

*Kathleen Wallman*  
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March 27, 2008

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

RE: Notice of *Ex Parte* Communication – Consolidated Applications for Authority to Transfer Control of XM Satellite Radio Holdings Inc. (XM) and Sirius Satellite Radio Inc. (Sirius) (MB Docket No. 07-57)

Dear Ms. Dortch,

On March 26, 2008, the undersigned, along with Cameron McAlpine, met on behalf of U.S. Electronics, Inc. (“USE”) with Michelle Carey, Senior Legal Advisor, Media Issues to Chairman Kevin Martin.

We advocated and discussed implementation of the open device condition originally advocated by USE to ensure that consumers can continue to choose from a variety of radio receivers that are designed, manufactured and distributed in an open, competitive marketplace that delivers price, innovation and quality benefits to consumers. We offered, on the basis of USE’s extensive experience in the consumer electronics manufacturing market, to supply detailed specifications for the implementation of the open device condition.

In response to Ms. Carey’s question, we affirmed that several other organizations have embraced the open device condition, pointing to filings by Public Knowledge, Media Access Project and New America Foundation, iBiquity Digital Radio and the HD Radio Alliance and also pointed out that the most recent filing of NATOA endorses the importance of preserving consumer choice in radio receivers. In response to a question by Ms. Carey, we explained that calls for the integration of HD and satellite radio receiver capabilities necessitates adoption of an open device condition so that HD radio manufacturers can properly incorporate the satellite radio receiver chips into their devices. To attempt to implement this integration otherwise would give the surviving licensee, if the merger is approved, further power to preclude the competitive design, manufacture and distribution of consumer electronics equipment. The letters and filings of these entities in support of the open device condition, as well as two documents summarizing the specific conditions sought by USE and the rationales therefor, were left behind with Ms. Carey and have been appended to this *ex parte*.

We reiterated USE's previous calls for the appointment of an independent monitor to ensure compliance with conditions, including the a la carte condition that has been proffered by the applicants. In response to Ms. Carey's question, we confirmed that USE has previously advocated the appointment of an independent monitor in the record.

We also discussed the Freedom of Information Act Requests filed by USE seeking access to documents relevant to XM's and Sirius' history of compliance with Commission rules and orders. We informed Ms. Carey that USE likely will seek review of the decision to deny disclosure of many of the documents sought. We explained that these documents are directly germane to the public record in the merger because of the possibility that the merger, if approved, would seek to impose conditions upon the surviving network service provider. In that event, the licensees' past record of compliance, and dealings with the FCC in connection with compliance issues, is relevant to assessing whether and how conditions agreed to in connection with the pending merger, including such conditions as the applicants themselves may volunteer, can be monitored and enforced. We also reiterated USE's position that all relevant documents must be made part of the public record before the Commission may properly act on the merger.

Yours very truly,

*Kathleen Wallman*

Kathleen Wallman  
Wallman Consulting, LLC  
Advisor to U.S. Electronics, Inc.

Proposed Merger Conditions  
Of  
U.S. Electronics, Inc.  
Media Bureau Docket No. 07-57  
Consolidated Application of XM/Sirius

The merged entity should:

- Be barred from directly or indirectly engaging in or interfering with the design, manufacture or distribution of satellite radio receivers or other digital devices that can access the satellite radio network;
- Publish and make available information on the technical requirements and specifications of its network, including reasonably advanced notice of any changes to any qualified and willing partner;
- Not interfere with consumers' access to, or their choice of, devices by which to access the network;
- Comply with rules and regulations that provide for the compatibility of receivers to ensure that the satellite radio-using public has reasonable and non-discriminatory access to the satellite radio network;
- Comply with the FCC's policy that the public has the right to use any device to access and make use of the satellite radio network, consistent with the principles established in the *Hush-a-Phone* and *Carterfone* decisions -- as codified in Part 68 of the FCC's Rules, 47 C.F.R. Part 68, as well as the principles established under Section 629 of the Telecommunications Act of 1996, the FCC's implementing rules of Section 629, 76 C.F.R. §1200 et seq., and the Court's affirmation of the FCC's implementing regulations in *Charter Communications Company v. FCC*, 460 F.3d 31 (D.C. Cir. 2006); and importantly,
- Be subject to an independent monitor who will ensure compliance with FCC rules and regulations.

Note: These conditions have been inserted into the record numerous times in ex parte filings and in pleadings such as USE's Petition to Defer filed October 12, 2007.

Draft Public Interest Condition to the  
XM Satellite Radio and Sirius Satellite Radio Inc. Merger

*"Open Device Requirement"*

*Open Device Condition:* In order to mitigate concerns over the merged entity's vertical monopoly power, the merged entity should be required to operate under an open platform standard for devices. Specifically, the FCC must require, as a condition of approval, that the merged licensee allow customers and device manufacturers to use or develop any devices they choose. 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.

*Explanation:* Considerable concern has been raised in the XM Satellite Radio/Sirius Satellite Radio merger over the likelihood that the merged entity will be able to exert unreasonable vertical monopoly control over the satellite radio receiver marketplace. This means reduced choice and higher prices for consumers. Consumers will not be able to choose their own preferred receivers for use with their subscriptions; they will be constrained to purchase the receivers manufactured by the merged entity's sole source production partner. A sole source arrangement also means that the merged entity can extract higher prices, offsetting the consumer benefits of any conditions that might be imposed to prevent sharp increases in subscription prices.

For all these reasons, the FCC should require an open device commitment, with appropriate independent supervisory and enforcement provisions, as a condition of the merger. If consumers remain empowered to choose their preferred receiver, manufacturers will have incentives to continue to produce receivers and to compete on price and features, thus sustaining for consumers the benefits of cycles of innovation.

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. Copps' 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 the first name "Alex" and last name "Curtis" clearly distinguishable.

Alex Curtis  
Director of Policy and New Media

cc:  
Rick Chessen  
Bruce Gottlieb



January 29, 2008

Marlene Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, D.C. 20554

Re: Written *Ex Parte* Comments, Consolidated Applications for Authority to Transfer Control of XM Satellite Radio Holdings Inc. (XM) and Sirius Satellite Radio Inc. (Sirius) (MB Docket No. 07-57)

Dear Ms. Dortch:

Media Access Project (MAP) and the New America Foundation (NAF) respectfully submit these written *ex parte* comments in the above referenced proceeding.

MAP has previously expressed concerns about the implications of this merger and therefore, has asked the Commission to deny the proposed transaction.<sup>1</sup> Nonetheless, in the event the Commission chooses to approve the proposed transaction, MAP has urged the Commission to impose merger conditions in this proceeding to protect the public interest.<sup>2</sup> MAP writes today, joined by NAF, to reiterate its concerns about the public interest implications of this merger. We also encourage the Commission to adopt a further condition in the event the Commission approves the transaction. We urge the Commission to require the merged entity to 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.

Since MAP's initial filing, the record has evolved to suggest that XM/Sirius intend to adopt a "sole source" model for satellite radio devices once the parties complete the merger. Such a vertical monopoly would, by design and in effect, eradicate consumer choice and price competition across manufactures. Accordingly, MAP and NAF strongly urge the Commission to impose this additional condition on the merged entity. This "open device" principle will allow

<sup>1</sup> MAP, along with Prometheus Radio Project and U.S. PIRG, timely filed an Informal Objection to the proposed transaction on July 9, 2007.

<sup>2</sup> These conditions include: establishing a set-aside for noncommercial, educational programming; providing leased access of channels; returning of a portion of the spectrum, and requiring must carry for local noncommercial, educational channels.

consumers to make their own choices with respect to devices and will help to protect consumers against limited or no price competition.

In the past, the Commission has undertaken a number of analogous initiatives to protect consumers from incurring higher costs and limited flexibility as a result of mandatory bundling and “sole source” end-user equipment. These include the Commission’s *Carterfone* decision allowing telephone users to connect any telephone or safe device to the network and the Commission’s 2005 order mandating alternatives to cable set-top box leasing. Both examples underscore the continued importance of *Carterfone* and open-device principles as an effective means to encourage competition and reduce costs to consumers.<sup>3</sup>

Thus, we urge the Commission to require that the merged entity 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 Commission rules, these devices must be certified by the Commission for receiving signals on the frequencies licensed to the merged entity and be subject to a minimum “do-no-harm” requirement.

Respectfully submitted,

\_\_\_\_\_/s/  
Parul P. Desai  
Andrew Jay Schwartzman  
Media Access Project  
Suite 1000  
1625 K Street, NW  
Washington, DC 20006  
(202) 232-4300

\_\_\_\_\_/s/  
Michael Calabrese  
Director, Wireless Future Program  
New America Foundation  
7<sup>th</sup> Floor  
1630 Connecticut Avenue, N.W.  
Washington, DC 20009  
(202) 986-2700

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<sup>3</sup> See Rob Frieden, “Wireless *Carterfone*: A Long Overdue Policy Promoting Consumer Choice and Competition,” New America Foundation, available at [http://www.newamerica.net/files/Wireless\\_Carterfone\\_Frieden.pdf](http://www.newamerica.net/files/Wireless_Carterfone_Frieden.pdf).

## ELECTRONIC DELIVERY VIA ECFS

January 16, 2008

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 January 15, 2008 with Commissioner Robert McDowell and Angela Giancarlo and Cristina Chou Pauze of Commissioner McDowell's office. iBiquity was represented by Robert Struble (CEO) and Albert Shuldiner (General Counsel) of iBiquity, 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 to discourage proliferation of HD Radio products. iBiquity discussed 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.

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*

cc: Commissioner Robert McDowell  
Ms. Angela Giancarlo  
Ms. Christina Chou Pauze

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January 24, 2008

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.E.  
Washington, DC 20554

**Re: Written Ex Parte Presentation** in MB Docket No. 07-57, Consolidated Applications for Authority to Transfer Control of XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc.

Dear Ms. Dortch:

The HD Digital Radio Alliance (the "Alliance"), by its attorneys, respectfully submits this letter in the above-referenced docket regarding the remedy proposed by iBiquity Digital Corporation ("iBiquity") in connection with the pending merger between XM and Sirius; namely, that any approval of this merger be conditioned on (a) a requirement that HD Radio™ technology be included in all satellite radio receivers, and (b) 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.

The merger of XM and Sirius would reduce consumer choice. And at this point in its development, HD Radio cannot be considered a competitive alternative to satellite radio. There are ample grounds to disapprove this merger. Indeed that is precisely what the FCC should do – refrain from granting the license transfer. Failing that, the Commission should recognize that the merger would not only reduce consumer choice, it would also increase entry barriers. As outlined below and in iBiquity's December 20, 2007, ex parte presentation, the merger would make it more difficult for HD Radio to expand consumer choice. The elimination of exclusives and the inclusion of HD Radio capability in satellite radios are the minimum requirements for ameliorating the entry barriers that would otherwise substantially impede any progress toward additional consumer choice.

Marlene H. Dortch  
January 24, 2008  
Page 2

The Alliance is an initiative open to all radio broadcasters focused on promoting consumer awareness and adoption of HD Radio. The Alliance has assisted its members in the conversion of their radio stations to digital transmission, including the development of new “HD-2” channels (which cannot be received by consumers unless they obtain new digital radio receivers). However, the Alliance’s main purpose is to provide marketing support for HD Radio. In particular, the Alliance assists iBiquity and others in their efforts to persuade radio makers to design and produce affordable HD Radio receivers, electronics retailers to carry and promote HD Radio receivers, and, crucially, automobile OEMs to include HD Radios receivers as an option available to consumers across the entire spectrum of automobiles.

While substantial resources have been devoted to the promotion of HD Radio, and the Alliance has been generally successful in achieving its initial goals, many obstacles still must be overcome before HD Radio is adopted widely by consumers. In particular, today, the availability of HD Radio as a factory installed (or even factory authorized) option in automobiles is very limited. As it stands now, there are just two OEM’s that currently offer HD Radio as a factory installed option, and four others that have announced plans. In contrast, 17 OEM’s offer Sirius exclusively, 18 offer XM exclusively and six offer both XM and Sirius, *i.e.*, 41 major auto and motorcycle manufacturers offer factory installed satellite service, an overwhelming majority of the market. Thus, while XM and Sirius have already become entrenched, HD Radio is at the early stages of adoption in the most important distribution channel for both satellite and terrestrial radio.

The Alliance is concerned that the XM/Sirius merger would allow the combined firm to take advantage of its already dominant position and create insurmountable barriers to HD Radio’s achieving adequate adoption by automobile OEMs. XM and Sirius have shown a propensity to extract exclusive agreements, *e.g.*, from content providers and automobile OEMs. Following the merger, this propensity will increase. As the sole provider of satellite radio services, the combined company would be in a stronger position to bargain for exclusivity as against other digital audio such as HD Radio. And because there would be less competition for content and subscribers, there would be more funds available to subsidize exclusivity commitments from OEMs.

In addition – and this is the overriding policy problem with this merger – the combined company would have an unprecedented quantity of spectrum. The spectrum available to terrestrial broadcasters, on the other hand, is capped by regulation at levels well below what would be necessary to match the combined company’s allotment, even with the introduction of HD-2 channels, which today are unavailable to all but the very few consumers that have an HD radio. This inequality of spectrum – implemented by an uneven application of regulatory policy

Marlene H. Dortch  
January 24, 2008  
Page 3

– could well make it almost impossible to persuade the automobile OEMs to find a secure place in the dashboard for HD Radio. The conditions proposed by iBiquity could at least provide HD Radio the opportunity to grow into a counterweight to the dominance of a merged XM/Sirius. Such measures would serve the public interest by fostering the consumer choice that is jeopardized by this proposed merger.

In accordance with Section 1.1206 of the Commission's rules, one electronic copy of this letter is being filed in the above-referenced docket. Please direct any inquiries concerning this matter to the undersigned.

Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation



Charles E. Biggio  
Counsel to the HD Digital Radio Alliance

cc: Ms. Michelle Carey, Senior Legal Advisor to Chairman Kevin J. Martin  
Mr. Rick Chessen, Senior Legal Advisor to Commissioner Michael J. Copps  
Mr. Rudy Brioche, Legal Advisor to Commissioner Jonathan S. Adelstein  
Ms. Amy Blankenship, Legal Advisor to Commissioner Deborah Taylor Tate  
Ms. Cristina Chou Pauze, Legal Advisor to Commissioner Robert M. McDowell  
Mr. Roy Stewart (MB)  
Ms. Marcia Glauberman (MB)  
Mr. William Freedman (MB)  
Mr. Royce Sherlock (MB)  
Ms. Rosemary Harold (MB)  
Ms. Rosilee Chiara (MB)  
Ms. Jamila Bess Johnson (MB)  
Ms. Ann Bushmiller (OGC)  
Mr. Joel Robinowitz (OGC)  
Mr. Jim Bird (OGC)  
Mr. Jerry Duvall (IB)  
Mr. Gardner Foster (IB)

Wilson Sonsini Goodrich & Rosati  
PROFESSIONAL CORPORATION

Marlene H. Dortch  
January 24, 2008  
Page 4

Mr. David Strickland (IB)  
Ms. Shadnam Javid (IB)

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Consolidated Application for Authority	)	MB Docket No. 07-57
To Transfer Control of XM Radio Inc.	)	
And Sirius Satellite Radio Inc.	)	

**WRITTEN *EX PARTE* COMMENTS OF THE NATIONAL ASSOCIATION  
OF TELECOMMUNICATIONS OFFICERS AND ADVISORS**

**I. INTRODUCTION**

The National Association of Telecommunications Officers and Advisors (“NATOA”) hereby submits the following written *ex parte* comments in the above-referenced proceeding.

NATOA’s membership includes local government officials and staff members from across the nation whose responsibility it is to develop and administer communications policy and the provision of services for the nation’s local governments.

**II. THE PROPOSED MERGER OF XM AND SIRIUS IS NOT IN THE PUBLIC INTEREST**

On July 24, 2007, NATOA filed comments in the above-referenced proceeding in which we urged the Commission to deny XM’s and Sirius’s application on the basis that the proposed merger would likely harm consumers by driving up prices, decreasing innovation, and harming the quality of service. Of particular concern was the fact that consumers could face the very real prospect of getting stuck with antiquated hardware that would fail to make use of satellite radio’s full potential.

NATOA continues to stand by these earlier comments and believes that the proposed merger would not be in the public interest. Subsequent to the filing of our comments, it has come to our attention that the proposed merged entity intends to establish a “sole source” model for the design, manufacture, and distribution of satellite radio devices. This is particularly troubling in that it only serves to magnify our concerns regarding the anticompetitive nature of this transaction. It would appear that XM and Sirius intend to create two monopolies: one for subscription satellite radio service and another for the complete vertical integration of the satellite radio device market. If the merger is approved, consumer choice of satellite service providers is eliminated, along with the ability of customers to use the device of their choosing. As the recent 700 MHz auction demonstrates, the requirement that a licensee be required to permit all compatible devices to operate on a network does not deter investment. Open access not only benefits consumers, it also makes sound business sense as well.

In our earlier filing, NATOA outlined a number of reasons why this merger fails to be in the public interest. To that list, we now add the creation of this second monopoly. The Commission should act in the public interest and deny the application.

Respectfully submitted,



Libby Beaty  
Executive Director  
Stephen Traylor  
Deputy Director, Government Relations  
NATOA  
1800 Diagonal Road, Suite 495  
Alexandria, VA 22314  
(703) 519-8035  
February 27, 2008