

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

**U.S. ELECTRONICS, INC.'S
REPLY TO CONSOLIDATED OPPOSITION OF XM SATELLITE RADIO
HOLDINGS INC. AND SIRIUS SATELLITE RADIO INC.**

U.S. Electronics, Inc. (“USE”) responds herein to the Consolidated Opposition of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings, Inc. (“applicants”) dated December 26, 2007.

The tenor of the Consolidated Opposition is to wave the Commission off from giving due consideration to the public interest concerns raised by USE on the record in this proceeding. The applicants’ assertion that USE is merely trying to “extend its fight against Sirius beyond the contours of the on-going arbitration...” is completely false. The arbitration between Sirius and USE is exclusively about past issues relating to Sirius’s breach of its contract with USE, and has nothing to do with the forward looking consumer harm issues that are raised by the merger’s creation of a vertical monopoly.¹

¹ The rules of the arbitration do not permit a detailed disclosure of the issues in dispute, but a recent 10-K filing by Sirius characterizes the matter as contract dispute. See Sirius Satellite Radio Inc., 2006 Form 10-K Annual Report at 24, available at http://www.sec.gov/Archives/edgar/data/908937/000093041307001865/c47044_10k.htm

The arbitration and the merger docket are separate matters, and USE has consistently and diligently treated them as such. Accordingly, USE's filings have repeatedly cautioned the Commission about the future shape of the satellite radio receiver market if a monopoly network service provider is permitted to leverage its network monopoly into a vertical device monopoly. USE has repeatedly emphasized that there is decisional significance to the fact that the applicants have never provided the public with an adequate response to these concerns, despite their repeated assertions to the contrary.

In short, applicants are wrong: USE does not seek to embroil the Commission in a civil dispute and drag it into a "grudge match" against Sirius as applicants falsely assert. Indeed, the rules of the arbitration place strict limits on permissible disclosures outside the arbitration. USE has rigorously adhered to those rules. The Commission cannot be deterred from considering the merits of the public interest arguments that USE has raised because of the false insinuations of veiled motive erected by the applicants. The public interest issues inherent in USE's arguments are clear and unequivocal on their face, and are offered to assist the Commission acquit its obligations of serving the public and for no other purpose.

Indeed, as the record on this merger has evolved, one thing is clear: Applicants have not been forthcoming in detailing for the Commission the ways in which they have changed the vertical market for satellite radio receivers to bring it under their control. A marketplace that was once characterized by diversity in manufacturing and distribution, to the benefit of consumers, has been deliberately contracted to a market in which each of the current licensees controls the manufacturing and distribution of satellite radio receivers through their surrogates. This is not merely an allegation: In a recent call with

analysts, the Chief Executive Officer of Sirius's de facto exclusive distributor, Directed Electronics, Inc., ("DEI") told analysts that "we continue to be the leading provider of retail satellite radio receivers with a 62% market share and approximately 95% of *SIRIUS' aftermarket sales* in the third quarter."² (Emphasis supplied) Additionally, TWICE Magazine recently reported on the "exclusive relationships" between Sirius and DEI and between XM Radio and "Terk Electronics, owned by Audiovox."³

Applicants cannot paper over their self-serving transformation of the market by misleadingly asserting that "Delphi, Pioneer, Samsung, Alpine, Audiovox, Sony, Polk, Rotel, Kenwood, Clarion, Visteon and others have all made satellite radios". This recitation is misdirection for several reasons.

First, offering the Commission a description of historical participation by companies who "have . . . made" satellite radios is a sleight of hand and does not fairly or accurately describe the state of the market today, or belie the harms of the further contraction that would occur upon unconditioned approval of the merger.

Second, the list of companies conceals important facts about material relationships between the applicants and these purportedly independent distributors and manufacturers. The fact is that Sirius and XM are now the only parties responsible for the design and development of hardware compatible with their network. They exclusively decide the cosmetic look, available features and pricing. Sirius and XM select the manufacturer that will assemble the receiver. They control the quantity produced, distributor pricing, production schedules and acceptable quality levels. Sirius

² See Transcript of Directed Electronics, Inc. Call with Analysts, Nov. 8, 2007, at 3.

³ Amy Gilroy, "*iBiquity Responds to Sirius/XM Proposed Merger*", TWICE Magazine Dec. 28, 2007. (Attached hereto as Exhibit 1)

and XM have each selected a single distributor to control the distribution of the products in the marketplace and establish the retail pricing paid by consumers.

What is additionally clear is that USE's objections have illuminated what applicants hoped would remain in the dark: the fact that this merger is not just about one monopoly, but two, and the interplay of the two monopolies. The Commission's unconditioned approval of a merger that results in a horizontal monopoly will allow applicants to leverage that monopoly into a second, rent-seeking vertical monopoly. While the bulk of attention in the docket has focused on the effects of horizontal consolidation, applicants have managed to dodge acknowledging how the completion of the merger would perfect their exclusivity arrangements to the detriment of consumers and competition in the consumer electronics market.

Particularly subject to injury will be small retailers that lack the bargaining power to resist overreaching demands by the surviving entity, Sirius, for retail terms, marketing and advertising concessions, and quality of service policies, including consumer returns. Small retailers' resistance to Sirius' demands will lead to Sirius' withholding of its product, leaving such small retailers at a disadvantage compared to major retail chains such as Circuit City and Best Buy, which are better able to bargain because the volume of trade they represent.

On the specifics of the Consolidated Opposition, USE responds as follows:

First, applicants urge that the Commission disregard as merely "informal objections to the transaction" USE's concerns and arguments regarding the adverse impact the merger will have on consumer choice with respect to network devices unless proper conditions to the merger are imposed. This is unhelpful to the Commission's

public interest determination, and, even if USE's filings were regarded as "informal objections", these are treated as contributions with standing in license-related determinations and are timely up until the time of Commission action. *See* 47 C.F.R. § 73.3587

USE's status as a petitioner for denial of the merger *vel non*, is irrelevant. USE's documented concerns are fully and properly lodged in the merger docket, and must be accounted for and considered by the Commission in its public interest determination. Further, USE has standing to appeal an adverse decision of the Commission, *see* 47 U.S.C. § 402.

Second, applicants assert that they have "answered USE's arguments – repeatedly." But merely saying this, even saying it repeatedly, does not make it true. Applicants have *not* answered USE's arguments. References to three filings by applicants dated August 27, October 25 and November 13, 2007 are provided in the Consolidated Opposition. None contains a substantive response to USE's arguments that is satisfactory to answer the public interest concerns raised. Each filing is addressed below.

- a) In their August 27, 2007 filing, applicants treated USE's arguments and proposed conditions in a footnote, together with the arguments and proposed conditions of another party, and urges the Commission to "reject these proposed conditions . . . because they are clearly designed to advance the companies' business interests to the detriment of consumers...." This is not a reasoned or substantive response to USE's arguments.

b) In their October 25, 2007 filing, applicants opposed USE's petition asking the Commission to defer a decision on the merger until the vertical monopoly arguments could be duly responded to by the applicants and considered by the Commission. Applicants argued that USE's arguments related to the "merits of the merger" and that the petition to defer should not be granted because no additional time was necessary to address or consider the vertical monopoly issues. Applicants repeated the argument that USE's concerns should be dismissed because they were offered "to advance [USE's] own business interests" and alleged that the concerns were not timely raised. Applicants stated that "the parties will respond to those [vertical monopoly] claims as necessary..." Yet, nowhere in this October 25, 2007 filing, offered in the December 26, 2007 filing as one of the numerous instances where applicants have answered USE's arguments, do applicants actually do so.

c) In their November 13, 2007 filing, applicants finally do approach the merits of USE's arguments. But instead of allaying the public interest concerns raised by USE, the applicants argue that the law leaves them completely free to impose the vertical monopoly that USE has consistently argued would adversely affect consumers. Further, they argue, because satellite radio is part of a broader market for audio entertainment, the Commission need not be concerned about a vertical monopoly in satellite

radio receivers. But even if applicants are right about the contours of the horizontal market, iPods cannot access the satellite radio network, nor can terrestrial radio receivers, whether analog or digital. These devices are not substitutes for satellite radio receivers and offer no foreseeable competition to satellite radio receivers on price, quality, innovation, service or choice.

Applicants have nothing more than reliance on an argument, raised in their November 13 and December 26 filings, about the motivation of the surviving, combined monopoly network service provider. They asserted in their November 13 filing that “the combined company will have every incentive to ensure the availability of low-cost, high-quality receivers – regardless of whether it engages in ‘sole sourcing’.” Of course, these arguments regarding incentives may be offered by any network service provider that is reliant upon consumers acquiring electronics devices to subscribe to the network service. But this has not prevented the Commission from imposing open device conditions to protect consumers’ right to choose as it recently has with respect to portions of the spectrum in the Upper 700 MHz block⁴, or from supervising equipment prices as it did in implementing the Cable Act of 1992.⁵ If the applicants’ motives are as closely aligned

⁴ See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150, Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309, Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket 03-264, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules, WT Docket No. 06-169, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96-86, Second Report and Order, FCC 07-132, (2007) at ¶ 195 *et seq.*

⁵ In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation MM Docket 92-266, 8 FCC Rcd 5631, 5800 – 25 (1993).

with the public interest as they claim, they should readily accept an open device condition.⁶

Third, applicants assert that USE's arguments "have nothing to do with the public interest". It is, of course, the Commission's province to assess the merits of USE's arguments and whether they voice a public interest concern of sufficient gravity that conditions are appropriate, but applicants' assertion is false. As explained above, it is not true that these concerns are offered for any purpose other than to inform the Commission about adverse impacts on the future shape of the market.

And the concerns raised are not USE's alone. Recently, Public Knowledge, a prominent voice for the public interest, urged that the "merger should be approved only if it is subject to ... four conditions", including the following:

the new company makes the technical specifications of its devices and network open and available to allow device manufacturers to develop, and consumers to use, any device they choose without interference. Pursuant to Commission rules, these devices must be certified by the FCC for receiving signals on the frequencies licensed to the merged entity and be subject to a minimum "do-no-harm" requirement.⁷

Additionally, iBiquity Digital Corporation recently filed an ex parte notice urging that

any approval [of the merger] be conditioned upon agreement by the merged entity to enact...[a] requirement that the merged entity terminate all exclusive arrangements and prohibit the merged satellite company from entering into

⁶ Contrary to applicants' assertions, USE has never advocated any condition that would "require the combined company to license any manufacturer to make the company's equipment – no matter what the quality." The open device condition proposed by USE would not be in any way incompatible with applicants' quality control and security requirements. Applicants have supervised licensed manufacture and distribution of devices for many years, and would retain control over quality control and security under the condition proposed by USE.

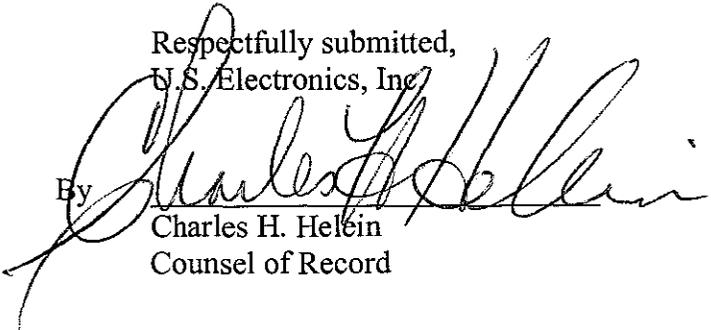
⁷ Letter from Alex Curtis, Director of Policy and New Media, Public Knowledge to Marlene H. Dortch, Secretary, Federal Communications Commission, *Ex Parte* in MB Docket 07-57, CS Docket 97-80 and PP Docket 00-67 (filed Dec. 7, 2007).

exclusive arrangement with suppliers, retailers and automobile manufacturers in the future.⁸

Others similarly situated to USE, and knowledgeable about the consumer electronics market, might also have added their voices to support this concern and urge adoption of conditions. But the power of applicants, today as duopolists, perhaps tomorrow as a combined monopolist, over vendors and potential vendors has created, USE believes, a cautionary silence that regrettably has impoverished the public record on the vertical impacts of the merger, thus highlighting USE's position as a stand-out, vocal opponent of an unconditioned merger. Accordingly, amplifying the applicants' power by allowing them to merge to monopoly is a step that the Commission ought not take without appropriate conditions to protect consumers against the adverse effects of a monopoly in devices essential to accessing a monopoly network built on public spectrum.

Respectfully submitted,
U.S. Electronics, Inc

By


Charles H. Helein
Counsel of Record

Of Counsel:
Helein & Marashlian, LLC
The CommLawGroup
1483 Chain Bridge Road, Suite 301
McLean, VA 22101-5703
703-714-1301
chh@commlawgroup.com

Kathleen Wallman
Kathleen Wallman, PLLC
9332 Ramey Lane

⁸ Letter from Robert A. Mazer, Counsel for iBiquity Digital Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission, *Ex Parte* in Docket 07-57 (filed Dec. 20, 2007).

Great Falls, Va 22066
202-641-5387
wallmank@wallman.com
Counsel to U. S. Electronics, Inc.

January 8, 2008

CERTIFICATE OF SERVICE

I, Deborah L. Schneider, do hereby certify that on January 8, 2008, I caused to be served a copy of the foregoing Reply To Consolidated Opposition Of XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc. upon the following parties by first-class U.S. mail:

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. Hindlin
Wiley Rein LLP
1776 K Street, N.W.
Washington, DC 20006

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

Gary M. Epstein
James H. Barker
Brian W. Murray
Barry J. Blonien
Latham & Watkins LLP
555 Eleventh St., N.W.
Washington, DC 20004


Deborah L. Schneider
Deborah L. Schneider

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