



The CommLaw Group

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March 5, 2008

Electronically Filed

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20054

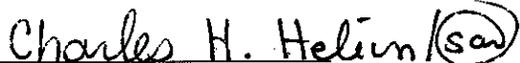
Re: Notice of Ex Parte Communication in MB Docket No. 07-57

Dear Ms. Dortch:

In accordance with Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206, and original and one copy of this letter and its attachment are being submitted to the Secretary's Office, with copies to the Office of the Chairman and the Offices of each Commissioner. In addition, a copy of this letter is being filed electronically for inclusion in the public record.

Please direct any questions concerning this matter to the undersigned.

Respectfully submitted,


Charles H. Helein
Counsel of Record for
U.S. Electronics, Inc.



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VIA U.S. MAIL AND FACSIMILE

Fax: 202-418-7290

Ms. Karen Mercer
FCC Enforcement Bureau
Spectrum Enforcement Division
Room 3-A325
445 12th Street, S.W.
Washington, D.C. 20554

Re: FOIA Control No. 2008-190

Dear Ms. Mercer:

U.S. Electronics, Inc. ("USE") hereby submits its comments and opposition to the responses submitted on February 29, 2008 by Sirius Satellite Radio, Inc. ("Sirius"), XM Radio Inc. ("XM") and "Three Unnamed Employees of XM Radio Inc." ("XM Employees") (Collectively, the "Respondents") to the letters of Kathryn S. Berthot dated February 14, 2008 seeking the positions of the Respondents on the Freedom of Information Request submitted by USE on January 25, 2008 ("USE's FOIA Request").

Respondents raise a number of objections to the granting of USE's FOIA Request. As shown herein, the Respondents' objections are without merit.

Although Respondents provide citations to decisions justifying denials of other FOIA requests, those decisions are inapposite to USE's FOIA Request. The decisions are a collection of legal truisms without any relevance to the facts underlying and justifying USE's FOIA Request. In general, those decisions involve risks that disclosure would result in competitive harms, would discourage voluntary disclosures to the Commission, and would violate the expectation to and rights of privacy of individuals. None of these risks is applicable USE's FOIA Request.

The information sought by USE vitally affects the qualifications of the Applicants to be licensees of public spectrum; and in particular, is directly relevant to the justification or lack thereof for the extraordinary relief the Applicants seek for the consolidation of their licenses – a step that has been expressly prohibited by the Commission for over the past decade. The information being sought also inherently affects the public interest in the enforcement of the Commission's statutory responsibilities as well as its rules and policies.

The Respondents' claim to confidentiality based on competitive concerns is disingenuous because the facts regarding interoperability, violations of emission standards and violations of authorized locations for siting terrestrial repeaters are in no way competitively meaningful to what they characterize as their "other audio entertainment competitors." It is equally disingenuous for the Respondents to assert confidentiality for the manufacturing entities (Wistron and KRI) in regard to which they have no standing to interpose any objections. Nor are any of the individuals (the XM Employees) entitled to an expectation of privacy for revealing what they know and to what extent they participated in violations of Commission rules. For the same reasons, it is disingenuous to argue that disclosure of information and activities that relate to and may be proof of violations of Commission rules would retard the voluntary submission of information to the Commission. The Commission has ample compulsory means to obtain such information that would not be submitted voluntarily.

As for the defense that Commission investigations are allegedly involved, the Commission began its investigation into violations of the emission standards and the mis-siting of repeaters almost two years ago. An on-going enforcement action, if any, during which the Applicants requested their extraordinary relief from the bar against consolidation of their licenses, should not perpetually bar disclosure of information important to the public interest. In addition, the Commission apparently has never investigated the Applicants' non-compliance with the interoperability mandate.

Ignoring all of these critical facts, the Applicants cite the action taken in regard to a similar FOIA request made months ago by the NAB. The Enforcement Bureau granted NAB's request in part only to have disclosure blocked by the Applicants' Applications for Review of the Bureau's decision. Inexplicably, no action on those Applications for Review has been taken despite their pendency for over 9 months. Nor has any explanation been provided as to how such a delay complies with the timetable imposed by the FOIA on the agency's duty to respond to FOIA requests. In this connection, the Commission should take official notice that Congress has passed and the President has recently signed into law "The OPEN Government Act of 2007" (Pub. L. No. 110-75) that, among other things, tightens the time limits for agencies to act on FOIA requests.

In conclusion, the generalized concerns offered by Respondents cannot and do not outweigh the reality that by asking the Commission for permission to merge, they have squarely put these compliance issues in contention, and have made the materials they submitted indispensable to the public comment process. The Commission should grant USE's FOIA

Request and allow the requested information into the record for consideration of its impact on the public interests affected by the proposed merger.

Respectfully submitted,
U.S. Electronics, Inc.

By Charles H. Helein (S) 
Charles H. Helein
Counsel of Record

Cc:
Office of the Chairman
Offices of the Commissioners

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