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March 7, 2008

Electronically Filed

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

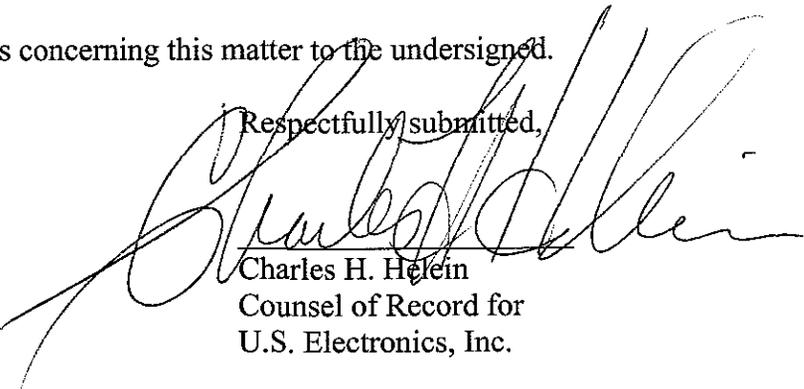
Re: Notice of Ex Parte Communication in MB Docket No. 07-57

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 attachments 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. 2008-197

Dear Ms. Mercer:

U.S. Electronics, Inc. ("USE") hereby submits its comments and opposition to the letter dated February 29, 2008 ("Letter") by counsel for Ki Ryung Electronics Company, Ltd. ("KRI") in response to the letter of Kathryn S. Berthot dated February 14, 2008 seeking the positions of KRI on the Freedom of Information Request submitted by USE on January 28, 2008 ("USE's FOIA Request").

Counsel for KRI objects to the grant of USE's FOIA Request relying on Exemptions 7(A) and 4. As shown below, KRI's objections are without merit.

First, KRI's reliance on decisions on other FOIA requests is misplaced. These decisions are inapposite. They are a collection of legal truisms without any relevance to the facts underlying and justifying USE's FOIA Request in that they involve investigatory files compiled for law enforcement purposes, concerns that disclosure would result in competitive harms and would discourage voluntary disclosures to the Commission. None of these risks is applicable to USE's FOIA Request. Moreover, the cases relied upon by KRI (or the other opponents to USE's FOIA Request) do not involve the interaction of a contemporaneous merger application and the public interest harms that would result from a failure to disclose the information sought by USE's FOIA Request.

The information sought by USE vitally affects the qualifications of the two Applicants, XM Satellite Radio Inc. ("XM") and Sirius Satellite Radio Inc. ("Sirius"), that seek to become a merged licensee of public spectrum; and in particular, is directly relevant to the justification or lack thereof for the extraordinary relief sought by the Applicants, namely, 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.

KRI's first assertion is that USE's FOIA Request if granted would interfere with enforcement proceedings by preventing the Commission from obtaining data in related on-going proceedings or prospective proceedings. Letter p.3. The narrow scope of USE's FOIA Request and the applicable circumstances makes this a virtual impossibility. USE's FOIA Request is about the merger Applicants' non-compliance with Commission rules in three discrete and limited areas – interoperable satellite radios, violation of emission standards for satellite radios and the construction of terrestrial repeaters in unauthorized locations. USE is unaware of any other ongoing proceedings or any prospective proceedings addressing these areas of non-compliance; nor are there other satellite radio entities that could possibly engage in activities that would involve such violations. Ironically, the one ongoing proceeding to which USE's FOIA Request relates is the Commission's consideration of the merger application and a grant of USE's FOIA Request would plainly aid the Commission in passing upon the issues in that proceeding.

KRI's arguments that disclosure would adversely impact the cooperation of other targets of investigations or reveal the Commission's investigatory techniques is based on the presumption that an incentive would be created "to destroy or alter relevant evidence or change their operations to escape detection... [and] determine what information they want to destroy before an investigation is initiated." In short, KRI is arguing that disclosure of information required for the Commission to perform its statutory duties should not be required for fear that to do so would be to encourage others to engage in criminal conduct – obstruction of justice and fraud. Id. 4. Such a contention is not rational and totally without merit.

KRI's claims to confidentiality based upon impairing the Commission's ability to obtain information in the future and cause competitive harm are similarly disingenuous. Id. The facts regarding interoperability, violations of emission standards and violations of authorized locations for siting terrestrial repeaters are in no way meaningful to KRI's competitors. It is equally 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 information that it needs in the discharge of its responsibilities.

KRI further argues it provided information "based on the understanding that KRI's highly confidential supply, distribution and sales arrangements would be protected from disclosure. If materials of this type were routinely made available whenever an entity requested it under FOIA, future Commission respondents would be less forthcoming ..." Id. 5. USE's FOIA Request does not seek disclosure of KRI's supply, distribution and sales arrangements. More precisely, USE's FOIA Request does not seek disclosure of KRI's supply, distribution and sales arrangements UNLESS they aided in the violation of the emission standards. In such a case,

KRI would have no expectation of or right to confidentiality. The same analysis defeats KRI's objection that disclosure would present a situation of "substantial competitive injury." Id. Unless KRI competes on the basis of violations of the Commission technical standards, there is no threat here to its competitive position.

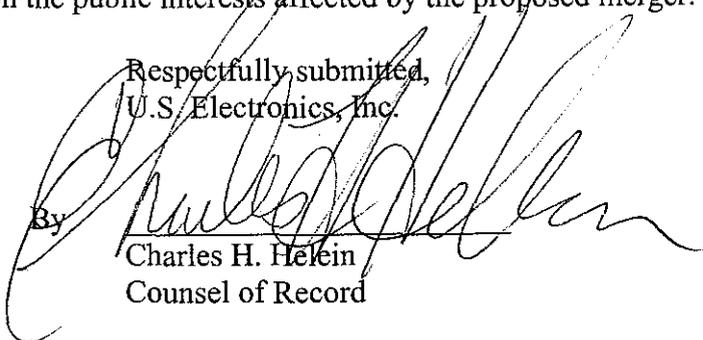
KRI provides a detailed rebuttal addressed to specific submissions of information in its August 2, 2006 submission. Id. 6-11. As part of these responses, several times, KRI claims the information is in USE's possession or is available from the Office of Engineering & Technology. Unless USE is provided with KRI's submission of August 2, 2006, it has no reference as to what information it already possesses or might obtain from OET.

More importantly perhaps, the Commission should understand that any commercial, financial or technical information, including even pricing, that existed in mid-2006 is not relevant to the 2008 market of today. In the electronics market, yesterday's prices, designs, technologies, products, etc. are quickly rendered obsolete. And again, even if this were not 100% true, the information USE seeks is narrowly focused on non-compliant conduct and not KRI's legitimate business practices and strategies.

In conclusion, the generalized concerns offered by KRI cannot and do not outweigh the reality that by asking the Commission for permission to merge, the Applicants, XM and Sirius, have squarely put compliance issues in contention, and have made the information submitted by the Applicants, their manufacturers and employees indispensable to the public comment process. The Commission should grant USE's FOIA Request and make the requested information part of 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
Counsel of Record

Cc:
Office of the Chairman
Offices of the Commissioners
Office of General Counsel
Office of the Secretary
Alfred M. Mamlet



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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 letter dated February 29, 2008 ("Letter") by the Searcy Law Offices ("Counsel") on behalf of "Four XM Employees," unnamed (hereinafter, "Four Unnamed XM Employees") to the letter of Kathryn S. Berthot dated February 14, 2008 to Scott Blake Harris, Counsel for XM Satellite Radio Inc., seeking a response to the Freedom of Information Request submitted by USE on January 25, 2008 ("USE's FOIA Request").

The argument offered against public disclosure boils down to this: The Commission sent XM a Letter of Inquiry concerning certain violations of law. In its response, XM served up the names of certain employees, including the Four Unnamed XM Employees, who might be knowledgeable about the matters the Commission was making inquiry. It is argued however, that the public should not be entitled to know who these unnamed individuals are or what information they contributed in response to the inquiry because it might embarrass them. Meanwhile, XM and Sirius demand that the Commission approve their merger application as in the public interest, and abet their preference to keep the public in the dark about past violations of the law and Commission regulations.

Counsel's response is directed to the "extent that [USE's FOIA Request] seeks disclosure of XM's Letter of Inquiry Responses Dated August 21 and September 6, 2006 (collectively, the 'Compliance Responses')." In addition, Counsel represents that the Four Unnamed XM Employees "expressly rely upon and incorporate the Application for Review" filed in response to the FOIA request of the NAB, FOIA Control No. 2007-235. Letter ¶ 1, notes 1 and 2.

Counsel seeks to have the Compliance Responses withheld from disclosure or "redacted to remove any personal identifiers or other information that could disclose the employees' identity." Id. ¶ 2. In setting forth the basis for these requests, Counsel provides the background on the submission of the Compliance Requests.

The Letter of Inquiry ... sought information about employees who may have known about "potential" non-compliance issues ... XM's Compliance Responses identify employees, including the Four [Unnamed] XM Employees, whose knowledge or roles in the matters under investigation may have been tangential or even non-existent. As a consequence, the Compliance Responses attribute "potential" wrongdoing to the Four [Unnamed] XM Employees based on an incomplete record, which would constitute a serious invasion of privacy, leading to harassment, personal and professional harm to these private citizens. Id. ¶ 3. (Underscoring supplied.)

As shown by the underscored portions of Counsel's description of the background on the submission of the Compliance Responses, Counsel's assertions are self-serving, intended to create a basis for the objections thereafter presented based on FOIA exemptions 6 and 7(C). Counsel argues:

FOIA exemptions 6 and 7(C) safeguard against unwarranted disclosure of private information pertaining to a particular individual or information that was compiled for law enforcement purposes, such as the information contained in the Compliance Responses...Where, as here, disclosure would tarnish the reputations of private citizens by associating them with alleged wrongdoing, courts deem the privacy interests to be "significant." Id. ¶ 4. (Underscoring supplied.)

These objections are without merit. The background provided by Counsel quoted above, which appears to be selectively extracted from the LOI, apparently attributed wrongdoing to the Four Unnamed XM Employees. Counsel's labeling this wrongdoing as "potential" must be taken as self-serving and disingenuous. Similarly, allegations of an incomplete record and the fact that the attribution of wrongdoing would be a serious invasion of privacy that would lead to harassment, and personal and professional harm are also self-serving and disingenuous. In other words, there are no facts that support these assertions.

As for the defense that the Compliance Responses contain information compiled for law enforcement purposes, the fact is that the Commission investigations of XM and its employees began almost two years ago and this sort of defense did not deter the Enforcement Bureau's grant in part of NAB's similar FOIA request cited by Counsel. The pendency of an enforcement action which involves facts directly related to the extraordinary relief the Applicants seek in the merger application, i.e., the Applicant's past misconduct, should not perpetually bar disclosure of

said information which is critical to public interest issues raised by the Applicants and the merger application.

Counsel next argues that –

The significant privacy interests at stake here can be outweighed only if a relevant countervailing public interest in disclosure exists... In the context of FOIA, ‘public interest’ means an interest that relates directly to the conduct of a government agency... disclosure of personally identifying information about employees would shed no light whatsoever on the conduct of the agency. Id.¶ 5. (Underscoring supplied.)

Counsel is wrong again. 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.

Indeed, the “personally identifying information” about the Four Unnamed XM Employees relates directly to the conduct of the Commission. It is the Commission’s duty to determine the position of an applicant’s or a licensee’s employees engaged in or being investigated for violations of Commission rules. If senior executives or those with management control are involved in the rule violation it can disqualify the applicant or the licensee from obtaining or retaining a Commission license. If the Commission discovered violations by such employees and failed to take action, then the Commission’s own conduct is subject to challenge. If the Commission discovered violations by such employees and fails to make its discovery part of the record in the proceeding in which the Applicants seek extraordinary relief and withholds such information from the public, any Commission action in such circumstances would not withstand judicial review.

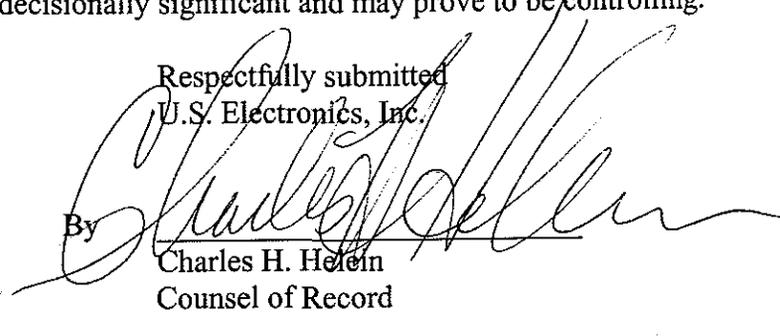
Counsel’s suggestion that the information on the Four Unnamed XM Employees be withheld permanently or until the Application for Review is decided ignores the fact that no action on the Application for Review has been taken despite its pendency for over 9 months. Nor has any explanation been provided 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 concerns offered by Counsel cannot and do not outweigh the reality that by asking the Commission for permission to merge, XM has squarely put its and its employees compliance with Commission rules and policies into contention, and have made the materials it submitted in the Compliance Responses, including the identity and employment positions of the Four Unnamed XM Employees, indispensable to the public comment process. The Commission should promptly grant USE’s FOIA Request so that the information becomes

part of the record on the merger application, is thereby available to those whose interests are affected and because the information is decisionally significant and may prove to be controlling.

Respectfully submitted
U.S. Electronics, Inc.

By


Charles H. Helm
Counsel of Record

Cc:
Lori J. Searcy
Offices of the Chairman and Commissioners
Office of General Counsel
Office of the Secretary