

**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.'S
EX PARTE SUBMISSION**

U.S. Electronics, Inc., (USE), by its attorneys, files this ex parte submission to correct and update the record following the filing of the “Joint Ex Parte Submission of XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc.”¹ and the expiration of the pleading cycle applicable to the “Petition of U.S. Electronics, Inc. to Designate Application for Hearing”².

INTRODUCTION

This proceeding is about whether the condition imposed on the Applicants’ licenses prohibiting XM and Sirius from merging can or should be removed so that the merger proposed may be approved. Based on the record in this proceeding it is clear that as proposed and defended by the Applicants, the merger will create not one, but two monopolies, one horizontal and the

¹ Joint Ex Parte Submission of XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc., November 13, 2007 (“Joint Submission”). The Joint Submission was not served by XM Satellite Radio Holdings Inc. (XM) or Sirius Satellite Radio Inc. (Sirius), (collectively, “Applicants”).

² Petition of U.S. Electronics, Inc. to Designate Application for Hearing, November 9, 2007 (“Designation Petition”). Applicants opposition to the Designation Petition was due on or before November 27, 2007. Counsel has not been served with an opposition and finds no record of an opposition having been filed.

other vertical, eliminating competition both in satellite radio services and in the downstream supply of satellite receivers and other devices accessing the network. This dual monopoly will lead to increased prices, severely restricted consumer choice and minimal innovation.³ As all of these are harmful to consumers, the public interest cannot be served unless the Commission acts to prevent the creation of a vertical monopoly along side the horizontal monopoly that will be created by the merger as proposed by the Applicants.

Since the FCC prohibited XM and Sirius from merging over a decade ago, nothing has changed that justifies removing that prohibition or ignoring the pro-competitive, pro-consumer rationales for it. On the contrary, this record shows that the Applicants have failed not only to prove their contention about the horizontal market, that satellite radio is but one product option in a broader product market, but also have failed to provide any credible response to USE's proofs that the Applicants will use the merger to create a second monopoly in the vertical market.

A vertical monopoly will produce adverse impacts on the satellite radio equipment market, particularly satellite receivers. These devices, sold by major and small retailers and made part of most automakers' installed base of consumer-attractive new car options, are the only means by which listeners can access the programming offered by today's satellite radio providers and "tomorrow's satellite radio provider. USE has repeatedly advised that focusing on low subscription rates (the horizontal impact) will disserve consumers in the short and long terms. Based on its extensive experience in consumer electronics, USE knows that the lack of competing products will undermine the natural reduction in production costs that is created when the volume of production increases, but the savings that result will not be passed on to consumers. Eventually, because of the closed market that is created by the ability to prevent the introduction of competing

³ USE is not alone in its concerns. See Attachment 1 that synthesizes the filings of a number of parties that support open access to the satellite radio network.

products, the merged entity's vertical monopoly will allow it to raise equipment prices and to do so virtually undetected. As USE has pointed out on the record, the abuse of this power is happening today because the Applicants, acting as if in consort, are refusing to give technological specifications to non-favored device makers and by refusing to give any business to other companies, in other words, engaging in sole sourcing.

Dramatic additional proof of the Applicants' sole sourcing and its effects has recently been submitted by USE. On November 28, 2007, USE made two ex parte submissions. One submission was an article that identified Directed Electronics, Inc. (DEI) as the sole retail distributor of satellite radio receivers for Sirius.⁴ The other ex parte submission contained excerpts from the transcript of a conference in which the President and CEO of DEI in conversations with securities analysts, disclosed that DEI had 95% of the retail satellite radio receiver market and that consumers really had no choice other than DEI to obtain Sirius satellite radio receivers.⁵ DEI's CEO made his comments in response to a question whether the new arrangements DEI had made with Sirius to reduce DEI's costs by reducing consumers' ability to recover on claims under warranty and for returns wouldn't have an adverse effect on DEI's revenues. The answer DEI's CEO gave is apocalyptic – consumers have no place else to go for Sirius receivers so DEI has no concern that its consumer-unfriendly changes in its warranty and return policies will impact DEI's revenues. Mr. Manarik's exact words were, "... I don't want this to sound wrong, but there's not a lot of places to buy Sirius receivers." ability to prevent the introduction of competing products,

This is compelling evidence that sole sourcing of satellite receivers exists today and is already adversely affecting consumers while the merger is still pending. The adverse impact on

⁴ Letter of Charles H. Helein to Marlene Dortch, Secretary of the Commission, November 28, 2007. See Attachment 2.

⁵ Letter of Charles H. Helein to Marlene Dortch, Secretary of the Commission, November 28, 2007. See Attachment 3.

consumers will be exacerbated after the merger through reduced consumer expectations and protections, reduced innovation in design, functionality and features; retention of savings due to the natural reduction in production costs, restricted inventories in retail outlets, limited product options at retail and product lock-ins in the automotive markets. The only ways to counter these consumer harms, is either to reject the merger and enforce its prohibition against these licensees combining together or to impose strict “open access” conditions, requiring the merged entity to accept the products of any device manufacturer to have access to the satellite radio network as long as the product does no harm to that network.

As regards USE’s open access conditions, it should be decisionally significant that the Applicants have repeatedly chosen not to respond to USE’s assertions about vertical monopoly and the harms it will cause to consumers and competition. Nor have the Applicants attempted in any way to address the application of the Commission’s long-standing and consistent enforcement of its network open access policies to prevent the creation of a vertical monopoly. As USE has urged before, the Applicants’ failures to respond justifies a finding that they have conceded the issue that satellite radio networks are subject to these open access policies.

APPLICANTS’ JOINT EX PARTE SUBMISSION

In its Joint Submission, Applicants for the first time attempt to address USE’s claims of a vertical monopoly. Applicants allege that USE’s claims of a vertical monopoly are unsupported⁶

⁶ Applicants claim that the vertical monopoly argument and USE’s call for an “open device requirement,” as a condition on the merger – is unfounded.” Joint Submission at 7. That’s it. No citations to the record, to precedents, to facts or materials are provided in support of this claim. Moreover, no mention is made, much less any attempt to deal with, the established policies and rulings that require open access to networks or to use Applicants’ phrase “open device requirement.” However, USE first raised the issue of vertical monopoly in its comments in response to the Notice of Proposed Rulemaking issued in this Docket. *See*, “Comments of U.S. Electronics, Inc.,” August 9, 2007, MB Docket No. 07-57 (“USE Comments”); in USE’s Reply Comments, *See*, “Reply Comments of U.S. Electronics, Inc.,” August 24, 2007, MB

and that such assertions have been addressed in the record.⁷ The first of these assertions is expressly contradicted by the record submissions of USE.⁸ The second of these assertions is expressly contradicted by Applicants repeated failures to contradict the facts presented by USE,⁹ by their failure to address, much less deny, that USE has direct experience in dealing with the sole sourcing being followed,¹⁰ and by their repeated reliance on sweeping self-serving conclusions that have not an ounce of factual evidence to support them.¹¹

Docket No. 07-57 (USE Reply”); in numerous *ex parte* submissions and presentations since then, *See, e.g.*, Letter of Charles H. Helein to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57 (Sept.4, 2007); Letter of Charles H. Helein to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57 (Sept. 25, 2007); in two petitions, *see* “U.S. Electronic, Inc.’s Petition to Defer Action,” October 12, 2007, MB Docket No. 07-57 (USE Petition to Defer) and “Petition of U.S. Electronic, Inc. to Designate Application for Hearing,” November 9, 2007, MB Docket No. 07-57 (USE Petition to Designate”).

⁷ Joint Submission at 7.

⁸ *See* Attachments 1 and 2. In addition, the support for USE’s claim that a vertical monopoly is being established is found throughout the record. *See* USE Comments at ii, n. 2, ¶¶ 12-24, 35-55; USE Petition to Defer at p. 5-8; USE Reply to Petition to Defer at p. 4-5; USE Petition to Designate at pp. 2-3, 5-14; and *ex parte* submissions such as Letter of Charles H. Helein to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57 (Sept.21, 2007); Letter of Charles H. Helein to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57 (Oct. 23, 2007), Letter of Charles H. Helein to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57 (Oct. 25, 2007).

⁹ Consolidated Reply Comments of Sirius and XM, MB Docket No. 07-57 (Aug. 27, 2007) at p. 6-7, n. 22.

¹⁰ Other than attempting to denigrate USE’s purposes in raising the vertical monopoly issue as self-serving for ulterior motives, *see* Joint Submission at p. 8-9, Sirius has not informed the Commission of its dealings with USE, its termination of those dealings, the circumstances leading to such termination nor has it disclosed the extent of its dealings with Directed Electronics, Inc. (DEI). It will be shown that Sirius’s dealings with DEI are persuasive evidence of the vertical monopoly issue raised by USE.

¹¹ Applicants’ attempt to twist USE’s request to add requests for information directed to facts concerning the issue of exclusive distributorships or vertical monopoly into a “discovery” request is misguided. USE has no need to “discover” anything. But the Commission does. And USE is perfectly within its rights to attempt to assist the Commission develop an accurate and complete record by showing that important information has been overlooked. Moreover, the criticism contradicts the Applicants’ assertion that USE’s argument against vertical monopoly is unsupported. The information USE has asked the Commission to request, if requested, will only add support to the existing record that already supports USE’s argument on vertical monopoly.

The next argument rests on a legal truism that has no relevance to the vertical monopoly issue confronting the Commission. Whatever the presumption about exclusive distributorships may be in general, the exclusive distributorships here extend a monopoly in the horizontal market to the vertical market and violate the open access policies of the Commission. These are reasons enough to rebut the “presumption” loosely relied on by Applicants.¹² And by defending exclusive distributorships the Applicants admit they intend to create a vertical monopoly.

In attempting to paint the vertical monopoly concerns as part of the “merger-to-monopoly” claim, the Applicants assert that they “have shown” the merged entity will “in fact comprise a very small part of a rapidly evolving marketplace that features a growing array of audio entertainment and more to the point, consumer electronic devices.” *Id.* There are no facts in this record that relate to the existence of an audio entertainment market, no facts in this record that show that Applicants’ horizontal and vertical monopolies in satellite radio will be disciplined by other sources of audio entertainment.

The Applicants assert that the merged entity will “have every incentive to ensure the availability of low-cost, high-quality receivers – regardless of whether it engages in ‘sole sourcing.’” *Id.* at 9. They claim the merged entity would be in no position to dictate consumer choice of equipment or to stifle development of new generation satellite radio receivers because consumers would respond by turning to “any number of other entertainment options.” *Id.* The Applicants also argue that because USE is an “importer and distributor of *a wide variety of electronic devices,*” it can continue to provide these devices after the merger. *Id.* (emphasis in

¹² Applicants’ reliance on this presumption is also undercut by their argument that exclusive distributorships “are vertical non-price agreements almost uniformly **designed to maximize sales and outputs.**” *Id.* at 8 (emphasis added). The public interest is not defined by the Applicants’ profit motives.

original). USE disputes each of these assertions and to the extent the Commission finds these assertions implicate material facts, a hearing is required to resolve the disputes.

The Applicants next claims are misleading.

Further, neither XM nor Sirius manufacture, import, or distribute radios themselves, instead relying on a number of third parties to handle these functions. For example, XM radios currently are available in the aftermarket under the Delphi, Pioneer, Samsung, Alpine, Audiovox, Sony and Polk brand names, among others. And Sirius devices have been manufactured, imported and/or distributed by companies such as Pioneer, Rotel, Delphi, Kenwood, Clarion, Visteon and Directed Electronics, Inc. – as well as USE. *Id.* at 9-10.

The first claim is a half-truth and therefore misleading because while the Applicants do not physically manufacture, import, or distribute radios themselves, they have total control over these processes. The facts are that no entity manufactures, and no entity are allowed to import or to distribute radios without the approval of the Applicants. The Commission may should take official notice that Sirius admitted in its public filings with the SEC that its own personnel “requested” its manufactures to exceed the FCC’s emission limitations.¹³ And the Commission should take official notice of the recently announced amended agreement Sirius entered into with its exclusive distributor DEI. A synopsis of the redacted version of this agreement is attached (Attachment 4) and shows beyond a doubt that Sirius controls all aspects of manufacturing and distribution.¹⁴

The Applicants claim that USE has urged “the Commission to prevent the merged company from directly or indirectly participating in the design of satellite radio receivers.” *Id.*

¹³ Sirius 10K filing dated March 13, 2006, cited by USE in its Reply Comments at p. 13, n. 35.

¹⁴ Directed Electronics has claimed it alone distributes 91% of Sirius’s receivers. And more recently has claimed to have captured 95% of Sirius’s distribution. It is because of this exclusive relationship with Directed Electronics that USE and the other companies listed by the Applicants no longer distribute Sirius receivers. *See* Letter of Charles H. Helein to Marlene Dortch, Secretary of the Commission, November 28, 2007.

USE's position is that the merged entity need not be involved in any aspects of design other than to raise an issue whether a particular design would in fact cause harm to the network.

The argument that USE's conditions "could also delay if not prevent the introduction of next-generation receivers capable of supporting a la carte programming and providing the new and innovative services that the combined company is committed to offering," *Id.* is not supported by any facts, is contradicted by the last 40 years of the innumerable new uses of the telephone network made possible by the open access policies and Part 68 of the Commission's rules, is based on self-serving speculation, and ignores the failure of both Applicants after 10 years to provide a single device with interoperable capability.

The Applicants next argue that –

[g]iven the abundant record evidence that XM and Sirius have presented concerning the competitive market in which they would compete as a merged company ...[the Applicants admit that they] have not yet specifically addressed [USE's] arguments,... [but blame their failure on] inevitable consequence of USE's failure to raise these issues during the comment phase on the merger's merits. ... USE did not even make its "vertical integration" argument ... until *after* the formal comment period was closed and the rulemaking phase of the proceeding had begun..." *Id.* (Emphasis in original).

The Applicants' argument is disingenuous. It ignores (1) their own recognition that the proceeding on the merger and the rulemaking are one and the same and that this was pointed out by USE in its Comments;¹⁵ (2) their one line response to all parties requesting conditions, including USE, as proposed solely to promote private business interests;¹⁶ (3) the permit and disclose nature of the proceeding which permits unlimited submissions into the record until the Sunshine Act requirements become applicable; (4) their decision not to use ex parte submissions to address USE arguments on vertical monopoly until their Joint Submission of November 13th;

¹⁵ USE Reply at 1, n.1.

¹⁶ Consolidated Reply Comments of Sirius and XM, MB Docket No. 07-57 (Aug. 27, 2007) at p. 6-7, n. 22.

and (5) their failure to show how USE's having raised this issue when it did has procedurally prejudiced the Applicants in any way.

The Applicants argue that because USE's Petition to Designate for Hearing comes "a full *four months* after the Commission's stated deadline for such requests ... [it] should be dismissed as procedurally improper." *Id.* at 10-11.¹⁷ The Applicants rely on the Commission's June 8, 2007 Public Notice cited at n. 37 of the Joint Submission. The actual text of the Notice states – "Interested parties must file **petitions to deny**, comments, or informal comments no later than July 9, 2007." (Emphasis added). Hence, the filing of USE's Petition to Designate is not procedurally improper.

Applicants' final argument concerning the arbitration between Sirius and USE is disingenuous. USE revealed its arbitration with Sirius at the outset of its participation in this proceeding.¹⁸ More importantly, the arbitration is about past facts and has nothing to do with this proceeding that is concerned exclusively with the future.

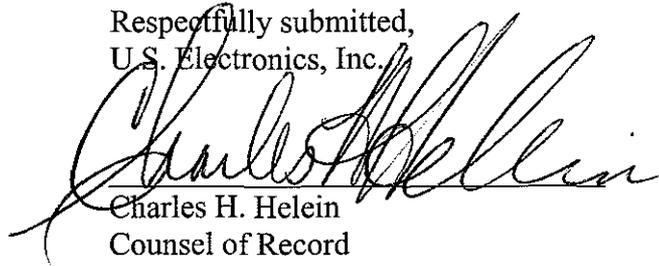
In conclusion, having finally provoked a response from the Applicants, USE has also shown that not only is the Applicants' response without a scintilla of merit, USE has also shown that the record supports either that Applicants have conceded the issue, and if the merger is to be approved, USE's conditions must be imposed; or the Commission must designate the

¹⁷ USE raised the issue of vertical monopoly in its Comments and Reply Comments in the NPRM. Since the NPRM raises the same issues about the merits of the merger, that is, whether the merger can be shown to have such public interest benefits as to require the Commission to waive a rule or to overturn its policy restricting the very combination the merger would create, USE properly raised the issue of vertical monopoly within the context of the rulemaking. Since then, the record has made it clear that there are numerous disputed material facts that require a hearing to adjudicate if the Commission is to meet its obligations under Section 310 of the Act and the requirements of the Administrative Procedure Act, 5 U.S.C. §§ 556, 557, 706 *et seq.*

¹⁸ See USE Comments at 2, n. 1.

Consolidated Application for hearing; or the Commission must deny the Consolidated Application.

Respectfully submitted,
U.S. Electronics, Inc.



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Attachment 1

Synopsis of Supporting Comments on Requiring Open Access for Satellite Radio Network

ICO Satellite Services G.P. ("ICO") – Comments on Consolidated Application for Authority to Transfer Control, July 9, 2007

ICO is a next-generation satellite communications company, that is developing an advanced hybrid system, combining both satellite and terrestrial communications capabilities, in order to offer wireless voice, data, video, and Internet services on mobile and portable devices. In its comments, ICO urged the Commission -

... to ensure that any approval of the merger is subject to conditions to safeguard the ability of potential competitors to enter the markets in which the Merged Entity would operate ... The ability of other entities to compete with the Merged Entity through new devices or services, however, could be thwarted or impeded by existing or future contractual arrangements that inhibit competition. This includes, for example, exclusive agreements with automobile manufacturers. The Commission should therefore ensure the potential for competition with the Merged Entity (if the merger is approved) by prohibiting the Merged Entity from maintaining or entering into agreements that would have the effect of limiting the ability of other entities to provide competitive products or services. ICO Comments at 2.

Slacker, Inc. - Comments of Slacker Inc., July 9, 2007

Slacker Inc. is a new personal audio service and provided its web site for more detail on its services, www.slacker.com. In its comments, Slacker urged the Commission to -

... impose two conditions assuring that present and future mobile audio technologies have nondiscriminatory access to automobiles. Slacker Comments at 1.

In support of its request for conditions, Slacker pointed out that major auto manufacturers held seats on the Boards of Directors of each of the Applicants and then argued -

The proposed XM-Sirius merger could give the merged company enough economic leverage to obtain or expand exclusive arrangements with car manufacturers. And to the extent car manufacturers also have economic interests in the single satellite radio provider, they will have an incentive to make it difficult to impossible for alternative technologies to be installed in cars. Id. at 2.

It then proposed its conditions -

First, the merged company should not be permitted to continue or enter into any exclusive arrangement with any car manufacturer; to the extent XM or Sirius has any current contracts that provide for exclusivity, those exclusivity provisions should be

terminated before they may close the merger transaction. Similar conditions have been imposed in analogous circumstances. *See, e.g., In the Matter of Comsat Corporation*, 16 FCC Rcd. 21661 (2001) at ¶ 52 (discussing the prohibition against any exclusive arrangements or management ties between ICO Global Communications and Inmarsat after the former was spun off from Inmarsat). *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, 19 FCC Rcd. 473 (2004), Appendix F (merger condition prohibiting News Corp. from offering any of its national and regional programming services on an exclusive basis to any multichannel video programming distributor). Second, the Commission should not permit car manufacturers to be represented on the board of directors of the newly formed company. *Id.* at 3. (Emphasis in original.)

Blue Sky Services Reply Comment, July 25, 2007

In Blue Sky Services Reply Comment, it cited to the fact that the Applicants had addressed the Commission's interoperability mandate (referred to as the "unified standard") in their respective 10-K Annual Report filings in 2004 with the Securities and Exchange Commission. The following excerpt from the citation to Sirius' 10-K Annual Report filed March 16, 2004 with the SEC is directly relevant to USE's position on open access.

Both companies expect to work with their automakers and radio manufacturers to integrate the new unified standard and have agreed that future agreements with automakers and radio manufacturers will specify the unified satellite radio standard. Furthermore, we and XM Radio have agreed that future agreements with retail and automotive distribution partners and content providers will be on a non-exclusive basis. Blue Sky Services Reply Comment at 2, citing to Sirius' 10-K of March 16, 2004. (Emphasis added.)

In 2004, both companies not only were then following a policy of dealing with a variety of manufacturers of satellite radio receivers, including those that were to provide interoperable receivers, but also announced their adoption of a policy not to enter into exclusive distributorships for retail, automotive or content satellite radio receivers and products. By 2005, without explanation, the Applicants abandoned this policy. Importantly, although The Applicants have been directly challenged on the record in this proceeding for abandoning their non-exclusive policy, they have failed to provide any response or defense for having done so.

Comments Of Rockwell Collins, Inc., July 9, 2007

Rockwell Collins, Inc. ("Rockwell Collins") is a global company and major manufacturer and integrator of avionics and Global Positioning System ("GPS") equipment for civilian and military customers, one of its products being its Pro Line 21™ avionics system that is capable of receiving and displaying the XM WX Satellite Weather Data Service. Comments at 1. Rockwell Collins expresses concerns closely aligned with those of USE.

The following excerpts show clearly that USE's concerns over open access extend to other devices with the same adverse effects on consumers and competition. First, it is made clear that Rockwell Collins comments concern equipment needed to access the satellite network for aviation and safety purposes.

[Rockwell Collins] comments are limited to the impact of the proposed merger on the supply of satellite-based weather systems ("SBWS") for aviation applications. Id at 2. Emphasis added.)

Like USE if seeks the imposition of conditions if the merger is to be approved.

If the FCC were to approve the proposed merger, important conditions should be imposed in order to limit the potential anticompetitive effects of the merger and to protect the public interest in the development, supply and pricing of this important safety technology. Id. at 2.

It has confronted the use of exclusive dealings in regard to equipment accessing the network and has experienced the disadvantages that such exclusive dealings caused to its ability to compete and to competition in general.

It is Rockwell Collins' understanding that XM has entered into exclusive licenses of its technology with two companies: Garmin International, Inc., ("Garmin") (which, like Rockwell Collins, is an integrated avionics manufacturer) and Heads Up Technologies, Inc. ("HUT") (a satellite radio receiver manufacturer), or their respective subsidiaries. Id. at 3.

XM has been unwilling to enter into a direct license with Rockwell Collins (or, to our knowledge, with any other integrated avionics manufacturers) seeking to compete on a level playing field with Garmin.* Id. at 3

*XM requires Rockwell Collins to acquire XM technology exclusively from HUT. We believe that this requirement has placed Rockwell Collins at a substantial cost disadvantage vis-à-vis Garmin, which is able to deal directly with XM. Id.

As a result, XM and Sirius/WSI now are direct horizontal competitors in the supply of satellite-based weather information services for aviation applications. Id.

It recognizes that the Applicants current duopoly will be converted into a monopoly in total control of services and applications that will extend to down-stream suppliers, i.e., extend the monopoly over the horizontal market to a second or dual monopoly to the vertical market.

Accordingly, XM and Sirius/WSI currently are a duopoly for this service. Id. at 4.

The merger of XM and Sirius will result in a monopoly for satellite-based weather information services for aviation applications. Id.

The elimination of one of the two services would leave avionics manufacturers such as Rockwell Collins, which are seeking to develop and market SBWS, beholden to a single satellite weather information supplier. Competition between the two satellite-based weather information services, as well as competition among down-stream suppliers of SBWS, could be lost as a result of the merger, possibly forever. *Id.*

It is also recognized that the extension of the merged entity's monopoly powers will increase prices, harm technological development and deny the public the benefits of better equipment that will increase safety concerns.

That higher SBWS prices caused by a merger would reduce the number of SBWS consumed. A reduction in the number of SBWS consumed – absent a cost competitive substitute – would translate into more aircraft continuing to fly without the safety benefit of effective, near real time weather data. *Id.* at 5.

The XM and Sirius systems are different, and were the parties to eliminate one of the two services, avionics manufacturers with investments in the technology employed in the eliminated system would face stranded costs. Since these systems both are relatively new, neither has proved itself technologically better than the other through direct competition. *Id.*

Because of Rockwell Collins concerns, it, like USE, seeks conditions to protect consumers and competition that would establish a “level playing field” among equipment providers.

The merged entity should be required to deal with all companies, like Rockwell Collins and its competitors, who provide equipment that is used by pilots to access these two satellite-based weather services, on a non-exclusive and non-discriminatory basis. The requirement that the merged entity create such a “level playing field” in its dealings with such equipment providers will help to assure that aircraft owners and operators receive the full benefit of fair and even competition among all such equipment providers. *Id.* at 5-6.

Petition To Deny of the National Association Of Telecommunications Officers and Advisors, (NATOA), July 24, 2007

NATOA members include local government officials and staff members whose responsibility is to “... develop and administer communications policy and the provision of services for the nation's local governments. Comments at 1.

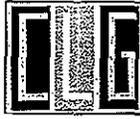
NATOA notes the alleged benefits the Applicants claim will result from the merger – lower prices, more programming choices, and deployment of enhanced technology. *Id.* at 3. But it is unconvinced that consumers will reap these benefits if the merger is permitted, based on concerns similar to those advanced by USE.

All three of these benefits, however, are contingent on the merged company's actions and are, arguably, unlikely to happen given the absence of competition in the relevant market. Id.

Once free of competitive market pressures, the merged company may have little incentive to invest substantial amounts of money into research and development. Id. at 6.

Without competition, consumers may be left with higher bills for antiquated services and technology. If the proposed merger goes forward, the subsequent company may have little incentive to develop new technologies for consumers, especially with respect to signal receivers. Hardware offerings are important to consumers and without competitive forces to drive development, consumers may languish with outdated models that fail to make use of satellite radio's full potential. Id at 9.

Attachment 2



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November 28, 2007

VIA ECSF and EMAIL

The Hon. Kevin Martin, Chairman
The Hon. Michael Copps, Commissioner
The Hon. Jonathan Adelstein, Commissioner
The Hon. Deborah Taylor Tate, Commissioner
The Hon. Robert McDowell, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: MB Docket No. 07-57

Dear Mr. Chairman and Commissioners:

For several months, U.S. Electronics has been contributing to the record in the proposed merger of XM Radio and Sirius Satellite Radio. Our continuing purpose has been to urge the Commission if it is inclined to approve the merger to adopt specific conditions to prevent the severe and evident consumer and competitive harms that will result if the monopoly provider of satellite radio services is allowed to move unfettered to a sole-source manufacturing arrangement. Absent adoption of such conditions, the Commission is urged to deny the merger.

The fact is that the Commission's action to approve the merger, if appropriate conditions are not imposed, will launch not just one monopoly, but two: one, obviously, in the horizontal market for satellite radio services but also another one in the vertical market for distribution of satellite radio receivers to consumers who want to become subscribers.

Based on U.S. Electronics' long experience in the manufacture and distribution of cutting edge consumer electronic components, we have urged that the impact on consumers of these two monopolies together will be higher prices and reduced services and innovation.

Today, I write to call the Commission's attention to the highly relevant recent statements of the Chief Executive Officer of Directed Electronics, Inc. ("DEI"), which remains in the

market as a leading provider of Sirius-licensed satellite radio receivers, tightly connected to and favored by Sirius. In a November 8, 2007 call with analysts covering DEI, James Minarik fielded questions concerning DEI's new tougher, more restrictive policies on consumer returns and whether retailers would accept the stricter policies, limiting such returns and enlarging the circumstances in which a consumer is likely to be stuck with a product that he or she does not want. Here is the most relevant part of the exchange, which weaves its way through several places in the ~~attached~~ transcript: *EM*

Q – Kevin Wenck: Okay. So it sounds like you don't think you're really going to have any significant sales losses from adopting what may, in fact, be more business-like terms with your [retail] channel.

A – James Minarik: *Yes. I don't want this to sound wrong, but there's not a lot of places to buy SIRIUS receivers.*

Yet, it does "sound wrong", and for good reason. The contraction in the number of manufacturers and distributors that *already* has been instituted by Sirius, as a duopolist, *already* has empowered a leading, favored, remaining distributor to reduce service levels to consumers by restricting its return policy and forcing retailers to accept the new policy whether they like it or not. If the merger is approved without appropriate conditions, this asymmetric power will be institutionalized as part of the market structure, to the detriment of consumers and competition. Competition disciplines manufacturers and distributors to pay attention to consumers' needs and preferences; the retreat of competition emboldens them to ignore the same.

For all the reasons that U.S. Electronics has previously articulated in the record, we again urge the Commission to require that the merger's approval be conditioned upon the applicants' agreement to an open device policy, to prevent the new dual monopoly from foreclosing the manufacturing and distribution processes from competition.

Respectfully submitted,

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cc: **Michelle Carey** - Senior Legal Advisor, Media Issues – Office of the Chairman
Rick Chessen – Senior Legal Advisor – Office of Commissioner Copps
Rudy Brioché - Legal Advisor for Media Issues – Office of Commissioner Adelstein
Amy Blankenship - Legal Advisor – Office of Commissioner Tate
Angela E. Giancarlo - Legal Advisor, Wireless & International Issues – Office of Commissioner McDowell
Cristina Chou Pauzé - Legal Advisor, Media Issues – Office of Commissioner McDowell
Commission XM/Sirius Transaction Staff
Roy Stewart, William Freedman, Marcia Glauberman, and Rosilee Chiara, Media Bureau,
Jim Bird, Ann Bushmiller and Joel Rabinovitz, Office of General Counsel, Bruce Ramano,
Office of Engineering and Technology and Gardner Foster, David Strickland, Jerry Duvall
and Shabnam Javid, International Bureau

Attachment 3



The CommLaw Group

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November 28, 2007

VIA ECSF and EMAIL

The Hon. Kevin Martin, Chairman
The Hon. Michael Copps, Commissioner
The Hon. Jonathan Adelstein, Commissioner
The Hon. Deborah Taylor Tate, Commissioner
The Hon. Robert McDowell, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: MB Docket No. 07-57

Dear Mr. Chairman and Commissioners:

As further proof of the existing sole sourcing policies being followed in today's duopoly environment by each of the Applicants for merger, please see the attached published report on Directed Electronics Inc. (DEI) by *Twice*, a web-based publication on the electronics industry of Reed Business Information, a division of Reed Elsevier Inc. dated November 27, 2007.

The *Twice* report should be read in conjunction with the transcript of the phone conference of November 8, 2007 between DEI and security analysts, an excerpt from which was recently filed as an ex parte this same date.¹ Of central importance, this report by *Twice* confirms that the negotiations between DEI and Sirius on their distributor contract referred to in the November 8th conference with analysts have been concluded and as a result "Directed Electronics will extend its contract to distribute Sirius Satellite Radio products to Aug. 31, 2008" irrespective of the pending merger between Sirius and XM.

¹ See, Letter of Charles H. Helein to the Honorable Kevin Martin, Chairman, et al, November 28, 2007, 12:25 pm.

In addition, *Twice* confirms that both XM and Sirius today have exclusive distributors – “It is not known if a merged Sirius and XM, which each has an exclusive distributor, would cause the termination of one of those distributors.”

Directed president and CEO Jim Minarik, is quoted as confirming that the amended agreement will serve as the exclusive distributorship platform for DEI’s dealings with the merged entity, “... we believe this amended agreement will serve as an excellent template for future extensions we plan to discuss after regulatory review of their merger is fully resolved in the coming months,” said Minarik.”

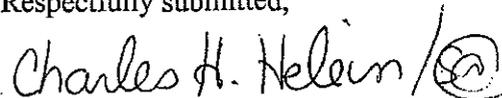
The report also confirms US Electronics’ assertions made on the record that not only is “Audiovox ... currently the distributor for XM ...” but that “... Directed has been the exclusive distributor for Sirius since the fall of 2004. (Emphasis added.)

And finally, the report confirms DEI’s change in its return and warranty policies that US Electronics described in its ex parte filed earlier today.²

Directed’s new contract also contains some changes in Sirius’ distribution policy effective Jan. 1, 2008, regarding the handling of product returns “that Directed expects will enhance cost recovery, reduce uncertainty and volatility with respect to returns and meaningfully improve the predictability of the company’s earnings in the satellite radio category,” it said.

This trade report by *Twice* provides independent evidence further supporting U.S. Electronics’ submissions on the record that the public interest requires the Commission to adopt conditions that establish an open device policy that prevents the merged entity from foreclosing competition in the manufacturing and distribution processes for satellite radio receivers.

Respectfully submitted,



Charles H. Helein
Counsel of Record
for U.S. Electronics, Inc.

Attachment

cc: **Michelle Carey** - Senior Legal Advisor, Media Issues – Office of the Chairman
Rick Chessen – Senior Legal Advisor – Office of Commissioner Copps
Rudy Brioché - Legal Advisor for Media Issues – Office of Commissioner Adelstein
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Roy Stewart, William Freedman, Marcia Glauberman, and Rosilee Chiara, Media Bureau,
Jim Bird, Ann Bushmiller and Joel Rabinovitz, Office of General Counsel, Bruce Ramano,

² Id.

Office of Engineering and Technology and Gardner Foster, David Strickland, Jerry Duvall
and Shabnam Javid, International Bureau



« Back | Print

Directed Extends Sirius Contract

By Amy Gilroy – TWICE, 11/27/2007 10:28:00 AM

Vista, Calif. — Directed Electronics will extend its contract to distribute Sirius Satellite Radio products to Aug. 31, 2008.

This agreement is significant in light of the uncertainty caused by the pending merger between Sirius and XM.

Directed's contract with Sirius was due to expire in April of 2008.

It is not known if a merged Sirius and XM, which each has an exclusive distributor, would cause the termination of one of those distributors.

Directed president and CEO Jim Minarik said, "While the pending merger between Sirius and XM has added a degree of uncertainty to the satellite radio market during 2007, as well as our agreement renewal discussions, we believe this amended agreement will serve as an excellent template for future extensions we plan to discuss after regulatory review of their merger is fully resolved in the coming months," said Minarik.

Audiovox is currently the distributor for XM and Directed has been the exclusive distributor for Sirius since the fall of 2004.

Directed's new contract also contains some changes in Sirius' distribution policy effective Jan. 1, 2008, regarding the handling of product returns "that Directed expects will enhance cost recovery, reduce uncertainty and volatility with respect to returns and meaningfully improve the predictability of the company's earnings in the satellite radio category," it said

« Back | Print

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Attachment 4

Attachment 4

EXCERPTS FROM REDACTED AMENDED DISTRIBUTION AGREEMENT BETWEEN SIRIUS AND DEI¹

On November 30, 2007, DEI filed a Form 8-K with the SEC attaching as Exhibit 10.30 a redacted version of an amended distributor agreement with Sirius. The following excerpts show that Sirius is in complete control of the manufacturing and distribution of Sirius receivers. IN the Definitions it is provided as follows:

(b) Section 1.01 of the Agreement is hereby amended by adding the following definitions in the appropriate alphabetical order: ...

“Core Accessory Products” means all Accessory Products that (a) have been designed or developed by or for Sirius at its expense and (b) include a Sirius brand and no third party hardware brand.

“Core Products” means Core Sirius Receivers and Core Accessory Products.

“Core Sirius Receivers” means Sirius Receivers that (a) have been designed or developed by or for Sirius at its expense and (b) include a Sirius brand and no third party hardware brand.

Because Sirius pays for the development costs of all receivers and accessories that carry their brand name, the “Core Products” are currently the only products a consumer interested in Sirius service can purchase.

Next, Sirius informs Directed in writing what to order and guarantees sales to Directed through a Backstop arrangement.

(b) Sirius may, from time to time, provide written instructions (in a form to be mutually agreed) to Directed to place orders with Authorized Manufacturers for specified quantities of Core Products (each such order placed by Directed pursuant to such written instructions, a “Backstop Purchase Order”). In no event shall any order for Products other than Core Products be considered a Backstop Purchase Order. In the event that any Core Products purchased by Directed under a Backstop Purchase Order are not shipped to a customer within ninety days of receipt by Directed, Sirius shall purchase such Core

¹ See, DEI’s Form 8-K and Exhibit 10.30, filed November 30, 2007 with the Securities and Exchange Commission.

Products from Directed at the then current [* * *] offered by the applicable Authorized Manufacturer.

Sirius also agrees to cover any expedited shipping costs to retailers.

SECTION 3.11. Expedited Shipping Costs. Sirius shall be responsible for the incremental costs associated with the expedited shipment of Products by Directed to Approved Dealers (in comparison to standard shipment costs), only to the extent that such expedited shipment has been approved by Sirius in advance in writing.

Sirius will also pay for remanufactured receivers and units that are not tied to a new subscription.

SECTION 4.02. Activation Payments. (a) Sirius shall pay Directed an activation fee of \$[* * *] (an "Activation Fee") and a dealer payment of \$[* * *] (a "Dealer Payment") for the initial activation of the Sirius Radio Service by a Subscriber on a new Sirius Receiver sold by Directed (identified by electronic serial number), excluding:

- (i) the activation of a Sirius Receiver by an existing subscriber in connection with a Sirius Receiver exchange, upgrade or subscription transfer;
- (ii) the activation of a re-manufactured or refurbished Sirius Receiver ...

Sirius and Directed will set the wholesale and retail prices for products "that are competitive with the costs and retail prices of similar products marketed and sold by third parties". But there are no other parties manufacturing, distributing or selling Sirius receivers that are not controlled by Sirius.

SECTION 3.03. Product Sourcing and Pricing. (a) Directed shall purchase Products (other than Directed/Sirius Accessory Products) from third party manufacturers authorized by Sirius ("Authorized Manufacturers"). Directed and Sirius shall work together to establish mutually acceptable dealer costs and suggested retail prices for such Products that are competitive with the costs and retail prices of similar products marketed and sold by third parties, which costs and prices may change from time to time due to market conditions. Directed shall publish documents for its dealers that contain such dealer costs and suggested retail prices in accordance with the costs and prices set forth in Exhibit B.

The amended agreement contains provisions on returns but is heavily redacted. But from the un-redacted provisions it is clear that Sirius is intimately involved. In addition, some provisions appear to disadvantage consumers wishing to return receivers. For example, Sirius' involvement in the processing of returns to Directed is likely to slow the process down. And the ramifications of the provision that has Sirius working with Directed to minimize the return of Core Products with consumer induced damage would appear to arise from Directed's intent to increase its revenues by the changes in its returns and warranty policies announced by its CEO on November 9th.

SECTION 3.09. Returns. (a) Directed and Sirius shall process all Core Products returned to Directed by Approved Dealers in the manner set forth in this Section 3.09.

(b) Directed shall use all commercially reasonable efforts to ensure that the Core Products returned to Directed by an Approved Dealer adhere [* * *] (the "Warranty"), and at a minimum will [* * *]:

(i) the Core Product returned is accompanied by [* * *], the Core Product was returned within the applicable Warranty period [* * *]; and

(ii) at the time the Approved Dealer returned the Core Products to Directed, the Core Products were not [* * *] manufactured and the applicable Authorized Manufacturer warranty period for the last manufactured unit has expired. Core Products to be included in the "Products Ineligible for Return" list shall be determined jointly by Directed and Sirius.

(c) Directed shall visually inspect each Approved Dealer-returned Core Product to determine if such Core Product has observable consumer induced damage. Directed shall use Sirius' Cosmetic Acceptance Standards for "B-Stock" Products, attached hereto as Exhibit C (as it may be amended by Sirius from time to time), as a guideline for determining whether such Core Product has observable consumer induced damage. Directed shall return consumer damaged Core Products to the appropriate Approved Dealer, or otherwise handle such consumer damaged Core Products in a commercially reasonable manner approved by Sirius in writing, provided that such approval shall not be unreasonably withheld. Sirius shall work with Directed in good faith to minimize the return of Core Products with consumer-induced damage.