

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
XM Satellite Radio Holdings Inc.,	)	
	)	
Transferor	)	
	)	MB Docket No. 07-57
and	)	
	)	
Sirius Satellite Radio Inc.,	)	
	)	
Transferee	)	
	)	
Consolidated Application for Authority to	)	
Transfer Control of XM Radio Inc. and	)	
Sirius Satellite Radio Inc.	)	

**OPPOSITION OF SIRIUS SATELLITE RADIO INC. AND XM SATELLITE RADIO  
HOLDINGS INC. TO REQUEST FOR PUBLIC DISCLOSURE OF  
CERTAIN DOCUMENTS DESIGNATED HIGHLY CONFIDENTIAL**

Sirius Satellite Radio Inc. (“Sirius”) and XM Satellite Radio Holdings Inc. (“XM”) hereby oppose the National Association of Broadcasters’ (“NAB”) request for public disclosure of four documents designated as containing “Highly Confidential Information.”<sup>1</sup> The documents sought by NAB relate to Sirius’ and XM’s design and development of interoperable technology. The Commission need not consider the merits of NAB’s request, however, because its filing should be dismissed as procedurally defective. On its face, NAB’s request fails to comply with the Commission’s Freedom of Information Act (“FOIA”) rules. In any event, the Commission should deny NAB’s request because the highly confidential documents at issue here are exempted from disclosure under FOIA. Disclosure would also be unnecessary and serve no

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<sup>1</sup> National Association of Broadcasters’ Request for Public Disclosure of Certain Documents Designated Highly Confidential, MB Docket No. 07-57 (filed June 3, 2008) (“NAB Request”).

legitimate purpose because NAB's outside and in-house counsel have access to the documents. Accordingly, the Commission should either dismiss or deny NAB's request.

**I. NAB'S REQUEST FOR DISCLOSURE IS PROCEDURALLY DEFECTIVE AND SHOULD BE DISMISSED.**

NAB's request for public disclosure of certain highly confidential documents should be dismissed as procedurally defective. Section 0.461 of the Commission's rules state that a person "desiring to inspect Commission records which are not listed in § 0.453 or § 0.455 shall file a request for inspection meeting the requirements of this section."<sup>2</sup> Indeed, "[a]ny requests for inspection of the confidential materials must comply with the requirements set forth in Section 0.461 of the Commission's Rules."<sup>3</sup>

Specifically, Section 0.461 provides that a person requesting disclosure must reasonably describe the records sought, caption the request as a "Freedom of Information Act Request," specify the maximum search fee the person is willing to pay, and include a statement of reasons for the inspection and the facts in support.<sup>4</sup> Moreover, the rules require the FOIA request to be clearly captioned so it can be assigned to the FOIA Control Office and acted upon by the custodian of records.<sup>5</sup>

NAB has plainly failed to satisfy the mandatory FOIA requirements in Section 0.461. In stark contrast to NAB's March 22, 2007 FOIA request,<sup>6</sup> NAB has neither captioned its latest

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<sup>2</sup> 47 C.F.R. § 0.461 (emphasis added).

<sup>3</sup> *In re Communications Assistance for Law Enforcement Act*, 14 FCC Rcd 13,093, ¶ 4 n.11 (Office of Engineering and Technology 1999).

<sup>4</sup> 47 C.F.R. § 0.461(a)-(c).

<sup>5</sup> *Id.* § 0.461(e), (g).

<sup>6</sup> Letter from David H. Solomon, Counsel, National Association of Broadcasters, to Anthony J. Dale, Managing Director, FOIA Officer, FCC (Mar. 22, 2007).

filing as a proper FOIA request nor specified the maximum search fee it is willing to pay. Instead, the NAB filed a Request for Public Disclosure pursuant to the *Second Protective Order*.<sup>7</sup> That *Order*, however, directed the parties to follow the procedures in Rule 0.461 to “request[] disclosure of Highly Confidential Information outside the terms of this Second Protective Order.”<sup>8</sup> In failing to follow the terms of the *Second Protective Order* or the FOIA requirements in Rule 0.461, NAB’s request is procedurally defective.

Accordingly, the Commission need not “consider petitions which are procedurally defective.”<sup>9</sup> Indeed, the FCC and its Bureaus routinely dismiss requests that are procedurally defective.<sup>10</sup> The Commission should follow the same course here and dismiss NAB’s procedurally-defective request.

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<sup>7</sup> NAB Request at 1.

<sup>8</sup> *In re Applications of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc.*, 22 FCC Rcd 19924, ¶ 14 (Media Bureau 2007) (“*Second Protective Order*”) (“If any person requests disclosure of Highly Confidential Information outside the terms of this Second Protective Order, such a request will be treated in accordance with Sections 0.442 and 0.461 of the Commission’s rules.”).

<sup>9</sup> *In re Claircom Communications Group, L.P.*, 8 FCC Rcd 7258, ¶ 2 (Mobile Services Division 1993).

<sup>10</sup> *See, e.g., In re Sagir, Inc.*, 18 FCC Rcd 15967, ¶ 12 (2003) (stating that “we dismiss this portion of NECC’s petition for lack of compliance with our rules”); *In re Peninsula Communications, Inc.*, 17 FCC Rcd 2838, ¶ 5 n.12 (2002) (“We dismiss Peninsula’s request. Peninsula’s request does not comply with section 1.44(e) of our rules, 47 C.F.R. § 1.44(e), which requires that stay requests be filed as separate pleadings.”); *In re Americom Las Vegas Limited Partnership*, 22 FCC Rcd 20530, ¶ 1 (Enforcement Bureau 2007) (stating that “we dismiss Americom’s petition because it does not comply with the requirements of Section 1.106(b)(2) of the Rules, and is therefore procedurally defective”); *In re WBSWP Licensing Corporation*, 22 FCC Rcd 1277, ¶ 11 (Wireless Telecommunications Bureau 2007) (“Accordingly, we dismiss the Petition for failure to comply with Section 1.106(c) of the Commission’s Rules.”); *In re Electronic Radio Services, Inc.*, 17 FCC Rcd 16104, ¶ 1 (Telecommunications Bureau 2002) (stating that “we dismiss the Petition because ERSI did not comply with Section 1.945(e) of the Commission’s Rules”); *In re Sagir, Inc.*, 15 FCC Rcd 4466, ¶ 4 (Policy and Rules Branch 2000) (“We therefore conclude that NECC has failed to show good reason why it was not possible for it to participate at the earlier petition to deny stage. Accordingly, we are dismissing NECC’s petition because it fails to meet the requirements of Section 1.106(b)(1) of our rules.”), *aff’d*, 16

## II. THE DOCUMENTS REQUESTED BY NAB ARE PROTECTED FROM DISCLOSURE UNDER FOIA EXEMPTION 4.

In any event, the highly confidential materials requested by NAB are protected from disclosure under FOIA Exemption 4. Sirius submitted these documents pursuant to requests for confidential treatment for the specific reason that the documents contain information that is privileged, contains trade secrets, or contains sensitive commercial or financial information.

Section 0.457(d)(2) of the Commission's rules, which implements FOIA Exemption 4,<sup>11</sup> provides that materials containing "trade secrets or commercial, financial or technical data which would customarily be guarded from competitors" are exempt from FOIA's public-inspection rules.<sup>12</sup> Courts have interpreted this provision to exempt commercial or financial information if disclosure will: (1) impair the government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.<sup>13</sup>

First, the disclosure of the highly sensitive commercial information related to interoperability provided to the Commission by Sirius could impair the quality and amount of information provided to the Commission in the future if competitors, such as NAB members, are able to use FOIA to obtain highly confidential information. Sirius was forthcoming with the Commission's inquiries because it believed these materials would be shielded from the public

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FCC Rcd 8159, ¶¶ 3-4 (2001); *In re Barry County Telephone Company*, 11 FCC Rcd 5621, ¶ 7 (Common Carrier Bureau 1996) ("On the basis of the foregoing discussion, we conclude that Barry County's petition for reconsideration does not comply with Section 405(a) of the Act and Section 1.106 of the Commission's rules and is thus procedurally defective. We therefore dismiss this petition.").

<sup>11</sup> 5 U.S.C. § 552(b)(4)

<sup>12</sup> 47 C.F.R. § 0.457(d)(2).

<sup>13</sup> *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

and its competitors. But, if materials of this type were routinely disclosed to the public in response to FOIA requests, it could encourage parties to be less forthcoming in their responses to the Commission. The first prong of the *National Parks* test was designed to avoid this precise result.

Second, disclosure of the commercial and financial information at issue here could cause substantial competitive harm to Sirius and XM. Satellite radio comprises only a fraction of the radio market compared to terrestrial radio. Yet, disclosure of this information could give Sirius' and XM's terrestrial competitors unprecedented access to their confidential business processes and commercial strategies. This disclosure could consequently put Sirius and XM at a substantial competitive disadvantage, harming their abilities to negotiate with future business partners and allowing competitors to modify their offerings. Accordingly, the Commission should deny NAB's request because the documents are protected from disclosure under FOIA Exemption 4.

Finally, disclosure of these highly confidential documents is unnecessary and would serve no legitimate purpose. The *Second Protective Order* permits the disclosure of highly confidential material to "Outside Counsel of Record, their employees, and Outside Consultants and experts whom they retain to assist them in this proceeding."<sup>14</sup> Consistent with this *Order*, NAB's in-house counsel and Outside Counsel of Record already have access to these four documents.<sup>15</sup> There is no legitimate need to further disseminate this material and risk substantial competitive harm to both Sirius and XM.

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<sup>14</sup> *Second Protective Order*, 22 FCC Rcd 19924, ¶ 3.

<sup>15</sup> Letter from David H. Solomon, Counsel, National Association of Broadcasters, to Marlene H. Dortch, Secretary, FCC (Apr. 24, 2008) (Acknowledgements of Confidentiality of Marsha J. MacBride, Jane E. Mago, and Lawrence A. Walke); Letter from David H. Solomon, Counsel, National Association of Broadcasters, to Marlene H. Dortch, Secretary, FCC (Nov. 20,

### III. CONCLUSION

For the foregoing reasons, Sirius respectfully requests that the Commission dismiss NAB's request as procedurally defective or, in the alternative, enter an order denying NAB's request for public disclosure of these highly confidential documents.

Respectfully submitted,

*/s/ Robert L. Pettit*

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June 13, 2008

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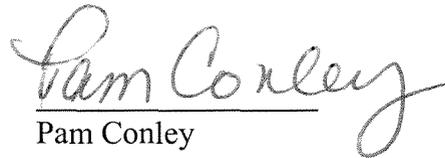
2007) (Acknowledgements of Confidentiality of David H. Solomon, J. Wade Lindsay, and Marc D. Knox).

## CERTIFICATE OF SERVICE

I, Pam Conley, do hereby certify that on June 13, 2008, I served a copy of the Opposition of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. to Request for Public Disclosure of Certain Documents Designated Highly Confidential upon the following parties by first-class U.S. mail:

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