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November 30, 2007

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

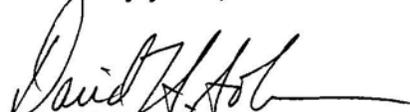
Re: MM Docket No. 07-57; Notice of Ex Parte Presentation

Dear Ms. Dortch:

On November 30, 2007, on behalf of the National Association of Broadcasters ("NAB"), I, along with J. Wade Lindsay of my office, met with Helen Domenici, Bureau Chief, International Bureau, Roderick Porter, Deputy Bureau Chief, International Bureau, Gardner Foster, Legal Advisor, and Robert Nelson, Division Chief, Satellite Division. We discussed NAB's argument that the proposed merger of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. would give the combined entity control of 100 percent of the spectrum available for satellite Digital Audio Radio Service, in violation of the Commission's policy prohibiting spectrum monopolies. We discussed matters addressed in the enclosed memorandum, copies of which I left with each meeting participant.

Please contact me if you have any questions.

Sincerely yours,


David H. Solomon

Enclosure

cc: Helen Domenici (w/enc.)
Roderick Porter (w/enc.)
Gardner Foster (w/enc.)
Robert Nelson (w/enc.)

THE XM/SIRIUS MERGER WOULD CREATE A SPECTRUM MONOPOLY, IN VIOLATION OF LONG-STANDING FCC SPECTRUM POLICY

Summary

- The proposed merger would give the combined XM/Sirius control of 100 percent of all satellite DARS spectrum, in direct violation of FCC policy prohibiting spectrum monopolies. This is a threshold reason for not approving the proposed merger.

EchoStar/DirecTV Merger

- The FCC declined to approve the proposed EchoStar/DirecTV merger in part because the merger would create a monopoly in the DBS spectrum, contrary to “well-established federal pro-competitive spectrum policies.” *EchoStar/DirecTV Merger Order*, 17 FCC Rcd 20559, 20586 (2002). The FCC made this finding without regard to whether the relevant market for competition analysis was DBS alone or all MVPD services. Specifically, the Commission concluded (*id.* at 20603):

[T]he proposed transaction is not consistent with this Commission’s long-standing spectrum policies, the bulk of which have been aimed at creating competitive spectrum-based communications services within and among the voice, video and data services markets. We have consistently found that from the perspective of spectrum policy, the public interest is better served by the existence of a diversity of service providers wherever possible. Today we have such diversity in the DBS service, and Applicants have presented no compelling reason, from a spectrum policy standpoint, why we should approve license transfers that would effectively replace facilities-based intramodal DBS competition with a monopoly. . . .

- The Commission should refuse to approve the proposed XM/Sirius merger for the same reasons.

Cellular/CMRS

- The pro-competitive policy relied on in the *EchoStar/DirecTV Merger Order* is not new. In 1981, the Commission rejected proposals for a monopoly cellular radio licensee in each market because spectrum competition would “foster important public benefits of diversity in technology, service and price, which should not be sacrificed absent some compelling reason.” *Cellular Radio Order*, 86 FCC 2d 469, 478 (1981). Similarly, there is no compelling reason to permit a spectrum monopoly here.
 - When the FCC allowed the subsequently adopted CMRS spectrum cap to sunset, it re-confirmed its “obligation to ensure that acquisitions of CMRS spectrum do not

have anticompetitive effects that render them contrary to the public interest.” 2000 *Biennial Regulatory Review*, 16 FCC Rcd 22668, 22696 (2002).

MSS

- In the only case we have identified where the FCC found a compelling reason to permit a spectrum monopoly – in the MSS L-band – the Commission took this “unique” step because “economical and technical constraints” made “only one mobile satellite system . . . feasible.” *MSS Order*, 2 FCC Rcd 485, 486 (1981). Once an MSS system in the L-band became feasible with less spectrum, the FCC took away spectrum from the licensee to make it available to other MSS applicants. *2002 L-Band Order*, 17 FCC Rcd 2704 (2002). The FCC took this action even though other entities were providing MSS using other spectrum. *Seventh CMRS Competition Report*, 17 FCC Rcd 12985, 13026 (2002). Here, it is already feasible to maintain competition in the satellite DARS spectrum, whatever the alleged benefits of the merger may be, so there is no need to create a spectrum monopoly.
- In creating the original MSS L-band monopoly, the FCC imposed heavy regulatory requirements as a counterbalance; specifically, it required that (1) the spectrum be licensed to a consortium comprised of all qualified and willing applicants, and (2) the consortium be regulated as a common carrier. Moreover, it did so even though it recognized that “there appears to be, at least for some MSS services, substitute services available” and that some needs to be filled by MSS “may be met with other technologies.” *Id.* at 490. Here, where spectrum competition is feasible, allowing such competition serves the public interest better than monopoly regulation.

Conclusion

- Approving the proposed XM/Sirius merger would create a spectrum monopoly contrary to long-standing Commission spectrum policy. Accordingly, the Commission should deny the merger.

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