

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
XM Satellite Radio Holdings Inc.,)	
Transferor,)	
)	
and)	MB Docket No. 07-57
)	
Sirius Satellite Radio Inc.,)	
Transferee.)	
)	
Consolidated Application for Authority to)	
Transfer Control of XM Radio Inc. and Sirius)	
Satellite Radio Inc.)	

CONSOLIDATED OPPOSITION

Sirius Satellite Radio Inc. (“Sirius”) and XM Satellite Radio Holdings Inc. (“XM”) hereby submit this Consolidated Opposition to the multitude of petitions, motions, and other filings submitted by U.S. Electronics, Inc. (“USE”) in or relating to the above-captioned proceeding (the “merger”).

USE never petitioned to deny the merger in accordance with the Commission’s rules and thus has no standing to raise anything but informal objections to the transaction. But since the close of the formal merger pleading cycle, USE has inundated the Commission with at least 40 petitions, motions, letters, and other filings in the merger docket.¹ These filings say virtually the

¹ See, e.g., Petition of U.S. Electronics, Inc. To Designate Application for Hearing, MB Docket No. 07-57 (filed Nov. 9, 2007) (“Designation Petition”); Comments on Notice of Proposed Rulemaking Submitted by U.S. Electronics, Inc., MB Docket No. 07-57 (filed Aug. 10, 2007) (“USE Rulemaking Comments”); Letter from Charles Helein to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57 (Sept. 4, 2007); Letter from Charles Helein to Marlene

same thing in different procedural forms, and raise the very same substance at issue in an arbitration proceeding between Sirius and USE.² Indeed, USE's interest in Commission processes and continuing spate of regulatory filings have nothing to do with the public interest. They instead constitute an attempt by a former manufacturer/distributor to extend its fight against Sirius beyond the contours of the on-going arbitration to achieve results via a merger condition that were not achieved during USE's markedly unsuccessful contractual relationship with Sirius.

Sirius and XM have answered USE's arguments—repeatedly.³ In essence, USE invites the Commission to insert itself in the arbitration between Sirius and USE in order to require Sirius to license USE to manufacture and distribute Sirius equipment, in spite of the inability of Sirius and USE to work together in a contractual relationship. USE was wrong to engage in this abuse of Commission process when it first tried (belatedly) to inject its contractual business

H. Dortch, Secretary, FCC, MB Docket No. 07-57 (Sept. 25, 2007). USE also has advanced various other complaints that at times border on the frivolous—for example, USE's suggestion that, despite making numerous filings in this docket to date, it has nonetheless been denied access to Commission personnel or that there is an imagined conspiracy to keep its pleadings out of the Commission's docket file. *See* Letter from Charles Helein to Chairman Kevin Martin, FCC, MB Docket No. 07-57 (filed Oct. 9, 2007); Letter from Charles Helein to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57 (Oct. 2, 2007).

² *U.S. Electronics, Inc. v. Sirius Satellite Radio Inc.*, No. 13 133 Y 011 07 06 (AAA). *See also* U.S. Electronics, Inc. Reply Comments on Notice of Proposed Rulemaking, MB Docket No. 07-57, at ii (filed Aug. 24, 2007) (“USE Rulemaking Reply Comments”) (referring to “the merged entity's . . . ability to leverage the monopoly over the network into other market areas (e.g., hardware/equipment)”).

³ *See, e.g.*, Consolidated Reply Comments of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc., MB Docket No. 07-57 (filed Aug. 27, 2007); Joint Opposition of Sirius and XM to Petitions to Defer Action, MB Docket No. 07-57 (filed Oct. 25, 2007); Joint Ex Parte Submission of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc., MB Docket No. 07-57 (filed Nov. 13, 2007) (“Joint Ex Parte”).

issues into the Commission’s “public interest” evaluation of the merger.⁴ And it continues to be wrong each time a new USE filing appears.⁵

As Sirius and XM have repeatedly observed, USE’s perceived problem with Sirius is a private contractual dispute. USE is a former licensed manufacturer and distributor of Sirius radios sold under USE’s “Xact” brand. Sirius did not continue its relationship with USE as a manufacturer/distributor after the contract expired for a variety of reasons. The parties had incompatible business philosophies, and by the time the contract expired, the parties were in arbitration covering almost every aspect of the parties’ relationship. In the arbitration, USE primarily alleges that Sirius—after entering into agreements with USE—entered into an agreement with Directed Electronics (“DEI”) for DEI to distribute receivers designed by Sirius and sold under the Sirius brand name and that Sirius improperly favored DEI over USE in a variety of ways. One of the principal allegations of the arbitration—that Sirius supposedly made DEI its key, if not sole, distributor—mirrors the recurring theme in USE’s filings before the FCC. With the expiration of USE’s agreements and with the relationship now mired in an acrimonious and aggressively-fought arbitration, USE has no opportunity to re-enter the market for Sirius satellite radios through a contractual arrangement. So, like a spurned suitor, it has brought its battle with Sirius to the FCC, and asks the agency to force the parties together.

⁴ See USE Rulemaking Comments; USE Rulemaking Reply Comments.

⁵ USE’s latest installment of the argument comes in a December 12, 2007 filing entitled U.S. Electronics, Inc.’s Motion to Designate and for Summary Decision, MB Docket No. 07-57 (filed Dec. 12, 2007), for which this Consolidated Opposition will serve as a response. That pleading itself appears largely to repeat USE’s November 9, 2007 Designation Petition, the substance of which was responded to in an ex parte filed by Sirius and XM on November 13, 2007. See Joint Ex Parte at 7-11.

The effort is wholly inappropriate. USE has tried mightily to transform this commercial dispute into something that sounds like an FCC policy concern, but, as Sirius and XM have argued at length, those arguments simply fall flat. First, despite USE’s arguments about a variety of imagined consumer harms, neither the individual companies nor a combined company has any economic incentive to stifle receiver innovation, increase receiver cost, or engage in any of the other consumer harms about which USE speculates. To the contrary, in order to maintain and increase its share of the listening audience in the highly competitive audio entertainment market, the combined company will have every incentive to ensure the availability of low-cost, innovative, high-quality receivers.⁶ With competition from a host of alternative audio entertainment devices and services, the combined company will strive to maintain cutting-edge technology to provide receivers with a high level of functionality and quality at the lowest possible price point.

USE desires the Commission to ignore these obvious market incentives. The “conditions” that USE seeks would essentially require the combined company to license any manufacturer to make the company’s equipment—no matter what the quality. This market intrusion would undoubtedly benefit USE—and essentially derail USE’s arbitration with Sirius—but it is difficult to see how it would benefit consumers or, in fact, make it easier for the Commission to conclude the WCS/Satellite Radio Terrestrial Repeater rulemaking.⁷

⁶ See Joint Ex Parte at 9.

⁷ *Amendment of Part 27 of the Commission’s Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band; Establishment of Rules and Policies for the Digital Audio Radio Satellite Services in the 2310-2360 Frequency Band*, Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, FCC 07-215 (Dec. 18, 2007) (“WCS/Satellite Radio Terrestrial Repeater Rulemaking”).

Finally, even if there were something wrong with “sole sourcing” the manufacture of satellite radios, which USE clearly thinks there is,⁸ USE’s argument is simply irrelevant. Neither XM nor Sirius relies on a single source for radios. As the Commission is well aware, Delphi, Pioneer, Samsung, Alpine, Audiovox, Sony, Polk, Rotel, Kenwood, Clarion, Visteon and others have all made satellite radios.⁹

USE appears to have no ready answer to these facts. Rather, it is reduced to preposterous procedural arguments—such as its most recent argument that the Commission is *required* to designate the merger applications for hearing. Fundamentally, as a matter of administrative law, USE’s various motions and requests are not self-executing.¹⁰ Moreover, as indicated above, it is simply untrue that USE’s repeated arguments have not also been repeatedly opposed.

The volume of USE’s filings expose the grudge match that it is pursuing against Sirius, and the relief it seeks exposes the self-interest underlying USE’s filings. Sirius and XM urge the Commission to resist USE’s invitation to insert the FCC into this private contractual dispute. The Commission has repeatedly refused to do so in numerous other cases,¹¹ and it should do so here.

⁸ See USE Rulemaking Comments at 8-13; Letter from Charles Helein to Robert M. McDowell, FCC, MB Docket No. 07-57 (Dec. 11, 2007).

⁹ See Joint Ex Parte at 9-10.

¹⁰ See, e.g., *In re Comark Cable Fund III v. Northwestern Indiana Telephone Co.*, 104 F.C.C.2d 451, *5 & n.20 (1985) (noting that “it is clear that the decision of when trial-type hearings are necessary is one which lies within the discretion of the Commission”).

¹¹ See, e.g., *Vodafone AirTouch, PLC, and Bell Atlantic Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 16507, 16,514 n.37 (WTB, IB 2000) (“*Bell Atlantic-Vodaphone Order*”) (citing *Applications of WorldCom and MCI Communications Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 18,025, 18,148 ¶ 214 (1998)); *Applications of Vodafone Airtouch, PLC and Bell Atlantic Corp.*, Order on Further Reconsideration, 17 FCC Rcd 10,998, 11,000 ¶ 6 (WTB

For these reasons, the FCC should reject USE's procedural and substantive arguments and expeditiously approve the merger.

Respectfully Submitted,

/s/ Patrick L. Donnelly

Patrick L. Donnelly
Executive Vice President, General Counsel
and Secretary
Sirius Satellite Radio Inc.
1221 Avenue of the Americas
36th Floor
New York, NY 10020

Richard E. Wiley
Robert L. Pettit
Peter D. Shields
Jennifer D. Hindin
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006
202.719.7000

Attorneys for Sirius Satellite Radio Inc.

December 26, 2007

/s/ Dara F. Altman

Dara F. Altman
Executive Vice President, Business and
Legal Affairs
XM Satellite Radio Holdings Inc.
1500 Eckington Place, NE
Washington, DC 20002

Gary M. Epstein
James H. Barker
Brian W. Murray
Barry J. Blonien
Latham & Watkins LLP
555 Eleventh Street, NW
Washington, DC 20004-1304
202.637.2200

*Attorneys for XM Satellite Radio Holdings
Inc.*

2002), *reconsideration dismissed* 18 FCC Rcd 1,861 (WTB 2003), *review denied in part, dismissed in part* 20 FCC Rcd 6,439 (2005). *See also Cingular-AT&T Wireless Order*, 19 FCC Rcd 21,522, 21,552 n.222 (citing *Bell Atlantic-Vodafone Order* at 16,511-12 ¶ 12 and *Applications of Centel Corp. and Sprint Corp.*, Memorandum Opinion and Order, 8 FCC Rcd 1,829, 1,831 ¶ 10 (CCB 1993)). In fact, the United States Supreme Court has found that it would “not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others.” *Regents of University System of Georgia v. Carroll*, 338 U.S. 586, 602 (1950).

CERTIFICATE OF SERVICE

I, Cheryl Hearn, do hereby certify that on December 26, 2007, I served a copy of the Consolidated Opposition upon the following parties by first-class U.S. mail:

Charles H. Helein
Helein & Marshlian, LLC
The CommLaw Group
1483 Chain Bridge Road, Suite 301
McLean, Virginia 22101

Kathleen Wallman
Wallman Consulting, LLC
9332 Ramey Lane
Great Falls, Virginia 22066

/s/ Cheryl Hearn

Cheryl Hearn