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April 22, 2008

VIA ECFS FILING

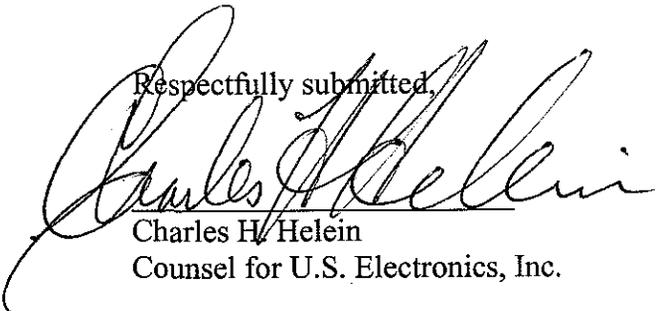
Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: MB Docket No. 07-57

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206, this letter and its attachment are submitted to the Secretary's Office, with copies to the Office of the Chairman, the Offices of each Commissioner and the Office of General Counsel. In addition, a copy of this letter is being filed via ECFS for inclusion in the public record of these proceedings.

Respectfully submitted,



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

cc: The Hon. Kevin Martin, Chairman
The Hon. Michael Copps, Commissioner
The Hon. Jonathan Adelstein, Commissioner
The Hon. Deborah Taylor Tate, Commissioner
The Hon. Robert McDowell, Commissioner

Matthew Berry, Office of General Counsel

Michelle Carey - *Senior Legal Advisor, Media Issues – Office of the Chairman*
Rick Chesson – *Senior Legal Advisor – Office of Commissioner Capps*
Rudy Brioché - *Legal Advisor for Media Issues – Office of Commissioner Adelstein*
Amy Blankenship - *Legal Advisor – Office of Commissioner Tate*
Angela E. Giancarlo - *Legal Advisor, Wireless & International Issues – Office of Commissioner McDowell*
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and Shabnam Javid, International Bureau

Communications: U.S. Electronics Wants Open Access As Condition of XM-Sirius Merger Approval

By Cheryl Bolen
BNA
April 14, 2008
No. 71 | Page A-11

U.S. Electronics Inc. has been urging the Federal Communications Commission to impose "open access" conditions on any approval of the pending XM-Sirius Satellite Radio merger, Kathleen Wallman, who is representing the electronics company, told BNA April 11.

Until a couple years ago, U.S. Electronics, a New York-based consumer electronics manufacturer, made radios for Sirius, Wallman said. Its contract expired and a dispute arose, which is now in arbitration, but the company and many others like it want to be able to make satellite radios in the future, she said.

Wallman formerly served at the FCC and in the executive branch from 1994-1997, including as chief of the FCC's Common Carrier Bureau. Wallman left the White House in November 1997 to found Wallman Strategic Consulting LLC.

Rather than this being a matter of one company being excluded from the market, it is really a consumer issue or an open device issue, Wallman said. It is the same issue that the commission was trying to address when it adopted open access conditions for the C Block of spectrum in the recent 700 MHz auction, she said.

Wallman said she suggested the company appeal to the commission on open access grounds and explain the consequences of eliminating competitive manufacturing. Essentially, the merger of XM and Sirius would not only create a satellite radio monopoly, but subtend a second monopoly in the manufacture of satellite radios.

The two licensees were initially told that at no time would the two licenses ever be held by one entity, Wallman said. And now the commission is considering a change to that fundamental rule, she said.

This change would result in one licensee in the satellite digital audio radio service (SDARS) market, Wallman said. "So, that's a monopoly in SDARS," she said.

If the combined company is also permitted to say that since it has a proprietary interest in the chip that connects the radio to the satellite network it will only deal with its favorite manufacturer, that would result in a second monopoly, Wallman said.

"And we're trying to shed some light on this second monopoly," Wallman said.

Some Consumer Choice

If the commission believes it can make a compelling case about why the two SDARS licensees can combine in the first place, then it should at least leave consumers a choice about what devices they can put in their homes and cars, Wallman said.

All of the arguments that compelled the commission to adopt open access conditions for the C Block of spectrum for wireless broadband services are equally compelling here, Wallman said.

It used to be that XM and Sirius had a broad "ecosystem" of manufacturers that produced their radios, Wallman said. This is expected of companies that make their revenues from subscriptions, she said. The idea is that their radios should be available ubiquitously and inexpensively, she said.

Now, consumers select their network, either XM or Sirius, then go to a consumer electronics retail store and buy a radio that works with that network. There is a small range of choices, which is getting smaller over time, Wallman said.

Both XM and Sirius have gone "sole source" with a favorite manufacturer now finding that more than 85 percent of their orders go to one manufacturer, Wallman said. "So when they go from two licensees to one, then they can perfect that arrangement and have just one single source," she said.

The primary response to these charges from XM and Sirius has been, "we wouldn't do that," Wallman said. However, the manufacturers that they point to are those they have worked with in the past, she said. The current situation is that they have effectively gone to sole source, she said.

Their other argument is that even if the combined company wanted to give its business to just one manufacturer, that would not be illegal, Wallman said. "That doesn't give you much comfort, if you're trying to effectuate a system where consumers get a choice because manufacturers are able to make competing products," she said.

Open Access Proposal

XM and Sirius have developed and invested in a proprietary chip, and no one is proposing that they simply "sprinkle those on the streets" for any manufacturer to pick up, Wallman said.

However, U.S. Electronics is proposing that the combined company make its chip available on a reasonable and nondiscriminatory basis to manufacturers with a bona fide interest in making radios for consumers, Wallman said.

The companies have argued that this would compromise their intellectual property or their encryption and make them vulnerable to piracy of their signals, Wallman said. But a few years ago, XM and Sirius worked with many manufacturers without experiencing these problems, she said.

"This has worked in the past, it can work again," Wallman said.

What U.S. Electronics has suggested is that an independent laboratory ascertain whether radios are properly certified and perform to quality control standards, Wallman said.

Wallman said that while U.S. Electronics has not proposed specific language to the commission, it has outlined the specific "concept" to staff. It is also proposing that there be an independent monitor to oversee the process, she said.

While some on the commission believe this is their job, it is a detailed supervisory job, much like the 800 MHz public safety transition, Wallman said. With decisions that must be made day-to-day fairly quickly, it would be important and valuable to have an independent administrator, she said.

At the moment, the timing of the whole merger is still up in the air, Wallman said. "I get the sense that everybody feels it's going to be soon," but an order has not yet circulated and there is nothing yet to react to, she said. Staff have been "circumspect" about discussing the merger, she said.

Still, Wallman said she continues to stress the important points of their proposal, which should be a condition of the merger. It includes reasonable and nondiscriminatory access to chips; an independent laboratory to certify devices; and an independent monitor to ensure compliance.

New Radios for Consumers?

One question that has not been clearly answered is whether subscribers will eventually have to buy new radios if the companies combine. Wallman said it was "not resolved in the record," but that XM and Sirius have committed not to remove anyone from the network, for now.

"But I don't think it's clearly defined exactly what the path is to interoperability, or some kind of transitional device," Wallman said.

In its initial application to the commission, filed on March 20, 2007, the companies said that they had approximately 20 million radios in the market, including millions built into vehicles manufactured by automakers.

"This merger will neither interrupt nor affect customers' use of these existing radios. After the merger, current subscribers may choose to continue to receive substantially similar service at the same price over their existing satellite radio. No customer will need to purchase a new radio in order to keep substantially similar service," the application stated.

However, the merger also will foster the commercial introduction of interoperable satellite radios, the application stated. In originally implementing the rules for satellite radio service, the commission required the companies to develop a radio capable of receiving the signal of either system, it noted.

To meet this requirement, XM and Sirius jointly funded an engineering team that developed a radio that is interoperable with each other's networks, the application stated. In a footnote, the companies said they notified the commission of this development in a letter dated March 14, 2005.

However, the interoperable radios are larger, consume more power, are more expensive, and have fewer features than the current single-system radios, the application stated. There is little incentive for either company to subsidize the cost of these radios, since the buyer might not subscribe to that company's service.

"Because of these limitations, manufacturers have not expressed an interest in producing and distributing these radios, nor have any automobile manufacturers opted to include these radios in their vehicles," the application stated.

DOJ Approval

Wallman said one of the more interesting aspects of the Department of Justice's decision not to challenge the XM-Sirius merger had to do with interoperable radios.

In describing its reasoning, the department said subscribers do not tend to switch between XM and Sirius because their radios are not interoperable, Wallman said. Because there is no interoperability, there is not much competition between the two companies, she said.

And since there is an absence of competition, the department concluded that the merger would not be harmful, Wallman said.

It is ironic that when the licenses were first granted by the FCC, the parties were required to come up with a solution for interoperability, Wallman said. "And they never did," she said. There are some Freedom of Information Act requests pending to try to discover what happened.

The commission made this mandate, which was clearly in the public interest, but it never happened, Wallman said. "Why not have an interoperable unit?" she said. "They [XM and Sirius] claim that they 'developed' it, but they just didn't market it," she said.

This is the equivalent of rewarding obstinacy, Wallman said. "There's something wrong with that," she said.

In terms of spectrum use, there are competing plans for any spectrum that could be spun off from the merger, Wallman said. But ultimately the combined company will have to have a technology solution to allow all of their frequencies to be received on one unit, she said.

In the short term, the combined company must continue to operate on all frequencies in order not to force subscribers to buy new radios, Wallman said.

But in the long term, however the company decides it wants to solve interoperability--either by continuing to make two kinds of radios with two kinds of chips, one radio with two chips, or one chip that picks up both signals--U.S. Electronics wants to be part of a "flotilla" of manufacturers that are able to receive the chips on a reasonable and nondiscriminatory basis, she said.