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December 19, 2007

Via ECFS

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

Re: MB Docket No. 07-57

Dear Ms. Dortch:

On December 17, 2007, an ex parte meeting was held between representatives of U.S. Electronics, Inc. New York, New York (USE) and the following members of the XM/Sirius transaction staff of the Commission – Marcia Glauberman, Rosalee Chiara, and Dan Bring, Media Bureau, Joel Rabinovitz and Ann Bushmiller, Office of General Counsel and Jerry B. Duvall, International Bureau.

Attending for USE were Mr. Andrew Lowinger, President and CEO of USE, Bill Acevedo, Operations Manager, Kathleen Wallman of Wallman Consulting, LLC and the undersigned as Counsel of Record for USE.

At the meeting, three copies of an "Executive Summary of Key Presentations" were provided. The Executive Summary contained summaries of the formal pleadings and ex parte filings made by USE since August 9, 2007 in Docket MB 07-57. This Summary of USE filings shows that USE has consistently raised the harms to consumers and competition that the Applicants use of sole sourcing would produce by creating a vertical monopoly that would result in a dual monopoly in satellite radio (both horizontal and vertical) – monopolies over both network services and the equipment/access to those services. Also provided was a summary of

the Applicants' submissions on the record that showed that those submissions did not address the core issues, factual allegations or established policies contained in USE's filings that showed that permitting the creation of a dual monopoly in satellite radio would be contrary to the public interest by harming consumers and competition.

Emphasis was placed on the fact that despite the extensive information USE had provided on the record, not only had the Applicants failed to respond to the issues raised on the record by USE over all this time, the Applicants had even failed to oppose USE's Petition to Designate the Consolidated Application for hearing. It was pointed out that the harm to consumers from the vertical monopoly over equipment would occur outside the scope of the Commission's oversight capabilities. As an example of why this is so, a statement made by the CEO of Sirius' exclusive retail distributor, Directed Electronics, Inc. was quoted and the Staff told that this statement should be taken as a "peek into the future" of how consumers would be treated by the monopolist and its agent. With but one source for satellite radios, DEI's CEO admitted that cutting back on support services for the receivers raised no concern of an adverse impact on its revenues, because "... there's not a lot of places to buy Sirius receivers."[1]

USE next called attention to the fact that others were supporting USE, including public interest groups, e.g., Public Knowledge as well as commercial interests.[2] USE submitted that support for its position was even broader, including those that opposed the merger on any terms or sought other types of conditions.

Expressing the understanding that USE's presentations were still "timely," i.e., that preparation of any decision had not commenced, a question was asked whether USE was supplying enough information, was it helpful and how could USE be more helpful. This led to a discussion of process with focus on the unopposed Designation Petition and the lack of meaningful responses from the Applicants to USE's issues.[3] USE argued that since process was essential to the public's right to know, the Applicants should not be allowed to remain silent on material facts in an effort to avoid a hearing. The consequences of such stonewalling would be that the public would not be informed as is their right.

Given the Applicants' failures to respond, especially to a Designation Petition, USE asked whether its vertical monopoly issue would be considered by the Staff. USE was assured that of course all issues are considered, that having raised the issue was helpful and had raised issues of importance.

Inadvertently, the copies of the Executive Summary lacked the Index prepared to make reference to the tabbed documents easier. The copy of the Executive Summary attached hereto contains the Index.

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[1] Executive Summary at Tab 22, page 28.

[2] Id. at Tab 25, page 31.

[3] Reference was made to the summary of USE's filings contained in the binders and it was pointed out that under Tab 29 was a memo summarizing the Applicants' responses that showed their lack of substance vis-à-vis USE's issues.

Pursuant to Section 1.1206 of the Commission's Rules, this letter and its attachments are submitted via ECFS for inclusion in the public record of these proceedings, with email copies of this cover letter sent to those listed below.

Respectfully submitted,

By: Charles H. Helein /(Sa)
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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)
	)
Consolidated Application for Authority to Transfer Control of Licenses	)
	)
XM Satellite Radio Holdings Inc., Transferor,	)
	)
to	)
	)
Sirius Satellite Radio Inc., Transferee	)

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EX PARTE SUBMISSION
OF
U.S. ELECTRONICS, INC.
IN

MB Docket No. 07-57
The Consolidated Application of
XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc.
For
Transfer of Licenses

EXECUTIVE SUMMARY OF KEY PRESENTATIONS
DECEMBER 17, 2007

U. S. Electronics, Inc. (USE) filed its opening comments in this Docket on August 9, 2007. Since then it has continued its participation through both formal and ex parte submissions. The following executive summary of USE's key presentations is provided to aid in the review of the substantial and material facts, established precedents and the arguments contained in USE's presentations.[1]

[1] Legend: USE's formal and ex parte presentations are listed in chronological order by date and by title or description of the subject matter of each presentation. A CD containing a complete copy of each presentation is also being furnished.

TAB 1

1. Comments on Notice of Proposed Rulemaking, August 9, 2007

USE expressly identified that the issues it addressed in its comments were about "what has occurred, and is still occurring, with the design, development, manufacture and distribution of satellite radio receivers... [and that the] issue is a critical part of the Commission's public interest analysis with present and future consequences for the public." At ii.

USE identified for the first time on the record that the "... Applicants are changing from using multiple suppliers of satellite radio receivers to sole source supply arrangements...pointing out specifically that "Sirius has supported and is entering into an exclusive distributorship with Directed Electronics, Inc. (DEI) [and that] XM is negotiating an exclusive arrangement with Audiovox Corporation." *Id.*

USE commented that such "[s]ole source supply arrangements eliminate all intra-brand competition in the design, development, manufacturing and distribution of satellite radio receivers..." *Id.* [and that the] "... control that Sirius and XM wield over the entire production of the necessary receivers allows them to use hardware pricing as a tool to promote self-serving practices that can harm the consumer." *Id.* at iii.

USE argued that the Applicants' sole sourcing would cause the "[e]limination of competition in devices essential to consumer access to network services [and result] in the loss of creative and innovative design, higher prices, limited options and closed access to services." *Id.*

USE cited to the fact that "[f]or over 50 years, Commission policies and rules have followed the precedents established in the watershed cases of *Hush-a-Phone* and *Carterphone* to ensure a robust, highly diversified and vigorously competitive market for a vast array of devices connected to the telephone network to the benefit of consumers. The Commission itself has applied this policy to the new wireless network facilities that will be opened to auction early next year." *Id.*

TAB 2

2. Reply Comments on Notice of Proposed Rulemaking, August 24, 2007

The issue and arguments advanced in its August 9th Comments were continued and expanded in its Reply Comments of August 24th and cited to the fact that "[s]mall businesses are being disadvantaged by the Applicants' parallel shifts as duopolists to sole sourcing suppliers for the equipment needed by consumers to access their networks." At i.

USE then challenged the "... claim that the merged entity will not raise or be able to raise prices lest it lose customers ..." as flawed because the "... argument is narrowly focused on only one aspect – the network services. What is ignored is the ability to leverage the monopoly over the network into other market areas (e.g., hardware/equipment) where through cross-subsidization, the merged entity can exact monopoly profits to subsidize keeping its services below cost." *Id.* at ii.

Based on the precedents of *Carterfone* cited in its Comments, USE put forth "... empirical evidence gained by its direct experiences in dealing with or knowing about the Applicants' practices regarding the manufacture, distribution and design of satellite radio hardware/equipment, [and proposed] ... restrictions on the merged entity's involvement (or that of the present duopolist licensees if the merger is not approved) in the manufacturing process and, by necessary implication, the distribution and design and development of such hardware/equipment." *Id.* at iii.

USE was careful to point out that its "... approach would allow the merged entity (or the current duopolists) to collaborate in the early phases of the design and development of the hardware to be manufactured; ... [but argued that] any participation in actual manufacturing and/or the ability to control manufacturing would be prohibited." *Id.*

USE explained that its proposed "... ban would extend to actual distribution and control of distribution [but would allow for the identification of] reasonable parameters (e.g., protocols, certain software, technical requirements, etc.) required to protect or enhance the satellite radio network ... [as long as these are] ... publicly disclosed, [along with] ... any changes in such specifications, [with] access to all would-be providers ... guaranteed." *Id.*

It argued that " ... the Commission must provide that control of the satellite network itself (by a single monopolist or by the duopolists) cannot be leveraged to control and dictate consumer choice of how and with what equipment they access the network and cannot be used to grant undue preferences or accord arbitrary preferential treatment to any manufacturer, distributor or other source of supply." *Id.*

And, in response to the Applicants' claim that no "'merger to monopoly'" is possible or involved," USE pointed out that "the Applicants simply ignore that the first victim of their merger is the competition that exists ... in such areas as choice of manufacturer for the hardware equipment, [the loss of] multiple manufacturers to drive innovation, and [the loss] in retail incentive offerings that produce lower consumer prices for the equipment needed to access the network." *Id.* at iv.

TAB 3

3. Errata to Reply Comments, August 27, 2007

Corrected a reference to section 273 of the Act. Inadvertently, the reference was to section 253.

TAB 4

4. Written Ex Parte on Public's Right to Open Access, September 4, 2007

On August 30, 2007, USE requested scheduling for the first in its series of ex parte meetings. Because the request for this scheduling commented on the merits of the merger, it was filed as an ex parte on September 4, 2007. The merits of the merger to be addressed in the requested meetings were described as follows:

> The issues raised by USE concerns on-going adverse consequences to the public's right to open access to the satellite radio network of the existing duopolist licensees and the certain expansion of those adverse consequences if the merger is approved. The on-going artificial restriction of the public's rights to access the satellite networks arises from the Applicants' parallel actions to provide exclusive rights to supply satellite radio equipment – Sirius to Directed Electronics, Inc. or DEI and XM to Audiovox Corporation. In support of this assertion, an article dated February 21, 2007 that reported on the exclusive arrangements made by Sirius and XM was attached to [the September 4 ex parte]. At 2.

And although USE had raised these concerns in both its Comments and Reply Comments, USE advised that the –

> … Applicants have not attempted to rebut these concerns. They have simply attempted to denigrate them based on the self-serving assertion that USE' Comments (and others as well) seek certain conditions on the merger "because they are clearly designed to advance the companies' business interests to the detriment of consumers …" Consolidated Reply Comments of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc., MB Docket No. 07-57, at n. 22, p. 6, August 27, 2007. *Id.*

USE argued that the Applicants' silence and dismissive attitude could lead to but one conclusion.

> The Applicants' dismissive response to the issues raised by USE leaves un-refuted the facts on which they are based, and leaves unaddressed the established precedents on which USE relies to support its request for Commission action to condition the merger in furtherance of those precedents and the core public interests they represent. *Id.*

TAB 5

5. Ex Parte Meeting with Commissioner Tate's Legal Advisor, September 21, 2007

On September 19, 2007, USE had an ex parte meeting with Amy Blankenship, Legal Advisor to Commissioner Tate.

In this ex parte, USE repeated its concerns, emphasizing that the concerns were based on USE's President's " ... years of experience in the design, development, and distribution of network communications devices and the manufacturing process that produces such devices, ... [pointing out] that controlling the supply of network access devices through sole sourcing dictated by the network operator will harm consumers and competition ... [that the] move to control the supply and distribution network by the Applicants as duopolists is already taking place ... [and that] there is a need for conditions or regulatory requirements that eliminate the present and protect against the future harms that sole sourcing dictated by the network operator cause." At 2.

In addition, as it had in its filings and other ex partes, USE continued to emphasize "... the need to apply the open access policies of the Commission, established 50 years ago, in the *Hush-a-Phone and Carterfone* decisions and not long thereafter codified in Part 68 of the Commission's rules and most recently reaffirmed by the Commission as to wireless networks and cable set top converters." *Id.*

TAB 6

6. Ex Parte Meeting with the FCC's Transaction Staff, September 19, 2007

On September 19, 2007, USE also had an ex parte meeting members of Commission's transaction staff engaged in consideration of Media Bureau Docket No. 07-57. The ex parte on this meeting was filed September 25, 2007.

Here again, USE's President " ... provided information on his and his company's first-hand experience with the current impact of the Applicants' (as duopolists) sole sourcing practices on the manufacturing and supply of satellite radio receivers and how that impact would be extended after the merger should the Commission grant the consolidated application." At 1.

In this meeting important exchanges were made between USE and the Staff. The ex parte contained the following report on the exchanges on the subject of conditioning the merger.

> In response to questions, specific conditions were discussed including barring a network provider from directly or indirectly engaging in the manufacture of satellite radio receivers or other digital devices that can access the satellite radio network; barring the network provider from interfering with the design, manufacture or distribution of satellite radio receivers or other digital devices that can access the satellite radio network; barring the network provider from arbitrarily discriminating against any supplier by manipulating its control and knowledge of its network; requiring the network provider to publish and make available information on the technical requirements and specifications of the network, including reasonably advanced notice of any changes; and imposing the FCC's policy that the public has the right to use any device to access and make use of the satellite radio network, consistent with the principles established in the *Hush-a-Phone* and *Carterfone* decisions -- as codified in Part 68 of the FCC's Rules, 47 C.F.R. Part 68. *Id.* at 2.

In response to the Staff's " ... question ... about the response the Applicants made to USE's position... [USE informed the Staff] ... that the Applicants have not attempted to rebut these concerns." *Id.* at 3.

TAB 7

7. Ex Parte Meeting with Commissioner Adelstein and his Legal advisor, September 24, 2007

On September 24, 2007, an ex parte meeting was held with Commissioner Jonathan S. Adelstein and Rudy Brioche, the Commissioner's Legal Advisor for Media Issues. An ex parte was filed on September 25, 2007 on this meeting.

In this meeting, USE identified that its concerns and experience with the Applicants' sole sourcing had created the "... issue of vertical integration ..." At 2.

Then to "... address the potential harms arising from the vertical integration sole sourcing creates, merger conditions were proposed and set forth in a briefing memorandum that was provided at the end of the meeting." At 2.

A copy of that memorandum was attached to the ex parte and is on the CD being provided.

TAB 8

8. Ex Parte Meeting with Commissioner Copps and his Legal advisor, September 24, 2007

On September 24, 2007, an ex parte meeting was held with Commissioner Michael J. Copps and Rick C. Chessen, the Commissioner's Senior Legal Advisor/Media Advisor.

In this meeting as well, USE identified that its concerns and experience with the Applicants' sole sourcing had created the "... issue of vertical integration ...." At 2.

And, as was done with Commissioner Adelstein, to "... address the potential harms arising from the vertical integration sole sourcing creates, merger conditions were proposed and set forth in a briefing memorandum that was provided at the end of the meeting." *Id.*

A copy of that memorandum was attached to the ex parte with Commissioner Copps and Mr. Chessen as well and is identical to the memorandum provided to Commissioner Adelstein and Mr. Brioche.

TAB 9

9. Written Ex Parte of October 2, 2007 - Article Posted by Seeking Alpha

On October 2, 2007, USE filed a written ex parte containing a "... recent article posted by Seeking Alpha, the leading provider of stock market opinion and analysis ... available at http://seekingalpha.com/article/48431-xm-sirius-merger-update-is-positivity-warranted. At 1.

Pertinent excerpts from this Article read –

XM-Sirius Merger Update: Is Positivity Warranted?

The Counsel for U.S. Electronics submitted an ex parte filing which details concerns regarding the distribution habits of the companies and how hardware (radios) distribution may adversely affect consumers under a single entity.

Compounding the issue is the fact that there are no legitimate conditions regulators can impose to protect third parties who currently use the "duopolists" as negotiating leverage. While tiered pricing may benefit consumers and can be policed to some extent, there is currently no assurance or mechanism in place to keep the combined entity from dictating negotiating terms for products and services specific to satellite radio.

TAB 10

10. Written Ex Parte on Failure to Post Ex Partes, September 25, 2007

As indicated at tabs 7 and 8 preceding, on September 25, 2007, two ex parte reports on meetings with Commissioners Copps and Adelstein and their respective Legal Advisors were filed. On October 2, 2007, an ex parte was filed complaining that the September 25th ex partes to the Commissioners had " ... not been posted. on the FCC's web site." At 1.

The bases for USE's concerns were the responses it received to the inquiries made as to the reasons for the delay in posting these ex partes. As explained -

> It has been stated that there was some unidentifiable "technical problem" with the posting using the ECFS system. The filings were made in the exact same manner as other ex parte filings. An ex parte report filed by XM on September 27th was posted on September 28th and an ex parte report of Sirius, filed September 28th, was posted that same day. Id at 2.

TAB 11

11. Written Ex Parte on Posting Delays, October 3, 2007.

On October 3, 2007, a written ex parte was filed with the Secretary's Office pertaining to the handling of the September 25, 2007 ex parte filings on meetings USE had with Commissioners Copps and Adelstein. At 1.

USE also pointed out in this ex parte that as "... of the time this letter was prepared, no information has been provided explaining why the ex partes filed and received September 25, 2007 were not posted on line within the customary time frame nor any explanation or information as to why these have not yet been posted over one week after their being filed." *Id.*

TAB 12

12. Ex Parte Letter to Chairman and Commissioners re Decision-making Matrix / Time Line, October 9, 2007

On October 9th, on behalf of USE a "... written *ex parte* [was] submitted to place in the record and to bring to [the] immediate attention [of the Chairman and Commissioners] new and unaddressed issues ... not included in the decision-making matrix and that, require the interruption of the standard time line for scheduled completion of action on the Consolidated Application." At 1.

The issues, among others, not receiving attention in USE's view were listed as follows -

Vertical monopoly/vertical integration of the equipment submarket/network access.
Issues raised by the handling of *ex parte* communications.
Issues raised by the release of information on the scheduling of agenda items.
Delays in access to decision-makers. *Id.* at 2.

TAB 13

13. Petition to Defer Action, October 12, 2007

On October 12, 2007, USE formally petitioned to defer action on the Consolidated Application.

> USE petitions for a formal tolling of the 180 days in order for the Commission to make certain that: (1) the issue of vertical monopoly/integration and its adverse impacts on competition in the retail market and on consumer choice, innovation in product, pricing, design, distribution and other consumer interests is addressed; (2) the Commission complete on-going investigations and disclose its findings on the Applicants' rule violations and failure to provide interoperable radios before any final decision is made on the merger; (3) its *ex parte* rules are working properly, that no favoritism creep into the decisional processes, that time be provided to ensure equal access to all decision-makers; and (4) should the merger move toward approval it be properly conditioned to protect the public interest. At 2.

USE's argument on the issue of Vertical Monopoly is summarized following.

> Vertical Monopoly. The adverse impact that would result in the monopolization of the sub-market for consumer devices to access the satellite radio network of the merged entity. At 5.

> The vertical integration of the access device market would deprive consumers of product choice, innovation in design, functionality and features, would result in higher prices, restricted inventories, and limited distribution alternatives, and have a profound adverse impact on both OEM (the automotive market for satellite radio receivers) and retail (from major retail chains and outlets to electronic boutiques). Dominance of the equipment submarket can be used to manipulate profits to the detriment of consumers. For example, the merged entity's sole sourcing will allow it to price equipment to subsidize lower subscription rates rendering Commission oversight of that consumer interest of limited or no benefit (footnote omitted). *Id.* at 6.

> Their ability to engage in sole sourcing as a monopoly would give them significant advantages at the retail level over their so-called audio entertainment "competitors," the iPods, MP3s, Internet, etc. The merged entity will be the only entity providing satellite radio product to retailers. Absent competitively protective conditions, its control of the product any consumer must buy who wants its unique national multi-channel subscription audio entertainment/information services, provides it with coercive and predatory power not only in the "broader market" it has defined, but also in the submarket that will affect that "broader market." Retailers, especially small, independent retailers, mom and pop retailers, will either acquiesce or lose their right to sell the merged entity's product. The small retailers can be denied to right to sell satellite radios unless they accept conditions and make concessions dictated by the merged entity. *Id.*

> The power of the merged entity also extends to the automotive industry. Sole sourcing has been the only method of manufacturing, design and distribution. *Id.* at 6 & 7.

The "only game in town" power of a merged entity will expose car manufacturers to its "take it or leave it" terms or be excluded from offering the satellite radio option to the car buying public. *Id.* at 8.

Certain Commissioners and their staffs have understood the concerns raised by the vertical monopoly/integration issue. *Id.*

Such results are in direct violation of the open network access policies. *Id.* at 9.

The Applicants' answer to these precedents is to ignore them. The Applicants have not in their many *ex parte* presentations, nor in their formal comments, addressed the issue of extending the monopoly to the vertical markets. *Id.*

TAB 14

14. Ex Parte Meeting with Michelle Carey, October 18, 2007

On October 18, 2007, an ex parte meeting was held with Michelle Carey, Senior Legal Advisor to Chairman Martin. On October 23, 2007 an ex parte of this meeting was filed.

USE's President, for the first time, was able to advise the Chairman's office of its "... concerns [for]

> ... the adverse impact on the vertical or downstream market and how that impact is likely to expand after merger ... [and that the] key point [was] the need for conditioning the merger to prevent the merged entity from unduly influencing and ultimately controlling the downstream markets of manufacturing and distribution of satellite radio receivers and accessories." At 1.

When asked "...whether it was USE's position that the merger was not in the public interest, USE answered that in its opinion it would not be in the public interest to approve the merger without proper conditions. When asked what conditions it would impose, USE provided a copy of the conditions it specified in its Petition to Defer Action of October 12, 2007." At 2.

In addition, USE –

> ... emphasized that not only did the novelty and complexity of the legal issues and factual circumstances support the need for additional time, but also the need to ensure development of a complete record on other critical issues such as vertical integration, the proposed conditions to be imposed, and the Applicant's record on regulatory compliance. These in turn create the need for additional information from and disclosures by the Applicants. USE suggested that a data request would be an appropriate vehicle to supplement the record. USE volunteered to provide what information it had gained from its experiences that might be relevant to such a document request. *Id.* at 2-3.

TAB 15

15. Ex Parte Meeting with Commissioner McDowell and His Legal Advisor, October 18, 2007

On October 18, 2007, an ex parte meeting was held with Commissioner McDowell and Cristina Chou Pauze, the Commissioner's Legal Advisor, Media Issues. On October 23, 2007 an ex parte of this meeting was filed.

Hereto, USE's President "... advised that USE' concerns are on the adverse impact on the vertical or downstream market and how that impact is likely to expand after merger...[that the] key points presented included the need for conditioning the merger to prevent the merged entity from unduly influencing and ultimately controlling the downstream markets of manufacturing and distribution of satellite radio receivers and accessories... [that] consumers could also be disadvantaged by other inherent characteristics of monopoly providers." At 1-2.

USE next described the danger of overlooking how the -

> ... adverse impacts on consumers in terms of price, quality, availability, features and functions resulting from a non-competitive market, consumers [could] also be misled about the true costs they are paying. Subscription rates, while quite visible to the consumer (the "front door" of the purchase decision), can be kept low while the prices for the equipment needed to obtain the service can be disguised and manipulated in ways that will be invisible to consumers (the "back door" of the purchase decision). In the end the reality becomes one of hidden subsidies that distort the true costs of satellite radio services. *Id.* at 2.

Based on USE's overall experience in the consumer electronics field, its specific experiences with the downstream markets for satellite radio receivers, and its observations of the present effects of the Applicants' moves to sole sourcing, USE also expressed concerns that the merger if not properly conditioned could adversely impact both the retail and automotive market segments for satellite radio. In retail, dominant suppliers can leverage their control of their offerings by exacting marketing and sales concessions that squeeze the retailers' profits forcing their prices to consumers to increase making them less competitive and even non-competitive. The small, mom and pop retailers are particularly vulnerable to these tactics. *Id.*

USE also pointed out that in " ... the automotive marketplace, the sole sourced supply of satellite radios for in-car options, means that there will be no alternative sources of supply to discipline pricing." *Id.*

USE repeated its request " ... that the merger be conditioned as it requested in its Petition to Defer Action." *Id.*

USE's ex parte also recorded that at "... the conclusion of the meeting, a request was made that the topics discussed be supplemented by writings as deemed pertinent in addition to this ex parte report." *Id.* at 3.

TAB 16

16. Written Ex Parte - Editorial in the Wall Street Journal by Walter Mossberg, "Free My Phone", October 25, 2007.

On October 25, 2007, USE submitted "... an editorial that appeared in the *Wall Street Journal* on October 22, 2007 authored by Walter S. Mossberg, entitled "Free My Phone."

USE's ex parte pointed out that the "... opinions expressed in the article have particular resonance not only with the concerns USE has raised in this Docket, but also with what is needed to cure the problem in the public interest ... At 1, and that Mr. Mossberg's article demonstrates that not only do logic, regulatory history, and Commission and court precedents support open access to communications networks, but so does broad public perception and experience." At 4.

TAB 17

17. Ex Parte Request to Michelle Carey, October 25, 2007

In a follow-up ex parte to the meeting with Ms. Carey on October 18th, USE urged "... that the Commission issue a Request for Additional Information to the Transfer Applicants, seeking the following information for the time period, where relevant to the response, 2001 through 2007, inclusive." At 1.

1. Each type of business arrangements used to provide satellite radio receivers to subscribers.

2. Each company that manufactures and/or manufactured satellite radio receivers identifying specifically, the time period that each receiver was manufactured, products currently in development by each manufacturer and reasons why former manufacturing partners no longer produce receivers.

3. Each distributor used to distribute satellite radio receivers to retail outlets and/or to auto manufacturers, identifying the models available from each sorted by year, products currently in development and reasons why former distribution partners ceased these operations.

4. Each company responsible for the design and/or development of each satellite radio receiver offered to consumers and the costs of these activities.

5. With respect to each year for which a decline in the number of distributors or licensees is reflected in the responsive data, the reason for such decline.

6. The names of distributors that have or had structural affiliations with each of the Applicants.

7. Each copy of Sirius' contracts/agreements with Directed Electronics, Inc. and all documents relating to the pending renewal or extension of this agreement.

8. Each copy of XM's contracts/agreements with Audiovox and any other currently licensed distributors including documents that relate to any new, agreements renewals or extensions currently in negotiation.

9. Each copy of Sirius' contracts/agreements with Kiryung, Wistron, and Humax and any documents that relate to an alteration, separation, cancellation or voiding of any agreement.

10. Notice of any disputes with licensed manufacturers including current monies owed to each.

11. The number of complaints received by each Applicant from complainants in each of the following categories, together with an explanation of the top five types of complaints heard from each category:
    a. Consumers
    b. Retailers
    c. Distributors
    d. Licensees

12. An explanation of structural and behavioral protections in place to ensure continued consumer choice as to receivers compatible with each Applicant's network.

13. An explanation of criteria and processes employed to determine whether and to whom licenses are granted by each Applicant for the manufacture and distribution of receivers.

14. Each Sirius employee, officer or other company representative that directed, instructed, ordered any manufacturer of satellite radio receivers to exceed FCC specifications.

15. Each Sirius employee, officer or other company representative that directed, instructed, ordered antennas to be erected at sites other than those authorized by the FCC.

16. All documents relating to the comprehensive compliance plan approved by Sirius' Board of Directors in response to the FCC violations.

17. Each XM employee, officer or other company representative that directed, instructed, ordered antennas to be erected at sites other than those authorized by the FCC.

18. For each year from 2005 to date, provide the number of complaints from consumers about satellite radio receiver performance, pricing, support, repair and/or replacement.

19. The number of satellite radio receivers repaired and/or replaced.

20. The savings realized by technological advancements, design, engineering or manufacturing efficiencies and records of how these savings were passed on to consumers.

USE pointed out that each "... of these requests is narrowly tailored to specific issues that have been raised in the record, but to which the Applicants have not responded. These requests focus on facts that are in the exclusive possession and control of the Applicants. Given that logic, history, precedent and public perception and experience support the concerns about the public harm that is caused by a vertical monopoly." At 3.

TAB 18

18. Request for Ex Parte Meetings, October 31, 2007

In a letter to Honorable Michael J. Copps dated October 30, 2007, USE requested an ex parte meeting " ... to discuss important developments affecting the merits of the Consolidated Application and the status of the record." At 1. USE listed these developments as follows -

> Two petitions have been filed asking that the Commission's standard time clock for decision be deferred. *Id.*
>
> Other recent developments affecting the Commission's consideration of the Consolidated Application. *Id.*
>
> USE' ex parte submission made October 25, 2007 to the Chairman's Office asking that the Commission issue a Request for Additional Information to the Transfer Applicants. *Id.* at 2.
>
> The General Accountability Office's report. *Id.*
>
> The publication of an article in the Wall Street Journal. *Id.*
>
> Developments in litigation seeking to enjoin the merger. *Id.*
>
> Concerns about the impact on the completeness of the record. *Id.*

TAB 19

19. Reply of U.S. Electronics, Inc To Joint Opposition To Petition To Defer Action, November 1, 2007

In its reply to the Applicants' Joint Opposition to USE's Petition to Defer Action, USE made the following points.

USE made its "request to ensure that the Commission has adequate time to consider a fully developed record. There is important information missing from this record. At 2.

"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. *Id.* at 4.

"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.'" *Id.*

The vertical monopoly issues have been briefed by USE. USE has introduced substantial evidence into the record on this issue and by presenting legal, economic and practical analyses of the attendant harms caused by vertical monopolies. 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. *Id.* at 4-5.

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. Is hearsay and not evidence. *Id.* at 6.

Applicants' promises of future benefits, such as ala carte services and pricing is not evidence. Applicants have ignored challenges that they have not provided supporting documentation or demonstrated on the record their actual capability to provide these. Several commenters have claimed that the Applicants have invented the "audio entertainment market," 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, provided a cogent legal 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. *Id.* at 6-7.

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. *Id.* at 9.

TAB 20

20. Petition of U.S. Electronics, Inc. To Designate Application For Hearing, November 9, 2007

On November 9, 2007, USE filed a Petition to Designate the Consolidated Application for Hearing. In support of its petition, USE made the following main points.

> On November 2, 2007, the Commission issued a detailed request for additional information to supplement the record. On November 16, 2007, Applicants are to respond to the Commission's request for additional information. At ii.
>
> Having reviewed the Commission's latest request for additional information, USE submits that it does not include requests that will produce information about the issue USE has presented on the record, viz., the vertical integration issues that are at the heart of the public interest determination that the Commission must make: whether consumers will be irreparably harmed by allowing not only horizontal integration of the satellite radio services market, but the further integration of that consolidated market vertically with the market for providing satellite radio receivers. *Id.*
>
> Although USE has repeatedly raised this issue, and the Applicants have ignored it. Despite the breadth of the Commission's requests that were issued, requests critical to developing the facts on vertical integration were not included that will require a reasoned and supported response from the Applicants. *Id.*
>
> In addition, developments have occurred and are occurring outside the scope of the Commission's proceeding that relate to the issues surrounding the merits of the Merger. Although the Applicants are obligated to keep the information on their pending application accurate and up-to-date, they have not done so. This failure violates Rule 1.65 and the manner of that violation raises issue of candor that reflects on the Applicants character qualifications. *Id.* at iii.
>
> Under section 309 of the Communications Act, if there are substantial and material questions of fact outstanding concerning the merits of an application, the Commission must designate the application for hearing. As set forth in detail in this Petition, there are substantial and material questions of fact outstanding that require the Commission to designate the Consolidated Application for hearing. *Id.*

USE also specified the issues requiring examination in a hearing.

Issue 1: Whether the vertical integration between the market for providing satellite radio services on the one hand and the market for providing satellite radios receivers on the other hand violates Commission policies and decisions and is adverse to the public interest? In reaching a determination on this issue, the following should be considered:

(a) whether there is any public benefit to excusing the satellite radio network from the application of the established open network access requirement;

(b) whether the public interest is harmed by the Applicants' departing from the use of multiple manufacturers, designers, and/or distributors to sole sourcing their requirements to single entities, and the facts and circumstances surrounding this departure;

(c) whether consumers are likely to be harmed by the adverse effects of sole sourcing on consumer choice of devices to access network services, including without limitation, higher prices, less innovation, lower quality, hidden subsidies;

(d) whether competition by and among manufacturers, designers, distributors and/or retailers in the satellite radio receiver market is likely to be harmed by the move to sole sourcing;

(e) whether the considerations developed in response to (a)-(d) preceding have the same, similar or different impacts in the OEM (Auto) market versus the retail market;

(f) whether the considerations developed in response to (a)-(e) preceding have the same, similar or different impacts in what the Applicants refer to as the broader audio entertainment market;

(g) whether a broader market as described by Applicants exist ; and

(h) whether there will be adverse economic effects caused by sole sourcing on the segment of the consumer electronics market for satellite radio receivers and devices in the OEM, retail or both markets.

Issue 2: Whether the vertical integration between the market for providing satellite radio services on the one hand and the market for providing satellite radios receivers on the other hand has any public interest benefits? In reaching a determination on this issue, the following should be considered:

(a) what support exists, if any, for any claimed cost savings, protection of content or other benefits Applicants assert may arise from vertical integration and sole sourcing;

(b) whether such cost savings or benefits are likely to flow through to the public and how; and

(c) whether specific conditions preventing vertical integration through sole sourcing would serve the public interest.

Issue 3: Whether the public interest, convenience and necessity would be served by the grant of the Consolidated Application without conditions being imposed preventing vertical integration through sole sourcing?

Issue 4: Whether the Applicants have failed to comply with their duties under Commission Rule 1.65, 47 C.F.R. Part 1, §1.65, for the continuing accuracy and completeness of information furnished in the Consolidated Application? In reaching a determination on this issue, the following should be considered:

(a) recent developments on the pending class action litigation entitled *Brockwell v. Sirius Satellite Radio, Inc., et al.,* Index No. 60019/07 and *Johnson v. Sirius Satellite Radio, Inc., et al,* Index No. 600899/07, pending in New York Supreme Court, New York County (Commercial Division) ("class actions");

(b) whether the failure to disclose to the Commission the matters related to shareholder actions and disclosures to shareholders violate Rule 1.65?

Id. at 2-3.

TAB 21

21. Ex Parte Meeting With Commissioner Adelstein and His Legal Advisor, November 20, 2007

On November 20, 2007, an ex parte meeting was held with Commissioner Jonathan S. Adelstein and Rudy Brioche, the Commissioner's Legal Advisor for Media Issues. An ex parte on the meeting was filed November 21, 2007.

As reported, in " ... the meeting, USE addressed the developments that have occurred since its last meeting with Commissioner Adelstein and Mr. Brioche on September 25, 2007, including the filings of Petitions to Defer Action and Petitions to Designate for Hearing; the Commission's own November 2, 2007 request for additional information, and the highly redacted responses filed by Sirius." At 1.

Next, USE questioned how the Commission could -

> ... consider the public interest factors raised by [the] horizontal monopoly ... created by the Consolidated Application, much less the ... issue ... concerning the extension of the horizontal monopoly to the vertical market for access equipment [when] the Applicants had ignored this issue failing to make any substantive response to USE's arguments leaving the record devoid of any rebuttal [and] making it reasonable to conclude that the Commission should find that the Applicants had conceded the issue. *Id.* at 1-2.

USE also expressed its concern that despite its consistent presentation of the issue on the creation of a dual monopoly, there had been no indication if the issue was receiving attention within the Commission and therefore " ... inquired whether it was known to what extent the vertical monopoly issue it raised was being considered within the Commission and whether its importance to consumers and competition was understood." *Id.*

The Commissioner " ...indicated that an inquiry of the merger staff would be made on this, but the issue was understood and considered important by [his] ... office." *Id.*

TAB 22

22. Written Ex Parte on Statements of Chief Executive Officer of Directed Electronics, Inc. ("DEI"), November 28, 2007

The written ex parte of November 28, 2007 provided undeniable evidence that if the Commission failed to adopt specific conditions to prevent sole-source manufacturing arrangements consumers would suffer. The evidence presented was the statements of the Chief Executive Officer of Directed Electronics, Inc. ("DEI"), the leading provider of Sirius-licensed satellite radio receivers. USE's ex parte stated -

> 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.
>
> **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.*** At 1-2.

The elimination of manufacturers and distributors that *already* has been instituted by Sirius has empowered Sirius's chosen 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." *Id.* at 2.

TAB 23

23. Written Ex Parte Of Report on Directed Electronics Inc. (DEI), November 28, 2007

USE next submitted " ... further proof of the existing sole sourcing policies being followed in today's duopoly environment by each of the Applicants ..." by submitting a "... 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." At 1.

USE urged, "The *Twice* report should be read in conjunction with the transcript of the phone conference of November 8, 2007 between DEI and security analysts. 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". At 1.

In short, "*Twice* confirms that both XM and Sirius today have exclusive distributors." *Id.* at 2.

TAB 24

24. Written Ex Parte on Announcement of Verizon Wireless, November 30, 2007

On November 30, 2007, USE submitted two " ... articles published in the Wall Street Journal, entitled, "Verizon to Open Cell Network to Others' Phones;" and "Verizon's Opening Move and You," and an article published in the Washington Post, entitled, "Verizon to Open Its Wireless Network – Move Gives Users Increased Choices." At 1.

It also quoted the support for Verizon's decision from both the Commission's Chairman and the ranking member of Congress with Commission oversight authority - "FCC Chairman Kevin J. Martin and Rep. Edward J. Markey, chairman of the House subcommittee in charge of telecommunications issues, praised the announcement as a victory for consumers." At 2.

TAB 25

25. Ex Parte Letters to Commissioner McDowell, December 6, 2007

In response to the invitation to submit further writings on USE's position made at the conclusion of the meeting with the President of USE on October 18, 2007, an ex parte was made. The letter set forth -

> The conditions USE seeks to have the Commission impose regardless of whether the merger is approved. ...
>
> - Be barred from directly or indirectly engaging in or interfering with the design, manufacture or distribution of satellite radio receivers or other digital devices that can access the satellite radio network;
> - Publish and make available information on the technical requirements and specifications of its network, including reasonably advanced notice of any changes to any qualified and willing partner;
> - Not interfere with consumers' access to, or their choice of, devices by which to access the network;
> - Comply with rules and regulations that provide for the compatibility of receivers to ensure that the satellite radio using public has reasonable and non-discriminatory access to the satellite radio network;
> - Comply with the FCC's policy that the public has the right to use any device to access and make use of the satellite radio network, consistent with the principles established in the Hush-a-Phone and Carterfone decisions -- as codified in Part 68 of the FCC's Rules, 47 C.F.R. Part 68, and as more recently applied to cable set-top converters; and importantly,
> - Be subject to an independent monitor who will ensure compliance with FCC rules and regulations.
>
> At 1-2.

In the other ex parte letter, USE summarized the record submissions of others that independent of USE's efforts support open access to the network listing the following comments. At 1.

> ICO Satellite Services G.P. ("ICO") – Comments on Consolidated Application for Authority to Transfer Control, July 9, 2007. Pg 1
>
> Slacker, Inc. – Comments of Slacker Inc., July 9, 2007. Pg 2
>
> Blue Sky Services Reply Comment, July 25, 2007. Pg 2
>
> Comments Of Rockwell Collins, Inc., July 9, 2007. Pg 3
>
> Petition To Deny of the National Association Of Telecommunications Officers and Advisors, (NATOA), July 24, 2007. Pg 5

TAB 26

26. Use's Ex Parte Submission, December 10, 2007

On December 10, 2007, USE filed an ex parte "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.'"[2] At 1.

In this ex parte, USE repeated its assertions that –

> Based on the record in this proceeding, the merger will create not one, but two monopolies, one horizontal and the 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 minimize innovation. At 1-2.

In this submission, USE again pointed out its previous arguments and submissions:

> Applicants 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. *Id.* at 2.

> USE has repeatedly advised 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. Because of the closed market that is created by the ability to prevent the introduction of competing products, the merged entity's vertical monopoly will allow it to raise equipment prices and to do so virtually undetected. 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. *Id.* at 2-3.

> Dramatic additional proof of the Applicants' sole sourcing and its effects. On November 28, 2007, USE made two ex parte submissions. An article that identified Directed Electronics, Inc. (DEI) as the sole retail distributor of satellite radio receivers for Sirius. The other 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.[3] DEI's CEO made his comments in response to a question whether the new arrangements DEI had made with Sirius to reduce DEI's

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[2] 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").

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

costs by reducing consumers' ability to recover on claims under warranty and for returns wouldn't have an adverse effect on DEI's revenues. 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. *Id.* at 3.

The adverse impact on consumers 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 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. *Id.* at 3-4.

As regards USE's open access conditions, Applicants have repeatedly chosen not to respond to USE's assertions about vertical monopoly and the harms it will cause to consumers and competition. *Id.* at 4.

In its Joint Submission, Applicants for the first time attempt to address USE's claims of a vertical monopoly expressly contradicted by the record submissions of USE. The second of these assertions is expressly contradicted by Applicants repeated failures to contradict the facts presented by USE, by their failure to address, much less deny, that USE has direct experience in dealing with the sole sourcing being followed, by their repeated reliance on sweeping self-serving conclusions that have not an ounce of factual evidence to support them. *Id.* at 4-5.

The next argument 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. And by defending exclusive distributorships the Applicants admit they intend to create a vertical monopoly. *Id.* at 6.

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 recently announced amended agreement Sirius entered into with its exclusive distributor DEI. A synopsis of the redacted version of this agreement shows beyond a doubt that Sirius controls all aspects of manufacturing and distribution. *Id.* at 7.

[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. ... *Id.* at 8.

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;[4] (2) their one line response to all parties requesting conditions, including USE, as proposed solely to promote private business interests;[5] (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; and (5) their failure to show how USE's having raised this issue when it did has procedurally prejudiced the Applicants in any way. *Id.* at 8-9.

[4] USE Reply at 1, n.1.

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

TAB 27

27. Written Ex Parte on The Adverse Impact of Sole Sourcing on the Automotive Marketplace, December 11, 2007

In making a third written submission to Commissioner McDowell in response to his requests for writings on USE's issues on the merger, a written ex parte was presented on December 11, 2007. In this submission, USE addressed the adverse impact of sole sourcing/vertical monopoly on the automotive marketplace. USE first explained that -

> The Applicants' ability to control the manufacture and distribution of satellite receivers is not limited to the retail market, but extends as well to the automotive marketplace (often referred to as the OEM market)[;that] XM and Sirius competed in the automotive marketplace to obtain exclusive agreements with various automakers[; that a]s both companies have moved to sole sourcing, what little competition there was has eroded. At 2.

USE advised that the

> ... impact of this ability to cross-subsidize will be felt across a broad spectrum of the automotive marketplace if not the entire marketplace [because, today] ... satellite radio is standard equipment in nearly all car lines including through XM's automotive partnerships with, among others, Toyota, Hyundai, Honda, Nissan, GM, and Subaru.*[Citing to XM Satellite Radio Holdings Inc.'s SEC Form 425, November 13, 2007. In this filing, XM states that its services are "available in 140 different vehicle models for 2007."]* [Likewise, USE pointed to the fact that] Sirius reports that its service is available in autos manufactured by, among others, Dodge, Ford, Mazda, Mitsubishi, Nissan, Scion, Toyota and VW. *[Citing to Sirius Satellite Radio Inc.'s SEC Form 425, November 13, 2007. Other automakers (mostly selling high-end models) are listed as well;* that in] 2006, Sirius announced a long-term deal that calls for all Kia models to include Sirius satellite radio as standard equipment starting in 2008 [; that every] Kia customer will pay for Sirius hardware whether they desire Sirius service or are already a Sirius subscriber with existing hardware[; that satellite] radio currently is and will increasingly become a service that will broach every level of society regardless of income level [and] ... can be particularly attractive to people living in rural areas where options for terrestrial radio service are limited, and where travel across great distances to urban areas is commonplace. *Id.*

USE further pointed out that it "... will hardly benefit automotive consumers to pay an artificially low monthly subscription, if the cost of the installed receiver to obtain that service is made too dear or the options of choice of receiver is 'one-size fits all.'" *Id.*

Finally, USE showed that because

> ... Sirius and XM already control every single aspect of the manufacturing process and the distribution process, even though they do not manufacture or distribute the receivers themselves, the dual monopoly over both the network and the hardware into which they will merge means that –

* automotive consumers will pay more for their receivers, even if subscription prices are not substantially increased,
* automotive consumers will pay for satellite radio hardware whether they desire satellite radio service or not,
* there will be no competition to discipline attention to product and service quality and reliability will deteriorate,
* product availability will not be based on market demand but on internal corporate interests such as prioritizing product placement in high density-low cost areas, and
* realizing corporate synergies will take priority over maintaining quality standards in customer service, (such as more limited return and warranty policies). *Id.* at 2-3.

TAB 28

28. U.S. Electronics, Inc.'s Motion to Designate and for Summary Decision, December 12, 2007

On December 12, 2007, USE filed a Motion to Designate and for Summary Decision that asked the Commission to designate the Consolidated Application for hearing as a matter of law.

In its motion, USE pointed out that the Applicants had not opposed USE's Petition to Designate Application for Hearing filed November 9, 2007 and set forth that under Section 309(e) of the Act, the Commission had a strict obligation to designate the Consolidated Application for hearing because of numerous questions of fact that "are both substantial and material..." as established by USE's unopposed Petition to Designate of November 9th. At 2.

USE also cited to Commission rule 47 C.F.R. 73.3591, to the broad mandate given it by Congress under section 151 of the Act and the duty to carry out the Nation's communications policy as legislated in section 157 of the Act. Id. at 3, arguing that a

> ... closed satellite radio network inhibits the establishment of a "Nation-wide [satellite] radio communication service with adequate facilities at reasonable charges" and frustrates the "policy of the United States to encourage the provision of new technologies and services to the public." At a minimum, under 47 USC 157, the Applicants "have the burden to demonstrate that [applying the open access policies of the Commission] is inconsistent with the public interest." But the Applicants have not done so. They have not even responded to USE's advocacy and showings of the need for open access to the satellite radio network now and in the future. *Id.* at 4.

USE concluded that given the unopposed Petition to Designate and the statutory prescriptions in sections 309, 151 and 157,

> ... the Commission must grant [USE's] motion and designate the Consolidated Application for hearing and thereafter issue a summary decision imposing the conditions proposed by USE that will ensure the application and implementation of the open access policies of the Commission to satellite radio now and in the future. *Id.* at 4.

TAB 29

29. Summary of Applicants' Record Submissions Showing They Have Not Addressed The Vertical Monopoly and Open Access Issues

Introduction

This summary highlights that the Applicants have failed and refused to deal with the issues raised by USE on vertical monopoly and open access. Instead, Applicants have chosen either to be completely non-responsive, to riddle their responses with non-sequiturs, to rely on conclusory and self-serving assertions, and to assume the existence of factual proofs instead of submitting them on the record.

Since the filing of its initial Comments on August 9, 2007, USE has thoroughly and repeatedly briefed the Commission about the adverse impact on consumers and competition if the proposed merger is allowed to create a dual monopoly over services and the sub-market for consumer devices needed to access the satellite radio network. USE has shown in its pleadings and *ex parte* submissions that the vertical integration of the access device market would deprive consumers of product choice, innovation in design, functionality and features, would result in higher prices, restricted inventories, and limited distribution alternatives, and have a profound adverse impact on both the automotive market for satellite radio receivers and the retail market -- from major retail chains and outlets to electronic boutiques.

As USE's Ex Parte Executive Summary of its presentations to the Commission in this Docket show, USE has introduced into the record evidence based on its direct experience, supported by legal and policy analyses, that should the merger be approved, it can only be approved subject to specified conditions that will protect satellite radio consumers' rights of open access as guaranteed under the Commission's longstanding open access policies.

In contrast to USE's submissions, Applicants' submissions to the record follow a practiced routine of for the most part ignoring USE's submissions, or in rare instances, filing

vague, self-serving denigrations of USE's facts and arguments, often followed by sweeping unsupported conclusions that the record contains proofs of the merger's merits without citation to any document, submission or any discrete part of the record where these proofs may be found. For example, Applicants assert that "the record in this docket amply demonstrates that the proposed merger is in the public interest;[6] that "the record so far developed in this proceeding demonstrates that this is not a 'merger to monopoly;'[7] that arguments supporting the likelihood of a vertical monopoly are "unfounded;"[8] that the "merger is in the public interest;"[9] and that the "[c]ompetitive landscape is well documented."[10]

In reality, what the "record shows" is that the Applicants' pattern of practice, throughout this entire proceeding, is to make conclusory statements without citing any credible evidence within "the record" or any supportive precedent to refute USE's claims. The Applicants repeated claims that the "merger is in the public interest" is supported by little else than expressions of support by individuals, companies and organizations. Applicants' promises of future benefits, such as a-la-carte services and pricing is not evidence. Even conceding these may be publicly beneficial, the Applicants have once again simply ignored challenges that they have not provided supporting documentation or demonstration of their actual capability to provide these.[11]

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[6] Consolidated Comments at p. 8.

[7] Joint Opposition at p. 35-36.

[8] Joint Ex Parte Submission at 7.

[9] *Id.* at 8.

[10] *Id.* at 9.

[11] Applicants apparently fail to see the irony in their willingness to embrace a-la-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. Furthermore, the Applicants have offered no factual support that its coined "audio entertainment market" exists or has ever been recognized

Summary of Applicants' Self-serving Non Sequiturs
Applicants' Consolidated Comments

The Applicants argue that they have shown that their proposed transaction will serve the public interest "without harming competition in the market for audio entertainment services." Consolidated Comments a p. 6.

➔ USE's Argument: USE shows that the market reality is that competition in satellite radio as an "audio entertainment service" is being bottlenecked by the Applicants' elimination of consumer choice in the devices available to access that service.

The Applicants claim that the merged entity "has every incentive to [provide public benefits] given the wide variety of other audio entertainment providers with which it competes (sic)." Consolidated Comments at p. 9.

➔ USE's Argument. USE has shown that the other audio entertainment providers with which the merged entity is said to compete do not, or cannot, artificially restrict consumer access to the devices needed to access the audio entertainment services available. *See* USE Reply at 3-4.

The Applicants argue that as a merged entity it will be "unable to raise prices or restrict output without losing customers" and instead, the merged entity will be able to "offer enhanced choice and lower prices." Consolidated Comments at p. 9.

➔ USE's Argument. USE's filings show that these assertions are not credible because they are divorced from the Applicants' actual practices of restricting consumer choice to

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by any reputable economic, business or judicial authority. They provided no cogent legal analysis of how markets are 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 precedent on its head. *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.

access the network through the move to sole sourcing, which sets the stage for them to raise prices through their exclusive control of the hardware for they can then raise prices.

The Applicants argue that satellite radio is a small part of the broad and competitive market for audio entertainment, which is dominated by terrestrial radio and that all the existing competitors would constrain the merged entity's ability to increase prices or decrease output. Consolidated Comments at p. 5-6.

➔ USE's Argument. USE shows that even if one were to assume that the market is as large as the Applicants now suggest, their ability to engage in sole sourcing as a monopoly would give them significant advantages at the retail level over their so-called audio entertainment "competitors". Absent competitively protective conditions, its control of the product any consumer must buy who wants its unique national multi-channel subscription audio entertainment/information services, provides it with coercive and predatory power in both the "broader market" it has defined, but also in the submarket that will affect that "broader market."

Consolidated Reply Comments of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc.

The Applicants only substantive response to USE's Comments relates to USE's call for open access conditions should the merger be approved.[12] The Applicants contend that "[a]part from these misrepresentations about the merger's benefits, several parties put forth proposed conditions irrelevant to the issues raised by the Notice of Proposed Rulemaking. ... Similarly, U.S. Electronics argues that a combined Sirius-XM must be "prohibited from limiting the availability of satellite radio receivers to those designed, developed manufactured and distributed by the network provider directly or through a single agent." USE Comments at iv. The Commission should reject these proposed conditions in the related transfer of control proceeding

[12] Applicants make another flippant reference to USE in a footnote stating that the Comments filed against the approval of the transfer application by companies like USE, "were authored by terrestrial broadcasters (or surrogates for them) who compete with the Applicants." *See Consolidated Reply* at 1-2, n.2.

because they are clearly designed to advance the companies' business interests to the determent of consumers." *Citing* Joint Opposition at 100.

➔ USE's Argument: Applicants' plea that the merger not be conditioned in any way telegraphs a corporate policy that the merged entity will tolerate no restrictions on its operations and practices regardless of public interest considerations. *See* Joint Opposition at p. 100-101, arguing that the "proposed conditions are unnecessary, inappropriate for consideration in the context of this merger, or designed only to advance the business interests of their proponents." *Id.* at 100.

Applicants' answer to the Commission's open access policy and *Carterphone* precedents is to ignore them. Moreover, the Applicants have not in their many *ex parte* presentations, nor in their formal Reply Comments, addressed the issue of extending the monopoly to the vertical markets. Instead they have relied on consumer testimonials claiming the merger will benefit the public through increased programming choices and lower prices, a new generation of products with advanced and user-friendly features. *See* October 4, 2007 *Ex Parte* filing by Sirius Satellite Radio Inc., a press release entitled "Consumer Will Benefit from Merged Satellite Radio Company Say Leading Electronic Retailers and Auto Manufacturers.

None of Applicants' testimonials or arguments addresses the Commission's long-standing policy or the plethora of precedents that prohibit a network operator's control over consumer choice of the devices by which to obtain the services of the network itself.

Joint Opposition to USE's Petition to Defer

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's Argument: The vertical monopoly issues in this case have been carefully briefed by USE. USE has introduced voluminous evidence into the record on these issues, evidence that the Applicants have not challenged. Having chosen to ignore the vertical monopoly issue, while acknowledging that the issue affects the merits of the merger, the Commission may 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.

Joint *Ex Parte* Submission of XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc.[13]

Rather than replying to USE's Petition to Designate Hearing, the Applicants filed a Joint Ex Parte Submission. In its Joint Ex Parte Submission, Applicants allege that USE's claims of a vertical monopoly are unsupported[14] and that such assertions have been addressed in the record.[15] Joint Ex Parte Submission at p. 8-9.

> ➔ USE's Argument: 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).
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> Furthermore, Applicants' claim is expressly contradicted by Applicants repeated failures to contradict the facts presented by USE,[16] by their failure to address, much less deny, that USE has direct experience in dealing with the sole sourcing being followed,[17] and by

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[13] Hereinafter referred to "Joint Ex Parte Submission."

[14] 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, as the record shows, USE first raised the issue of vertical monopoly in its initial Comments in response to the Notice of Proposed Rulemaking issued in this Docket. *See,* USE's Comments, Reply Comments and numerous ex parte submissions and presentations since the initiation of this NPRM; *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); and in two petitions, *see* "U.S. Electronic, Inc.'s Petition to Defer Action," October 12, 2007, MB Docket No. 07-57 and "Petition of U.S. Electronic, Inc. to Designate Application for Hearing," November 9, 2007, MB Docket No. 07-57.

[15] Joint Submission at 7.

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

[17] 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

their repeated reliance on sweeping self-serving conclusions that have not an ounce of factual evidence to support them.

Applicants argue that "Courts have routinely determined that exclusive distributorships are presumptively lawful because they are procompetitive vertical nonprice agreement almost uniformly designed to maximize sales and output." *Id.* at 9, n. 28.

➔ USE's Argument: The cited support is completely irrelevant to the vertical monopoly issues before 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.

Applicants dismiss USE's vertical monopoly arguments as "nothing more than a slightly different spin on the tired 'merger-to-monopoly' claim thoroughly rebutted in this record. Of course, there are no citations to this nor to the claim that "as XM and Sirius have shown, the merged company 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." Joint Ex Parte Submission at 9.

➔ USE's Argument: 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." Joint Ex Parte Submission at 9. 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.'" Joint Ex Parte Submission 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

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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.

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 original).

> ➔ USE's Argument: USE disputes each of these assertions and argues that to the extent the Commission finds these assertions implicate material facts, a hearing is required to resolve the disputes.

Applicant further presents a series of dismissive responses to the issues raised by USE:

- The "competitive landscape, already well documented in this record, will prevent the harms about which USE speculate." *Id.* at 10.
- The "conditions proposed by USE are not only unnecessary but also counterproductive." *Id.* at 11.
- Applicants have not "ignored" USE's arugments given the "abundant record evidence ... presented concerning the competitive market in which they would compete as a merged company." *Id.* at 11.

Applicants claim that USE's arguments are "obviously animated by USE's pending arbitration against Sirius relating to USE's prior role as a manufacturer and distributor of Sirius satellite radios and by its transparent desire to extend its role in the satellite radio receiver business. The Commission should not condone USE's efforts to use this proceeding to advance its own private commercial goals in another context." *Id.* at 11.

> ➔ USE's Argument: 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. Claims of increased programming choices and lower prices should not dissuade the Commission from the issue, which has never been addressed by the Applicants, that is, without merger conditions, the public will be captives to the Merged Company's sole source design, development and supply of receivers and future network access devices.

[18] *See* USE Comments at 2, n. 1.