the decisional-clock is now in its 146th day, leaving only 34 days to run. With so many open questions, so much additional information to be obtained and so little time left on the clock, the public interest cannot and will not be served in such circumstances. USE requests that its Petition to Defer Action be granted as soon as practicable.

Respectfully submitted,
U.S. Electronics, Inc.

By


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¹⁴ See, Letter to Michelle Carey, Senior Advisor, Chairman Martin from Charles H. Helein, October 25, 2007.

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November 1, 2007

CERTIFICATE OF SERVICE

I, Sherry A. Reese, hereby certify that, on this the 1st day of November, 2007, copies of the foregoing, Reply of U.S. Electronics, Inc. to Joint Opposition to 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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