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April 8, 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 April 8, 2008 the written ex parte communication below was submitted by the undersigned to Monica Desai, *Chief of the Media Bureau*. Courtesy copies were also sent to Michelle Carey, *Senior Legal Adviser for Media Issues, Chairman Martin*, Rich Chessen, *Senior Legal Adviser and Media Advisor, Commissioner Copps*, Rudy Brioche, *Legal Advisor for Media Issues, Commissioner Adelstein*, Amy Blankenship, *Legal Advisor, Commissioner Tate*, and Cristina Chou Pauzé, *Legal Advisor, Media, Commissioner McDowell*. Should you have any question please contact the undersigned.

Yours very truly,

*Kathleen Wallman*

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

***Kathleen Wallman***  
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9332 Ramey Lane  
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March 31, 2008

April 7, 2008

Monica S. Desai  
Chief, Media Bureau  
Federal Communications Commission  
445 12<sup>th</sup> St., S.W.  
Washington, DC 20554

Dear Ms. Desai:

U.S. Electronics, Inc. (“USE”) calls your attention to five recent articles that offer critical analysis of the proposed XM/Sirius merger.

***The Los Angeles Times***

In an editorial published on March 31, 2008, the Los Angeles Times urged that:

It's also reasonable for the FCC, which has the final say over mergers by license holders, to impose conditions designed to promote innovation and the public interest...the FCC should require the same kind of openness from XM and Sirius as it has started demanding from some wireless companies. It should direct the merged company to open its service to any manufacturer wanting to build compatible devices, and then let customers make their own choices.<sup>1</sup>

The editorial is referring to the most recent positive market validation of the open access concept in the 700 MHz C Block auction. Earlier successes as in *Carterfone* and *Hush-A-Phone* are well documented as to the benefits that accrue to consumers and competition with application of the open access concept.

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<sup>1</sup> See: “XM and Sirius Merge,” *Los Angeles Times*, (Available at: <http://www.orbitcast.com/archives/open-device-debate-extends-to-sirius-xm.html#more>)

### *The Miami Herald*

In an April 3, 2008 article The Miami Herald pointed out the illogic of the Department of Justice's reliance on the unavailability of a Sirius-XM interoperable radio as a factor justifying its decision not to oppose the merger.

When antitrust regulators decided last week to allow the nation's only two satellite radio companies to become one, they put forth an unexpected argument -- that the two companies largely do not compete with one another.

That may be true, but it's not what government regulators intended.

Justifying its decision, the Justice Department said customers of XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc. generally stick to one service once they have signed up, because if they want to switch, they have to buy a new radio. XM's receivers don't get Sirius signals, and vice versa.

When the Federal Communications Commission approved rules that created the business in 1997, it insisted that the two licensees "certify" that their radios would receive both services. The rule was meant to promote competition by making it easy for consumers to switch between satellite radio providers.

"At the very least, consumers should be able to access the services from all licensed satellite DARS (digital audio radio service) systems and our rule on receiver inter-operability accomplishes this," the FCC's 1997 decision reads.

Eleven years later, that goal has been all but abandoned. Subscribers to XM buy one type of radio, subscribers to Sirius buy another. Auto makers install one system or the other, depending on which company they have an exclusive contract with.

The failure to deploy radios that work with both systems was cited by the Justice Department as part of its justification to clear the merger.<sup>2</sup>

The Department of Justice's reliance on the licensees' apparent noncompliance with the Commission's directive to ensure that consumers could receive both licensees' signals rewards the licensees' noncompliance. The Commission should adopt the open device condition that has now been advocated or commented favorably upon, in addition to USE, by Public Knowledge, Media Access Project, New America Foundation, National Association of Telecommunications Officers and Advisors, iBiquity and HD

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<sup>2</sup> See: "Sirius, XM didn't market radios the way the Feds intended," John Dunbar, *Miami Herald*, (Available at: <http://www.miamiherald.com/152/story/480810.html>)

Radio Alliance. Such a condition will allow the competitive marketplace of consumer electronics manufacturers to afford consumers the choice and protection that has not been afforded to them because of the licensees' failure to comply with the Commission's directives.

**Public Knowledge, Orbitcast and Sirius Buzz Blogs**

- In a March 30, 2008 blog posting, Gigi Sohn, President and Co-Founder of Public Knowledge reiterated her organization's support for the open device condition.<sup>3</sup>
- Ryan Seghir, of the satellite radio industry blog "Orbitcast," stated in a March 28, 2008 posting that: "It's my firm belief that the "open device" issue has implications that - in the short term - may not seem very favorable to Sirius-XM (since it's harder to control the supply chain) but in the long term would ultimately help to benefit the companies and their consumers."<sup>4</sup>
- Tyler Savery, of the blog "Sirius Buzz" in his April 2, 2008 posting, "Open Access - What It Means to The Merger" wrote favorably about the open device condition and how it could be implemented.<sup>5</sup>

In view of the wide and growing support for the open device condition, USE reiterates its readiness to apply its long experience in the consumer electronics manufacturing market in defining implementation criteria. For example, with respect to quality assurance issues, one aspect of the implementation process could involve independent laboratory testing of satellite radio devices so that both Sirius, as the supplier of the receiver chips, and consumers, as users of the devices, can be sure that they operate as they should.

USE also reiterates the necessity of appointing an independent monitor to ensure that any conditions adopted, if the merger is approved, are carried out as mandated by the Commission. The licensees are apparently under investigation by the Commission for noncompliance with past mandates of the Commission; the documents relating to that investigation are the subject of a FOIA request for which USE shortly will seek Commission review. Full disclosure of these documents is essential so that proper ground rules for the monitoring and enforcement of conditions can be framed.

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<sup>3</sup> See: <http://www.publicknowledge.org/node/1488>

<sup>4</sup> See: <http://www.orbitcast.com/archives/open-device-debate-extends-to-sirius-xm.html#more>;

<sup>5</sup> See: <http://siriusbuzz.com/open-access-what-it-means-to-the-merger.php>

Respectfully submitted

*Kathleen Wallman*

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Advisor to U.S. Electronics

cc: Rich Chessen, Senior Legal Advisor and Media Advisor, Commissioner Copps  
Rudy Brioche, Legal Advisor for Media Issues, Commissioner Adelstein  
Amy Blankenship, Legal Advisor, Commissioner Tate  
Cristina Chou Pauzé, Legal Advisor, Media, Commissioner McDowell  
Monica Desai, Media Bureau Chief,