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January 15, 2008

### VIA EMAIL AND FIRST CLASS MAIL

Hon. Robert M. McDowell  
Commissioner  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

***Re: Ex Parte Submission of U.S. Electronics, Inc., in Docket No. MB 07-57***

Dear Commissioner McDowell:

#### **Introduction**

As you are aware, U.S. Electronics, Inc. ("USE") has urged the Commission that it is imperative not to approve the proposed merger of the satellite radio network duopolists, XM Satellite Radio Holdings, Inc. (XM) and Sirius Satellite Radio, Inc. (Sirius) unless the parties agree to implement an open device condition. USE has urged that this condition is vital to protect the public against the anti-competitive and anti-consumer harms of the second monopoly that this horizontal merger would create, namely, a vertical monopoly in the manufacturing and distribution of satellite radio receivers. Public Knowledge and iBiquity recently have joined USE in calling for this condition, and copies of their filings are attached hereto.

In an earlier meeting with USE, you expressed openness to learning more about the bases for USE's concerns. Accordingly, in this letter, USE provides further legal and factual support for the necessity to adopt the open device condition and reiterates why, without this condition the Commission should reject the merger. USE is constrained to repeat here what has already been said elsewhere because, as detailed below, the Commission has not treated these issues to date. Obviously, no pronouncement of the Commission's views on the ultimate merits of these issues

is expected prior to its vote on the merger. But the public and parties in interest in this proceeding may reasonably expect from the Commission a transparent process in which issues raised in the record are framed for treatment in the adversarial process, and reasoned responses are required to each substantial issue raised in the record. This is the cornerstone of the Commission's charge under the Administrative Procedure Act to conduct a reasoned and open decision making process. USE seeks your help in making the process conform to these standards.

### **Regulatory Parity in Treatment of Networks Requires Application of the Commission's Longstanding Open Access Policies to the Post-Merger Company**

The vertical monopoly over network access devices that would result from unconditioned approval of the merger would be in direct violation of the open access policies the Commission has established and enforced for over 50 years. This longstanding policy has served the public well, but unconditioned approval of the merger would allow the merged entity to deny the public its manifold benefits.

The public policy benefits of the Commission's time honored open access policies are well understood to include innovation in the design and development of network devices. The dynamic that unfolds from such innovation creates a competitive marketplace in which consumers benefit with respect to device prices, device choices, device quality and service quality. The Commission recently reaffirmed the historical rationale for open access policies in its service rules for the Upper 700 MHz spectrum block.<sup>1</sup>

In that important Order, the Commission established service rules for spectrum that will be the foundation for the next generation of wireless services for the nation and the launching pad for ubiquitous wireless broadband across the country. The Commission determined that the winners of the six C Block licenses would not be permitted to restrict subscribers to using only those devices that the licensees provide. The Commission protected consumers' right to choose.

USE recognizes that you disagreed with the Commission's decision on this point, but urges that the situation presented here is distinguishable from the Upper 700 MHz C Block, and fully consistent with the Commission's past application of open access policies.

In your dissent you stated your view that the Commission ought not to have applied *Carterfone*-type principles to the Upper 700 MHz C Block because the wireless marketplace of today is characterized by far more competition than was the wireline market of *Carterfone* days. The merger applicants have argued, of course, that even as a sole provider of satellite radio services, the post-merger company will face stiff competition from a broader market of audio entertainment service providers.

But the reality is that today's satellite radio market is a lot more like the pre-*Carterfone* wireline market than today's terrestrial wireless market. Today, there are only two network providers and after merger there will be only one. XM and Sirius are well understood to be moving already toward controlling the manufacture and distribution of satellite radio receivers

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<sup>1</sup> See *Upper 700 MHz Second Report and Order*, FCC 07-132, August 10, 2007.

through exclusive relationships.<sup>2</sup> The approval of the merger without conditions would perfect their ability to exercise buying power over upstream suppliers, a market in which competition is being eliminated by the actions of XM and Sirius.

Further, even if applicants' theory as to post-merger competition were true as to the horizontal market for *satellite radio services*, a proposition vigorously contested in the record, it is emphatically *not* true with respect to the market for *satellite radio receivers*. An iPod cannot access satellite radio receivers, nor can terrestrial radio receivers, whether analog or digital. There is no foreseeable competition to satellite radio receivers from any other provider of audio entertainment services or devices.

USE raises these arguments so emphatically because applicants' efforts to keep the Commission focused on the horizontal merger have deliberately obscured the perniciousness of the vertical monopoly that will be leveraged upon the horizontal merger. While the Commission has framed and required comment on subscription prices, and has lent an encouraging ear to proffered commitments of *à la carte* offerings, all this will be for naught if the post-merger company can raise equipment prices as they desire to optimize overall revenues. This manipulation, at consumers' expense, will be hard to detect since prices at retail points of sale are diverse and hard to supervise. Even harder to detect will be other adverse consumer impacts such as declines in quality, retardation of innovation cycles and declines in the quality of customer service as faulty equipment becomes harder to return on reasonable terms. The end result will be no credit to the Commission's decision making processes.

For these reasons, USE urges that the factors underlying your objections to the imposition of an open device condition in the C Block are not present here. To the contrary, proper and consistent administration of the Commission's open access policies demand parity in the application of these policies to comparably situated industries with comparable competitive profiles and presenting comparable risks of consumer harm.<sup>3</sup> Whereas the principles of open access have been applied to other similarly situated networks, including wireless and wireline networks, which have overlapping business and service plans with satellite radio, consistency demands application of these same principles to the monopoly satellite radio services network that applicants desire to emerge from this proceeding. The application of open access principles to those networks, now characterized by significant competition, makes application of the same principles vital, *a fortiori*, to a network with one proposed monopoly service provider.<sup>4</sup>

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<sup>2</sup> See, iBiquity Responds to Sirius/XM Proposed Merger, <http://www.twich.com/article/CA6515618.html>, 12/28/2007 and see attached to USE's Reply to Consolidated Opposition...January 8, 2008.

<sup>3</sup> USE notes that in your November 19, 2007 speech to the Media Institute, you reacted to Commission efforts to impose certain regulations on the cable industry by questioning the rationale for applying different approaches to different industries: "I have a lot of questions that need answering. Why is the FCC suddenly changing its evidentiary standard and methodology just for this one industry?" USE urges that this is the right question for this proceeding, too.

<sup>4</sup> Failure to observe network parity principles could also enlarge the Commission's vulnerability to reversal upon appeal on equal protection grounds. USE urges that the Commission's advocates would be hard pressed to explain why subscribers to the wireless and wireline networks under the FCC's jurisdiction are entitled to the benefit of open access principles, but subscribers to the satellite radio services of a mono of satellite radio spectrum, are not so entitled. See *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1127 (1978) (no substantial governmental interest served by FCC rule requiring non-commercial educational broadcast stations, but

## Procedural Issues and Legal Vulnerabilities

Unfortunately, the public and interested parties have been deprived of a fully developed record on which to evaluate these vertical monopoly concerns. The evidence adduced by USE and the concerns raised by Public Knowledge and iBiquity have been ignored by applicants, and the Commission has declined to demand countervailing evidence or a substantive response to these concerns.

USE has urged in numerous filings to the Commission – numerous only because of the Commission’s and the applicants’ continued lack of response to them – that the vertical monopoly concerns and the need for the proposed remedial open device condition should be regarded as conceded by applicants. USE has also urged the Commission to issue a Request for Additional Information to applicants to fill out the record on important points relating to the vertical monopoly. The Commission has not responded to any such procedural petitions or suggested information requests.

In its filings, USE has challenged applicants to explain that they will not leverage their desired horizontal monopoly into a second vertical monopoly, but no such proffer has been forthcoming. Applicants’ only response, far from providing any reassurance that it will not exploit a vertical monopoly in satellite receiver devices, has been that the prevailing interpretations of the antitrust laws leave the post-merger company completely free to execute such a vertical monopoly.<sup>5</sup>

USE has also petitioned the Commission to designate the unresponded-to issues for hearing. USE has learned informally that the Commission is not inclined to designate any aspect of the merger for hearing because it regards doing so as tantamount to vetoing the merger. No reconciliation of this position with the Commission’s duties under Section 309 has been offered.

USE also notes that the Commission has not even committed to considering relevant information available to it from within the Commission, from ongoing Commission proceedings, which might address gaps in the record, for example the forthcoming Annual Satellite Competition Report and comments in MB Docket No. 07-198, which examines program tying arrangements and *à la carte* approaches as possible remedies.<sup>6</sup> Nor has the Commission

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not others, to retain audio recordings of broadcasts). Poly provider also under the FCC’s supervision, and created by the FCC’s waiver of its own longstanding rule against consolidation.

<sup>5</sup> Attached hereto is USE’s January 8, 2008 reply to applicants’ Consolidated Opposition, dated December 26, 2007. Therein, USE rebuts in detail applicants’ repeated but unfounded assertions that they have on numerous occasions addressed USE’s vertical monopoly concerns. The public and the Commission deserve a response.

<sup>6</sup> For example, the comment cycle supporting the Annual Satellite Competition Report that analyzes the competitive market conditions with respect to domestic and international satellite communications services, including satellite radio services, just closed at the end of last month. The conclusions of this report could make a material decisional difference in the Commission’s consideration of this docket and public comment upon it, and the Commission should wait to decide on the merger until the report has been issued.

Additionally, the record in MB Docket No. 07-198, which examines program tying arrangements and *à la carte* approaches as possible remedies, does not close until January 22, 2008. To the extent that the Commission is

resolved the petition for declaratory ruling currently pending complaint filed by another party in interest concerning applicants' protracted non-compliance with the Commission's directive to XM and Sirius to develop interoperable radios capable of receiving the frequencies used by each and both of the current licensees. Further, the public and interested parties never have had the benefit of seeing the full record and conclusions of the Commission's investigations into XM's and Sirius' apparently deliberate emissions interference with broadcast signals, raised in the record many months ago by the National Association of Broadcasters, which is still seeking public disclosure of materials that are relevant to applicants' adherence to existing rules.

No explanation has been sought or offered by the Commission or applicants as to why Commission rule changes and license transfers would be in the public interest while applicants' compliance with Commission directives remains out of tune in these important respects.

USE highlights these issues for your consideration because you have often stated the principle that the Commission should not approve actions that have palpable legal authority or procedural vulnerabilities that would be indefensible upon judicial review. The Commission is nowhere more susceptible to reversal than when it fails to treat the record before it, where it fails to require presentation of evidence responsive to issues flagged in the record, and where it fails to follow the procedures specified in its own statute. Equally relevant are recent concerns raised by Congress concerning the lack of transparency and apparent irregularities in the Commission's observance of its own procedures. USE urges that the Commission's incomplete treatment of the issues in this record, and its inexplicable variances from statutory and regulatory procedures will be difficult to defend upon appeal, or upon inquiry from Congress, and require remediation before the Commission acts.

### **The Role of the Commission in Reviewing the Merger is Different From the Role of the Department of Justice**

In a recent press interview, you indicated you had reached no conclusions about the merits of the merger itself. You indicated that your consideration of the merger would take into account the position of the Department of Justice. USE respectfully offers the following observations.

It is traditional for the Commission to rely on the Justice Department for analysis of the antitrust aspects of mergers that must be approved by the Commission. At the same time, it is important that the Department's analysis be considered in its proper context. First, the Justice Department's analysis may extend only to the horizontal aspects of the merger. If so, it will not deal with the vertical integration issue that USE has presented. Second, even if the Department addresses the vertical aspects of the merger, the Commission's statutory charge is to evaluate whether the vertical monopoly that would result from the merger, if not addressed by an open device condition, would serve the public interest.

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considering an *à la carte* condition in connection with this docket, the results of MB Docket No. 07-198, or at least the comments collected therein, should be illuminating and helpful. The Commission should wait at least until the closing of that docket and the staff's completion of comment summaries before acting in this docket.

USE submits that a vertical monopoly, even if not challenged or addressed by the Justice Department, offends the public interest by harming consumers. It does this by foreclosing consumers' choice as to which devices they will put in their homes and their cars to listen to satellite radio, a service built upon and offered by means of public spectrum. Thus, the Commission's adherence to its half-century policy of requiring open access will be fully consistent with whatever analysis is offered by the Justice Department.

### **Conclusion and Request for Action**

In conclusion, USE submits that if XM and Sirius are allowed to merge and continue their sole sourcing practices controlling the satellite radio equipment market from which the public will obtain its ability to access the network services, the XM/Sirius entity will extend the horizontal spectrum monopoly the Commission authorizes into a vertical monopoly. This result offends rather than serves the public interest insofar as it disregards the open access policies this Commission has established and enforced for over half a century.

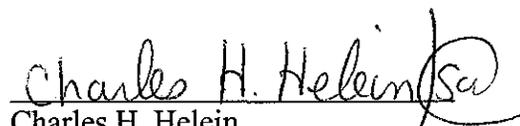
Given the foregoing, USE respectfully asks that the Commission impose an open device condition on the merger's approval, or reject the merger. The elements of the proposed condition, which have been lodged in the record, are attached.

\* \* \*

In conformity with the Commission's regulations, a copy of this letter will be filed in the above captioned docket, with copies provided to the Chairman, other Members of the Commission and their legal advisors and the transaction staff.

Respectfully submitted,  
U.S. Electronics, Inc.

By

  
Charles H. Helein  
Counsel of Record

Enclosures

cc: The Hon. Kevin Martin, Chairman  
The Hon. Michael Copps, Commissioner  
The Hon. Jonathan Adelstein, Commissioner  
The Hon. Deborah Taylor Tate, Commissioner

*Michelle Carey - Senior Legal Advisor, Media Issues - Office of the Chairman*  
*Rick Chessen - Senior Legal Advisor - Office of Commissioner Copps*  
*Rudy Brioché - Legal Advisor for Media Issues - Office of Commissioner Adelstein*  
*Amy Blankenship - Legal Advisor - Office of Commissioner Tate*

Angela E. Giancarlo - *Legal Advisor, Wireless & International Issues – Office of Commissioner McDowell*  
Cristina Chou Pauzé - *Legal Advisor, Media Issues – Office of Commissioner McDowell*

**Commission XM/Sirius Transaction Staff**

Roy Stewart, William Freedman, Marcia Glauberman, and Rosilee Chiara, Media Bureau,  
Jim Bird, Ann Bushmiller and Joel Rabinovitz, Office of General Counsel, Bruce Ramano,  
Office of Engineering and Technology and Gardner Foster, David Strickland, Jerry Duvall  
and Shabnam Javid, International Bureau

**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.<sup>1</sup>

<sup>1</sup> 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](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."<sup>2</sup> (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."<sup>3</sup>

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

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

<sup>3</sup> 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' 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 block<sup>4</sup>, or from supervising equipment prices as it did in implementing the Cable Act of 1992.<sup>5</sup> If the applicants’ motives are as closely aligned

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<sup>4</sup> 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.*

<sup>5</sup> 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 Red 5631, 5800 – 25 (1993).

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

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.<sup>7</sup>

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

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<sup>6</sup> 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.

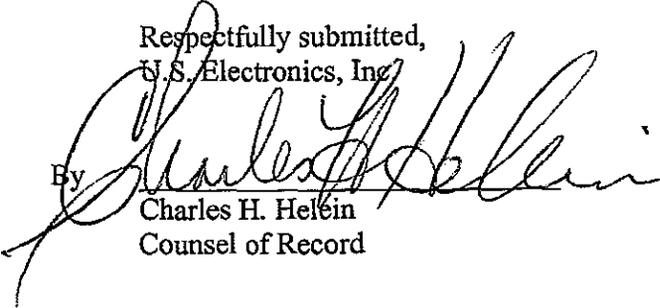
<sup>7</sup> Letter from Alex Curtis, Director of Policy and New Media, Public Knowledge to Marlene H. Dortch, Secretary, Federal Communications Commission, *Ex Parte* in MB Docket 07-57, CS Docket 97-80 and PP Docket 00-67 (filed Dec. 7, 2007).

exclusive arrangement with suppliers, retailers and automobile manufacturers in the future.<sup>8</sup>

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

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<sup>8</sup> 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).

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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  
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Deborah L. Schneider



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### iBiquity Responds To Sirius/XM Proposed Merger

By Amy Gilroy -- TWICE, 12/28/2007 11:36:00 AM

Columbia, Md. — HD-Radio developer iBiquity weighed in on the proposed merger of Sirius and XM in a letter to the Federal Communications Commission (FCC).

Although iBiquity said it has no formal position on the merger, it urged that FCC approval of the merger be contingent on two stipulations: one, that HD Radio technology be included in all satellite radio receivers, and two, that a merged Sirius and XM be prohibited from entering exclusive arrangements with suppliers, retailers and car makers and that it terminate existing exclusive relationships.

Sirius's exclusive relationships include agreements with Ford, BMW, Mercedes Benz, RadioShack and distributor Directed Electronics. XM's exclusive relationships include agreements with General Motors, Honda, Nissan and Terk Electronics, owned by Audiovox.

iBiquity noted that a "combined XM/Sirius could be in a better position to hamper iBiquity's ability to introduce HD Radio technology into the marketplace" and that exclusive arrangements between XM and Sirius and auto makers could "serve as a barrier to iBiquity's ability to sell HD Radio receivers to end users."

A spokeswoman for iBiquity would not elaborate on the recommendations but said, "We are making sure that moving forward, we continue the success that we've had until this point."

XM had no comment on the letter, filed with the FCC on Dec. 20, in summary of a meeting between iBiquity and the FCC.

Regarding other comments on the merger, Sirius recently responded to more than 40 filings by U.S. Electronics (USE) regarding the merger. Sirius said the filings amounted to asking the FCC to insert itself in contractual disputes between USE and Sirius, and said USE's filings "have nothing to do with the public interest."

USE Counsel Charles H. Helein said USE is asking that the FCC stipulate a merged Sirius and XM open their network so that any device maker could make Sirius/XM products.

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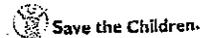


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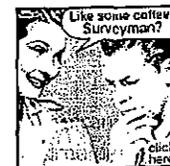


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# Vinson & Elkins

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## ELECTRONIC DELIVERY VIA ECFS

December 20, 2007

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
236 Massachusetts Avenue, N.E.  
Suite 110  
Washington, DC 20002

Re: MB Docket No. 07-57  
Notice of Ex Parte Presentation

Dear Ms. Dortch:

iBiquity Digital Corporation ("iBiquity"), by its attorneys, hereby notifies the Commission, pursuant to Section 1.1206 of the Commission's Rules, of a meeting held on December 19, 2007 with Rosemary Harold, Marcia Glauberman, William Freedman, Dana Scherer, Elvis Stumbergs, Jamila Bess Johnson and Susan Crawford of the Media Bureau, Ann Bushmiller, Joel Rabinovitz and Jim Bird of the Office of General Counsel and Shabam Javid of the International Bureau. iBiquity was represented by Albert Shuldiner, its General Counsel, and the undersigned.

At this meeting, iBiquity reviewed the competitive implications on its business relevant to the proposed merger of XM/Sirius. Specifically, iBiquity indicated that a combined XM/Sirius could be in a better position to hamper iBiquity's ability to introduce HD Radio™ technology into the marketplace. iBiquity raised concerns about exclusive arrangements between XM and Sirius and automobile manufacturers that could serve as a barrier to iBiquity's ability to sell HD Radio receivers to end users. iBiquity also expressed concern that satellite radio companies may have used subsidies and incentives paid to the automobile manufacturers and their suppliers to discourage proliferation of HD Radio products. iBiquity discussed with the Commission staff its concern that the merger has the potential to exacerbate these problems. A merged entity will have a stronger economic position and more cash to fund subsidies and incentives. As the sole provider of satellite

services, the merged entity will have greater leverage over retailers, car manufacturers and suppliers. This combined satellite monopoly would be in a better position to act anti-competitively to exclude HD Radio products.

Although iBiquity has no formal position on the merger, iBiquity would urge that any approval be conditioned upon agreement by the merged entity to enact the following in order to insure a level competitive playing field between satellite radio and HD Radio technology:

- A requirement that HD Radio technology be included in all satellite radio receivers
- A requirement that the merged entity terminate all exclusive arrangements and prohibit the merged satellite company from entering into exclusive arrangements with suppliers, retailers and automobile manufacturers in the future.

iBiquity made it clear that it will continue to license its patents on reasonable and nondiscriminatory terms and make its technology available for inclusion in dual use receivers.

A copy of this letter will be provided via e-mail to those in attendance.

Any questions regarding this matter should be directed to the undersigned.

Respectfully submitted,

/s/ Robert A. Mazer

Robert A. Mazer  
*Counsel for iBiquity Digital Corporation*

Enclosure

cc: Ms. Rosemary Harold (MB)  
Ms. Marcia Glauberman (MB)  
Mr. William Freedman (MB)  
Ms. Dana Sherer (MB)  
Ms. Susan Crawford (MB)  
Mr. Elvis Stumbergs (MB)  
Ms. Jamila Bess Johnson (MB)  
Ms. Ann Bushmiller (OGC)  
Mr. Joel Robinowitz (OGC)  
Mr. Jim Bird (OGC)  
Ms. Shadnam Javid (IB)

DC 731449v2

December 7, 2007

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, CS Docket No. 97-80,  
PP Docket No. 00-67

Dear Ms. Dortch:

On December 7, 2007, Gigi B. Sohn, President of Public Knowledge and I met with Commissioner Michael J. Capps' Senior Legal Advisor/Media Advisor Rick Chessen and Wireless and International Legal Advisor Bruce Gottlieb. The purpose of this meeting was to discuss the three conditions Public Knowledge proposed for the XM/Sirius Satellite Radio merger, previously filed with the Commission. In addition, we have proposed a fourth condition which we have come to believe is necessary for the merger to be in the public interest. The XM and Sirius Satellite radio merger should be approved only if it is subject to these four conditions:

- the new company makes available pricing choices such as a la carte or tiered programming;
- the new company makes 5% of its capacity available to non-commercial educational and informational programming over which it has no editorial control;
- the new company agrees 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 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.

Also in this meeting, we briefly discussed the issue of "two-way cable plug & play," the DCR+ proposal, and OpenCable technology (previously known as OCAP) presented in the above cited CS and PP dockets. We discussed our positions made in our previous filings in this docket, and expressed our cautious optimism that the agreement recently made between TiVo and the NCTA may indicate the the cable industry's willingness to open up its OpenCable standard and make it more flexible for third party device manufacturers that wish to connect to devices cable network with full functionality.

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

Respectfully submitted

A handwritten signature in black ink, appearing to read "Alex Curtis". The signature is fluid and cursive, with a long horizontal stroke at the end.

Alex Curtis  
Director of Policy and New Media

cc:

Rick Chessen  
Bruce Gottlieb