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June 3, 2008

FILED/ACCEPTED

JUN - 3 2008

Federal Communications Commission
Office of the Secretary

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

Re: *XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc.,
Consolidated Application for Authority to Transfer Control of XM Radio
Inc. and Sirius Satellite Radio Inc., MB Docket No. 07-57: REDACTED*
- **FOR PUBLIC INSPECTION**

Dear Ms. Dortch:

The National Association of Broadcasters ("NAB"), by its attorneys, hereby submits for filing in the above-referenced proceeding, two copies of the attached Request for Public Disclosure of Certain Documents Designated Highly Confidential (the "Request") redacted for public disclosure. In addition and pursuant to the terms of the Second Protective Order, *Application of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. for Approval to Transfer Control*, Protective Order, 22 FCC Rcd 19924 (MB 2007), NAB is filing one unredacted copy of the Request under separate cover and is serving two unredacted copies of the Request by hand delivery to Jamila Bess Johnson of the Media Bureau and is serving unredacted copies of the Request by hand delivery to counsel for XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc.

Please contact me if you have any questions.

Sincerely yours,


David H. Solomon
J Wade Lindsay

Enclosure

No. of Copies rec'd 0+2
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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Federal Communications Commission
Office of the Secretary

In the Matter of)
)
XM Satellite Radio Holdings Inc.,)
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Transferor)
)
and)
)
Sirius Satellite Radio Inc.,)
)
Transferee)
)
Consolidated Application for Authority to)
Transfer Control of XM Radio Inc. and Sirius)
Satellite Radio Inc.)

MB Docket No. 07-57

**NATIONAL ASSOCIATION OF BROADCASTERS’
REQUEST FOR PUBLIC DISCLOSURE OF
CERTAIN DOCUMENTS DESIGNATED HIGHLY CONFIDENTIAL**

The National Association of Broadcasters (“NAB”), by its attorneys and pursuant to Paragraph 14 of the *Second Protective Order* in this proceeding,¹ hereby requests the Commission to order public disclosure of four documents Sirius Satellite Radio Inc. (“Sirius”) has designated as containing “Highly Confidential Information” protected by the *Second Protective Order*.²

¹ *Application of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. for Approval to Transfer Control*, Protective Order, 22 FCC Rcd 19924 (MB 2007) (“*Second Protective Order*”). Paragraph 14 of the *Second Protective Order*, *id.* at 19929, permits requests for additional disclosure.

² The four documents subject to this request are: 

INTRODUCTION AND SUMMARY

As detailed in a May 27 written *ex parte* presentation by the Consumer Coalition for Competition in Satellite Radio (“C3SR”),³ and as confirmed by NAB’s own review, the four documents in question demonstrate that XM Radio, Inc. (“XM”) and Sirius (jointly “Applicants”) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Applicants, however, did not fully inform the Commission of these facts. To the contrary, they touted in their merger application the development of interoperable radios as a merger-specific benefit.⁶

The information in these four documents bears directly on a central issue pending before the Commission in connection with the XM-Sirius merger application -- whether the Commission may rely with any confidence on XM and Sirius to comply with any merger-related promises or conditions. This issue, coupled with “the public’s interest in openness in [Commission] licensing proceedings,”⁷ creates a compelling public interest in securing public disclosure with regard to these four documents so that they may be fully considered and evaluated in a

[REDACTED] The latter three documents were first submitted to the Commission on April 10, 2008.

³ Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from Julian L. Shepard, *et al.*, Williams Mullen, Counsel to C3SR (May 27, 2008) (“C3SR *Ex Parte*”).

⁴ [REDACTED]

⁵ [REDACTED]

⁶ Consolidated Application for Authority to Transfer Control at 15-16 (Mar. 20, 2007).

⁷ *Liberty Cable Company, Inc.*, 11 FCC Rcd 2475, 2477 (1996), *aff’d sub nom. Bartholdi Cable Co. v. FCC*, 114 F.3d 274 (D.C. Cir. 1997).

REDACTED – FOR PUBLIC INSPECTION

transparent manner in the context of the merger proceeding. Accordingly, the Commission should reclassify the documents as public (*i.e.*, not subject to either of the protective orders in this proceeding) and make them generally available for public inspection and comment.

DISCUSSION

As a preliminary matter, NAB questions whether these four documents are entitled to the protected classification Sirius has given to them. The documents do not contain competitively sensitive confidential information, let alone the kind of “highly sensitive” information contemplated by the *Second Protective Order* that would “allow . . . competitors to gain a significant competitive advantage in the marketplace”⁸ Given that XM and Sirius, as the only satellite DARS licensees and the major competitors to one another, [REDACTED]

[REDACTED] it is difficult to see how release of the information would cause competitive harm to either one. Moreover, public review of the documents would not result in disclosure of confidential intellectual property [REDACTED]

[REDACTED] Nevertheless, even if the Commission were to conclude that Sirius correctly designated the four documents under the *Second Protective Order*, continuing to treat these documents as confidential under either the *First Protective Order* or *Second Protective Order* is inappropriate.

Commission staff has emphasized in this proceeding that designating documents under a protective order “should be the exception, rather than the rule,” and that “overdesignation of

⁸ *Second Protective Order*, 22 FCC Rcd at 19925.

REDACTED – FOR PUBLIC INSPECTION

responsive documents . . . frustrates the Commission’s goals.”⁹ Commission staff, therefore, reserved the “right to take corrective measures to address such problems should they arise.”¹⁰ The Commission should exercise that discretion here and order these four documents to be made public.

Continuing to treat these documents as confidential would frustrate the Commission’s goal of “openness in [Commission] licensing proceedings.”¹¹ Indeed, in upholding the Commission’s decision to release information in the case just quoted, the D.C. Circuit referenced the Commission’s conclusion that “the public has a compelling interest in the information at issue as it bears directly on [the applicant’s] fitness as a licensee.”¹²

The public has a similarly compelling interest in the four documents at issue here because Applicants’ history of non-compliance with Commission requirements is central to the Commission’s review of the proposed merger. In the closely analogous *EchoStar/DirectTV Merger Order* the Commission stated that “EchoStar’s record with respect to compliance . . . suggests a resistance to taking steps to serve the public interest that do not also serve the

⁹ Letter to Richard E. Wiley *et al.*, Wiley Rein LLP, Counsel to Sirius, and Gary M. Epstein *et al.*, Latham & Watkins LLP, Counsel to XM, from Monica Shah Desai, Chief Media Bureau (July 11, 2007).

¹⁰ *Id.* See also *First Protective Order*, 22 FCC Rcd at 12825; *Second Protective Order*, 22 FCC Rcd at 19929 (both providing for “Requests for Additional Disclosure”).

¹¹ *Liberty Cable*, 11 FCC Rcd at 2477 . See also *Northeast Communications of Wisconsin, Inc.*, 15 FCC Rcd 3289, 3291 (2000) (“fairness to other participants . . . requires that this financial information be accessible to the public. Competing bidders and the public in general have a compelling interest in having access to the information because it bears directly on Northeast’s eligibility for bidding credits.”); *Larry d. Henderson and Robert S. Benz d/b/a Quad Communications*, 15 FCC Rcd 17073, 17074 (2000) (affirming staff denial of confidential treatment on basis that “considerations favoring openness in Commission licensing proceedings compelled disclosure . . .”).

¹² *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 282 (D.C. Cir. 1997); see also *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24818 (1998) (subsequent history omitted) (“Even when particular information falls within the scope of a FOIA exemption, federal agencies generally are afforded the discretion to release the information on public interest grounds.” (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 292-94 (1979))).

REDACTED – FOR PUBLIC INSPECTION

company's view of its own private economic interest. . . . Accordingly, this history of past conduct will be taken into account in assessing the likelihood that potential beneficial conduct will occur in the absence of private economic incentives.”¹³

In this case, NAB and others have already presented evidence that Applicants have engaged in a pattern of serious Commission rule violations – including non-compliance with the interoperability receiver requirement – that “suggests a resistance to taking steps to serve the public interest that do not serve the company[ies’] view of [their] own private economic interest.”¹⁴ The four documents subject to this request [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁶ notwithstanding that creating intra-model competition was the precise purpose of the interoperable radio rule.¹⁷ It is critical, therefore, that these documents be made public so that the Commission can understand and make an informed and

¹³ *Application of EchoStar Communications Corporation (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations)*, 17 FCC Rcd 20559, 20579 (2002).

¹⁴ *Id.* See also Petition to Deny of the National Association of Broadcasters at 45-46, 50-58 (July 9, 2007); Comments of Entravision Holdings, LLC at 19-21 (July 9, 2007); Petition to Deny of the National Association of Black Owned Broadcasters, Inc. at 13-14 (July 9, 2007).

¹⁵ [REDACTED]

¹⁶ [REDACTED]

¹⁷ *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd 5754, 5796 ¶ 103 (1997) (purpose of interoperability rule was, *inter alia*, to “promote competition by . . . enhancing consumers’ ability to switch between competing DARS providers”).

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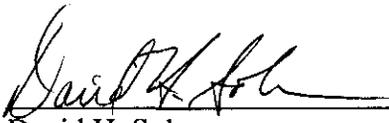
transparent decision regarding whether Applicants can be relied on to keep their promises and comply with any conditions the Commission may impose.

CONCLUSION

For the foregoing reasons, the Commission should reclassify the four documents identified herein and make them available for public inspection and further public comment in the proceeding.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS

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Date: June 3, 2008

CERTIFICATE OF SERVICE

I, LaVon E. Nickens, hereby certify that, on this 3rd day of June, 2008, copies of the forgoing Request for Public Disclosure of Certain Documents Designated Highly Confidential were delivered via hand delivery to the following:

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