



WILLIAMS MULLEN

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June 16, 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 notice. This submission relies upon and references Highly Confidential Documents filed in the above-referenced proceeding. Accordingly, C3SR, pursuant to the terms of the Second Protective Order,<sup>1</sup> is separately filing one unredacted copy with the Secretary’s Office, and two unredacted copies with Jamila Bess Johnson of the Media Bureau.<sup>2</sup>

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.

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<sup>1</sup> *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).

<sup>2</sup> C3SR has been advised by the FCC staff not to file both a redacted copy in the public record for this proceeding via ECFS and paper copies of the redacted version with the Secretary’s Office. Since the terms of the Second Protective Order require the paper filing with the Secretary’s Office, C3SR will not file a redacted copy in ECFS. It is C3SR’s understanding that a redacted copy will be made available in ECFS by the FCC staff.

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Please contact the undersigned with any questions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Julian L. Shepard".

A small, handwritten mark consisting of the letters "JS" enclosed within a circle.

Julian L. Shepard  
Counsel to C3SR

Enclosures



WILLIAMS MULLEN

Direct Dial: 202.293.8111  
 jshepard@williamsmullen.com

June 16, 2008

**VIA HAND DELIVERY**

Ms. Marlene H. Dortch, Secretary  
 Federal Communications Commission  
 Office of the Secretary  
 445 12<sup>th</sup> 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”), by its counsel, hereby submits this letter for consideration in the above-referenced proceeding. On June 6, 2008, XM Satellite Radio Holdings Inc. (“XM”) and Sirius Satellite Radio Inc. (“Sirius,” and collectively with XM, the “Merger Parties”) submitted a joint response (the “Joint Response Letter”) to C3SR’s May 27, 2008 letter (“C3SR’s Letter”). C3SR’s Letter requested that the FCC designate the proposed merger of XM and Sirius for hearing and commence an investigation leading to appropriate enforcement actions.

The facts in the Highly Confidential Documents referenced in C3SR’s Letter are not publicly available, and the Merger Parties are trading on the secrecy of these documents in the court of public opinion. The Joint Response Letter is not forthcoming with the facts. Indeed, the Joint Response Letter is limited to the self-serving legal conclusions and rule interpretations of the Merger Parties, and the affidavits attached to the Joint Response Letter are wholly lacking in relevant factual disclosures. The Declaration of Michael DeLuca, Vice President and General Manager of Interoperable Technologies, LLC (“Interoperable Technologies”), avoids the relevant issues altogether (as explained more fully below). Similarly, the affidavits of Messrs. Donnelly and Titlebaum merely affirm their belief that the legal conclusions and rule interpretations in the Joint Response Letter are complete and accurate. Despite their admitted personal knowledge of the facts, neither the affidavit of Mr. Donnelly nor Mr. Titlebaum actually states the facts.<sup>1</sup> Collectively, the documents attached to the Joint Response Letter fail to offer any facts that either contradict or refute the Highly Confidential Information referenced in C3SR’s Letter.

<sup>1</sup> Both Messrs. Donnelly and Titlebaum expressly state in their respective affidavits that they have personal knowledge of the facts “regarding Interoperable Technologies’ [REDACTED]” but they fail to state those facts.

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In public, the Merger Parties are denying the facts but failing to disclose the facts revealed in the Highly Confidential Documents and failing to provide any facts in support of their denial. Meanwhile, in private *ex parte* meetings with the Commission, the Merger Parties are secretly saying what they wish. While this proceeding is “permit but disclose” for purposes of the Commission’s *ex parte* rules,<sup>2</sup> that should not permit the Merger Parties to disregard the procedures set forth in Section 1.1206 of the Commission’s rules.<sup>3</sup> We note that recent notices of oral *ex parte* presentations filed by counsel to XM and Sirius (copies attached as Exhibit A) fail to honor the requirements of Section 1.1206 of the Commission’s Rules. In the Public Notice commencing this proceeding, all parties were reminded that “memoranda summarizing the presentation must contain the presentation’s substance, and not merely list the subjects discussed.”<sup>4</sup> More than a one- or two-sentence description of the views and arguments presented is generally required.<sup>5</sup> The Merger Parties have failed to honor this requirement of the rules.<sup>6</sup>

If the Commission relies solely on an exchange of written *ex parte* submissions and private *ex parte* meetings with the Merger Parties to examine the issues raised in C3SR’s Letter, without formally designating the issues raised for hearing, the Commission will not meet its public interest obligations under Section 309(d) of the Communications Act. If the Merger Parties are orally presenting their version of the facts to the Commission in private *ex parte* meetings, especially without the requisite disclosure, this entire proceeding is being tainted with violations of due process. Under such circumstances, there is no way for C3SR or other Petitioners in this proceeding to have notice and an opportunity to be heard or to cross-examine any of the “evidence” offered.

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<sup>2</sup> See generally 47 C.F.R. §§ 1.1200-1.1216.

<sup>3</sup> An *ex parte* presentation is any communication (spoken or written) directed to the merits or outcome of a proceeding made to a Commissioner, a Commissioner’s assistant, or other decision-making staff member, that, if written, is not served on other parties to the proceeding or, if oral, is made without an opportunity for all parties to be present. See 47 C.F.R. § 1.1201.

<sup>4</sup> See *Commission Emphasizes the Public’s Responsibilities in Permit-But-Disclose Proceedings*, Public Notice, 15 FCC Rcd 19945 (2000).

<sup>5</sup> See 47 C.F.R. § 1.1206(b)(2), as revised. Other rules pertaining to oral and written presentations are set forth in Section 1.1206(b) as well.

<sup>6</sup> These deficient *ex parte* notices do not contain the substance of the presentations made in these private *ex parte* meetings as required by the rules. It is impossible to know from these notices what specifically was discussed. Given the seriousness of the facts revealed in the Highly Confidential Documents as referenced in C3SR’s Letter, there is every reason to believe that the issues raised in C3SR’s Letter were discussed by the Merger Parties with the Commission in private *ex parte* meetings on May 30, 2008 and June 4, 6, and 9, 2008. There may have been even more such meetings for which the defective *ex parte* notices are not yet available on ECFS.



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The procedural objections made in the Joint Response Letter further reflect the desperateness of the Merger Parties to avoid a public airing of the facts. Essentially, the Merger Parties argue that C3SR, a Petitioner in this proceeding, cannot request a hearing on the issues raised in the Highly Confidential Documents because the issues were not raised in C3SR's previously filed Petition to Deny. This argument completely ignores that fact that the Highly Confidential Information at issue, which formed the basis of C3SR's Letter and its renewed request for a hearing, was not submitted to the Commission as part of the Merger Applications until April 10, 2008. The Commission's June 8, 2007 Public Notice of the Merger Applications set the deadline for Petitions to Deny as July 9, 2007. On that date, C3SR filed a timely Petition to Deny which requested that the Applications be designated for hearing. To the extent that the Merger Parties have been permitted to freely supplement their applications in this proceeding (thereby making them a moving target for Petitioners such as C3SR), due process requires the Commission allow Petitioners freely to supplement their Petitions to Deny in response to changes in information in the Merger Applications. At this stage of the proceeding there is no formal way to file such supplements. To the extent necessary, C3SR requests that its May 27, 2008 letter, as well as the instant letter, be treated as a supplement to its previously-filed Petition to Deny.

While C3SR is unable to respond to the oral representations of XM and Sirius in the private *ex parte* meetings with the Commission, C3SR provides this reply to the attachments to the Joint Response Letter; to the transparent attempt to discredit the Highly Confidential Documents through a declaration from the author of the documents, a lone executive at the Interoperable Technologies joint venture; and to the contrived interpretation of the Commission's rules set forth in the Joint Response Letter. The Commission should find the fact that the Joint Response Letter fails to include detailed factual declarations by any of the senior executives of either XM or Sirius who have personal knowledge of the facts quite troubling. Therefore, for the many reasons set forth below, the Joint Response Letter underscores the need to designate the merger applications for a full and complete hearing on the issues raised in C3SR's Letter.

**The DeLuca Declaration is Misleading.** The Declaration of Michael DeLuca (the "DeLuca Declaration"), Vice President and General Manager of Interoperable Technologies, is a thinly-veiled attempt by the Merger Parties to disclaim their responsibility for the Highly Confidential Documents. Mr. DeLuca, a lawyer admitted to practice in the state of Florida, declares that "neither Sirius nor XM has a controlling interest in Interoperable Technologies. Interoperable Technologies is an independent corporate entity..."<sup>7</sup> This is a very misleading and disingenuous presentation of the facts.

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<sup>7</sup> See DeLuca Declaration at para. 4.



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Essentially, the DeLuca Declaration argues that the Highly Confidential Documents were not the product of either one of the Merger Parties acting alone. But this is the very point of C3SR’s Letter — namely, the Merger Parties [REDACTED]. Indeed, the Joint Response Letter (including the DeLuca Declaration) does not deny that there has been an [REDACTED], even though Mr. DeLuca attributes his sources for the information contained in the Highly Confidential Documents to public sources.<sup>8</sup> It is inconceivable that the [REDACTED] set forth in the Highly Confidential Documents came from public sources because there was never a public offering of [REDACTED]. On the contrary, it is apparent on the face of the Highly Confidential Documents [REDACTED].<sup>9</sup>

In reality, Interoperable Technologies is jointly owned and controlled by XM and Sirius. Interoperable Technologies, a limited liability company organized under the laws of the State of Delaware, is likely 50% owned by Sirius and 50% owned by XM. In fact, XM has informed the SEC that Interoperable Technologies is a subsidiary of XM in which XM holds a 50% ownership interest.<sup>10</sup> As a “joint venture,” it is safe to assume that the other 50% of Interoperable Technologies membership shares are owned and voted by Sirius. Moreover, the Highly Confidential Documents reveal that “[REDACTED]” at Interoperable Technologies.<sup>11</sup> A Highly Confidential Document states, “[REDACTED]”

<sup>8</sup> The DeLuca Declaration states that “the information that Interoperable Technologies has regarding Sirius’ or XM’s business is publicly available information collected from press releases, public filings and media reports.” This statement, if true, requires the Commission to act favorably on the request of the National Association of Broadcasters to make the Highly Confidential Documents publicly available in this proceeding. However, this statement appears to be false insofar as some of the statements contained in Highly Confidential Documents, if publicly available, would appear to be actionable under the antitrust laws. To C3SR’s knowledge, the information contained in the Highly Confidential Documents, while not worthy of protection in this proceeding, has not been previously public in nature.

<sup>9</sup> [REDACTED]

<sup>10</sup> See XM Satellite Radio Holdings Inc., SEC Form 10-K Exhibit 21.1 (Mar. 3, 2006) attached in Exhibit B.

<sup>11</sup> [REDACTED]



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[REDACTED]<sup>12</sup> Therefore, the documents and conduct of Interoperable Technologies must be directly attributed to XM and Sirius.

Mr. DeLuca apparently was acting within the scope of his employment as the General Manager of a subsidiary of XM and Sirius, which is 100% owned and controlled by XM and Sirius, when he authored and distributed the documents at issue. There is no evidence to the contrary. There is no evidence that Mr. DeLuca was admonished or reprimanded by either XM or Sirius for his authorship of these documents. Moreover, there is no indication in the Joint Response Letter or the DeLuca Declaration that these Highly Confidential Documents were discarded by the Interoperable Technologies Board of Managers. Indeed, they appear to have been prepared for [REDACTED]

The apparent [REDACTED]  
[REDACTED]. In one of the Highly Confidential Documents, the following statements appear:

- “[REDACTED]<sup>13</sup>”
- “[REDACTED]<sup>14</sup>”
- “[REDACTED]<sup>15</sup>”

<sup>12</sup> [REDACTED]

<sup>13</sup> [REDACTED]

<sup>14</sup> [REDACTED]

<sup>15</sup> [REDACTED]



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The use of Interoperable Technologies by XM and Sirius to coordinate [REDACTED]

[REDACTED]

[REDACTED]<sup>16</sup> The cooperation envisioned by the Commission was in the creation of an interoperable receiver design — a purely technical exercise — and not a [REDACTED] (or more accurately, to thwart competition). Furthermore, there is no evidence that the FCC or US Department of Justice has ever exempted [REDACTED] or otherwise permitted the Merger Parties to [REDACTED]

Therefore, the Commission must look past this transparent attempt by the Merger Parties to cloud the more important issues. The Commission must inquire further about the use of the Highly Confidential Documents by the Board of Managers of Interoperable Technologies and by the member companies, XM and Sirius. What use was made of the Highly Confidential Documents by XM and Sirius? What information was exchanged? What decisions were made about the [REDACTED] [REDACTED]?

**The Joint Response Letter Underscores the Need for a Hearing.** Even though the Joint Response Letter argues that the Merger Parties have complied with the interoperable receiver requirement, this issue remains a substantial and material issue in dispute. Nothing in the attached documents provides an answer to the question. When did the Merger Parties possess an interoperable receiver design, and when, if ever, was it made available to the receiver manufacturing community? In fact, the Highly Confidential Documents reveal that the Merger Parties did not [REDACTED].<sup>17</sup> Moreover, this fact is corroborated by the submissions of U.S. Electronics, Inc. and Michael Hartleib in this proceeding.<sup>18</sup>

<sup>16</sup> [REDACTED]

<sup>17</sup> [REDACTED]

<sup>18</sup> See, e.g., Comments on Notice of Proposed Rulemaking, U.S. Electronics, Inc., MB Docket No. 07-57 (June 27, 2007) (discussing “sole sourcing” of receiver “design, development and distribution” by Sirius); Petition for Declaratory Ruling to Clarify the Lack of Enforcement and Implementation of the Interoperable Mandate FCC Rule 47 CFR Sec. 25.144(a)(3)(ii), Michael Hartleib, MB Docket No. 07-57 (June 24, 2007) (“The Petitioner also asks that the Commission follow through with the enforcement of their mandate and force the companies to immediately disclose to the public and their shareholders the availability of an interoperable radio which has existed for several years.”).



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There is no evidence in the Joint Response Letter to refute the facts in the Highly Confidential Documents. For example, the Highly Confidential Documents make clear that Interoperable Technologies was [REDACTED]

It is troubling that there is no apparent public record of the Merger Parties sharing a completed prototype interoperable SDARS receiver with the Commission's International Bureau or Enforcement Bureau staff, as stated in the Joint Response Letter.<sup>19</sup> If, in fact, this occurred, it begs important questions. When was the interoperable receiver design in prototype form shared with the FCC staff? Why was the design not generally shared with manufacturers? Did the Merger Parties ever make the interoperable receiver design generally available to manufacturers, or did they [REDACTED]? Was the interoperable receiver design shared with XM and Sirius's "manufacturing partners?" If so, who are these manufacturing partners; when was the design shared; and were the terms and conditions offered to manufacturers intended by XM and Sirius to make the manufacture of such receivers uneconomic?

To resolve the issues, it is necessary to cross-examine the evidence provided in the Joint Response Letter and to seek additional evidence from other sources. The truthfulness and veracity of the DeLuca Declaration and the arguments asserted in the Joint Response Letter must be determined by making inquiry of the Interoperable Technologies Board of Managers, which appears to have consisted of [REDACTED] (from XM); Mike [REDACTED] (from Sirius); and other employees at Interoperable Technologies, including at a minimum Paul Kelley and Ken Payne, managers within Interoperable Technologies who were featured on its website before the homepage was disabled and the internal pages hidden from the FCC and the public.<sup>20</sup>

The carefully crafted DeLuca Declaration and affidavits of Patrick L. Donnelley, and Joseph Titlebaum, standing alone, are wholly insufficient to resolve the issues. Indeed, these documents further emphasize the need for a hearing. It is quite curious that the Joint Response Letter lacks a declaration of Mr. Gary Parsons, a person [REDACTED]. One of the Highly Confidential Documents cited in C3SR's Letter explicitly [REDACTED].

<sup>19</sup> Joint Response Letter at 4.

<sup>20</sup> Interoperable Technologies, LLC About Us Page, [http://www.selectsatelliteradio.com/about\\_us.html](http://www.selectsatelliteradio.com/about_us.html) (last visited June 11, 2008). The "About Us" page is no longer accessible from the homepage; however, it can be accessed by typing in the exact web address listed above. In the event that the "About Us" page is taken down following the filing of this letter, a printout of the page is attached hereto as Exhibit C.





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In the Joint Response Letter, the Merger Parties claim that they [REDACTED]  
[REDACTED]  
[REDACTED]<sup>23</sup> It is unclear from the Joint Response Letter if the Merger Parties are referring to [REDACTED]  
[REDACTED]. Either way, the Merger Parties provide no evidence to support this *post-hoc* justification for [REDACTED]  
[REDACTED]. Furthermore, even if true, the Joint Response Letter raises a number of questions regarding the Merger Parties': (1) why had neither XM nor Sirius [REDACTED]; (2) why had neither XM nor Sirius [REDACTED]; (3) why had neither XM nor Sirius [REDACTED]; and (4) why were [REDACTED] not in place? Neither XM nor Sirius appears to have ever been willing to take the steps necessary to [REDACTED]  
[REDACTED], even if a major manufacturer agreed to produce the interoperable radio (with or without a subsidy).

The Highly Confidential Documents establish that the [REDACTED]  
[REDACTED]<sup>24</sup> Sirius CEO Mel Karmazin, however, testified before Congress that the cost of an interoperable radio, without a subsidy, would be around \$700.<sup>25</sup> The Merger Parties attempt to address this inconsistency by claiming [REDACTED]  
[REDACTED]

[REDACTED]<sup>26</sup> In short, the Merger Parties are asking the Commission to believe that a [REDACTED], which is why Mr. Karmazin provided Congress with a cost figure that [REDACTED]  
[REDACTED]. Even if the Commission, Congress, or the public were inclined to believe such a fanciful suggestion, the Merger Parties provide no evidence to support this claim.

Astonishingly, the Merger Parties dispute the fact that at [REDACTED]  
[REDACTED] already sold by both Sirius and XM. On XM's own website a satellite radio receiver sells for \$299.99.<sup>27</sup> Similarly, Sirius sells a satellite radio

<sup>23</sup> See Joint Response Letter at 7.

<sup>24</sup> [REDACTED]

<sup>25</sup> See Testimony of Mel Karmazin, Hearing of the House Judiciary Committee's Antitrust Task Force (Feb. 28, 2007) ("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.").

<sup>26</sup> See Joint Response Letter at 6.

<sup>27</sup> See XM Satellite Radio, <http://xmradio.com/shop/index.xmc> (price before rebate).



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receiver on its website for \$329.99.<sup>28</sup> To suggest that [REDACTED] to existing satellite radio receivers is not simply misleading, it is verifiably false.

**The Interoperable Receiver Requirement Has Not Been Satisfied.** The Merger Parties advocate an interpretation of Section 25.144(a)(3)(ii) of the Commission’s rules that has never been adopted by the Commission.<sup>29</sup> Essentially, the Merger Parties advocate an interpretation of the interoperable receiver requirement that would mean that mere possession of a “design” for an interoperable receiver is all that the Commission required and expected of SDARS licensees. The Joint Response Letter fails to cite legal authority for that unbelievable rule interpretation, because no such authority exists.

To interpret Section 25.144(a)(3)(ii) in this manner would render meaningless the Commission’s clear intention to enable consumers to freely switch between providers when it originally established the rules and policies governing SDARS in 1997.<sup>30</sup> Based on the clear language in those rules and policies, the Commission believed that its rule on receiver interoperability would permit consumers to “access the services from all licensed satellite DARS systems” from a single device.<sup>31</sup> Simply designing an interoperable receiver and [REDACTED] does not provide consumers the ability to access the service from both XM and Sirius from a single device and therefore fails to satisfy the FCC’s rule on receiver interoperability. What is the point of developing a technology to satisfy a license requirement if the technology need not be implemented? Did the FCC plan to inspect the technology in some underground vault, bless its design, and then rule that the Merger Parties had satisfied their requirement? What would be the public interest benefit if that really describes the process that the FCC envisioned?

<sup>28</sup> See Sirius Satellite Radio, [http://shop.sirius.com/edealinv/servlet/ExecMacro?url=control/StoreItem.vm&ctl\\_nbr=2640&siId=2885794&catParentID=7874&scId=7874&oldParentID=&cid=SL2PK1](http://shop.sirius.com/edealinv/servlet/ExecMacro?url=control/StoreItem.vm&ctl_nbr=2640&siId=2885794&catParentID=7874&scId=7874&oldParentID=&cid=SL2PK1).

<sup>29</sup> As pointed out in recent comments filed with the FCC in this proceeding, the Merger Parties’ current interpretation of the interoperability mandate is even at odds with their own previous interpretation, as evidenced in a portion of the Merger Parties’ Joint Development Agreement filed with the SEC on May 12, 2000. See Comments, Blue Sky Services, MB Docket No. 07-57 (June 9, 2008). In the Joint Development Agreement, the Merger Parties state that compliance with the FCC’s interoperable receiver requirement requires them to “jointly develop[] and deploy[] certain interoperable technology for the purpose of producing radios capable of receiving broadcasts from both the XM Radio System and the Sirius Radio System.” See XM Satellite Radio Holdings Inc., SEC Form 10-Q Exhibit 10.29 (May 12, 2000) (emphasis added).

<sup>30</sup> *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 106 (1997) (“*SDARS Order*”).

<sup>31</sup> *Id.* (emphasis added).



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Section 25.144(a)(3)(ii) requires a certification that each SDARS system “includes a receiver that will permit end users to access all licensed satellite DARS systems that are operational or under construction.”<sup>32</sup> When read in conjunction with Report and Order adopting the rule (as quoted above), it is clear that the Commission intended this requirement to result in full marketplace competition between the only two authorized SDARS providers.<sup>33</sup> Not only did the Commission reject a satellite radio monopoly in favor of a competitive duopoly, it stated clearly its objective of creating a marketplace in which consumers could freely switch between SDARS providers.<sup>34</sup> The rule requires interoperable receivers in the hands of consumers, not merely possession of an interoperable receiver design in the hands of XM and Sirius, which was [REDACTED].

The Commission has not clarified whether the interoperable receiver design requirement in Section 25.144(a)(3)(ii) requires simultaneous dual-band capability.<sup>35</sup> If Section 25.144(a)(3)(ii) requires simultaneous dual-band capability, the facts of the marketplace today and the information in the Highly Confidential Documents indicate that the Merger Parties have [REDACTED], and this is in direct contradiction to the arguments in the Joint Response Letter. However, if the rule requires only a satellite radio receiver capable of receiving XM and Sirius without simultaneous activation of both services, there are additional substantial and material issues of fact to be resolved in a hearing. For example, have such receivers (capable of receiving XM and Sirius without simultaneous activations of both systems) been sold in commerce by XM and Sirius?<sup>36</sup> And, if so, have XM and Sirius intentionally deceived the public by not informing consumers of this functionality that

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<sup>32</sup> 47 C.F.R. § 25.144(a)(3)(ii).

<sup>33</sup> See *SDARS Order* at para. 106.

<sup>34</sup> *Id.*

<sup>35</sup> See Notice of *Ex Parte* Presentation, Michael Hartleib, MB Docket No. 07-57 (June 10, 2008) (refiling June 24, 2007 Petition for Declaratory Ruling and asking for the FCC to act on the Petition prior to acting on the proposed merger of XM and Sirius). In his Petition for Declaratory Ruling, Mr. Hartleib asked the Commission to “[p]rovide clarity on the multiple terms they use to describe different, but similar devices (ie: ‘dual mode’, ‘interoperable device’, ‘interoperable radio’, ‘interoperable technology’, etc.).” According to Mr. Hartleib, interoperable radios and dual mode radios are not the same. An interoperable radio is able to “receive and process signals from one or the other service but not both ‘simultaneously’,” while a dual mode radio is able to receive and process signals from both services simultaneously. Mr. Hartleib asserts that XM and Sirius “frequently interchange these terms to confuse the issue and qualify their responses” to the Commission’s inquiries regarding the Merger Parties’ compliance with the interoperable mandate.

<sup>36</sup> Mr. Hartleib asserts that some satellite radio receivers already sold in commerce are capable of receiving either XM or Sirius, but not both simultaneously, with a “firmware update and/or flash of the receiver.”



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would enable them to avoid the costly replacement of their satellite radio receivers when switching providers? In any event, the Merger Parties' claim of compliance is hollow, unless the interoperable receiver certification rule is rendered meaningless through an *ex post facto* arbitrary and capricious interpretation by this Commission.<sup>37</sup>

**Conclusion.** Nothing in the Joint Response Letter or the attached documents illuminates the use of the Highly Confidential Documents by the Board of Managers of Interoperable Technologies or by the member companies, XM and Sirius. Apparently, Mr. DeLuca had high aspirations for [REDACTED], but XM and Sirius feared this [REDACTED]. Evidently, these fears led to the proposed merger as a means to avoid a price war with exposure to full marketplace competition, [REDACTED]. Trade press reports indicate that Sirius began its quest for the merger with XM in June, 2006, almost exactly at the same time [REDACTED].<sup>38</sup> Curiously, the price of XM and Sirius service has been maintained at exactly the same price for years, and there has never been a price war between the two services.

This begs the question: once the interoperable receiver design was completed, what was the purpose of Interoperable Technologies going forward? Was it the vehicle for illegal conspiracy and [REDACTED] between XM and Sirius in violation of the Sherman Act? The answer to this question is relevant to the issue of whether the proposed merger is the culmination of an illegal conspiracy to restrain trade. The entire conspiracy apparently included both the [REDACTED]. In the end, in addition to the many other anticompetitive motivations of the Merger Parties, the proposed merger was the best way for the Merger Parties to avoid the inevitability of full marketplace competition and to suppress the potential for price wars and [REDACTED] when interoperable receivers were available in any of [REDACTED].

In the Joint Response Letter, the Merger Parties confess that they flooded the DOJ with "more than twelve million pages" of documents, while providing only a few thousand documents to the FCC.<sup>39</sup> Therefore, despite the Commission's attempt to build a sufficient

<sup>37</sup> To credit the Merger Parties with compliance for building interoperable capability into their receivers but not telling consumers of this capability would be incomprehensible and contrary to the public interest. Unless consumers are informed of the interoperable capabilities of existing receivers, they cannot avail themselves of these features.

<sup>38</sup> See *Sirius' Karmazin Interested in Buying XM Satellite*, Reuters, June 26, 2006, available at <http://www.foxnews.com/story/0,2933,200993,00.html> (attached hereto beneath Exhibit D).

<sup>39</sup> Joint Response Letter at 8.



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record, the Commission may not have all of the facts. Additional evidence of FCC rule violations likely exists and would surface in a hearing on these issues. Accordingly, the Merger Applications should be designated for hearing.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Julian L. Shepard".

Julian L. Shepard  
Counsel to C3SR

Attachments  
Exhibits A thru D

# **EXHIBIT A**

**REDACTED - FOR PUBLIC INSPECTION**

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# LATHAM & WATKINS LLP

June 2, 2008

## VIA ECFS

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

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Re: Notice of *Ex Parte* Presentation; Consolidated Application for Authority to Transfer Control of XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc., MB Docket No. 07-57

Dear Ms. Dortch:

In accordance with Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, and the Commission's Public Notice dated March 29, 2007 (DA 07-1435), this letter notifies the Commission that on May 30, 2008, Richard E. Wiley, Robert L. Pettit, and Gregg Elias of Wiley Rein LLP, counsel for Sirius Satellite Radio Inc. ("Sirius"), Justin Lilley, President of Telemedia Policy Corp. and consultant to XM Satellite Radio Holdings Inc. ("XM"), and the undersigned of Latham & Watkins LLP, counsel for XM, met with Chairman Kevin Martin, Daniel Gonzalez, FCC Chief of Staff, and Elizabeth Andrion, Chairman Martin's Acting Legal Advisor for Media Issues, to review pending issues raised in recent filings in the above referenced proceeding. Counsel and consultants for Sirius and XM reiterated positions consistent with the parties' filings in this proceeding, and urged prompt approval of the pending merger.

Please contact me with any questions.

Respectfully,

/s/ Gary M. Epstein

Gary M. Epstein  
*Counsel for XM Satellite Radio Holdings Inc.*

cc: Chairman Martin  
Daniel Gonzalez  
Elizabeth Andrion

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June 5, 2008

Robert L. Pettit  
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**VIA ECFS**

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

Re: Notice of *Ex Parte* Presentation; Consolidated Application for Authority to  
Transfer Control of XM Radio Inc. and Sirius Satellite Radio Inc.  
MB Docket No. 07-57

Dear Ms. Dortch:

In accordance with Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, and the Commission's Public Notice dated March 29, 2007 (DA 07-1435), this letter notifies the Commission that on June 4, 2008, Richard E. Wiley, Gregg Elias and the undersigned of Wiley Rein LLP, counsel for Sirius Satellite Radio Inc. ("Sirius"), Gary Epstein of Latham & Watkins LLP, counsel for XM Radio Inc. ("XM"), and Justin Lilley, President of Telemedia Policy Corp. and consultant to XM, met with Chairman Kevin Martin, Daniel Gonzalez, and Catherine Bohigian to review pending issues raised in recent filings in the above-referenced proceeding. Counsel and consultants for Sirius and XM reiterated positions consistent with the parties' filings in this proceeding, and urged prompt approval of the pending merger.

Sincerely,

/s/ Robert L. Pettit

Robert L. Pettit

cc: Chairman Martin  
Daniel Gonzalez  
Catherine Bohigian

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June 9, 2008

Robert L. Pettit  
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VIA ECFS

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

Re: Notice of *Ex Parte* Presentation; Consolidated Application for Authority to Transfer Control of XM Radio Inc. and Sirius Satellite Radio Inc.  
MB Docket No. 07-57

Dear Ms. Dortch:

In accordance with Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, and the Commission's Public Notice dated March 29, 2007 (DA 07-1435), this letter notifies the Commission that on June 6, 2008, Richard E. Wiley of Wiley Rein LLP, counsel for Sirius Satellite Radio Inc. ("Sirius"), met with Commissioner Deborah Taylor Tate to review pending issues raised in recent filings in the above-referenced proceeding. Counsel for Sirius reiterated positions consistent with the parties' filings in this proceeding, and urged prompt approval of the pending merger.

Sincerely,

/s/ Robert L. Pettit

Robert L. Pettit

cc: Commissioner Deborah Taylor Tate

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**LATHAM & WATKINS** LLP

June 10, 2008

**VIA ECFS**

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

Re: Notice of *Ex Parte* Presentation; Consolidated Application for Authority to Transfer Control of XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc., MB Docket No. 07-57

Dear Ms. Dortch:

In accordance with Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, and the Commission's Public Notice dated March 29, 2007 (DA 07-1435), this letter notifies the Commission that on June 9, 2008, the following individuals met with Commissioner Tate and Amy Blankenship, Legal Advisor to Commissioner Tate: Mel Karmazin, Chief Executive Officer of Sirius Satellite Radio Inc. ("Sirius"); Patrick L. Donnelly, Executive Vice President and General Counsel of Sirius; Richard E. Wiley of Wiley Rein LLP, counsel for Sirius; Nate Davis, President and Chief Executive Officer of XM Satellite Radio Holdings Inc. ("XM"); Justin Lilley, President of Telemedia Policy Corp. and consultant to XM; and myself, counsel for XM. XM's and Sirius's representatives reiterated positions consistent with the parties' filings in this proceeding, and urged prompt approval of the pending merger.

Please contact me with any questions.

Respectfully,

/s/ Gary M. Epstein

Gary M. Epstein  
*Counsel for XM Satellite Radio Holdings Inc.*

cc: Commissioner Tate  
Amy Blankenship

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# **EXHIBIT B**

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EX-21.1 2 dex211.htm EXHIBIT 21.1

**XM SATELLITE RADIO HOLDINGS INC. AND SUBSIDIARIES**

**Exhibit 21.1**

**Subsidiaries of XM Satellite Radio Holdings Inc.**

XM Satellite Radio Inc.  
XM 1500 Eckington LLC  
XM Orbit LLC  
XM Investments LLC

**Subsidiaries of XM Satellite Radio Inc.**

XM Radio Inc.  
XM Innovations Inc.  
XM Equipment Leasing LLC  
XM EMail Inc.  
XM Capital Resources Inc.  
Interoperable Technologies LLC (50% owned)

All of these subsidiaries are organized in the State of Delaware and are wholly owned subsidiaries unless otherwise noted.

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# **EXHIBIT C**

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**Interoperable Technologies, LLC.**

All your favorite programming available together for the first time.

**About Us**

Interoperable Technologies, LLC is satellite radio's joint venture. Formed in 2003 as an independent Delaware corporation, our parents are SIRIUS Satellite Radio, Inc. and XM Satellite Radio Inc., who agreed to develop a unified standard for a common receiver platform. The common or dual-mode receiver platform enables consumers to purchase one radio capable of receiving the services of both XM and SIRIUS. The related technology is jointly developed and funded by our parent companies, who share in its ownership. Indeed, in 2005, we substantially completed the design of a radio capable of receiving both services.

It is acknowledged that SIRIUS, XM and their manufacturing partners already produce receivers that permit end users to access all Satellite Digital Audio Radio systems in compliance with FCC interoperability obligations. Furthermore, there currently is no assurance that the XM or Sirius manufacturing partners will build dual-mode radios, that they will be cost competitive, or that any significant market for dual-mode radios will develop. Even so, Interoperable Technologies stands to develop the opportunity for dual-mode satellite radio technology.

Having all XM and SIRIUS programming available together in a single radio can be quite the compelling experience. Or, for those consumers unsure of which of two great services to commit to, offering a choice between SIRIUS or XM - independent of purchased hardware may lower entry barriers and further accelerate the adoption of this exciting new media. To these ends, Interoperable Technologies continues to develop dual-mode receiver technology able to receive either or both satellite radio services.

**Michael J. DeLuca, JD – General Manager**

Prior to joining the satellite radio industry to head Interoperable Technologies, Mike practiced intellectual property law as a partner at Fleit Kain. During the late 1990s, he was Chief IP Counsel at high tech start-ups pioneering S-CDMA technology for the China Telco market and portable digital FM systems for the US market. The first 18 years of Mike's career were with Motorola, where he successfully engineered over a dozen high quality wireless data products for the Japan market. Mike has the unique distinction of being the only practicing attorney to attain both Master Innovator and Science Advisory Board status at Motorola. Mike has over 85 issued US patents in a variety of technologies.



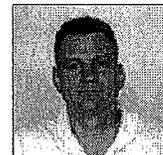
**Paul Kelley – Digital Systems**

Paul Kelley has more than 20 years of engineering experience developing digital solutions for consumer electronics. He is responsible for all aspects of baseband hardware and software development at Interoperable Technologies. Prior to joining the satellite radio industry, he was with Motorola for seven years, where, as a Principal ASIC designer, he developed digital subsystems for the i.250 and i.300 mobile phone platforms and the Flexchip paging IC. Paul was also Director of Product Development at Clariti Telecommunications, where he was responsible for hardware and software development of a wireless voicemail receiver that processed the FM SCA spectrum. Paul has also engineered disk drive and modem technology. He currently has 9 issued US patents.



**Ken Payne – RF Systems**

Ken brings over 20 years of RF/microwave design and development experience with wireless devices. Prior to joining the satellite radio industry, Ken founded his own company that provided worldwide RF/microwave training and consulting in cooperation with Besser Associates and CEI of Europe. Companies including Motorola, Nokia, HP, Lucent, Nortel and Ericsson regularly benefited from Ken's expertise. He developed automated RF design software including the Oscillator DesignGuide for Agilent Technologies. Ken designs high performance, low cost, high volume RF circuits using his command of computer RF circuit simulation software packages including ADS, MDS, and Microwave Office. He has substantial experience with EM simulation tools such as Momentum and HFSS. During his 12 years at Motorola, Ken pioneered active and passive device component modeling and introduced new modeling strategies that increased simulation accuracy by an order of magnitude.



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# **EXHIBIT D**

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## Sirius' Karmazin Interested in Buying XM Satellite

Monday, June 26, 2006

REUTERS ↗

NEW YORK —

Sirius Satellite Radio Inc. (SIRI) Chief Executive Mel Karmazin said Monday that he would like to buy arch-rival XM Satellite Radio Holdings Inc. (XMSR), but price and regulatory hurdles would be an issue.

Karmazin, speaking at a conference in New York, however stressed that Sirius' business plan "doesn't really involve our doing a deal" and indicated he wasn't interested in Sirius being bought.

"Regarding XM - would we like to buy them? Sure. We'd love to buy them. Price would matter, so that would be an issue ... (and) there would definitely be the regulatory issue," he said.

"From our point of view, we don't see — other than if it was in the best interests of our shareholders — that we would be interested ever in being acquired," Karmazin added.

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