



WILLIAMS MULLEN

June 4, 2008

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BY ELECTRONIC TRANSMISSION

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

Re: Notice of Oral Ex Parte Presentation in Connection With the Consolidated Applications for Authority to Transfer Control in Connection With the Sirius/XM Merger, as Amended (MB Docket No. 07-57)

Dear Ms. Dortch:

On June 3, 2008, the undersigned, Benjamin D. Arden, and Mary Virginia Mangum of Williams Mullen, representing the Consumer Coalition for Competition in Satellite Radio ("C3SR"), met with Mr. Rick Chessen, Senior Legal Advisor/Media Advisor to Commissioner Michael J. Copps, regarding C3SR's opposition to the proposed merger of XM Satellite Radio Holdings Inc. ("XM") and Sirius Satellite Radio Inc. ("Sirius") (collectively, the "Merger Parties").

C3SR referred to its May 27, 2008 letter in this proceeding ("C3SR's Letter") regarding certain Highly Confidential Documents (the "Highly Confidential Documents") submitted by Sirius on April 10, 2008, subject to the Second Protective Order, and the facts revealed in those documents. C3SR reiterated its request that the above-referenced applications (the "Merger Applications") be designated for hearing to resolve all of the substantial and material issues of fact raised by the Highly Confidential Documents. At a minimum, the issues for hearing must include: (1) lack of candor; and (2) whether the proposed merger is contrary to the public interest because it is the culmination of a conspiracy between XM and Sirius to restrain trade. Also, a hearing must resolve all of the substantial and material issues of fact raised by other petitioners and commenting parties in this proceeding.

Before the Merger Applications can be granted, the Commission must resolve satisfactorily all of the enforcement issues involving both XM and Sirius, including the issues raised in C3SR's Letter. C3SR's Letter specifically requests that the Commission "commence an investigation leading to appropriate enforcement actions." If a separate, free-standing complaint alleging violations of Sections 25.144(a)(3)(ii), and 1.65 of the Commission's rules and misrepresentation and lack of candor with the Commission (including false certifications to the Commission) is necessary to trigger enforcement actions for the allegations contained in

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C3SR's Letter, C3SR will make the requisite separate filing upon request by the Commission's staff, or when the protected status of these documents is waived or removed.¹

The issues of fact revealed by the Highly Confidential Documents must be further explored and clarified in a hearing. A thorough exploration of these issues is likely to lead to the discovery of additional evidence of violations of the Commission's rules and the antitrust laws. Resolution of these issues before the grant of the Merger Applications is critically important to the Commission's ability to rely prospectively on the character, truthfulness and candor of the new licensee that would be created by the merger. Therefore, these enforcement issues cannot be deferred by the Commission through a tolling agreement to permit grant of the Merger Applications before the issues are resolved. The public interest and the Communications Act requires these issues to be resolved before the Merger Applications can be granted.²

In the absence of a full investigation and hearing on these issues, the Commission should not compromise the public interest by granting the Merger Applications without several remedial measures including a mandatory disgorging of ill-gotten gains by the Merger Parties resulting from their FCC rule violations and restitution to the public for: (1) the injuries to competition resulting from these intentional violations of the Commission's rules; (2) the government's lost revenue from Auction No. 15 (SDARS), where the auction proceeds associated with the SDARS spectrum were lowered by the requirement of interoperable receivers. Essentially, the Merger Parties have been unjustly enriched by their violations and use of their licenses to date. The Commission should compel XM and Sirius to disgorge their unjust enrichment and to reimburse the U.S. Treasury in full for the foregone auction proceeds. These measures should take the form of voluntary contributions to the U.S. Treasury pursuant to a consent decree between each licensee, binding on its successors, and the Commission.

In the consent decree, the Merger Parties should be required to adopt a corporate compliance plan within 30 days of consummation to: (1) ensure truth, accuracy, and full disclosure in all communications with the FCC and adherence to all FCC regulations and policies going forward; and (2) permanently dismiss all officers, directors, and employees of the

¹ The Second Protective Order restricts the use of Highly Confidential Information to "the preparation and conduct of this license transfer proceeding before the Commission as delimited in this and subsequent paragraphs, and any judicial proceeding arising directly from this proceeding and, except as provided herein, shall not use such documents or information for any other purpose, including, without limitation, business, governmental, or commercial purposes, or in other administrative, regulatory or judicial proceedings." *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).

² A finding that the proposed licensee has the requisite character qualifications is part of the Commission's pre-decisional public interest inquiry under 47 U.S.C. 310(d). See, e.g., *Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation*, Hearing Designation Order, 17 FCC Rcd 20559, para. 28 (2002).



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predecessor licensees (XM and Sirius) who participated in, or had knowledge of, or conspired in violations of the FCC's rules, [REDACTED].

The ill-gotten gains to be disgorged from XM and Sirius resulting from the FCC rule violations are the excess revenue attributable to [REDACTED]

[REDACTED], treble damages are appropriate. Therefore, XM and Sirius must forfeit three times the excess revenues each earned during the period of violations, [REDACTED]

[REDACTED]. This forfeiture would likely be in excess of \$250 million.

In terms of government losses due to foregone proceeds from the SDARS spectrum auction, the proceeds from Auction 15 would likely have been much higher if the spectrum were not encumbered with a public interest obligation to make the SDARS receivers interoperable. The original auction for SDARS spectrum surely suffered depressed auction proceeds relative to an auction of unencumbered spectrum, because XM's and Sirius's consideration for the SDARS licenses was a combination of cash and a public-interest obligation — an obligation that XM and Sirius never fulfilled.³ [REDACTED], the U.S. Treasury was effectively shortchanged by the difference between auction proceeds without an interoperable-radio obligation and the actual auction proceeds.⁴

³ FCC Auction No. 15 generated \$173,234,888 in revenue for two competitive SDARS licenses. See http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=15. The auction revenue would have been considerably higher if it were clear to bidders that each SDARS license would operate without interoperable receivers. The service to the consumers selecting service from each licensee without an interoperable receiver requirement would be effectively exclusive.

⁴ This would not be the first time that a bidder in a spectrum auction was compelled to reimburse the U.S. Treasury for unjust enrichment in connection with a suppressed public price at an auction. In 1998, the Antitrust Division settled a civil suit against Omnipoint under section 1 of the Sherman Act on the theory that the firm "submitted bids that ended with three-digit numerical codes to communicate with rival bidders and that, through the use of these coded bids, Omnipoint and one of its rivals reached an agreement to refrain from bidding against one another," such that "Omnipoint and its competitor paid less for certain PCS licenses, resulting in a loss of revenue to the Treasury of the United States." See *United States v. Omnipoint Corp.*, Civil Action No. 1:98CV02750, Competitive Impact Statement at 1 (D.D.C. Nov. 10, 1998), available at <http://www.usdoj.gov/atr/cases/f2000/2066.htm>.



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Public interest obligations often suppress auction revenues. A binding interoperability constraint would increase competition and thereby reduce expected profits for the two SDARS licensees. For example, in the recent 700 MHz auction, the C Block license, which was subject to an “open access” requirement, sold for between \$0.40 and \$1.91 less per MHz-pop than the comparable spectrum in the A and B blocks, which were not subjected to those requirements. Given this disparity, it is highly likely that the SDARS auction, if conducted without an interoperable receiver requirement, could have produced approximately \$440 million in auction proceeds.⁵ This is a difference of approximately \$267 million from the actual SDARS auction proceeds (\$173.2 million). In addition, restitution for lost spectrum auction proceeds must include 11 years of interest.

In addition to the aforementioned remedies, the Commission should require two additional, interrelated remedies to address consumer harms — the deployment of interoperable receivers and divestiture. Retrospectively, the Merger Parties must make restitution to all of the harmed consumers who subscribed to either XM or Sirius, or both, in a marketplace without the benefit of interoperable receivers. At a minimum, each subscriber should receive free of charge a new, installed interoperable satellite radio receiver with comparable quality and features to replace each non-interoperable satellite radio purchased in commerce. This measure is consistent with the clear intention of the Commission that all receivers would be interoperable and that there would be full and fair marketplace competition between XM and Sirius. In addition, the Commission should require refunds to, or free interoperable receiver replacements for, those subscribers who purchased more than one satellite radio receiver.

Prospectively, the Merger Parties must divest of one entire satellite system within some reasonable period of time following consummation of the merger.⁶ Divestiture will prevent the permanent creation of an unprecedented spectrum monopoly, prevent unjust enrichment, and will restore full competition to the SDARS market. A required divestiture of one license (including system assets) is not only consistent with the FCC’s prior decision not to allow consolidation of the two SDARS licenses but is also consistent with the long-established policy against spectrum monopolies. Most importantly, it is a structural remedy to avoid a

⁵ The estimated proceeds for the SDARS auction was determined by multiplying the actual SDARS auction proceeds by the average price of the A and B blocks (\$1.92 per MHz-pop) and dividing the sum by the price of the C block (\$.756 per MHz-pop).

⁶ The revenue from this divestiture would make financial resources available to offset the costs of compliance with the required remedies described above.



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resulting spectrum monopoly and to ensure the restoration of competition to the marketplace (when combined with the deployment of interoperable receivers and other temporary safeguards described below).⁷

According to the Antitrust Division Policy Guide to Merger Remedies, “structural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market.”⁸ In contrast, a conduct remedy “typically is more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent.”⁹ For example, a spectrum lease would constitute a conduct remedy, would require the Commission to establish an access price, and would be wholly insufficient to restore a truly competitive marketplace. DOJ has also explained that a merging firm’s proposal to sell less than an existing business entity should be carefully scrutinized, “because the merging firm has an obvious incentive to sell fewer assets than are required for the purchaser to compete effectively going forward.”¹⁰

To ensure a level playing field for the new entrant and a favorable public interest outcome for consumers, as part of the divestiture, the Merger Parties must: (1) halt exclusive arrangements with programmers, retailers, and manufacturers; and (2) abide by program access requirements (to be adopted by the Commission) to permit the new entrant to acquire sufficient programming to be competitive in the short-run. Furthermore, to protect consumers during the divestiture period, the Merger Parties must adhere to temporary restrictions on price increases and advertising limits.

⁷ Remedies to correct the anticompetitive effects of a merger take two basic forms: one addresses the structure of the market; the other the conduct of the merged firm. A structural remedy generally involves the sale of physical assets by the merging firms; a conduct remedy typically entails injunctive provisions that manage or regulate the merged firm’s post-merger business conduct. Complete divestiture of one entire satellite system — which includes, at a minimum, the FCC licenses, space satellites, ground stations, and terrestrial repeater network — is the only way to mitigate the anticompetitive effects of an XM/Sirius merger. Re-establishing a duopoly through a system divestiture would be the fastest road to restore competitive pricing, competitive program quality and diversity, competitive commercial time constraints, and competitive technological improvements, but this remedy requires the mandatory deployment of interoperable receivers by the Merger Parties (as described above).

⁸ U.S. Department of Justice Antitrust Division, *Antitrust Division Policy Guide to Merger Remedies* 7 (2004).

⁹ *Id.* at 8.

¹⁰ *Id.* at 13. A purchaser’s interests are not necessarily identical to those of the public. Consequently, a purchaser may be willing to buy these assets at the right price, even if they are insufficient to produce competition at the pre-merger level. As long as the divested assets produce something of value to the purchaser (*e.g.*, providing it with the ability to earn profits in some other market or enabling it to produce weak competition in the relevant market), it may be willing to buy them at a fire-sale price regardless of whether they cure the competitive concerns.



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Pursuant to Section 1.1206 of the Commission's rules and DA 07-1435, this letter is submitted for inclusion in the public record of these proceedings, with a redacted copy to Mr. Chessen.¹¹

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Julian L. Shepard", followed by a small circular mark.

Julian L. Shepard
Counsel for C3SR

cc: (via e-mail)
Mr. Rick Chessen

¹¹ Redacted and unredacted copies of the instant ex parte notice will also be filed pursuant to the terms of the Second Protective Order in this proceeding.