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April 8, 2008

Via ECFS

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

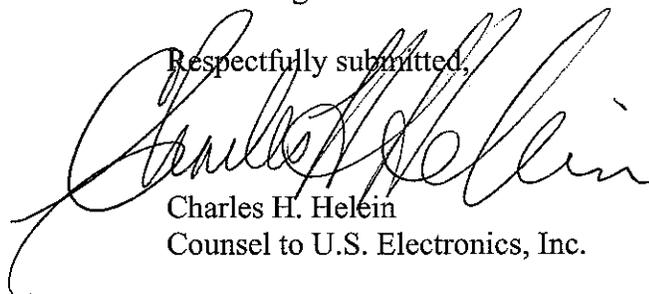
Re: Ex parte communication – MB Docket 07-57

Dear Ms. Dortch:

In accordance with Section 1.1206 of the Commission's Rules, 47 C.F.R. §1.1206, and the Commission's Public Notice, dated March 29, 2007 (DA 07-1435), a copy of the attached Opposition to Application for Review, filed in FCC FOIA Control No. 2008-190, is being filed in the above-captioned docket, via the Commission's Electronic Comment Filing System ("ECFS").

Please direct any questions or comments to the undersigned.

Respectfully submitted,



Charles H. Helein
Counsel to U.S. Electronics, Inc.

Enclosure

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
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Review of Freedom of Information) FOIA Control No. 2008-190
Act)
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OPPOSITION TO APPLICATION FOR REVIEW

U.S. Electronics, Inc. (“USE”), by its attorneys and pursuant to Section 0.461(i)(1) of the Commission’s Rules, hereby files its Opposition to the Application for Review submitted by XM Radio, Inc., (“XM”) of the Enforcement Bureau’s (“EB”) March 21, 2008 decision to the extent it granted USE’s Freedom of Information Act (“FOIA”) request of January 25, 2008, Control No. 2008-190 (“Request”).

XM’s Application for Review focuses on five documents that contain XM’s responses to the Commission’s Letters of Inquiry (“LOI”) regarding when XM became aware of compliance problems with its FM modulators and terrestrial repeaters, the reasons for those compliance problems, and the names of XM employees identified as being responsible for or aware of the compliance problems. In summary, XM argues that

... in order to answer and supplement the LOIs as candidly and completely as possible, XM did not merely supply the Enforcement Bureau with information from XM’s files. Rather, XM conducted its own internal investigation and included the fruits of that investigation in its response.” Application for Review at 3. Emphasis added.

XM’s argument then leaps over common logic by saying that in disclosing the fruits of what it discovered by its own investigation, it had to describe its internal decision-making processes, the events in question and the company’s knowledge of and response to those events.

This is tortured logic. In disclosing what its internal investigation found, there is no logic that suggests that XM was required to or in fact had to disclose how it found what it found. Moreover, if disclosure of its internal processes is somehow intertwined, then those processes become part of the disclosures of what it found that are necessary for a proper response to the LOI. In any event, any documents that disclose or describe the findings of XM's internal investigation are files called for under the LOI and what USE is seeking pursuant to its Request.

XM's next argument attempts to separate the fruits of what it found from "the events in question" and XM's "knowledge and response to those events." What XM appears to be arguing is that the disclosure of its findings of apparent wrongdoing (events) involves the disclosure of the wrongdoing (events) in question and XM's knowledge and response to such wrongdoing (events). Doing what is necessary to respond to the LOI is not a proper basis for withholding information requested under FOIA.

XM alleges that its responses identified persons whose actual involvement with, or knowledge of, the matters under investigation may have been only tangential¹ and that disclosure may lead to their reputations being tarnished. This begs the question. If these employees were only tangentially involved they would not be engaged in culpable conduct. Therefore, they are in no danger of having their reputations tarnished. On the other hand, if the persons were involved more than tangentially, they have no valid anticipation of privacy. Wrongdoers have no right of privacy in their own wrongdoing.

XM next argues that in responding to USE's FOIA Request, the Enforcement Bureau did not adequately consider the adverse consequences that disclosure would have on future internal inquiries to collect the "composite knowledge" of an organization. Presumably this vague

¹ The proper inference from XM's equivocal statement is that these persons were more than tangentially involved.

reference refers to XM's having collected information by encouraging its employees' full cooperation and candor. But XM cannot shift its responsibility to comply with Commission rules to its employees and their willingness to cooperate. Stated otherwise, a wrongdoer has no right to refuse to make internal inquiries to collect its "composite knowledge" of whether or not it complied with FCC rules.

Equally without merit is the argument that disclosure would unfairly subject companies, like XM, and individual employees to opportunistic attacks. There is no evidence or even a reasonable potential that any third party could use the disclosed information to make an "opportunistic attack" against XM or its employees. The only entity with such a possible interest is Sirius. Sirius cannot attack XM for violating FCC rules since it appears that Sirius violated the same rules. Nor could an opportunistic attack be made on innocent employees lest those doing so disregard the laws on defamation.

Lastly, XM claims that disclosure would undermine the public interest in facilitating internal investigations in response to government inquiries. This argument is without merit as well. On the contrary, to withhold the LOI documents would undermine: (1) the public interest in full disclosure of possible wrongdoing and how that apparent wrongdoing affects the FCC's evaluation and decision on the pending merger; and (2) the public interest in not allowing possible wrongdoers to engage in a self-serving cover-up using generalized arguments having nothing to do with the specific facts in question.

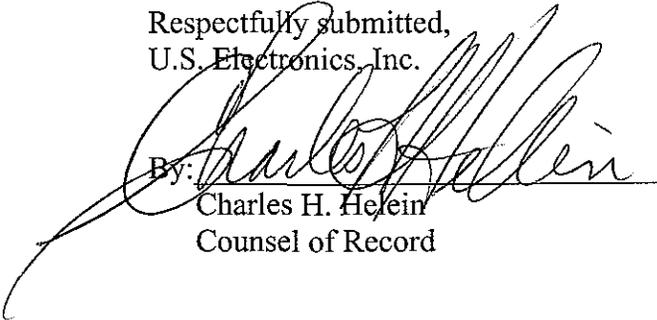
It is clear that XM seeks to keep secret certain information about its possible non-compliance, but there remains no justification for denying the public its rights to have vital information be made part of the record on the Merger Application.

Apart from the foregoing, the Commission has official notice that XM is a company whose securities are publicly-traded and has the obligation to publicly disclose all facts material to its compliance with law, especially when such compliance affects or could affect its qualifications to hold its single most important asset, its FCC license.

And finally, USE has repeatedly proposed that if the Commission approves the merger its approval be conditioned to prohibit the merged entity from being directly involved in or exercising control over the manufacture, design and distribution of devices to access the merged entity's satellite radio network. To ensure the merged entity complies with such conditions USE has argued for the appointment of an independent monitor. Accordingly, the Applicants' past compliance, or lack thereof, is of critical importance to the Commission's decision on the merger. And the materials USE's FOIA has requested that are the subject of this Application for Review are about XM's past compliance because disclosure is essential to ensure a comprehensive and reasoned decision on the merger.

For all of the foregoing reasons, XM's Application for Review should be denied.

Respectfully submitted,
U.S. Electronics, Inc.

By: 

Charles H. Helein
Counsel of Record

CERTIFICATE OF SERVICE

I, Suzanne Rafalko, administrative assistant in the law firm Helein & Marshlian, LLC, do hereby certify that on April 8, 2008, I served a copy of U.S. Electronics, Inc.'s Opposition to Application for Review upon the following parties by email:

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Counsel for Four Unnamed XM Employees

Lanny Bruer, Esq. (lbreuer@cov.com)
Counsel for Three Unnamed Employees

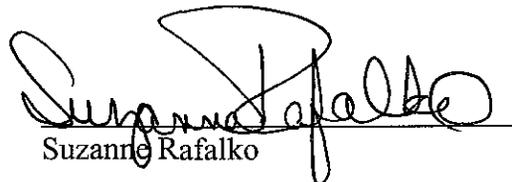
Robert L. Pettit, Esq. (rpettit@wileyrein.com)

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and the following parties via first class mail, postage pre-paid:

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