

January 11, 2008

ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 Twelfth St., SW
Washington, DC 20554

Re: *Notice of Ex parte* presentation in MB Docket No.07-57

Dear Ms. Dortch:

On January 11, 2008, Rashmi Rangnath, Public Knowledge Staff Attorney and I met with the following Media Bureau Staff: Senior Deputy Chief, Roy Stewart, Deputy Chief, Marcia Glauber, Deputy Chief, Rosemary Harold, Associate Chief, William Freedman, and staff attorneys Joel Rabinovitz and Royce Sherlock. The purpose of the meeting was to renew Public Knowledge's support for the proposed merger of XM Satellite Radio with Sirius Satellite Radio and to discuss the four conditions we have urged the Commission to impose should it approve the merger. These conditions are outlined in our July 9, 2007 comments and the *Notice of Ex Parte presentation* filed on December 7, 2007. The conditions are:

- The new company should make available pricing choices such as a la carte or tiered programming;
- The new company should make 5% of its capacity available to non-commercial educational and informational programming over which it has no editorial control;
- The new company should agree not to raise prices for its combined programming package (as opposed to each individual company's current programming package) for three years after the merger is approved; and
- The new company should make 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 the 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.

We have also asked the Commission to refrain from conditioning the merger on: 1) a prohibition against satellite radio providers providing local programming and 2) any content protection mandate such as the audio broadcast flag.

The majority of the discussion focused on the condition for the 5% set aside and how it would operate. Public Knowledge gave the staff a copy of a memorandum (Attachment A), which listed four requirements for the set-aside, which are substantially

similar to the requirements for the 4-7% set aside for direct broadcast satellite (DBS) under 47 U.S.C. §335(b) and 47 C.F.R. §25.701(f):

- The new company should be required to allocate only one channel per noncommercial programmer unless all other applications for channel space have been granted and qualifying programmers currently on either service should not be eligible;
- All subscribers of the new company should get access to all of the noncommercial channels without any additional charge, and the number of set-aside channels should be based on the total number of channels provided by the combined entity;
- The new company should not exercise any editorial control over the programming offered over these channels; and
- Only “national educational programming suppliers” should be eligible for the set-aside.

After discussions with the Bureau staff, we have revised the eligibility requirement listed in the fourth bullet point above. Instead of limiting eligibility for use of the set-aside to “national” educational programming suppliers, Public Knowledge supports making the set-aside available also to local educational programming suppliers. This would permit access to low power radio stations and other local entities consistent with the Commission’s responsibility to promote localism. We are submitting a revised memorandum (Attachment B) along with this letter that addresses this point.

We discussed the impact on diversity and localism of permitting satellite radio services, either merged or not, to provide local programming. Senior Deputy Chief Stewart asked whether we thought that, just as some have argued in the context of cable television, *a la carte* programming would have an adverse impact on diversity of programming in the context of satellite radio. We responded that cable TV and satellite radio are two entirely different markets and that at least for satellite radio, *a la carte* pricing was economically feasible.

We also reiterated our request that the Commission initiate a rule making proceeding to examine if prohibiting satellite radio from providing local programming is in public interest. We clarified that this proceeding should be commenced even if the proposed merger is denied.

Finally, we discussed the similarities and differences between this merger and the merger of Echostar and DirecTV, which the Commission denied in 2002. We stated that denying that merger had not been in the public interest, since as separate companies, the DBS providers have not been able to compete against cable in a way that has lowered the latter’s prices, and that in any event, there are relevant differences between the market for video and audio, i.e., because people receive local stations over DBS, they don’t compete with DBS like local stations compete with satellite radio, which does not carry those stations.

In accordance with 47 C.F.R. §1.1206, this letter is being filed electronically with your office today.

Respectfully submitted,

Gigi B. Sohn
President

cc. Marcia Glauber
William Freedman
Roy Stewart
Joel Rabinovitz
Royce Sherlock
Rosemary Harold

Attachments: January 11, 2008 Memorandum
Revised Memorandum

MEMORANDUM

To: Media Bureau Staff

From: Public Knowledge

Re: Set-Aside Condition for XM-Sirius Merger, MB Docket No. 07-57

Date: January 11, 2008

Public Knowledge renews its support for the proposed merger of XM Satellite Radio with Sirius Satellite Radio subject to four conditions outlined in its July 9, 2007 comments and its *Notice of Ex Parte presentation* filed December 7, 2007. The purpose of this memorandum is to provide the Bureau with more detail about the following proposed condition: that the new company be required to make available 5% of its channel capacity for “noncommercial educational and informational programming over which it has no editorial control.” Such a condition would not only mitigate possible anti-competitive effects of the merger, but also would promote greater diversity of radio programming.

As discussed in detail below, Public Knowledge proposes that the set-aside should operate on terms similar to the set-aside requirements for “noncommercial programming of an educational or informational nature” imposed on providers of direct broadcast satellite video (DBS) services.¹ These requirements have worked well, and with almost no regulatory intervention over the past nine years to promote new and diverse voices over DBS. There is no reason to think that they would work any less well in the context of satellite radio.

Specifically, Public Knowledge urges that the set-aside requirement for the merged satellite radio entity comply with the following four requirements:

- 1. The new company should be required to allocate only one channel per noncommercial programmer unless all other applications for channel space have been granted.**

To ensure greater programming diversity, the new company should be prohibited from allocating more than one channel to any one noncommercial programmer unless all other applications for channel space have been granted. DBS providers are subject to the same rule under 47 C.F.R. §25.701(f)(4). Furthermore, the new company should not be permitted to use noncommercial channels already on its service to satisfy this requirement. These requirements would ensure that new programmers that do not normally have access to a national satellite radio service would be able to reach a national audience.

¹47 U.S.C. §335(b) and 47 C.F.R. §25.701(f).

- 2. All subscribers of the new company should get access to all of the noncommercial channels without any additional charge, and the number of set-aside channels should be based on the total number of channels provided by the combined entity.**

Again, in the DBS context, the Commission has affirmed the obligation that all subscribers receive access to all of the set-aside channels at no additional charge.² This should be the case whether the individual has subscribed to all the channels offered or has opted for one of the *a la carte* package options that the companies have proposed.³ The number of set-aside channels that every subscriber receives should be 5% of the entire service offering, and not 5% of an *a la carte* package. For example, if the combined entity provides 200 channels, each subscriber should receive 10 channels of noncommercial educational and informational programming, regardless of his or her service package.⁴

- 3. The new company should not exercise any editorial control over the programming offered over these channels.**

The purpose of the proposed set-aside is to provide access to new voices that are not affiliated with the merged company and over which that company has no editorial control. DBS providers are subject to a similar limitation with respect to non-commercial programming offered under the set-aside requirement. 47 C.F.R. §25.701(f)(3) provides that although a DBS provider might be able to select from among applicants when demand exceeds capacity, it cannot require programmers to include particular programming on their channels or alter or censor content.

- 4. Only “national educational programming suppliers” should be eligible for the set aside.**

To ensure that the set-aside is used solely for noncommercial educational or informational programming, the Commission should limit eligibility to “national educational programming suppliers,” which would include the following four types of entities:

² Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, *Report & Order*, 13 F.C.C.R. 23,254, 23,285(1998); American Distance Education Consortium Request for an Expedited Declaratory Ruling and Informal Complaint, *Declaratory Ruling and Order*, 14 F.C.C.R. 19976 (1999) (ruling that EchoStar was obliged to place the public interest programming channels needed to satisfy the set-aside requirement on satellites that could reach customers all over the United States)

³ See “XM and Sirius to Offer A La Carte Programming,” Press Release, July 23, 2007, found at <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=255847&cat=&newsroom=>

⁴ To the extent that in the first several years after the merger there will be no combined service package, the set-aside should be calculated using the number of channels of each individual service, e.g. 130 XM channels would require 7 noncommercial set-aside channels.

- Noncommercial educational broadcast stations, which are owned and operated by a public agency or nonprofit private foundation, corporation or association.
- Public telecommunications entities as defined by 47 U.S.C. §397(12) *i.e.* public broadcast stations or noncommercial telecommunications entities that disseminate public telecommunications services to the public. Such entities may include stations like National Public Radio and Public Radio International.
- Accredited non-profit educational institutions or governmental educational institutions. College radio stations owned by nonprofit educational institutions, such as WNYU owned by New York University, may be part of this category of programmers.
- Non-profit institutions with an educational purpose and
- Entities organized for noncommercial purposes and having an educational mission.

The DBS set-aside is subject to the same requirement.⁵

⁵ 47 USC §335(b)(5)(B).

MEMORANDUM

To: Media Bureau Staff

From: Public Knowledge

Re: Set-Aside Condition for XM-Sirius Merger, MB Docket No. 07-57: Revised

Date: January 11, 2008

Public Knowledge renews its support for the proposed merger of XM Satellite Radio with Sirius Satellite Radio subject to four conditions outlined in its July 9, 2007 comments and its *Notice of Ex Parte presentation* filed December 7, 2007. The purpose of this memorandum is to provide the Bureau with more detail about the following proposed condition: that the new company be required to make available 5% of its channel capacity for “noncommercial educational and informational programming over which it has no editorial control.” Such a condition would not only mitigate possible anti-competitive effects of the merger, but also would promote greater diversity of radio programming. We have revised this memo in response to issues raised in our meeting today with certain members of the Bureau staff.

As discussed in detail below, Public Knowledge proposes that the set-aside should operate on terms similar to the set-aside requirements for “noncommercial programming of an educational or informational nature” imposed on providers of direct broadcast satellite video (DBS) services.¹ These requirements have worked well, and with almost no regulatory intervention over the past nine years to promote new and diverse voices over DBS. There is no reason to think that they would work any less well in the context of satellite radio.

Specifically, Public Knowledge urges that the set-aside requirement for the merged satellite radio entity comply with the following four requirements:

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Again, in the DBS context, the Commission has affirmed the obligation that all subscribers receive access to all of the set-aside channels at no additional charge.² This should be the case whether the individual has subscribed to all the channels offered or has opted for one of the *a la carte* package options that the companies have proposed.³ The number of set-aside channels that every subscriber receives should be 5% of the entire service offering, and not 5% of an *a la carte* package. For example, if the combined entity provides 200 channels, each subscriber should receive 10 channels of noncommercial educational and informational programming, regardless of his or her service package.⁴

- 3. The new company should not exercise any editorial control over the programming offered over these channels.**

The purpose of the proposed set-aside is to provide access to new voices that are not affiliated with the merged company and over which that company has no editorial control. DBS providers are subject to a similar limitation with respect to non-commercial programming offered under the set-aside requirement. 47 C.F.R. §25.701(f)(3) provides that although a DBS provider might be able to select from among applicants when demand exceeds capacity, it cannot require programmers to include particular programming on their channels or alter or censor content.

- 4. Only national and local educational programming suppliers should be eligible for the set aside.**

To ensure that the set-aside is used solely for noncommercial educational or informational programming, the Commission should limit eligibility to national and local educational programming suppliers, which would include the following five types of entities:

² Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, *Report & Order*, 13 F.C.C.R. 23,254, 23,285(1998); American Distance Education Consortium Request for an Expedited Declaratory Ruling and Informal Complaint, *Declaratory Ruling and Order*, 14 F.C.C.R. 19976 (1999) (ruling that EchoStar was obliged to place the public interest programming channels needed to satisfy the set-aside requirement on satellites that could reach customers all over the United States)

³ See "XM and Sirius to Offer A La Carte Programming," Press Release, July 23, 2007, found at <http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=255847&cat=&newsroom=>

⁴ To the extent that in the first several years after the merger there will be no combined service package, the set-aside should be calculated using the number of channels of each individual service, e.g. 130 XM channels would require 7 noncommercial set-aside channels.

- Noncommercial educational broadcast stations, which are owned and operated by a public agency or nonprofit private foundation, corporation or association;
- Public telecommunications entities as defined by 47 U.S.C. §397(12) *i.e.* public broadcast stations or noncommercial telecommunications entities that disseminate public telecommunications services to the public;
- Accredited non-profit educational institutions or governmental educational institutions. College radio stations owned by nonprofit educational institutions, such as WNYU owned by New York University, may be part of this category of programmers;
- Non-profit institutions with an educational purpose; and
- Entities organized for noncommercial purposes and having an educational mission.

47 USC §335(b)(5)(B) limits eligibility for the DBS set aside to “national educational programming suppliers.”⁵ Public Knowledge proposes expanding the eligibility requirement for the satellite radio set-aside to include local noncommercial entities as well. This would permit low power radio stations and other local entities to have access to satellite radio audiences, which in turn would further the Commission’s goal of promoting localism.⁶

⁵ The DBS set-aside was limited to national providers because at the time the requirement was adopted (as part of the Cable Television Consumer Protection and Competition Act of 1992), DBS had neither the technological means nor the legal ability to carry local programming.

⁶ *See* 47 U.S.C. §307.