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ATTORNEY GENERAL



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Office of The Attorney General
State of Connecticut

June 4, 2008

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

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

Dear Ms. Dortch:

On June 3, 2008, the Attorney General of Connecticut, Richard Blumenthal, along with staff members from Offices of the Attorneys General of Connecticut, Iowa, Maryland, Missouri, Ohio, Tennessee, Washington, and Wisconsin ("the States"), met telephonically with FCC Chairman Kevin J. Martin and his Legal Advisor, Elizabeth Andriou, to discuss the States' concerns regarding the proposed merger of XM Satellite Radio Holdings, Inc. and Sirius Satellite Radio, Inc. ("the Licensees.")

The States explained that as antitrust enforcers and consumer advocates they were surprised and disappointed by the Department of Justice's statement, publicly released on March 24, 2008, in which the Department of Justice announced that it was closing its antitrust investigation. Contrary to the Department of Justice, the States believe that satellite radio service that reaches the entire nation is not in direct competition with terrestrial radio, iPod devices, or audio entertainment in general, because satellite radio has the distinct feature of providing content that is broadcast across the nation and is therefore a unique service. The States further expressed strong disapproval of permitting one company to control the entire band of radio spectrum allocated to satellite radio service.

The States firmly believe that the merger should not be approved and urged the Commission to deny the Licensees' application. Having competition in the market is sound public policy, and is consistent with longstanding FCC public policy. The Commission referenced this pillar of public policy in 1997 when it adopted the prohibition on transfer of control of the two satellite radio licensees. The public interest in price and innovation always benefits from direct competition. Likewise, the public interest is also furthered through diversity

of ownership and voice, which is fostered by direct competition. Licensing a monopoly, in contrast, would not serve the public interest.

The States noted that the FCC's Public Interest Standard entails a broader, more flexible analysis than the standard antitrust analysis, and that the States' concerns fall within the FCC's Public Interest Standard. State attorneys general have a broad interest in protecting the public from harm due to loss of competition, and have authority under both federal and state antitrust laws. The Department of Justice's statement regarding its conclusion on the antitrust issues in this matter does not foreclose state action, nor should it necessarily compel the FCC to conclude there are no anti-competitive effects of the proposed merger. The Commission's test is more flexible than traditional antitrust review, as it involves a balancing of the potential public interest harms against public interest benefits and encompasses concepts beyond competition, such as diversity and localism.

The States also noted that robust and diverse media voices are extremely important in our democratic society, and that permitting one entity to have financial and editorial control over the entirety of the spectrum allocated to satellite radio necessarily limits viewpoint diversity and the dissemination of those views to the public.

In light of the Department of Justice's decision, the States understand that the Commission might also approve the transfer, in effect licensing a monopoly in the satellite radio service. In that spirit, the States provided the Commission with conditions that should be imposed to mitigate the anti-competitive impact of this merger. Further, it is critical that whatever remedies are imposed, they be implemented before a license transfer takes effect because these parties have a demonstrated history of noncompliance with FCC orders. The conditions we believe the Commission should impose on any merger that is approved are (1) mandated leasing of a substantial amount of spectrum, and (2) interoperable radio receiving equipment that would receive both companies' satellite radio transmissions as well as terrestrial radio's HD radio service. Leasing existing spectrum and the necessary facilities will stimulate competition. On the other hand, a divestiture of spectrum will leave a competitive void that will take many years to fill, if it is ever successful.

Mandated leasing. As a condition precedent to permitting any license transfer, some of the States advocate that Sirius and XM be required to lease a portion of their satellite systems to another firm that will provide satellite radio service in competition with the Licensees. The amount of spectrum leased should be sufficient to offer a commercially viable product. The lease should include both satellite space ("channels") and any other facilities that are required to provide satellite radio service. A minimum of 20% of the channels now allocated to satellite radio service should be included in the lease. Because of the current lack of interoperable radios, equal amounts of spectrum from each licensee should be leased. This new lessee(s) should be permitted to offer service to the listening public without any subscription fee. The States also

urged the Commission to set aside spectrum for programming by not-for-profit firms, for transmission of non-commercial and educational programming, as part of any leasing option.

While not necessarily a sufficient remedy to resolve the States' antitrust concerns, the leasing option would serve the public interest by promoting diversity of ownership in satellite radio service, and improving the ability of residents in areas that are currently underserved by terrestrial radio to receive a wider array of radio programming. It would ensure that people who have chosen not to continue their XM or Sirius subscriptions would have a use for the radio receiver that they purchased.

The States did not advocate any particular firm to provide this service, and are well aware that Georgetown Partners has expressed an interest in leasing space and capacity to provide a for-profit satellite radio service. The States urged that any leasing solution be effectuated through an open and transparent environment that solicits proposals from various firms or organizations.

Interoperable receivers and integrated HD radio receivers. In its 1997 Order *In the Matter of Establishment of Rules and Policies for the Digital Audio Radio Satellite Service*, 12 FCC Rcd. 5754 at 5796, para. 103 (March 3, 1997), ("*SDARS Order*") the FCC adopted an interoperable radio requirement, stating that XM and Sirius would be required to design a receiver which would accommodate all satellite radio providers. The Commission's stated purposes underlying this requirement were to make the equipment affordable, to promote competition, and to enhance consumers' ability to switch between competing satellite radio providers. These goals cannot be achieved without the Licensees' support, and a mandate from the Commission.

It is disturbing that eleven years after the Commission mandated interoperable receivers, no such radio is readily available for the public. There is no interoperable receiver, in spite of the fact that both Licensees have entered into long-term exclusive contracts with car manufacturers to install satellite radios in new cars – yet appear to have purposefully avoided supporting or requiring the interoperable receiver. The lack of an interoperable radio thus only serves to carve up the market between the Licensees. The direct consequence of these exclusive contracts is that consumers are denied choice. Consumers cannot switch from XM to Sirius without incurring substantial additional cost. When that receiver is in an automobile, which is most often the case, the consumer would have to install a new radio receiver in their car. Consumers are being denied the choice that the Commission intended.. In addition, the interoperable equipment requirement should be enforced regardless of the outcome of the merger.

The States urged the FCC to take steps to ensure competitive sources of interoperable equipment, such as requiring the Licensees to make the Intellectual Property freely licensable,

and to put it in the market for manufacturers and standards setting bodies. The sole source model for satellite radios that XM and Sirius are discussing with car manufacturers would extend their market power from satellite radio service to the market for receiving equipment.

Open licensing by itself would not resolve the interoperable equipment issue, such that market demand would determine whether interoperable radios were deployed. The States believe that would be an inadequate response, and would not restore consumer choice. The Licensees are closely involved with the deployment of receiving equipment, having entered into various exclusive arrangements with a number of car manufacturers. It is unlikely that interoperable radios will be installed without there being a requirement imposed by the Commission. Public comments have been submitted to the Commission which include a statement from Mel Karmazin, the CEO of Sirius, that Sirius would not subsidize an interoperable radio because "it doesn't make any sense for us to subsidize a radio where we don't get a subscription." See Ex Parte Presentation of the Consumer Coalition for Competition in Satellite Radio, (May 27, 2008), (cover letter and pp. 18-20 attached for reference). The Licensees have openly ignored the FCC's interoperable radio requirement for the very reason that a consumer might thereby be able to have a choice between the Licensees.

The FCC should also prohibit any further exclusive contracts with automobile manufacturers, and prohibit the renewal of any such contracts. The requirement of the production of an interoperable receiver, of course, would largely moot the anticompetitive impact of such deals because the consumer could, finally, switch between providers as the Commission intended.

The *SDARS Order* specifically declined to mandate that the SDARS receiver be capable of receiving terrestrial broadcasting formats. Yet, it now appears that such a requirement by the FCC could yield a significant benefit for consumers. It would enhance spectrum efficiency, by enabling the listening public to receive the many digital FM channels now being broadcast. In addition, the roll-out of so many new SDARS receivers seems made to order for increasing the numbers of HD radio receivers. The States support the request to mandate integrating the terrestrial radio format in SDARS receivers. HD Radio could also become a more viable competitor to satellite radio programming.

The States do not generally support the price freeze being suggested by the Licensees. The States do not believe these promised price constraints will offset the harm caused by the loss of competition from a two-to-one merger. Moreover, given the record of rule violations of the Licensees, the States question whether the public could rely upon any lasting benefit from this offer.

Pursuant to Section 1.1206(b) of the Commission's Rules, an original and one copy of this letter are being submitted to the Secretary's office, with a copy to Chairman Martin and Ms.

Andrion. In addition, a copy of this letter is being filed electronically for inclusion in the public record of these proceedings.

Very truly yours,


RICHARD BLUMENTHAL
ATTORNEY GENERAL

cc: The Honorable Kevin J. Martin, Chairman
Elizabeth Andrion, Esq.



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May 27, 2008

VIA HAND DELIVERY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Office of the Secretary
236 Massachusetts Avenue, NE, Suite 110
Washington, D.C. 20002

Re: MB Docket No. 07-57
REDACTED – FOR PUBLIC INSPECTION

Dear Ms. Dortch:

The Consumer Coalition for Competition in Satellite Radio (“C3SR”), by its counsel, hereby submits, in the above-referenced proceeding, two redacted copies of the attached written ex parte presentation. This submission relies upon and references Highly Confidential documents filed by Sirius on April 10, 2008. Accordingly, C3SR, pursuant to the terms of the Second Protective Order,¹ is separately filing one unredacted copy with the Secretary’s Office, and two unredacted copies with Jamila Bess Johnson of the Media Bureau. A redacted copy is also being filed in the public record for this proceeding via ECFS.

C3SR shall make the unredacted version of the ex parte notice available for inspection at the offices of Williams Mullen, 1666 K Street NW, Suite 1200, Washington, D.C. 20006. Individuals who have executed the required Acknowledgment of Confidentiality should contact Benjamin D. Arden at 202.293.8135 to coordinate access.

Please contact the undersigned with any questions.

Respectfully submitted,

Julian L. Shepard
Counsel to C3SR

Enclosures

¹ *Applications of Sirius Satellite Radio Inc. And XM Satellite Radio Holdings Inc. for Approval to Transfer Control, Protective Order, DA 07-4666 (rel. Nov. 16, 2007).*

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MARCH 7, 2007 TESTIMONY BEFORE THE HOUSE ENERGY AND
COMMERCE COMMITTEE'S SUBCOMMITTEE
ON TELECOMMUNICATIONS AND THE INTERNET

Representative Engel: “Mr. Karmazin, Mr. Kimmelman noted earlier that the FCC only had 25 megahertz of spectrum to auction for satellite radio services. If it subsequently allocated all of the available spectrum, 12.5 megahertz each to Sirius and to XM – you noted that compression technology allows greater efficiency. So given the efficiencies generated by the merger, can Sirius and XM operate together on a single allocation of 12.5 megahertz?”

Mel Karmazin: “Mr. Chairman, what we want to do is make sure that this is not in any way, shape, or form disruptive to the American public. So if you have a Ford vehicle, as we talked about earlier, for at least the next 10, 15 years we’re going to have to provide service into that Ford vehicle. And the only way we can provide that service into the Ford vehicle is through our [Sirius] network, and the same thing would be true for XM. So we’re going to put up three more satellites over, you know, the next three to five years, each one costing about \$300 million and each one having a life term of about ten to 12 years.

“So the first time that we would be able to consider something like that would be somewhere in the 2017, 2018 where we would be able to have the ability to use one platform. And again, in fact, you know, there was some interest in that area in that time frame, of course, like anything else, we would be open to it. We’re not spectrum hogs. We bought our spectrum. We paid for it. And if in fact at any time that we had excess of spectrum we would certainly be open to hear any suggestions in that regard.”

Highly Confidential Documents Dated [REDACTED] Reveal:

[REDACTED]

Representative Engel: “Would you swap out the equipment for one half of your subscribers and then – or would you continue to operate both systems simultaneously?”

Mel Karmazin: “[W]e have developed an interoperable receiver, and if there is any equipment manufacturer who wanted to make it we would absolutely give them our intellectual property so they could make it.”

Highly Confidential Documents Dated [REDACTED] Reveal:

[REDACTED]

Mel Karmazin: “[W]e will not subsidize it today, and the reason we will not subsidize it today – because it’s possible that Sirius would subsidize an interoperable radio, which would result in XM getting a subscription. It doesn’t make any sense for us to subsidize a radio where we don’t get a subscription.”

Highly Confidential Documents Dated [REDACTED] Reveal:

[REDACTED]

APRIL 17, 2007 TESTIMONY BEFORE THE
SENATE COMMITTEE ON COMMERCE, SCIENCE & TECHNOLOGY

Senator Stevens: “As satellite radio developed, was it impossible to make just one set that received both?”

Mel Karmazin: “That radio would cost a higher price in the market today than the consumer would be willing to pay.”

Highly Confidential Documents Dated [REDACTED] Reveal:

[REDACTED]

Highly Confidential Documents Dated [REDACTED] Reveal:

[REDACTED]

Mel Karmazin: “It doesn’t make very much sense for us to subsidize a radio that doesn’t result in a subscription for us because if a consumer bought that interoperable radio, and they chose to subscribe to our competitors or one of the other – the other service, then we would not be getting a subscriber.”

Highly Confidential Documents Dated [REDACTED] Reveal:

[REDACTED]