



WILLIAMS MULLEN

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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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May 27, 2008

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

Re: Written 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:

The Consumer Coalition for Competition in Satellite Radio (“C3SR”), a Petitioner and commenting party in this proceeding, by its counsel, hereby requests that the Commission designate the above-referenced consolidated applications (the “Merger Applications”) for hearing and commence an investigation leading to appropriate enforcement actions based on certain new information provided to the Commission by Sirius Satellite Radio Inc. (“Sirius”) in the Commission’s ongoing consideration of the proposed merger of Sirius and XM Satellite Radio Holdings Inc. (“XM”) (collectively, the “Merger Parties”).

On April 10, 2008, Sirius submitted additional documents to the Commission subject to the First and Second Protective Orders¹ in this proceeding (the “Highly Confidential Documents”).² The Highly Confidential Documents cast the proposed merger in a very negative light and call into question the truthfulness and candor of both Sirius and XM with respect to their dealings with the Commission as licensees and during this proceeding. Instead of diligently complying with the interoperable receiver requirements in each company’s FCC license, Sirius and XM

[REDACTED]

¹ See *Applications of Sirius Satellite Radio Inc. And XM Satellite Radio Holdings Inc. For Approval to Transfer Control*, Protective Order, MB Docket No. 07-57 (July 11, 2007); *Applications of Sirius Satellite Radio Inc. And XM Satellite Radio Holdings Inc. For Approval to Transfer Control*, Protective Order, MB Docket No. 07-57 (Nov. 16, 2007).

² C3SR does not agree with the protected classifications given to the Highly Confidential Documents by Sirius. However, C3SR is obligated to comply with the protective orders unless and until the Commission properly classifies the Highly Confidential Documents as public (*i.e.*, not subject to the protective orders).

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[REDACTED] In sum, full and fair marketplace competition, as originally intended by the Commission, has never occurred because of the conduct of Sirius and XM.

In addition to the many other issues in this proceeding that require a hearing,⁴ the Highly Confidential Documents raise the following substantial and material issues of fact:

- 1) whether Sirius and XM have lacked candor in both their individual and joint representations to the Commission in the Merger Applications; and
- 2) whether the proposed merger is contrary to the public interest because it furthers an illegal conspiracy to restrain trade.

Resolution of the substantial and material issues raised by the Highly Confidential Documents is necessary to any public interest determination on the Merger Applications. [REDACTED]

[REDACTED] Moreover, under these circumstances, there is no reason to believe that the Commission can rely on the Merger Parties prospectively to perform all of their obligations under any set of voluntary conditions imposed in an order granting the proposed merger. Until these and all other substantial and material issues raised in this proceeding are resolved, the Commission cannot grant the Merger Applications based on a rational public interest finding.

Both Sirius and XM had approximately seven full years preceding the filing of the Merger Applications to bring interoperable receivers to market. During that period, both failed to disclose [REDACTED]

[REDACTED] As the Consumer Federation of America, Consumers Union and Free Press stated in their recent *ex parte* submission, Sirius and XM “violated another term of their license, which required them to produce an interoperable radio. This bad behavior has harmed the public, but the licensees now demand a reward (i.e. approval of merger) to deliver on their original promise. Absent the merger, interoperable radios would have improved the

³ [REDACTED] formed an essential part of the Department of Justice Antitrust Division’s (“DOJ”) March 24, 2008 finding that the proposed merger will not result in anticompetitive harm to consumers. The DOJ reasoned that because consumers would incur high switching costs between the two providers, due to the lack of interoperable receivers, the Merger Parties effectively do not compete with one another once consumers make the initial receiver purchase.

⁴ For example, the issues of market definition (both product and geographic), and the resulting degree of concentration from the merger of Sirius and XM are substantial and material under Section 309(d) of the Communications Act, 47 U.S.C. § 309(d).



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performance of the satellite market by increasing competition. With the merger approved, it will rob consumers of that competitive benefit.”⁵

The proposed merger, viewed in light of [REDACTED], may be seen as the culmination of a coordinated plan to restrain trade in contravention of the public interest and in violation of the Commission’s rules and policies and of the antitrust laws. Immediate Commission action is justified in response to such conduct. Moreover, Sirius and XM should be required to make restitution to all parties harmed by such conduct.

It is the duty of the Commission to bring [REDACTED] to the attention of antitrust enforcement authorities and to Congress. [REDACTED] warrant antitrust investigation under Section 1 of the Sherman Act (*see* 15 U.S.C. § 1) to determine whether Sirius and XM agreed to (a) [REDACTED]; (b) [REDACTED]; and (c) [REDACTED].⁶ Also, the relevant Congressional subcommittees should call upon the Sirius CEO to account for his oral testimony in 2007, which appears frequently to contradict information in the [REDACTED].⁷

I. Lack of Candor with the Commission in the Merger Applications

In authorizing the service, the Commission stated, “satellite DARS licensees are required to design a receiver which would accommodate all satellite DARS providers.”⁸ The Commission imposed this requirement as a condition of licensing to ensure that consumers were “able to access the services from all licensed satellite DARS systems.”⁹ The Commission codified this requirement as a qualification for licensing.¹⁰ As codified, the requirement was not limited to the mere “design” of an interoperable receiver.

⁵ Letter from Consumer Federation of America, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 07-57 (May 7, 2008) (filed on behalf of the Consumer Federation of America, Consumers Union, and Free Press).

⁶ [REDACTED]

⁷ *See* Exhibit 1 attached hereto.

⁸ *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5754, para. 103 (1997).

⁹ *Id.* at para. 106.

¹⁰ 47 C.F.R. § 25.144(a)(3)(ii) (an applicant must “[c]ertify that its satellite DARS system includes a receiver that will permit end users to access all licensed satellite DARS systems that are operational or under construction . . .”) (emphasis added).



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The Commission's clear intent in imposing the condition was to make interoperable receivers commercially available to satellite radio consumers, a fact that the Merger Parties appear to have understood. [REDACTED]

[REDACTED]

[REDACTED]

Sirius and XM each made initial certifications to the Commission regarding interoperable receivers, appearing to manifest their intent to satisfy these requirements.¹³ In both cases, the licensees promised to "include" an interoperable receiver in their satellite systems. Subsequently, it appears [REDACTED]

[REDACTED] when the Commission's International Bureau pursued Sirius and XM separately on the issue of compliance with the interoperable receiver in 2005.¹⁴ The International Bureau asked both Sirius and XM to report on the status of each company's "efforts to develop an interoperable receiver and its time frame for making such an interoperable receiver available to the public."¹⁵ The Merger Parties responded jointly (the "Joint Letter").¹⁶

¹¹ [REDACTED]

¹² [REDACTED]

¹³ See Submission and Amendment to Application of Satellite CD Radio, Inc., 49/50-DSS-P/L-90; 58/59-DSS-AMEND-90; 44/45-DSS-AMEND-92; 71-SAT-AMEND-97 (May 16, 1997); Amendment, American Mobile Radio Corporation, 26/27-DSS-LA-93; 10/11-DSS-P-93; 72-SATAMEND-97 (May 16, 1997).

¹⁴ See Letter from Thomas S. Tycz, Chief, Satellite Division, to Senior Vice President, XM Radio Inc. (Jan. 28, 2005); Letter from Thomas S. Tycz, Chief, Satellite Division, to Executive Vice President and General Counsel, SIRIUS Satellite Radio (Jan. 28, 2005) (collectively, the "Tycz Letters") (attached hereto as Exhibit 2).

¹⁵ *Id.*

¹⁶ See Letter from XM Radio Inc. and Sirius Satellite Radio Inc., to Thomas S. Tycz, Chief, Satellite Division (Mar. 14, 2005) (attached hereto as Exhibit 3).



In the Joint Letter, the Merger Parties discussed the status of their interoperable technology by stating that at a “minimum” a “prototype” interoperable receiver would be developed in 2005.¹⁷ In fact, it appears that the Merger Parties lacked candor because

[REDACTED]

While there is a time lag between the date of the Joint Letter (March 14) and the date of this [REDACTED], it is unlikely that the facts materially changed during the [REDACTED]

[REDACTED]

Most importantly, even if the facts changed during that period, applicants have a duty to keep the Commission informed of changes to the information contained in pending applications.²⁰ The Joint Letter was submitted into the record of a number of pending applications;²¹ therefore, Sirius and XM had an obligation to ensure the continuing accuracy and completeness of the information in the Joint Letter.

C3SR can only speculate as to the motive that Sirius and XM had in 2005 for failing to provide full information. By the time of the merger announcement in 2007, however, it was apparent that the companies wanted to claim interoperability as a merger-specific benefit, and thus continue to withhold information. In this proceeding, the Merger Parties stated, “[i]n short, the proposed merger will eliminate the final barriers to the commercial availability of an interoperable radio. Again, this is the very definition of a merger-specific benefit and claims to the contrary fall

¹⁷ *Id.* at 2.

¹⁸ [REDACTED]

¹⁹ [REDACTED]

²⁰ 47 C.F.R. § 1.65.

²¹ In its January 28, 2005 letters to Sirius and XM, the FCC indicated that the parties’ response to the FCC’s request for additional information regarding the development and distribution of an interoperable receiver was to be filed in “pending proceedings where interoperable receivers are an issue.” *See* Tycz Letters (emphasis added). The FCC identified a number of such pending proceedings (including applications): IB Docket o. 95-91; SAT-MOD-20040212-00017; SAT-RPL-20040212-00018; SAT-RPL-20040212-00019; 72-SAT-AMEND-97; 10/11-DSS-P-9312/15/92; 26/27-DSS-LA-931/15/93; 83/83-SAT-AMEND-953/10/95. *Id.*



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flat.”²² In their Consolidated Applications for Authority to Transfer Control, filed March 20, 2007, the Merger Parties stated that:

There is also little incentive for either company to subsidize the cost of interoperable radios, because of uncertainty whether the subsidy would be recouped 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.²³

In their July 24, 2007 Joint Opposition to Petitions to Deny and Reply Comments, the Merger Parties claimed that:

... due to current size and cost constraints of an interoperable radio, manufacturers have expressed little interest in producing or distributing such a product; nor has any automobile company opted to include one in its vehicles. And neither company has chosen to subsidize the cost of producing an interoperable radio because of uncertainty that such an expense could be recouped in the marketplace.²⁴

The rationale offered by the Merger Parties for the lack of interoperable receivers is not supported by [REDACTED]

[REDACTED]

We note that U.S.

²² Joint Opposition to Petition to Deny and Reply Comments, XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc. 22 (July 24, 2007) (hereinafter “Joint Opposition”).

²³ Consolidated Application for Authority to Transfer Control, XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc. 16, (March 20, 2007).

²⁴ Joint Opposition at 21.

²⁵ [REDACTED]

²⁶ [REDACTED]



Electronics, Inc. (“USE”) has highlighted another potential lack of candor in the Merger Applications by Sirius related to interoperable receivers.²⁷ Sirius would have the Commission believe that it was making the intellectual property for receivers available to independent manufacturers, without control over the manufacturing process. [REDACTED] and as USE has separately pointed out, it appears that Sirius was quite directly involved in the receiver manufacturing process.

[REDACTED]

[REDACTED] the commercial availability of an interoperable radio is not a merger-specific benefit.

[REDACTED]

That Sirius and XM chose not to reveal this information to the Commission raises a material issue of fact with regard to this merger. The Commission should investigate the apparent lack of candor.

The Merger Parties’ apparent lack of candor does not stand alone as the sole basis upon which the Commission should investigate. Therefore, the Commission should not evaluate the issues raised in isolation. Both licensees have manifested a proclivity to violate the Commission’s rules, complying with the rules selectively only when such compliance will not jeopardize their business objectives.³¹ The record now contains evidence of several other tangible examples of willful and intentional violations of the Commission’s rules by the Merger Parties. Sirius and XM violated the FCC rules governing the maximum power for FM modulators (adapters for aftermarket

²⁷ See Notice of Ex Parte Communication, U.S. Electronics, Inc., MB Docket No. 07-57 (May 14, 2008).

²⁸ [REDACTED]

²⁹ [REDACTED]

³⁰ [REDACTED]

³¹ See, e.g., Petition to Deny, National Association of Broadcasters, MB Docket No. 07-57 (July 9, 2007) (“NAB Petition to Deny”) (noting violations by the Merger Parties of numerous FCC rules).

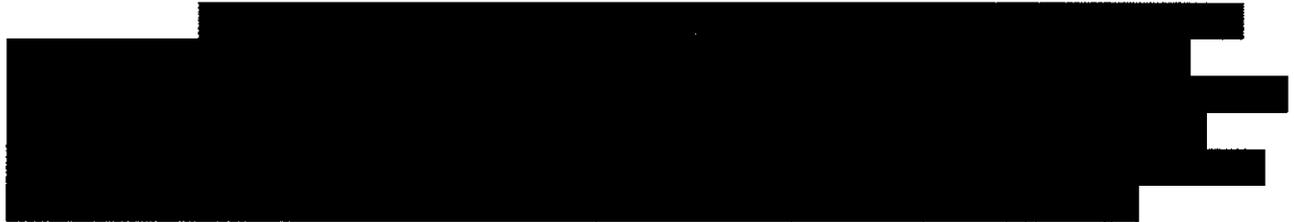


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receivers) — they were caught by the FCC’s Enforcement Bureau.³² In addition, Sirius and XM both violated the terms and conditions of their authority to deploy terrestrial repeaters, disregarding their duty to prevent harmful interference to other licensees.³³

II. The Merger Is the Culmination of an Ongoing Restraint of Trade



³² The Enforcement Bureau is currently investigating both Sirius and XM for the apparent intentional production of FM modulators that violated the FCC’s emissions and frequency rules for such devices. According to the Enforcement Bureau, “executive and senior-level employees” for both Sirius and XM were involved in the decision to produce the potentially non-compliant FM modulators. *See* NAB Petition to Deny (citing Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, to David H. Solomon, Counsel to NAB, FOIA Control No. 2007-235 – Sirius Records at 4 (June 18, 2007); Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, to David H. Solomon, Counsel to NAB, FOIA Control No. 2007-235 – XM Records at 4-5 (June 18, 2007)). XM has already proposed to enter into a consent decree with the FCC to resolve XM’s violations. *See* XM Satellite Radio Holdings Inc., SEC Form 10-K at 15 (Feb. 29, 2008) (“XM 10-K”). Sirius has not publicly proposed to enter into a consent decree, but has admitted that its “personnel requested manufacturers to produce SIRIUS radios that were not consistent with [the FCC’s rules].” *See* Sirius Satellite Radio Inc., SEC Form 10-K at 12 (Feb. 29, 2008) (“Sirius 10-K”). As noted by the FCC, such violations of the Commission’s rules will have a potential bearing on the character qualification of Sirius and XM. *See Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order and Policy Statement, 102 FCC 2d 1179, para. 23 (1986) (“*Character Qualifications*”). The FCC’s broadcast character standards have also been applied to licensees (existing and prospective) in non-broadcast services. *See, e.g., Twiggs County Cellular Partnership Macon-Warner Robins*, Order, 14 FCC Rcd 9663, para. 9 (1999) (applying broadcast standards to application to provide cellular service); Applications of NYNEX Corporation Transferor, - and - Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, Memorandum Opinion and Order, 12 FCC Rcd 19985, para. 236 (1997) (applying broadcast standards to application to transfer control of various wireless licenses).

³³ “Several hundred” of XM’s terrestrial repeaters were operated in violation of their FCC authorization. XM 10-K at 14. These violations include “some repeaters not being built in the exact locations, or with the same antenna heights, power levels, or antenna characteristics set forth in the [FCC authorization].” *Id.* In some instances, repeaters were operated with no FCC authority. *Id.* Sirius also operated a number of non-compliant terrestrial repeaters. *See* Sirius 10-K at 18. The unauthorized operation of SDARS terrestrial repeaters, particularly at power levels in excess of the underlying authorization, has the potential for significant interference to WCS spectrum licensees. *See generally*, Comments, WCS Coalition, WT Docket No. 07-293 (Feb. 14, 2008) (discussing potential interference to WCS spectrum from the operation of SDARS terrestrial repeaters). Widespread misconduct raises issues of reliability that are central to the Commission’s character analysis. *See Character Qualifications* at para. 55.

³⁴ [REDACTED]

³⁵ [REDACTED]



[REDACTED]

The proposed merger obliterates the urgency of an interoperable receiver requirement and the [REDACTED]. With the merger, interoperable receivers are no longer imperative because the merged firm would own all of the customers and all of the SDARS spectrum. The anticompetitive motivations for this merger are easily understood by a review of how Sirius and XM [REDACTED]. According to the [REDACTED]

[REDACTED]:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

36 [REDACTED]

37 [REDACTED]

38 [REDACTED]

39 [REDACTED]

40 [REDACTED]

41 [REDACTED]



At the same time the Merger Parties alleged to the FCC that “the market will ultimately determine the success of these products [interoperable satellite radio receivers],”⁴²

[REDACTED]

[REDACTED] in violation of the Sherman Act. The antitrust laws look not only at what firms say in their documents but at their resulting conduct. In this case,

[REDACTED]

[REDACTED] In combination with the exclusive arrangement with automobile manufacturers, this conduct ensured a permanently divided marketplace.

[REDACTED] was the threat of full marketplace competition between the two licensees as originally envisioned by the Commission. Given the divided market that each licensee enjoys today, real competition

[REDACTED]

III. Contradictions Between Highly Confidential Documents and Congressional Testimony

In oral testimony before the House Judiciary Committee’s Antitrust Task Force on February 28, 2007; the House Subcommittee on Telecommunications and the Internet on March 7, 2007; and the Senate Commerce Committee on April 17, 2007, the Sirius CEO provided a number of justifications for the Merger Parties’ failure to make interoperable radios commercially available. In one hearing, he justified the need to keep all 25 MHz of SDARS spectrum until at least 2017 because of the lack of interoperable satellite radio receivers. Significant parts of the testimony given are inconsistent with the Highly Confidential Documents submitted to the FCC on April 10, 2008, as detailed in Exhibit 1, attached hereto.

⁴² See Joint Letter at 2.

⁴³ [REDACTED]

⁴⁴ [REDACTED]

⁴⁵ [REDACTED]



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IV. Conclusion

The Merger Parties have obstructed the Commission's goal of full and fair SDARS competition; they have [REDACTED]; and they have not been candid before the Commission and Congress. This conduct raises serious questions that must be investigated and fully resolved before the Merger Applications can be decided. The [REDACTED], when viewed in connection with other violations of Commission rules and policies by the Merger Parties, raise material questions of fact regarding the proposed merger under Section 310(d) of the Communications Act. The Commission should either deny the proposed merger or designate the Consolidated Applications for hearing. Separately, the Commission should initiate a proceeding to determine whether to revoke the licenses of both Sirius and XM for a failure to comply with the interoperable receiver condition.

Respectfully submitted,

Julian L. Shepard
Counsel to C3SR

Attachments

EXHIBIT 1

**DISCREPANCIES AND APPARENT CONTRADICTIONS
BETWEEN CONGRESSIONAL TESTIMONY
AND THE
HIGHLY CONFIDENTIAL DOCUMENTS**

THE HIGHLY CONFIDENTIAL DOCUMENTS REFERENCED HEREIN ARE SUBJECT TO THE FCC'S PROTECTIVE ORDERS IN MB DOCKET NO. 07-57. THESE DOCUMENTS WERE SUBMITTED BY SIRIUS ON APRIL 10, 2008.

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FEBRUARY 28, 2007 TESTIMONY BEFORE THE
HOUSE JUDICIARY COMMITTEE'S ANTITRUST TASK FORCE

Representative Conyers: “We have, unfortunately, a not-too-good-record of performance of satellite radio keeping promise. That’s part of the record that I think both companies have to overcome. There is no public interoperable radios that would work on both networks. And that was promised.”

Mel Karmazin: “The problem with it is that there is no receiver manufacturer that wants to pay to supply it”

Highly Confidential Documents Dated [REDACTED] Reveal:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Highly Confidential Documents Dated [REDACTED] Reveal:

[REDACTED]

Mel Karmazin: “The idea of us subsidizing a radio when we may not get a subscription doesn’t make any sense for us.”

Highly Confidential Documents Dated [REDACTED] Reveal:

[REDACTED]

[REDACTED]

Mel Karmazin: “We have offered intellectual property to receiver manufacturers, so if any receiver manufacturer wants to make an interoperable radio, they can make it.”

Highly Confidential Documents [REDACTED] Reveal:

[REDACTED]

Mel Karmazin: “The problem is, it would sell somewhere around \$700 without a subsidy, and that is why the merger could make it possible, because we can get a subscription.”

Highly Confidential Documents Dated [REDACTED] Reveal:

[REDACTED]

[REDACTED]

[REDACTED]

Highly Confidential Documents Dated [REDACTED] Reveal:

[REDACTED]

**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, if 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]

[REDACTED]

Senator McCaskill: “[I]t’s been ten years since promises were made about interoperability. And as one of your subscribers, I’ve never heard of such a thing. I’m a consumer. I’ve never heard about interoperability. I’ve never hear about it being available. I’ve never heard about where I could buy it. I’ve never heard about how much it would cost.”

Mel Karmazin: “We certainly have made our IP available to any receiver manufacturer that would like to develop an interoperable radio.”

Highly Confidential Documents Dated [REDACTED] Reveal:

[REDACTED]

Highly Confidential Documents Dated [REDACTED] Reveal:

[REDACTED]

**MORE REVELATIONS
ABOUT INTEROPERABLE RADIOS**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

EXHIBIT 2



International Bureau

Federal Communications Commission
Washington, DC 20554

January 28, 2005

Mr. Patrick L. Donnelly
Executive Vice President and General Counsel
SIRIUS Satellite Radio
1221 Avenue of the Americas
New York, NY 10020

File Nos: IB Docket No. 95-91; SAT-MOD-20040212-00017; SAT-RPL-20040212-00018; SAT-RPL-20040212-00019; 72-SAT-AMEND-97; 10/11-DSS-P-9312/15/92; 26/27-DSS-LA-931/15/93; 83/83-SAT-AMEND-953/10/95

Dear Mr. Donnelly:

As an alternative to the Commission mandating standards for receivers used in providing Satellite Digital Audio Radio Service (SDARS), SDARS operators are to certify to the Commission that their systems include a receiver that will permit end users to access all licensed SDARS systems that are operational or under construction.¹ The Commission authorized Sirius Satellite Radio Inc. (Sirius) in 1997 to provide SDARS in the United States subject to such a certification.² The authorization of the other SDARS licensee, XM Radio Inc. (XM Radio), is subject to an identical certification requirement.³

In our recent authorization of XM Radio for the launch and operation of replacement satellites,⁴ we noted that Sirius and XM Radio have on file a letter dated October 6, 2000, in which the two SDARS licensees announced an agreement to develop a unified standard for satellite radios, and stated their anticipation that interoperable chips capable of receiving both services would be produced in volume in mid-2004.⁵ The two licensees also stated their agreement to introduce interim interoperable radios, prior to the introduction of fully-interoperable chipsets, that would include a common wiring harness.

¹ Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, *Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 12 FCC Red 5754, 5757 (para. 106) (1997); see also 47 C.F.R. § 25.144(a)(3)(ii) (2004).

² Satellite CD Radio, Inc., *Order and Authorization*, 13 FCC Red 7971, 7995 (para. 57) (Int'l Bur. 1997) (1997 Sirius Authorization Order) ("IT IS FURTHER ORDERED that this authorization is subject to certification by [Sirius] that its final receiver design is interoperable with respect to the [XM Radio Inc.]'s Satellite Digital Audio Radio Service system final receiver design.").

³ American Mobile Radio Corporation, *Order and Authorization*, 13 FCC Red 8829, 8851 (para. 54) (Int'l Bur. 1997).

⁴ XM Radio Inc., *Order and Authorization*, DA 05-180 (Int'l Bur. Sat. Div. rel. Jan. 26, 2005).

⁵ Letter from John R. Wormington, XM Radio Inc., and Robert D. Briskman, Sirius Satellite Radio Inc., to Magalie Roman Salas, FCC, dated Oct. 6, 2000 (*October 6 Letter*).

Mr. Patrick L. Donnelly
Page 2

head unit, antenna, and an interchangeable trunk-mounted box containing processing elements for both company's signals.⁶

In order to reflect more accurately the status of SDARS licensees' efforts in developing interoperable receivers, we are requesting that Sirius and XM Radio file an update to the October 6, 2000 Letter in pending proceedings where interoperable receivers are an issue. Although the Commission is cognizant of the differences between the two SDARS licensees' transmission technologies that initially affected the ability to develop receiver interoperability,⁷ it is not clear, given the passage of time, that these differences still exist.

For this reason, we request that Sirius submit to the Satellite Division, within 45 days from the date of this letter, the status of Sirius' efforts to develop an interoperable receiver and its timeframe for making such an interoperable receiver available to the public.⁸

Please contact JoAnn Lucanik, (202) 418-0873, or Stephen Duall, (202) 418-1103, of my staff if you have any questions regarding this letter.

Sincerely,


Thomas S. Tcyz *fw*
Chief
Satellite Division

cc: Carl R. Frank
Counsel
Wiley Rein & Fielding LP
1776 K Street, NW
Washington, DC 20006
(202) 719-7049 (Fax)

⁶ October 6 Letter at 4.

⁷ 1997 Sirius Authorization Order, 13 FCC Red at 7990 (para. 42).

⁸ We have also separately instructed XM Radio to file such a status report within the same time period.



Federal Communications Commission
Washington, DC 20554

International Bureau

January 28, 2005

Mr. Lon C. Levin
Senior Vice President
XM Radio Inc.
1500 Eckington Place, NE
Washington, D.C. 20002

File Nos: IB Docket No. 95-91; SAT-MOD-20040212-00017; SAT-RPL-20040212-00018; SAT-RPL-20040212-00019; 72-SAT-AMEND-97; 10/11-DSS-P-9312/15/92; 26/27-DSS-LA-9311/15/93; 83/83-SAT-AMEND-953/10/95

Dear Mr. Levin:

As an alternative to the Commission mandating standards for receivers used in providing Satellite Digital Audio Radio Service (SDARS), SDARS operators are to certify to the Commission that their systems include a receiver that will permit end users to access all licensed SDARS systems that are operational or under construction.¹ The Commission authorized XM Radio Inc. (XM Radio) in 1997 to provide SDARS in the United States subject to such a certification.² The authorization of the other SDARS licensee, Sirius Satellite Radio (Sirius), is subject to an identical certification requirement.³

In our recent authorization to XM Radio for the launch and operation of replacement satellites,⁴ we noted that XM Radio and Sirius have on file a letter dated October 6, 2000, in which the two SDARS licensees announced an agreement to develop a unified standard for satellite radios, and stated their anticipation that interoperable chips capable of receiving both services would be produced in volume in mid-2004.⁵ The two licensees also stated their agreement to introduce interim interoperable radios, prior to the introduction of fully-interoperable chipsets, that would include a common wiring harness,

¹ Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, *Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 5754, 5797 (para. 106) (1997); see also 47 C.F.R. § 25.144(a)(3)(ii) (2004).

² American Mobile Radio Corporation, *Order and Authorization*, 13 FCC Rcd 8829, 8851 (para. 54) (Int'l Bur. 1997) (*1997 XM Authorization Order*) ("IT IS FURTHER ORDERED that this authorization is subject to certification by [XM Radio] that its final receiver design is interoperable with respect to the [Sirius'] Satellite Digital Audio Radio Service system final receiver design.").

³ Satellite CD Radio, Inc., *Order and Authorization*, 13 FCC Rcd 7971, 7995 (para. 57) (Int'l Bur. 1997).

⁴ XM Radio Inc., *Order and Authorization*, DA 05-180 (Int'l Bur. Sat. Div. ref. Jan. 26, 2005).

⁵ Letter from John R. Wormington, XM Radio Inc., and Robert D. Briskman, Sirius Satellite Radio Inc., to Magalie Roman Salas, FCC, dated Oct. 6, 2000 (*October 6 Letter*).

Mr. Lon C. Levin

Page 2

head unit, antenna, and an interchangeable trunk-mounted box containing processing elements for both company's signals.⁶

In order to reflect more accurately the status of SDARS licensees' efforts in developing interoperable receivers, we are requesting that XM Radio and Sirius file an update to the October 6, 2000 Letter in pending proceedings where interoperable receivers are an issue. Although the Commission is cognizant of the differences between the two SDARS licensees' transmission technologies that initially affected the ability to develop receiver interoperability,⁷ it is not clear, given the passage of time, that these differences still exist.

For this reason, we request that XM Radio submit to the Satellite Division, within 45 days from the date of this letter, the status of XM Radio's efforts to develop an interoperable receiver and its timeframe for making such an interoperable receiver available to the public.⁸

Please contact JoAnn Lucanik, (202) 418-0873, or Stephen Duall, (202) 418-1103, of my staff if you have any questions regarding this letter.

Sincerely,

Cassandra C. Thomas

Thomas S. Teyz
Chief
Satellite Division

cc: Bruce D. Jacobs
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2300 N Street, NW
Washington, DC 20037-1128
(202) 663-8977 (Fax)

⁶ October 6 Letter at 4.

⁷ 1997 XM Authorization Order, 13 FCC Rcd at 8846 (para. 38).

⁸ We have also separately instructed Sirius to file such a status report within the same time period.

EXHIBIT 3

ORIGINAL

March 14, 2005

Mr. Thomas S. Tycz
Chief, Satellite Division
International Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Received
MAR 29 2005
Policy Branch
International Bureau

Re: IB Docket No. 95-91; SAT-MOD 20040212-00017; SAT-RPL-20040212-00018; SAT-RPL-20040212-00019; SAT-AMEND-97; 10/11-DSS-P-9312/15/92; 26/27-DSS-LA-931/15/93; 83/83-SAT-AMEND-953/10/95

Dear Mr. Tycz:

On January 28, 2005, you asked XM Radio Inc. ("XM") and Sirius Satellite Radio Inc. ("Sirius") to update you on their activities related to receiver design.¹ XM and Sirius jointly submit this letter in response to your request, and reconfirm their compliance with Section 25.144(a)(3)(ii) of the Commission's rules by including interoperable radios in their respective system designs.

XM and Sirius have designed and licensed receiver systems that share a common head unit, antenna, and wiring harness, while other entities continue to be responsible for the manufacture and distribution of satellite radios. Several aftermarket and OEM radio manufacturers now produce head units that operate with the receiver boxes of either service provider. Some head units are also branded and marketed as "SAT Ready" to denote their ability to work with both systems. At least one automaker factory installs head units and antennas that are compatible with both XM and Sirius' systems. This configuration allows the customer to purchase a trunk-mounted box for either satellite radio provider without disturbing the rest of the components. This unit can be swapped at any time for a trunk-mounted box from the other satellite radio provider.

In February 2000, XM and Sirius signed a joint development agreement to develop interoperable technologies, and cross-licensed to each other their respective intellectual property and technology to advance the joint venture. This joint venture has been tasked with combining XM's and Sirius' proprietary chipsets into a compact and efficient device capable of receiving both services. The joint venture has been staffed with engineering personnel that are independent of XM and Sirius. To date, the

¹ See Letter from Thomas S. Tycz to Lon C. Levin, XM Radio Inc. (January 28, 2005); Letter from Thomas S. Tycz to Patrick L. Donnelly, Sirius Satellite Radio Inc. (January 28, 2005).

Mr. Thomas S. Tycz

March 14, 2005

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companies have spent nearly \$5,000,000 to fund the joint venture and expect to spend more in the future. Both Sirius and XM are optimistic that, at a minimum, a prototype for this type of interoperable radio (i.e., a receiver using a common antenna, a common RF tuner, and two baseband modules, one for XM and one for Sirius) will be completed by the joint venture in 2005. Upon completion, and subject to successful performance and manufacturability testing, we believe this prototype could be manufactured.

Nevertheless, the market will ultimately determine the success of these products. Competition for the attention of consumers in automobiles is not limited to SDARS licensees. AM, FM, HD radio, cassette decks, CD players, navigation systems, DVD players, iPod and other MP3 players all compete for space in automobile head units. Soon wireless broadband services and cell phones may further crowd this busy space. All of these devices affect the quality, quantity, and price points that manufacturers carefully assess before introducing a product.

In the four and a half years that have passed since XM's and Sirius' previous submission, the two companies have invested billions of dollars, and have been extraordinarily successful in fulfilling the Commission's vision of providing Americans with "continuous nationwide radio programming" that will "increase the variety of programming available to the listening public." Ahead of the Commission's milestones, each company launched satellites, licensed technology to manufacturers, and began offering over 120 channels of digital music, news, sports, entertainment, traffic and weather. The new service has been well received in the marketplace and has been a positive development for consumers, the consumer electronics industry, the music and artist community, and the United States commercial satellite industry.

That success is due in significant part to the Commission's decision not to mandate the use of a particular technology. The freedom to design systems unbounded by government-imposed mandates has allowed each company to get to market quickly and continue to innovate. The satellite radio industry has not only developed the expected satellite receiver units which operate with car radios, but has also pioneered the development of whole new categories of audio products, including satellite radio "plug and play" devices, standalone home stereo component systems, integrated AM/FM/Satellite receivers, portable/wearable satellite radio devices with integrated antennas and "time shifted" recording capability, and various ancillary telematics and data/navigation services. All of this has been done at prices that have made the equipment increasingly affordable.

Simply put, Sirius and XM have invested considerable time, effort and money designing, launching and operating systems compliant with the Commission's rules, including an interoperable radio design offered to manufacturers. The companies are continuing those efforts to streamline and improve that design. The availability of

Mr. Thomas S. Tycz
March 14, 2005
Page 3

interoperable radios, however, will depend in large part on factors outside of the control of either XM or Sirius, including consumer demand for interoperability and the willingness of manufacturers to manufacture, distribute, market and sell interoperable radios after carefully weighing the integration, qualification, costs and efficiency considerations.

Please contact the undersigned if you have any further questions.

Very truly yours,



William Bailey
Senior Vice President
Regulatory and Government Affairs
XM Radio Inc.
1500 Eckington Place, NE
Washington, DC 20002
202 380 4000



Patrick L. Donnelly
Executive Vice President and General Counsel
Sirius Satellite Radio Inc.
1221 Avenue of the Americas
New York, NY 10020
212 584 5100

cc: Office of the Secretary
JoAnn Lucanik
Stephen Duall