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June 25, 2008

Via ECFS

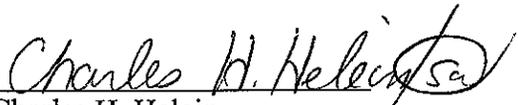
Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: MB Docket No. 07-57

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's Rules, this letter and its attachments is submitted via ECFS for inclusion in the public record of these proceedings, with email copies of this cover letter sent to those listed below. This also records that the subject matters in the attachments were discussed in a meeting of June 24, 2008 with Commissioner McDowell and his Legal Advisor, Angela Giancarlo.

Respectfully submitted,

By: 
Charles H. Helein
Counsel of Record
for U.S. Electronics, Inc.

cc (via email):

Hon. Robert M. McDowell, Commissioner
Angela Giancarlo, Legal Advisor, Office of Commissioner McDowell

EX PARTE MEETING
JUNE 24, 2008
COMMISSIONER ROBERT M. McDOWELL

DOCUMENTS on OPEN DEVICE CONDITIONS

1. Open Device Conditions: Applicants' "Commitment to Open Access" – A Sham
2. Excerpt from June 13, 2008 Ex Parte to Chairman Martin - Quote of Applicants' "Commitment to Open Access"
3. Analysis of Sirius/XM's Open Device Condition – the Need for Effective Conditions
4. Proper Open Access Conditions Ensure Minimal Regulatory Oversight
5. Equipment Authorization of Telephone Terminal Equipment, June 28, 2006
Re: Administrative Council for Terminal Attachments (ACTA).
Telecommunications Certification Body (TCB), 47 CFR §§68.160 and 68.162
Supplier's Declaration of Conformity (SDoC), 47 CFR §68.324
List of TCBs

DOCUMENTS on CHARACTER AND CANDOR
THE NEED FOR INDEPENDENT LABORATORY TESTING
AND INDEPENDENT MONITOR

6. Copy – June 10, 2008 Letter of Senator Sam Brownback To Senator Patrick Leahy stating:

I am troubled by the notion Congress may have been misled in its prior hearings on this merger ..." based on a comparison of "an un-redacted copy of the ... May 27, 2008 letter, from ... Counsel to the Consumer Coalition for Competition in Satellite Radio, ... [that] raises possible contradictions between 'highly confidential' documents filed with the Commission by Sirius ... and testimony given before Congress by Sirius CEO Mel Karmazin.
7. Copy - May 27, 2008 Ex Parte Letter of Consumer Coalition for Competitive Satellite Radio (Redacted).
8. Copy – June 6, 2008 Ex Parte Letter of Wiley Rein LLP - Applicants' Reply to May 27, 2008 Ex Parte Letter of Consumer Coalition for Competitive Satellite Radio (Redacted).
9. Copy – June 10, 2008 Ex Parte Resubmission of Petition for Declaratory Ruling on Interoperability Mandate.

1

Talking Points
Commissioner McDowell Meeting
Tuesday, June 24, 2008, 3:00 pm

Open Access Conditions On
Merger of XM and Sirius

Sirius "Commitment" on "Equipment" Is a Sham.

USE is encouraged that conditioning approval of the merger on open access for satellite radio devices has been recognized by the Commission.

However, USE is very concerned that the Commission not be misled by the so-called "commitment" by Sirius on "Equipment."

The Sirius "commitment" will not result in open access to the merged satellite radio network.¹

The Commission must adopt its own statement of conditions and these must include:

1. Sirius (meaning the merged entity) must be barred from participating, directly, indirectly, by proxy or through favored and/or strategic relationships in hardware (device) manufacturing and in the distribution of the hardware.
2. Sirius must be monitored by an independent body to ensure it complies with Condition No. 1.²
3. Sirius' CEO must be made to certify that it is not participating in any manner in the manufacture or distribution of hardware not less than quarterly in the first year after merger and on an annual basis thereafter.
4. Sirius must be barred from participating, directly, indirectly, by proxy or through favored and/or strategic relationships in evaluating any manufacturer or distributor.
5. Sirius must be barred from participating, directly, indirectly, by proxy or through favored and/or strategic relationships in approving or creating subjective standards for any manufacturer or distributor.

¹ This is clear from the language of Sirius' June 16th "Commitment." Sirius states that under its proposed condition, the combined company would have the right to "require the licensee and qualified manufacturer to satisfy technical and quality assurance standards and tests established by the combined company from time to time and applicable to licensees and qualified manufacturers." This test amounts to the ability of Sirius to pick and choose among manufacturers based on whatever standard may be to its liking, and without oversight. To create an 'open device' system in practice, it is imperative that the 'open device' conditions specified in the Commission's final ruling include sufficient protections to ensure that there will be multiple manufacturers of devices able to provide consumers access to Sirius on an equal basis.

² Eventually, the Commission should be able to rely on independent testing bodies to ensure that satellite radio devices meet common standards to prevent any such devices from posing a risk of technical harm to the satellite radio network in the way the Commission now relies on such bodies to test telephone and other devices to ensure no technical harm is caused to telecommunications networks. The importance of independent testing and monitoring as part of the conditions cannot be overstated. It is especially needed here, as Sirius has a history of not meeting its regulatory commitments. The company has not only previously broken promises to make an interoperable radio available, but now stands accused of misleading the Commission and Congress about interoperability. Other compliance issues have included improper transmitter placement and its failure to meet required limits on emissions.

6. Sirius must be made to grant full access for competing manufacturers and distributors to retail and automotive markets, and unfettered access to all necessary technical requirements, specification and chipsets.

7. Sirius' one-year moratorium on allowing manufacturers access to the satellite radio network must be barred. Open access means authorization for all manufacturers as of the time the merger is approved.

8. Sirius' ability to continue to grant subsidies on a selective basis to favored entities must be barred.

9. Sirius must be barred from taking any action relating to the pricing of receivers.

END

2

EXCERPT FROM EX PARTE TO CHAIRMAN MARTIN
Sirius Satellite Radio Inc. and XM Satellite Radio Holdings, Inc. ("Applicants")
Submitted Friday, June 13, 2008,
Filed Monday, June 16, 2008
Re: Manufacture and Distribution of Satellite Radio Network Devices

Background:

U.S. Electronics, Inc. (USE) has proposed specific conditions to protect consumer choice, innovation, quality of product and competition in the downstream market for consumer products to be used to obtain the services of a merged satellite radio network operator pursuant to MB Docket No. 07-57. USE's proposal has been variously referred to as the "open access," "open device," and "open radio" policy or merger condition (hereinafter, "open device.").

In an ex parte submitted by the Applicants to Chairman Martin on June 13, 2008, the Applicants purport to make a commitment in response to the open device condition. The following excerpt is a verbatim quote of the commitment.

Equipment. The merged company will permit any device manufacturer to develop equipment that can deliver the company's satellite radio service. Device manufacturers will also be permitted to incorporate in satellite radio receivers any other technology that would not result in harmful interference with the merged company's network, including hybrid digital (HD) radio technology, iPod ports, internet connectivity, or other technology. This principle of openness will serve to promote competition, protect consumers, and spur technological innovation. Within one year following the consummation of the merger, the combined company shall offer for license, on commercially reasonable and non-discriminatory terms, the intellectual property it owns and controls of the basic functionality of satellite radios that is necessary to independently design, develop and have manufactured satellite radios (other than chip set technology, which technology includes its encryption and conditional access keys) to any bona fide third party that wishes to design, develop, have manufactured and distribute subscriber equipment compatible with the Sirius system, the XM system, or both. Chip sets for satellite radios may be purchased by licensees from manufacturers in negotiated transactions with such manufacturers. Such technology license shall contain commercially reasonable terms, including, without limitation, confidentiality, indemnity and default obligations; require the licensee to comply with all existing and applicable law, including the rules and regulations of the Federal Communications Commission and applicable copyright laws of the United States; and require the licensee and qualified manufacturer to satisfy technical and quality assurance standards and tests established by the combined company from time to time and applicable to licensees and qualified manufacturers. Further, the merged company will not execute any agreement or take any other action that would bar, or have the effect of barring, a car manufacturer or other third party from including non-interfering HD radio chips, iPod compatibility, or other audio technology in an automobile or audio device. Each licensee shall be responsible for, and bear all costs associated with, the design, development, manufacturing, including parts procurement, logistics, warranty, sales, marketing, and distribution of such satellite radios.

3

Re: Analysis of Inadequacy of Sirius/XM's Proposed 'Open Device' Condition – and the Need for an Effective Condition to Protect Consumers

In considering the proposed merger between Sirius Satellite Radio and XM Satellite Radio, the Federal Communications Commission must remain committed to the critical importance of 'open device', a condition central to consumer protection that has been supported by a host of public interest groups, private companies in the industry and Members of Congress.

A meaningful 'open device' condition will protect consumers and foster innovation by allowing open and fair competition between independent manufacturers and distributors in the satellite radio hardware market. 'Open device' conditions historically have led to innovative new products, greater choice, lower prices, higher quality and better service.

On June 16, 2008, Sirius and XM submitted a list of commitments they are willing to have the merged entity meet. Included in those commitments is a purported commitment to provide 'open device' access. The full text of the purported commitment has been quoted for reference.

Even a cursory reading indicates that the commitment does not provide for open device access, but is in reality not only a sham but if accepted by the Commission would have the effect of allowing the merged entity to create monopoly control over the manufacture and distribution of devices to access the merged satellite radio network in partnership with whomever it may favor as its "partner."

Sirius/XM claim to have accepted the principle of providing an 'open device' condition stating that the "principle of openness will serve to promote competition, protect consumers, and spur technological innovation." But in practice, the proposed 'open device' condition submitted by Sirius/XM would constitute a grossly inadequate means of implementing that principle, and create substantial opportunities for anti-competitive practices and results.

The proposed condition:

- Includes a one-year moratorium on allowing open competition, guaranteeing the merged entity and its preferred provider an advantage over any other potential competitor, dramatically increasing the cost to any independent manufacturer interested in entering the market;
- Provides no independent enforcement mechanism to ensure fair and open access to the network;
- Allows the combined company to continue today's practices of selectively subsidizing and marketing certain devices over others, effectively denying fair competition; and
- Allows the combined company to decide which radio manufacturers are approved, and which are not, perpetuating the market control that exists over devices today.

This is clear from the language of the submission, in which it is stated that under the proposed commitment, the combined company would have the right to “require the licensee and qualified manufacturer to satisfy technical and quality assurance standards and tests established by the combined company from time to time and applicable to licensees and qualified manufacturers.” This test amounts to the ability of the combined company to pick and choose among manufacturers based on whatever standard may be to its liking, without oversight.

To create an ‘open device’ system in practice, it is imperative that the ‘open device’ condition specified in the Commission’s final ruling include sufficient protections to ensure that there will be multiple manufacturers of devices able to provide consumers access to Sirius on an equal basis. At minimum, the Commission should require Sirius to agree to at least the following measures as part of any ‘open device’ conditions:

- No moratorium on allowing other manufacturers access to the satellite radio network, but authorization as of the time of any approval of this proposed merger;
- Free consumer access to the satellite radio network through any device of their choosing, as long as the device does no harm to the network;
- Full access for competing manufacturers and distributors to retail and automotive markets, and unfettered access to all necessary technical requirements, specification and chipsets;
- An independent testing facility, not controlled by the merged company, to certify company’s wishing to enter the market;
- An independent monitor to ensure the combined company’s compliance with FCC rules and regulations, including the stipulations of the ‘open device’ condition; and
- Prohibitions on the combined company that ensure it will not:
 - Engage in any anti-competitive or exclusive agreement relating to the service;
 - Undertake any action relating to the pricing of receivers; or
 - Participate or own any company that is involved directly or indirectly in manufacturing, selling, leasing or distributing receivers.

The importance of independent testing and monitoring as components of the open device access conditions cannot be overstated. Independent testing is a logical condition to discourage anti-competitive practices under any circumstances. It is especially needed here, as both Sirius and XM have a history of not meeting its regulatory commitments. These companies have previously broken promises to make an interoperable radio available. Their compliance issues have included improper transmitter placement and its failure to meet required limits on emissions. In light of this history, independent oversight is essential to ensure that the Commission’s goals are met should this merger be approved.

Direct limitations on the combined company’s ability to engage in anti-competitive practices are also essential. It is not reasonable to believe that the combined company would treat third parties on an equal basis if it has economic interests in or a relationship with a particular manufacturer. The combined company’s economic interest as a provider of satellite

radio services needs to be decoupled from any economic interests it may have relating to the equipment receiving its services so that it cannot maintain anti-competitive advantages and thereby control the market to the detriment of competitors and consumers alike.

Finally, in light of the extensive Congressional, media, and public concern about this merger, it is essential that the Commission take a considered approach to reviewing the so-called open access commitment of Sirius/XM to ensure that no approval is given in the absence of meaningful conditions to ensure that the combined company cannot undermine the "open device" conditions to the detriment of competition and consumer choice.

U.S. Electronics, Inc.
Charles H. Helein,
Counsel of Record

June24, 2008

4

Talking Point – Proper Open Access Conditions Ensure Minimal Regulatory Oversight

Reliance on Independent Laboratories Capable of Certifying Satellite Radio Devices

The following is an outline of the implementation process that would be associated with the adoption of meaningful open access conditions as proposed by U.S. Electronics. An important part of that process involves the use of independent testing laboratories that to ensure compliance with reasonable technical specifications for devices would examine, test and approve devices meant to access a merged Sirius satellite radio network. This is of course a process that has worked successfully for the telephone network for the past 30 or so years. Also attached is information on existing independent laboratories that could perform this important function.

Implementation Process

For an independent lab to be able to examine a device for compliance, it only needs the technical parameters to be specified. Under Part 68 for the telephone industry, the myriad devices tested for interconnection come with a wide variety of technical specifications and the labs simply adapt once they have the information about the devices themselves. Importantly, it is the manufacturers that first design their devices to meet the network requirements once those are published. The labs simply verify that the manufacturers "got it right."

Here are the steps in the process.

1. The FCC and manufacturers would collaborate on standards for receivers to be able to receive the merged company's transmissions that are fair, reasonable and non-discriminatory;
2. The merged entity would be required to publish standards;
3. Once agreed upon and published, the manufacturers design, develop and produce their prototype devices to meet the established standards;
4. In the meantime, the labs also would have obtained and studied the established standards. Thereafter, the labs would put in place the tools and expertise necessary to examine whether a manufacturer's device meets the standards so that it can certify the device as compliant;
5. The labs may also be required to update the information the FCC has on their own capabilities to certify receivers. This step could be taken while the manufacturers are developing their devices;
6. The lab certification program is then put in place and manufacturers select the lab to which they wish to send their prototypes for certification, paying the labs for their review and certification;
7. Once the labs have so certified and issued their reports, the manufacturer files to register its device with the FCC as compliant with the FCC specifications adopted from the merged specifications as may have been modified by public comment.

In such a program, there is no need for the merged entity and the manufacturers to interface. Indeed, the process is intended to prevent the merged entity from controlling or favoring any device.

If in the unlikely event a device meets the criteria but in actual operation causes interference or does not work, the device would be barred from use, and the responsible company would be prohibited from marketing or selling the device. Because these are "receivers", the only real problem possible is that they don't work. As receivers, it is highly unlikely that they can cause any interference because they only receive, and do not transmit, a signal.

5

Equipment Authorization of Telephone Terminal Equipment

June 28, 2006

The FCC has minimized the government's role in the equipment authorization of Telephone Terminal Equipment (TTE) by privatizing significant portions of its rules¹ regulating the connection of customer premises equipment to the public switched telephone network and certain private-line services. The FCC has privatized both the standards development and terminal equipment approval processes.

To provide for the management of the technical and administrative requirements as well as the management of the equipment authorization program, the FCC mandated the establishment of the Administrative Council for Terminal Attachments (ACTA). ACTA was formed through the co-sponsorship and support of the Alliance for Telecommunications Industry Solutions (ATIS) and Telecommunications Industry Association (TIA).²

TTE connected to the public network and private-line services, must comply with the applicable Part 68 rules and regulations and with the applicable ACTA-adopted technical criteria, labeling requirements, and customer information requirements.

There are two approval methods³ recognized by the FCC:

- Telecommunications Certification Body (TCB) – Subject to the FCC Rules governing the TCB Program⁴
- Supplier's Declaration of Conformity (SDoC)⁵ – SDoC is a procedure where the Responsible Party⁶ makes measurements or takes other necessary steps to ensure that the terminal equipment complies with the appropriate technical standards

Questions regarding TTE requirements and equipment authorization should be addressed to ACTA. (www.part68.org)

¹ See "In the matter of 2000 Biennial Regulatory Review of Part 68 of the Commission's Rules and Regulations", Report and Order, FCC 00-400.

² See "Sponsor of the Administrative Council for Terminal Attachment", 47 C.F.R. §68.68.602.

³ See "Connection to the Public Switched Telephone Network", 47 C.F.R. §68.201.

⁴ See "Designation of Telecommunication Certification Bodies (TCBs)", 47 C.F.R. §68.160, and "Requirements for Telecommunications Certification Bodies", §68.162.

⁵ See "Supplier's Declaration of Conformity requirements", 47 C.F.R §68.324.

⁶ See 47 C.F.R. §68.3, Responsible Party.

List of Recognized Telecommunications Certification Bodies
Scope C – Telephone Terminal Equipment

The following is a list of Telecommunication Certification Bodies (TCBs) recognized by the FCC to perform equipment authorizations under Scope C – Telephone Terminal Equipment:

ORGANIZATION	ADDRESS	CONTACT INFO
Germany		
BZT-ETS Certification GmbH	Storkower Strasse 38c D-15526 Reichenwalde Germany	Dieter Griep Phone: 49-33631-888-220 Email: griep@ets-bzt.com
EMCC Dr. Rasek	Moggast D-91320 Ebermannstadt Germany	Werner Rasek Phone: 49-9194-9016 Email: Emc.cert@emcc.de
Netherlands		
Telefication BV	Edisonstraat 12a NL-6902 PK Zevenaar Netherlands	Wouter Blom Phone: 31-316-583-180 Email: certification@telefication.com
Singapore		
PSB Corporation Pte. Ltd.	No. 1 Science Park Drive Singapore 118221	Chiew Wan Tan Phone: 65-6885-1265 Fax: 65-6776-9725 Email: chiew-wan.tan@psbcorp.com
United Kingdom		
British Approvals Board for Telecommunications – BAPT	Claremont House 34 Molesey Road Walton-on-Thames Surrey KT12 4RQ United Kingdom	Hilton Carr Phone: 44-1329-443-325 Email: Hilton.carr@bapt.com
KTL	Saxon Way Priory Park West Hull HU13 9PB United Kingdom	Mr. J. S. Harros Phone: 44-1482-801-801 Fax: 44-1482-801-806 Email: info@kti.com
United States		

ORGANIZATION	ADDRESS	CONTACT INFO
Bay Area Compliance Laboratory Corporation	230 Commercial St. Suite 2 Sunnyvale, CA 94086	Mr. John Chan Phone: 408-732-9162 Fax: 408-732-9164 Email: johnc@baclcorp.com
CKC Certification Services	4933 Sierra Pines Dr. Mariposa, CA 95338	Mr. Steve Behm Phone: 209-966-5240 Fax: 209-742-6133 Email: steve.behm@ckc.com
Communication Certification Laboratory	1940 W. Alexander St. Salt Lake City, UT 84119	Mr. Thomas Jackson Phone: 801-972-6146 Fax: 801-972-8432 Email: KPT@cclab.com
Compatible Electronics, Inc.	114 Olinda Drive Brea, CA 92823	Mr. Jeff Klinger Phone: 714-579-0500 Fax: 714-528-1992 Email: jeff@ceelectronics.com
Curtis-Straus LLC	527 Great Road Littleton, MA 01460	Mr. Barry Quinlan Phone: 978-486-8880 Fax: 978-486-3529 Email: bquinlan@curtis-straus.com
Elite Electronic Engineering, Inc.	1516 Centre Circle Downers Grove, IL 60515	Mr. Richard King Phone: 630-495-9770 Fax: 630-495-9785 Email: sales@elitetest.com
Intertek Testing Services, NA Inc.	3933 U.S. Route 11 PO Box 2040 Cortland, NY 13045	Mr. Paul Moliski Phone: 607-753-6711 Fax: 607-756-9891 Email: pmoliski@itsqs.com
	70 Codman Hill Road Boxborough, MA 01719	Phone: 978-263-2662 Fax: 978-263-7086
MET Laboratories, Inc.	914 W. Patapsco Ave. Baltimore, MD 21230	Ms. Marie Confroy Phone: 410-354-3300 x 412 Fax: 410-354-3323 Email: Mconfroy@metlabs.com

ORGANIZATION	ADDRESS	CONTACT INFO
PCTEST Engineering Laboratory, Inc.	6660-B Dobbin Road Columbia, MD 21045	Mr. Randy Ortanez Phone: 410-290-6652 Fax: 410-290-6654 Email: randy@pctestlab.com
Timco Engineering, Inc.	849 NW State Road 45 P.O. Box 370 Newberry, FL 32669	Mr. Sid Sanders Phone 352-472-5500 Fax 352-472-2030 Email : sid@timco.cc
TUV Rheinland of North America, Inc.	Product Safety Division 12 Commerce Road Newtown, CT 06470	Mr. Timothy Dwyer Phone: 203-426-0888 Fax: 203-270-8883 Email: tdwyer@us.tuv.com
Underwriters Laboratories, Inc.	333 Pfingsten Road Northbrook, IL 60062	Ms. Jodine Smyth Phone: 847-272-8800 x42418 Fax: 847-559-9795 Email: Jodine.e.smyth@us.ul.com
	1655 Scott Boulevard Santa Clara, CA 95050-4169	Phone: 408-985-2400 Fax: 408-296-3256

6

SAM BROWNBACK
KANSAS

(202) 224-6521 PHONE
(202) 228-1265 FAX

COMMITTEES:
APPROPRIATIONS
JOINT ECONOMIC
JUDICIARY
UNITED STATES
HELSINKI COMMISSION

United States Senate

WASHINGTON, DC 20510-1604

June 10, 2008

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy:

As a member of the Subcommittee on Antitrust, Competition Policy and Consumer Rights, I am writing to request that you seek for all members of the Judiciary Committee an un-redacted copy of the enclosed May 27, 2008 letter, from Julian Shepard, Counsel to the Consumer Coalition for Competition in Satellite Radio, to the Federal Communications Commission (FCC). The letter raises possible contradictions between "highly confidential" documents filed with the Commission by Sirius Satellite Radio and testimony given before Congress by Sirius CEO Mel Karmazin. In its redacted form, this letter is a public document. It was provided to me and other members of the Subcommittee by former U.S. Attorney General Dick Thornburgh, also Counsel to the Consumer Coalition for Competition in Satellite Radio. The redacted letter raises issues of great importance to the full Committee and the Subcommittee in our oversight of the enforcement of our Nation's antitrust laws. These issues must be investigated fully by the Committee before the FCC reaches its final decision on the proposed merger of Sirius and XM.

The public interest standard applied to merger reviews by the FCC includes consideration of the antitrust laws. The enclosed letter raises issues of a serious nature under the antitrust laws which require a review of certain non-public documents in the possession of the FCC. I am very troubled by the notion that Congress may have been misled in its prior hearings on this merger and I believe that the Committee must have access to all of the facts so that we can provide effective oversight of this proposed merger. Inasmuch as the enclosed letter refers to information subject to an FCC protective order, it may be necessary for the Committee to subpoena this information, in addition to the unredacted letter, from the FCC.

The Judiciary Committee must be confident that all the important antitrust issues before both the U.S. Department of Justice and the FCC have been properly considered before a final merger approval is given.

The integrity of government decision-making affecting competition, markets and antitrust law enforcement is at stake in this matter. It is our duty to oversee the process on this merger to ensure that justice is done.

Sincerely,



Sam Brownback
United States Senator

612 SOUTH KANSAS AVENUE
TOPEKA, KS 66603
(785) 233-2503 PHONE
(785) 233-2616 FAX

1001-C NORTH BROADWAY
PITTSBURG, KS 66762
(620) 231-6040 PHONE
(620) 231-6347 FAX

811 NORTH MAIN STREET, SUITE A
GARDEN CITY, KS 67846
(620) 275-1124 PHONE
(620) 275-1837 FAX

245 NORTH WACO, SUITE 240
WICHITA, KS 67202
(316) 264-8066 PHONE
(316) 264-9078 FAX

11111 WEST 95TH, SUITE 245
OVERLAND PARK, KS 66214
(913) 492-6378 PHONE
(913) 492-7253 FAX

www.senate.gov/~brownback

Cc: Senator Arlen Specter
Senator Herb Kohl
Senator Orrin Hatch

7



WILLIAMS MULLEN

Direct Dial: 202.293.8111
jshepard@williamsmullen.com

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).

A Professional Corporation



REDACTED – FOR PUBLIC INSPECTION

WILLIAMS MULLEN

Direct Dial: 202.293.8111
jshepard@williamsmullen.com

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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1666 K Street, N.W., Suite 1200 Washington, D.C. 20006 Tel: 202.833.9200 Fax: 804.783.6507 or 202.293.5939
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May 27, 2008
Page 2

WILLIAMS MULLEN

[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).



May 27, 2008
Page 3

WILLIAMS MULLEN

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).



May 27, 2008
Page 4

WILLIAMS MULLEN

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]

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] 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).



May 27, 2008
Page 5

WILLIAMS MULLEN

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.*



May 27, 2008
Page 6

WILLIAMS MULLEN

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]

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]



May 27, 2008
Page 7

WILLIAMS MULLEN

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).



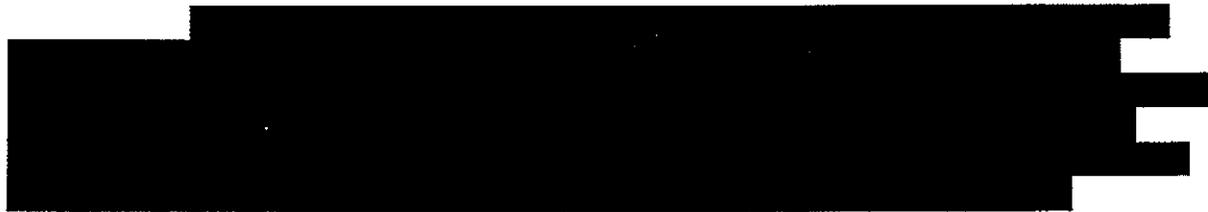
May 27, 2008

WILLIAMS MULLEN

Page 8

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]

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]



May 27, 2008
Page 11

WILLIAMS MULLEN

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.

Table Of Contents

	<u>Page</u>
FEBRUARY 28, 2007 TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE'S ANTITRUST TASK FORCE.....	1
MARCH 7, 2007 TESTIMONY BEFORE THE HOUSE ENERGY AND COMMERCE COMMITTEE'S SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET	4
APRIL 17, 2007 TESTIMONY BEFORE THE SENATE COMMITTEE ON COMMERCE, SCIENCE & TECHNOLOGY.....	6
MORE REVELATIONS ABOUT INTEROPERABLE RADIOS	8

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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: HB 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, 8831 (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. Worthington, XM Radio Inc., and Robert D. Briskman, Sirius Satellite Radio Inc., to Magalie Rouan Salas, FCC, dated Oct. 6, 2000 (*October 6 Letter*).

Mr. Patrick L. Donnelly

Page 2

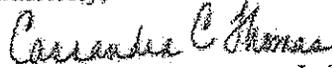
head unit, antenna, and an interchangeable trunk-mounted box containing processing elements for both company's signals.⁶

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. Foyz
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 Rcd at 7990 (para. 42).

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



International Bureau

Federal Communications Commission
Washington, DC 20554

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-931/15/93; 83/83-SAT-AMEND-933/10/95

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. rel. Jan. 26, 2005).

⁵ Letter from John R. Wornington, XM Radio Inc., and Robert D. Briskunan, 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,

Thomas S. Teyz
Thomas S. Teyz
Chief
Satellite Division

cc: Bruce D. Jacobs
David S. Konezal
Counsel
Shaw Pittman LLP
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 Lou 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
Page 2

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.

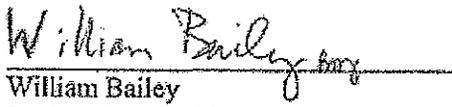
Simply put, Sirius and XM have invested considerable time, effort and money designing, launching and operating systems compliant with the Commission's rules, including an interoperable radio design offered to manufacturers. The companies are continuing those efforts to streamline and improve that design.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

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

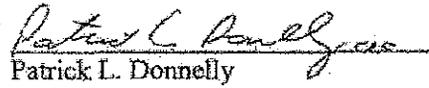
interoperable radios, however, will depend in large part on factors outside of the control of either XM or Sirius, including consumer demand for interoperability and the willingness of manufacturers to manufacture, distribute, market and sell interoperable radios after carefully weighing the integration,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

8



Stamp and Return

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www.wileyrein.com

June 6, 2008

Jennifer D. Hindin
202.719.4975
jhindin@wileyrein.com

FILED/ACCEPTED
JUN - 6 2008
Federal Communications Commission
Office of the Secretary

VIA HAND DELIVERY

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

Re: REDACTED - FOR PUBLIC INSPECTION
MB DOCKET NO. 07-57

Dear Ms. Dortch:

In accordance with the Order adopting the Protective Order,¹ the Order adopting the Second Protective Order,² and the instructions we have received from the staff of the Media Bureau, enclosed please find two *redacted* copies of the attached written ex parte presentation.

Per the Protective Orders, Sirius is filing today, under separate transmittal, one redacted, public version of these documents via ECFS and one unredacted paper copy of these documents with the Secretary's Office. In addition, two unredacted paper copies are being hand-delivered to Jamila Bess Johnson of the Industry Analysis Division of the Media Bureau.

The unredacted version of confidential information will be made available for inspection, pursuant to the terms of the First Protective Order or the Second Protective Order, as applicable, at the offices of Wiley Rein LLP, 1776 K Street NW, Washington, D.C. 20006. Counsel for parties to this proceeding should contact Peter D. Shields at (202) 719-3249 or Nicholas M. Holland at (202) 719-4632 to coordinate access after they comply with the terms of the First Protective Order or Second Protective Order, as applicable. Parties seeking access to Confidential or Highly Confidential documents should serve the required

¹ *Applications of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. For Approval to Transfer Control*, MB Docket No. 07-57, Protective Order, DA 07-3135 (rel. Jul. 11, 2007) ("First Protective Order").

² *Applications of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. For Approval to Transfer Control*, MB Docket No. 07-57, Protective Order, DA 07-4666 (rel. Nov. 16, 2007) ("Second Protective Order").



Marlene H. Dortch

June 6, 2008

Page 2

Acknowledgement of Confidentiality on Peter D. Shields and Nicholas M. Holland
at Wiley Rein LLP, 1776 K Street, NW, Washington, D.C. 20006.

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

A handwritten signature in cursive script that reads "Jennifer D. Hindin".

Jennifer D. Hindin

Enclosures

cc: Jamila Bess Johnson, Industry Analysis Division, Media Bureau

**REDACTED
FOR PUBLIC INSPECTION**

June 6, 2008

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

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

Dear Ms. Dortch:

Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc., by counsel, hereby reply to the May 27, 2008 request by the Consumer Coalition for Competition in Satellite Radio (the "NAB Coalition")¹ that the Commission designate the above-captioned applications for hearing and "commence an investigation leading to appropriate enforcement actions."² The NAB Coalition's Filing is yet another salvo in the National Association of Broadcasters' long campaign to prevent the merger of XM and Sirius and forestall the creation of a stronger competitor for terrestrial radio.

The NAB Coalition Filing is replete with misstatements of law and false allegations regarding the purpose and production of certain highly confidential documents. Far from demonstrating a violation of the FCC's requirements, the documents reflect the substantial efforts Sirius and XM made not only to design an interoperable radio but also to analyze the possible production and commercial introduction of interoperable radios. Furthermore, the NAB Coalition Filing is procedurally deficient and falls far short of establishing substantial and material questions of fact

¹ As the Commission is aware, the Consumer Coalition for Competition in Satellite Radio in actuality is a handful of law students, funded by the National Association of Broadcasters and organized by an "executive director" who once was a full-time lobbyist employed by the law firm that represents the Coalition. See Joint Opposition to Petitions to Deny and Reply Comments of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. at 6-7, n.17 (filed July 24, 2007) ("Joint Opposition").

² See Written Ex Parte Presentation from Julian L. Shepard, Counsel to the NAB Coalition to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 07-57 (filed May 27, 2008) ("NAB Coalition Filing").

Ms. Marlene H. Dortch
June 6, 2008
Page 2

that would require designation for an evidentiary hearing. Accordingly, the Commission should dismiss or deny the NAB Coalition Filing.

I. The NAB Coalition's Request Blatantly Mischaracterizes the Interoperability Requirements, Ignores the Companies' Compliance With These Requirements, and Should be Denied.

The NAB Coalition claims that Sirius and XM failed to comply with the Commission's directive to design an interoperable receiver. Sirius and XM have repeatedly and exhaustively described their compliance with the Commission's interoperability requirement in earlier filings in this proceeding.³ The NAB Coalition ignores this explanation and its own previous statements⁴ and now claims that the applicable rules required Sirius and XM to produce and market an interoperable radio, when in fact the rules required only that the companies develop designs for such a radio – a requirement they fully met. This claim has been made repeatedly by the broadcaster interests, despite a clear statement from the Commission regarding what is required with respect to interoperable radios.

The NAB Coalition blatantly ignores the inconvenient truth: In its implementing rules for the satellite radio service, the FCC required all satellite radio licensees *to develop designs* for an

³ XM Satellite Radio Holdings Inc., Transferor, and Sirius Satellite Radio Inc., Transferee, Consolidated Application for Authority to Transfer Control of XM Radio Inc. and Sirius Satellite Radio Inc., MB Docket No. 07-57, File Nos. SAT-T/C-20070320-00054, SAT-T/C-20070320-00053, SES-T/C-20070320-00380, SES-T/C-20070320-00379, SES-T/C-20070625-00863, ULS 0002948781, 004-EX-TC-2007 at 15-16, n.37 (citing certification letters) (filed Mar. 20, 2007) (“Application”); Joint Opposition at 95-96.

⁴ See Petition to Deny of the Consumer Coalition for Competition in Satellite Radio, MB Docket No. 07-57 at 12 (filed July 9, 2007) (acknowledging that any obligation to produce an interoperable radio is only derived from what the NAB Coalition claims is the “spirit” of the Commission's pronouncements rather than the black-letter requirements).

**REDACTED
FOR PUBLIC INSPECTION**

Ms. Marlene H. Dortch
June 6, 2008
Page 3

interoperable radio⁵ and to certify that they had done so.⁶ Sirius and XM have fully complied with this requirement.

The NAB Coalition relies upon unsupported assertions as to the “spirit” and “intent” of the implementing rules and the satellite companies’ licenses to argue that they required the companies to manufacture, import, distribute, deploy, market, sell or subsidize interoperable radios. Nothing could be farther from the truth. The relevant provisions are unambiguous. The implementing rules and license conditions merely require the licensees to design an interoperable receiver. The Commission left the decision to manufacture, import, distribute, deploy, market and sell interoperable radios to the private sector.

As reflected in a thorough review of the documents submitted to the Justice Department and the FCC, Sirius and XM have gone well beyond the FCC’s mandate to simply design an interoperable radio. In fact, Sirius and XM, through a Joint Development Agreement, have developed and built prototype interoperable radios. The companies have not taken the ultimate step of bringing interoperable radios to market – a step that was not mandated by the Commission – because it would not make economic sense for them to do so, since they ordinarily subsidize the production of their radios and would not be assured of recouping these subsidies for interoperable radios through subscription fees. Without such subsidies, the interoperable radios’ cost would make them not commercially viable. The NAB Coalition seeks an interpretation of the relevant provisions inconsistent with their plain meaning and

⁵ See *Establishment of Rules and Policies for the Digital Audio Radio Satellite Svc. in the 2310-2360 MHz Frequency Band*, Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5754, 5795-98 (¶¶ 102-07) (1997).

⁶ 47 C.F.R. § 25.144(a)(3)(ii). Consistent with this requirement, Sirius’ license contains a condition that Sirius certify “that its final receiver design is interoperable” with respect to XM’s final receiver design. *Satellite CD Radio, Inc., Application for Authority to Construct, Launch and Operate Two Satellites in the Digital Audio Radio Service*, Order and Authorization, 13 FCC Rcd 7971, 7995 (¶ 57) (1997) (“*Sirius Authorization Order*”). XM’s license contains virtually the same condition with respect to Sirius’ receiver design. *American Mobile Radio Corporation, Application for Authority to Construct, Launch, and Operate Two Satellites in the Satellite Digital Audio Radio Service*, Order and Authorization, 13 FCC Rcd 8829, 8830 (¶ 54) (1997) (“*XM Authorization Order*”).

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FOR PUBLIC INSPECTION**

Ms. Marlene H. Dortch
June 6, 2008
Page 4

unambiguous language, which would have resulted in an onerous commercial burden on two unprofitable companies that have billions of dollars in accumulated losses.

Sirius and XM fully complied with the Commission's requirement by certifying to the Commission that they jointly completed a design for an interoperable radio. This compliance has now been a matter of public record for over two years.⁷ Sirius and XM have been entirely candid with the Commission with regard to the design of interoperable receivers, and nothing that the NAB Coalition has put forth shows otherwise. When asked by the Commission staff in writing for an update on their design efforts, Sirius and XM provided their best assessment. When a prototype interoperable radio was produced, XM and Sirius provided it to the staff of the International Bureau and the Enforcement Bureau.

Remarkably, the NAB Coalition's entire argument is based on a distorted reading of four documents culled from more than twelve million pages submitted to the United States Department of Justice as part of the merger review process and thousands of pages of documents provided to the FCC demonstrating compliance with the FCC's interoperability rule. It is essential to understand that these four documents were not prepared by either Sirius or XM, but rather by Interoperable Technologies LLC ("Interoperable Technologies"), a joint venture created by Sirius and XM to further design and develop interoperable radio technologies. Rather than revealing any lack of candor or antitrust violations, as spuriously alleged by the NAB Coalition, the documents cited by the NAB Coalition show that Sirius and XM forthrightly explored avenues to [REDACTED]

Michael DeLuca, Vice President and General Manager of Interoperable Technologies, drafted the highly confidential documents cited by the NAB Coalition. Mr. DeLuca's responsibility at Interoperable Technologies was to develop interoperable radio technology. Mr. DeLuca is an engineer and he also has a law degree. As he notes in his attached Declaration, neither he nor anyone at Interoperable Technologies "had the expertise necessary to know whether the proposals suggested by the documents were feasible or would result in a profitable business centered around interoperable radio."⁸ He has no experience in business planning, finance,

⁷ Application at 15-16, n.37 (citing certification letters); Joint Opposition at 96, n. 339.

⁸ Declaration of Michael DeLuca, ¶ 8 ("DeLuca Declaration") (attached).

**REDACTED
FOR PUBLIC INSPECTION**

Ms. Marlene H. Dortch
June 6, 2008
Page 5

marketing, retail distribution and logistics, customer service or any other expertise that is required to market interoperable radios to the public and, in fact, "Interoperable Technologies employs no marketing staff, advertising staff, programming staff, or the other staff necessary to operate a conventional satellite radio company."⁹

As the attached declaration makes clear, Mr. DeLuca's white papers are the aspirational hopes of an engineer who had spent considerable time developing interoperable technology. They are not – and were not intended to be – a business plan or detailed product launch plan for interoperable radios, and no sophisticated business person would ever mistake them for such plans. Moreover, Mr. DeLuca's views did not represent Sirius' or XM's views. Mr. DeLuca has specifically noted that these documents "did not, and were not intended to, reflect the business judgment of Sirius or XM, and they were never endorsed or otherwise adopted by Sirius or XM."¹⁰

As the leader of this joint venture, Mr. DeLuca had every incentive to promote the interoperable radio, but his [REDACTED] are not representative of the companies' business plans or conclusions.¹¹ In fact, the documents themselves recognize the limitations of these proposals and estimates. For example, Mr. DeLuca states in one document that [REDACTED]

[REDACTED]¹² Additionally, he notes that, [REDACTED]

[REDACTED]¹³ Accordingly, a fair and complete review of the documents themselves undercuts the NAB Coalition's arguments.

⁹ *Id.* ¶ 3.

¹⁰ *Id.* ¶ 2.

¹¹ For additional information on the purpose of Interoperable Technologies LLC, see DeLuca Declaration, ¶¶ 2-5 ("DeLuca Declaration").

¹² SIRIUS-FCC-SUPP.001085.

¹³ SIRIUS-FCC-SUPP.001088.

**REDACTED
FOR PUBLIC INSPECTION**

Ms. Marlene H. Dortch
June 6, 2008
Page 6

The NAB Coalition nevertheless tries to make the case that [REDACTED] made by a joint venture company that was not responsible for any business or marketing planning processes related to satellite radio are proof of Sirius' and XM's lack of candor. Despite the extensive verbiage, however, their arguments are not supported by the facts. For example, the NAB Coalition repeatedly cites [REDACTED]

[REDACTED]¹⁴ The NAB Coalition claims that this the statements of Sirius' Chief Executive Officer, Mel Karmazin, in Congressional testimony that an interoperable radio would cost around \$700 without a subsidy.¹⁵ These statements are not inconsistent because they relate to two different things. Interoperable Technologies' [REDACTED] takes into account only [REDACTED]

[REDACTED]. This estimate [REDACTED]

[REDACTED]¹⁶ As noted by Mr. DeLuca, that price also "does not include any [REDACTED]

Moreover, the NAB Coalition's assertion that [REDACTED] is untrue. Today, Sirius satellite radios are available nationwide at RadioShack and Wal-Mart for approximately \$29 and XM satellite radios are available nationwide starting at similar price points. Most Sirius and XM radios, even those distributed nationally through large volume "big box" retailers, cost less than \$100, and the most expensive comparable radios cost about \$170.

¹⁴ See NAB Coalition Filing at 6, and Exhibit 1 at 2, 5, 6 and 7.

¹⁵ See NAB Coalition Filing, Exhibit 1 at 2.

¹⁶ DeLuca Declaration, ¶ 14.

¹⁷ *Id.* ¶ 11.

Ms. Marlene H. Dortch
June 6, 2008
Page 7

The NAB Coalition also expresses concern about [REDACTED]

Contrary to NAB Coalition's insinuations, there was nothing untoward about this decision. Neither Sirius nor XM was ever required to mass produce and distribute interoperable radios on its own part. Each was free to make its own decision [REDACTED]

Consequently, the NAB Coalition's claims that [REDACTED]

[REDACTED] are patently false. At most, the documents cited by the NAB Coalition reveal the aspirations of one person, employed by a joint venture charged with promoting interoperable radios, who was not engaged to evaluate the practical distribution and sale of interoperable radios, and whose directive was to develop interoperable technologies. As is clear on their face, these limited documents simply do not reflect [REDACTED]

The NAB Coalition's Exhibit 1 professes to show discrepancies between Mel Karmazin's testimony and Interoperable Technologies' documents. In fact, the Exhibit is nothing more than a repetitive and misleading manipulation of four out of twelve million pages of documents. Mr. Karmazin's statements regarding interoperable radios were, and continue to be, accurate. Mr.

Ms. Marlene H. Dortch
June 6, 2008
Page 8

DeLuca's Declaration both disputes the NAB Coalition's portrayal and supports Mr. Karmazin's statements.

II. The Department of Justice Has Already Decided That the Proposed Merger Presents No Antitrust Concerns.

The NAB Coalition also alleges that Sirius' and XM's actions constitute a Sherman Act violation and invites the Commission to share certain highly confidential documents with the Department of Justice for investigation.¹⁹ As the Commission is fully aware, all of the documents to which NAB Coalition refers were provided to the Department of Justice by the companies. In fact, as indicated above, the Justice Department was provided with over twelve million pages related to this merger, took numerous depositions, heard at length from opponents of the merger, and fully and exhaustively analyzed this transaction over a period of many months. Far from finding Sherman Act violations, the Justice Department concluded, after reviewing the very documents cited by the NAB Coalition, that the merger of Sirius and XM will not result in any anti-competitive harm.

III. The NAB Coalition's Request That the FCC Deny the Merger Application or Designate the Merger for Hearing is Procedurally Deficient and Should be Dismissed.

The NAB Coalition's filing is procedurally defective. In everything but title, the NAB Coalition's most recent filing is a petition to deny. In fact, the NAB Coalition Filing cites Section 310(d) of the Communications Act in concluding that their allegations "raise material questions of fact regarding the proposed merger" that require the applications to be denied or designated for evidentiary hearing.

However, the Commission's rules clearly require petitions to deny and petitions for other forms of relief to be filed within 30 days after the date of public notice of acceptance for filing of an application or major amendment.²⁰ The FCC issued a public notice accepting the Sirius-XM

¹⁹ NAB Coalition Filing at 3.

²⁰ 47 C.F.R. § 25.154(a)(2).

**REDACTED
FOR PUBLIC INSPECTION**

Ms. Marlene H. Dortch
June 6, 2008
Page 9

merger for filing on June 8, 2007.²¹ As such, all petitions to deny were required to be filed almost a year ago, by July 9, 2007.²²

Additionally, the NAB Coalition Filing is substantively deficient. Pursuant to Section 309(d)(1) of the Communications Act and by operation of long-standing Commission precedent, petitions to deny or to designate an application for hearing “shall contain specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent” with a finding that the application is in the public interest, convenience, and necessity and, where appropriate, must be supported by an affidavit of person or persons with personal knowledge of these facts.²³ The NAB Coalition Filing contains no such showing – supported by affidavit or otherwise – but relies, instead, as demonstrated above, on speculative statements and surmised interpretation. Accordingly, the NAB Coalition Filing should be denied.

²¹ See Public Notice, *Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. Seek Approval to Transfer Control of FCC Licenses and Authorizations*, MB Docket No. 07-57, DA 07-2417 (June 8, 2007).

²² *Id.* In part, of course, the NAB Coalition relies on the highly confidential documents filed by Sirius and XM on April 10, 2008, in response to a document request from the FCC staff. See Letter from Jennifer D. Hindin, Counsel for Sirius Satellite Radio Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 07-57 (filed Apr. 10, 2008); Letter from Gary M. Epstein, Counsel for XM Satellite Radio Holdings Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 07-57 (filed Apr. 10, 2008). The Commission’s rules do not provide for a new filing period to be opened on the event of the filing of these documents. But even if this submission had opened a new filing period, any petition responding to that filing would have been due by May 12, 2008, *more than two weeks before the NAB Coalition got around to submitting this filing.* By any measure, the NAB Coalition’s filing is woefully late and should be dismissed. Additionally, pursuant to Section 25.154(a)(5), all petitions to deny must include “a certificate of service showing that it has been mailed to the applicant no later than the date the pleading is filed with the Commission.” 47 C.F.R. § 25.154(a)(5). The NAB Coalition Filing includes no certificate of service, nor was this pleading served upon the applicants.

²³ 47 U.S.C. § 309(d)(1).

**REDACTED
FOR PUBLIC INSPECTION**

Ms. Marlene H. Dortch
June 6, 2008
Page 10

* * *

In light of the foregoing, Sirius and XM respectfully request that the Commission promptly dismiss or deny the NAB Coalition's latest submission and that the Commission approve the proposed satellite radio merger.

Respectfully submitted,

/s/ Robert L. Pettit

Robert L. Pettit
Wiley Rein LLP
Counsel to Sirius Satellite Radio Inc.

/s/ Gary M. Epstein

Gary M. Epstein
Latham & Watkins LLP
*Counsel to XM Satellite Radio
Holdings Inc.*

DECLARATION OF MICHAEL DELUCA
Vice President and General Manager, Interoperable Technologies LLC

I, Michael DeLuca, hereby declare the following:

I. Biographical Information

1. I am the Vice President and General Manager of Interoperable Technologies LLC

("Interoperable Technologies"). I am the only corporate officer employed by Interoperable Technologies and I am responsible for managing the day-to-day activities of the company and ensuring that Interoperable Technologies is meeting its mandates as established by its Board of Managers. I have held this position since the inception of the company, approximately five years. I hold a bachelor's degree in electrical engineering from Virginia Tech and a Juris Doctorate from Nova Southeastern University.

II. Purpose

2. This declaration is provided to clarify the purpose of Interoperable Technologies and to provide context for the documents created by Interoperable Technologies and submitted to the FCC by Sirius. In particular, I have reviewed the May 27, 2008 filing by the Consumer Coalition for Competition in Satellite Radio. That filing wholly misconstrues the purpose and content of several documents I produced on behalf of Interoperable Technologies and misrepresents these

~~documents as representing the intentions of either XM or Sirius. As detailed~~

below, these documents represent my own aspirational statements and efforts to advocate IT's position to Sirius and XM regarding the possible introduction of interoperable satellite radios. Specifically, they did not, and were not intended to,

represent the business judgment of Sirius or XM, and they were never endorsed or otherwise adopted by Sirius or XM.

III. Information Regarding Interoperable Technologies LLC

3. Interoperable Technologies was founded in November 2003 as the result of a Joint Development Agreement ("JDA") between Sirius and XM. Interoperable Technologies is a separate corporate entity from XM and Sirius that has seven employees and one contractor and reports to a six-person Board of Managers, as reflected in the submitted documents. Interoperable Technologies' employees and contractors comprise an administrative assistant and several engineers. Interoperable Technologies employs no marketing staff, advertising staff, programming staff, or the other staff necessary to operate a conventional satellite radio company. Interoperable Technologies has no other marketing resources or expertise and receives no advance information from Sirius or XM regarding their business or marketing plans. 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.
4. Although Interoperable Technologies is entirely funded by Sirius and XM, neither Sirius nor XM has a controlling interest in Interoperable Technologies.

~~Interoperable Technologies is an independent corporate entity, and neither Sirius nor XM has the authority to unilaterally mandate the day-to-day activities and plans of Interoperable Technologies.~~

5. Interoperable Technologies' mandate was established by the JDA. From its inception, Interoperable Technologies was directed to further the design and development of interoperable radio technologies. Interoperable Technologies has spent millions of dollars, provided by Sirius and XM, towards that goal and in particular to develop technology that permitted the use of a single radio and antenna to receive both Sirius and XM programming.

IV. Development of Interoperable Technologies Documents

6. I developed the documents that were provided to the FCC on April 10. These documents were intended to advance my view of the "best case" for the deployment of interoperable radios. Importantly, they *did not* intend to represent the thinking of either Sirius or XM on the viability, total cost, or profitability of interoperable radios.
7. I drafted these documents to stimulate discussion on ways in which interoperable radios might be introduced to the public. These documents were not distributed publicly.
8. No one at Interoperable Technologies had the experience necessary to know whether the proposals suggested by the documents were feasible or would result in a profitable business centered around interoperable radio. No employees of XM and Sirius provided input regarding whether Interoperable Technologies was correct in its proposed assertions prior to their presentations to Sirius and XM. No outside legal or advisory opinions were requested regarding the legality of the proposed business models with regard to antitrust or other legal concerns. No

consumer studies were ever conducted by Interoperable Technologies to determine whether an interoperable radio was an appealing product or whether consumers would purchase such a device.

9. Put simply, the documents did not intend to represent the thinking of Sirius or XM, were advocacy pieces generated by me, and were purposefully written to provide greater weight to the introduction of interoperable technology than to the impact of that technology on the business plans of the satellite radio companies or the ultimate cost or viability of an interoperability business model.

V. [REDACTED]

10. In addition to designing and developing interoperable radios, Interoperable Technologies developed plans for [REDACTED]

11. As part of these proposals, Interoperable Technologies calculated the [REDACTED]

[REDACTED]. The goal in [REDACTED]

[REDACTED]. Interoperable

Technologies did not receive information from Sirius or XM regarding the [REDACTED]

[REDACTED] that go into setting the MSRP of a conventional satellite

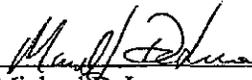
radio device. Notably, the [REDACTED] proposed in the documents does not

include any [REDACTED]
[REDACTED]

12. The proposals also advanced a [REDACTED] relative to established Sirius and XM practices. The proposals did not evaluate any [REDACTED] [REDACTED] in response to the marketing of a radio able to receive Sirius or XM service without providing the standard of customer care associated with the Sirius or XM radio brand.

**REDACTED
FOR PUBLIC INSPECTION**

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.



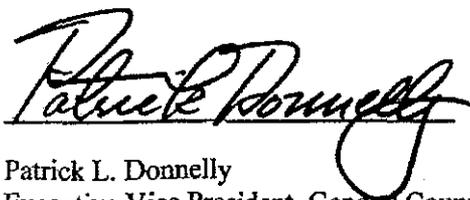
Michael DeLuca
Vice President and General Manager
Interoperable Technologies LLC

Executed on June 6, 2008.

AFFIDAVIT OF PATRICK L. DONNELLY

I, Patrick L. Donnelly, am the Executive Vice President, General Counsel and Secretary at Sirius Satellite Radio Inc. ("Sirius"). I joined Sirius in 1998 and, in addition to the positions I currently hold, previously served as the acting Chief Financial Officer of Sirius from August 1999 to April 2001. I am a member of the Board of Managers of Interoperable Technologies LLC. Prior to joining Sirius, I was Vice President and the deputy general counsel of ITT Corporation. I hold an A.B. degree from Lafayette College and a Juris Doctorate from Cornell Law School.

I hereby declare under penalty of perjury that I am qualified to speak on behalf of Sirius with regard to Sirius' relationship with Interoperable Technologies and the facts surrounding the design and development of interoperable radios. I am also familiar with the facts regarding Interoperable Technologies' [REDACTED]. In addition, I have either prepared or reviewed the preceding letter submitted on behalf of Sirius, and it is complete and accurate to the best of my knowledge, understanding, and belief.



Patrick L. Donnelly
Executive Vice President, General Counsel and Secretary
Sirius Satellite Radio Inc.

Dated: June 6, 2008

REDACTED
FOR PUBLIC INSPECTION

AFFIDAVIT OF JOSEPH M. TITLEBAUM

I, Joseph M. Titlebaum, am General Counsel and Secretary at XM Satellite Radio Inc. ("XM"). I joined XM in 1998. I am a member of the Board of Managers of Interoperable Technologies LLC. Prior to joining XM, I was an attorney with Cleary Gottlieb Steen & Hamilton LLC in New York City. I hold an A.B. degree from Columbia University and a Juris Doctorate from Harvard Law School.

I hereby declare under penalty of perjury that I am qualified to speak on behalf of XM with regard to XM's relationship with Interoperable Technologies and the facts surrounding the design and development of interoperable radios. I am also familiar with the facts regarding Interoperable Technologies' [REDACTED]. In addition, I have reviewed the preceding letter submitted on behalf of XM, and it is complete and accurate to the best of my knowledge, understanding, and belief.



Joseph M. Titlebaum
General Counsel and Secretary
XM Satellite Radio Inc.

Dated:

9

**MICHAEL HARTLEIB
P.O. BOX 7078
LAGUNA NIGUEL, CA 92607**

FILED VIA ECFS

June 10, 2008

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:

Given the past response from Sirius Satellite Radio on the FCC's additional request for information regarding, *inter alia*, interoperability of current receivers¹ as well as migration plans for the combined entity², I find it necessary to RE-submit this Petition for Declaratory Ruling dated June 24, 2007. I demand the Petition be considered prior to any ruling on the pending merger as the issue of interoperability remains rife with confusion. The Commission should rule as to the compliance of these two licensees regarding the interoperable mandate. As I have stated previously in past filings, I find it unconscionable that after nearly twelve months since the Petition was properly drafted, executed and filed, according to Michelle Carey, that said Petition has gone publicly unaddressed with no answers to the companies' compliance with said Mandate and/or licensing requirements.

¹ See *SIRIUS SATELLITE RADIO INC. RESPONSE TO INITIAL INFORMATION AND DOCUMENT REQUEST Submitted November 16, 2007* "Receiver models sold since January 2001 have limitations that preclude them from becoming interoperable."

² See *SIRIUS SATELLITE RADIO INC. RESPONSE TO INITIAL INFORMATION AND DOCUMENT REQUEST Submitted November 16, 2007* "Future Sirius receivers would need to have some modifications to their tuner sections in order to tune to the portion of the band currently licensed to XM, but the remainder of the electronics in the Sirius receivers would be unchanged. If such an approach were to be adopted, however, its implementation would be many years in the future."

Given the recent filings of C3SR and others regarding certain documents that support and/or confirm the allegations set forth in the Petition for Declaratory Ruling, I believe the Commission has a duty to protect the public interest and must address these issues prior to any ruling on the pending merger. Some are alleging a cover up or abuse of process within the FCC. I implore the Commission to promptly address these issues with concise answers as to the two companies' compliance with their licensing requirements.

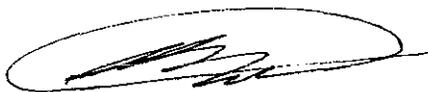
Please note, on June 9, 2008, I tried to contact Stephen Duall and others in the International Bureau and was replied to by Bill Freedman (at the FCC) directly as he has been assigned to respond to my inquiries. I expressed my concerns to Bill Freedman.

I would like to direct the Commission's attention to the attached Authorization to Construct, Launch and Operate Sirius FM-5, Item #3 which states as follows:

"The authority granted herein to operate SIRIUS FM-5 is without prejudice (emphasis added) to any action that the Commission may take regarding Sirius's compliance with the requirement that its system include a receiver that will permit end users to access all licensed SDARS systems that are operational or under construction."

Please note the grant date of this Authorization: April 16, 2007. I would argue this Authorization clearly supports my previously asserted concerns in said Petition regarding the issue surrounding the compliance of the Interoperable Mandate.

Respectfully submitted,



Michael Hartleib

MH/th

Encl.

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

In the Matter of)
Petition for Declaratory Ruling)
By Michael Hartleib) **MB Docket No. 07-57**
RE: FCC Rule 47)
CFR Sec. 25.144(a)(3)(ii))

**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)**

Identification of Party

Petitioner is **Michael Hartleib**, on his behalf and on behalf of satellite radio consumers and/or shareholders.

CC:

The Honorable Chairman Kevin J Martin
The Honorable Michael Copps
The Honorable Jonathan Adelstein
The Honorable Deborah Taylor Tate
The Honorable Robert McDowell
Thomas O. Barnett

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

In the Matter of)
Petition for Declaratory Ruling)
By Michael Hartleib) **MB Docket No. 07-57**
RE: FCC Rule 47)
CFR Sec. 25.144(a)(3)(ii))

**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 respectfully petitions the Commission for a declaratory ruling to clarify the lack of enforcement and implementation of the interoperable mandate FCC Rule 47 CFR Sec. 25.144(a)(3)(ii) requiring the receiver designs to be capable of receiving ALL channels allocated by the FCC for the satellite digital audio radio services (SDARS).

Identification of Party

Petitioner is **Michael Hartleib**, on his behalf and on behalf of satellite radio consumers and/or shareholders.

His Mailing Address is:

Michael Hartleib
P.O. Box 7078
Laguna Niguel, CA 92607

Discussion

The Petitioner argues that the FCC has failed the consumer by not enforcing the interoperable mandate and for allowing both satellite companies to make excuses as to why they have been unable to comply. It has been nearly 10 years since the FCC has granted both licenses; it is unconscionable that this has been allowed to go on for such a prolonged period of time. It appears as though the letter from Thomas S. Teyz of the International Bureau Satellite Division, dated January 28, 2005 to Sirius and XM (File Nos: IB Docket No. 95-91; SAT-MOD-20040212-00017) was an attempt to resolve the issue by offering a compromise; instead of having a unified standard, you required receiver designs to be capable of receiving all SDARS signals and to be certified. As of the date of this letter, the Petitioner has been told no such certification exists. Also, as per the footnotes of the January 28, 2005 letter, it appears there were citations issued for the failure to comply.

The Petitioner has confirmed information that leads him to believe many of the radios in service today are capable of receiving "either/or" service and signals, but not both simultaneously. The Petitioner has also been told that could be done via a firmware update and/or flash of the receiver. Please note legal definitions obtained from the patent infringement suit (Sirius vs. XM):

Interoperable Radio" shall mean a radio that, at a minimum, (a) receives and processes the audio portion of both the Sirius Radio System signal and the XM Radio System signal, either as a result of an Interoperable Chipset contained in the unit itself or as a result of an Interoperable Chipset contained in an outboard location which interfaces directly with the unit, and (b) which is capable of providing the user interface for both Sirius Radio System broadcasts and XM Radio System broadcasts, including displaying the artist and title information transmitted as part of such broadcasts, in each case, without the consumer purchasing additional hardware or software.

"Interoperability Technology" shall mean the technology, including the technology which is jointly funded and developed by Sirius and XM pursuant to this Agreement or owned and/or licensed by either party, which is required to design, develop and/or manufacture an Interoperable Radio, as well as any enhancements and modifications jointly funded and developed for such technology pursuant to this Agreement (including the industry standards jointly developed by the parties pursuant to Section 3.03), but shall not include Non-core Technology.

"Single Mode Radio" shall mean a radio that (a) receives and processes the Sirius Radio System signal or the XM Radio System signal, but not both, and (b) which is capable of providing the user interface for either Sirius Radio System broadcasts or XM Radio System broadcasts, but not both.

h) XM and Sirius shall each use commercially reasonable efforts to design and develop Interoperable Radios that are backward compatible with then existing Single Mode Radios.

The Petitioner alleges interoperable radio and dual mode radio are not the same. The companies frequently interchange these terms to confuse the issue and qualify their responses. As stated in the Engineering Statement prepared on behalf of The National Association of Broadcasters, "It is not possible for the current production satellite receivers to simultaneously receive both XM and Sirius signals".³ Interoperable Radio or Interoperable Chip sets can receive and process signals from one or the other service but not both "simultaneously". Dual Mode Radio can receive and process both signals simultaneously.

In a joint response from Sirius and XM Radio dated March 14, 2005, the companies "reconfirm their compliance with Section 25.144(a)(3)(ii) of the Commission's rules by including interoperable radios in their respective system designs".

It is the Petitioner's opinion that both companies have been less than forthright regarding the interoperability issue and have done their best to confuse this issue. Both companies have argued that there has been minimal demand for a dual mode radio and that the OEM's have expressed little interest. The fact of the matter is it was their exclusive OEM deals that limited such demand. A consumer's choice in satellite radio should not be determined by which make or model of vehicle the consumer chooses to purchase; nor is it reasonable to expect that consumers would know the terms and conditions of exclusive content deals which creates yet another problem. Example: On January 1, 2007, NASCAR fans who previously purchased XM radio for NASCAR coverage were forced to purchase new equipment and switch services to enable them to continue their NASCAR coverage (via Sirius). Had the interoperable mandate been enforced, consumers would not be in this position. The lack of enforcement and compliance creates a situation where the consumer is bounced back and forth, thus resulting in a ping-pong effect. This is not consumer friendly.

These issues have directly contributed to the situation we now find ourselves in today. Shareholders have lost billions of dollars as these two companies continue to battle over exclusive content. When the Petitioner (and many others) invested in the sector, the Petitioner knew that an interoperable device would even the playing field, and subsequently the company with the most compelling content would "win the battle"; shareholders would be rewarded, and consumers would have the choice the mandate was supposed to grant them. Unfortunately, the interoperable mandate has yet to be enforced.

It is the understanding of the Petitioner that the role of the FCC is to protect the interest of consumers. The intent of the mandate was clear: consumers were to be given a choice and "so the consumer could switch services with no additional hardware purchases".⁴ The way things are now consumers are being locked out of dashboards and are not able to choose the service or exclusive content they would prefer. Had the mandate been implemented, Sirius shareholders may not be in the position of having to spend nearly \$5 billion to acquire their competitor. The Commission is now forced to make a decision regarding the proposed merger.

³ See "An Engineering Statement Prepared on Behalf of the National Association of Broadcasters" dated March 16, 2007 (pg 8).

⁴ See "Satellite Radio Tech World" article dated Monday April 30, 2007

The Petitioner is in favor of the merger; provided there are minimal or no restrictions on the combined company. Given the current situation with all of the exclusive deals, the Petitioner does not see any other solution. If the merger is not allowed, the Commission must enforce the mandate for the interoperable device which could have severe consequences for the company with the least compelling content. Without a merger, consumers could end up with a single satellite service provider by default.

Not only was there a mandate for the interoperable device but there was also a settlement between Sirius and XM on their patent infringement case in 2000. In that settlement stipulation, they agreed to develop and implement the interoperable device that was required. Attached is a copy of their February 16, 2000 *Press Release* that specifically addresses these issues.

Conclusion

Based on the foregoing, **Michael Hartleib** respectfully asks the Commission to explain the lack of enforcement, certification and implementation of the interoperable mandate. As there is direct impact on Satellite radio consumers, the outcome of the Petition for Declaratory Ruling should be determined apart from and prior to consideration of the pending merger.

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.

The Petitioner-also asks the FCC to:

- Provide clarity on the multiple terms they use to describe different, but similar, devices (ie: "dual mode", "interoperable device", "interoperable radio", "interoperable technology", etc.)⁵
- Require companies to explain how they would provide "catastrophic back up" if the receivers are not currently capable of receiving "either/or" services.⁶

³ "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." (Source: Select Satellite Interoperable Technologies, LLC)

⁴ Section 14.02. of the JOINT DEVELOPMENT AGREEMENT: "Catastrophic Loss Backup. XM and Sirius shall negotiate in good faith with respect to an agreement to provide service to the other's subscribers in the event of a catastrophic failure of the XM Radio System or the Sirius Radio System."

- Please remember, as per the March 14, 2005 letter to Thomas S. Tyez, Chief of Satellite Division, International Bureau, XM and Sirius jointly “reconfirmed their compliance” therefore, current receivers are capable of receiving “either/or” service but not both simultaneously. The Petitioner asks that the FCC require the companies to stop qualifying which type of interoperable radio they are describing and disclose ALL types (ie: a receiver using a common antenna, a common RF tuner, one baseband module, 2 baseband module, or any other derivative thereof) and to stop qualifying their response to the FCC with specific and misleading and/or contradictory responses.⁷
- Require both companies to disclose any and all citations, pending and/or filed due to lack of compliance and/or certification regarding the interoperable mandate.

⁵“a receiver using a common antenna, a common RF tuner, and two baseband modules, one for XM and one for Sirius” (source: March 14, 2005 letter from Sirius and XM to Mr. Thomas S. Tyez of the FCC).

PRESS RELEASE

For Immediate Release

**Sirius Radio and XM Radio Form Alliance to Develop
Unified Standard for Satellite Radios**

New York, NY and Washington, DC -- February 16, 2000 -- Sirius Satellite Radio (NASDAQ: SIRI) and XM Satellite Radio (NASDAQ: XMSR) today announced an agreement to develop a unified standard for satellite radios.

The standard is expected to accelerate growth of the satellite radio category by enabling consumers to purchase one radio capable of receiving both companies' broadcasts. XM Radio and Sirius will jointly fund development of the technology and work together to proliferate the new standard by creating a service mark for satellite radio. As part of the agreement, each company will contribute its intellectual property to the initiative and have agreed to resolve any pending patent litigation.

"This standard is good news both for consumers and for the category," said David Margolese, Sirius Chairman and CEO, and High Panero, XM President and CEO, in a joint statement. "This will allow for reduced subscriber acquisition costs, more satellite radios in the marketplace, and a simplified choice for consumers."

The unified standard will represent a second generation of satellite radios. At the time of the commercial launches of XM Radio and Sirius, consumers will be able to purchase radios capable of receiving one of the two companies' broadcasts. These radios are already being developed by leading electronics and automotive manufacturers. XM and Sirius will work with their existing automobile and radio manufacturing partners to integrate the new standard under the terms of their existing agreements. All future agreements with automakers and radio partners will specify the new satellite radio standard.

XM Radio and Sirius are each building a digital satellite radio service for consumers, offering up to 100 channels of audio entertainment for a monthly subscription fee of \$9.95. For more information about the companies, visit XM Satellite Radio at www.xmradio.com and Sirius Satellite Radio at

www.siriusradio.com.

Any statements that express, or involve discussions as to, expectations, beliefs, plans, objectives, assumptions, future events or performance with respect to Sirius Satellite Radio Inc. or XM Satellite Radio Inc. are not historical facts and may be forward-looking and, accordingly, such statements involve estimates, assumptions and uncertainties which could cause actual results to differ materially from those expressed in the forward-looking statements. Accordingly, any such statements are qualified in their entirety by reference to the factors discussed, as the case may be, in XM Satellite Radio Inc.'s registration statement on Form S-1 (File No. 333-93529) filed with the Securities and Exchange Commission or Sirius Satellite Radio Inc.'s Annual Report on Form 10-K for the year ended December 31, 1998, filed under the company's former name, CD Radio Inc. Among the key factors that have a direct bearing on the companies' results of operations are the potential risk of delay in implementing the companies' business plans; increased costs of construction and launch of necessary satellites; dependence on satellite construction and launch contractors; dependence on third-party technology partners; risk of launch failure; unproven market and unproven applications of existing technology; unavailability of satellite radio receivers; and the companies' need for additional financing.

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For more information, please call:

Sirius Satellite Radio:	XM Satellite Radio:
Mindy Kramer	Vicki Stearn
212-584-5138	202-969-7070

Respectfully submitted,

Dated: June 24, 2007

Michael Hartleib
P.O. Box 7078
Laguna Niguel, A 92607

Sirius Satellite Radio Inc.
IBFS File No. SAT-LOA-20060901-00096
Call Sign S2710

The application of Sirius Satellite Radio Inc. (Sirius), IBFS File No. SAT-LOA-20060901-00096, IS GRANTED, and Sirius IS AUTHORIZED to construct, launch, and operate a geostationary satellite, SIRIUS FM-5, Call Sign S2710, at the 96° W.L. orbital location, using the frequency bands 2320.0-2332.5 MHz (space-to-Earth) and 7050.5-7072.5 MHz (Earth-to-space), in accordance with technical specifications set forth in its application and consistent with the Commission's rules, unless specifically conditioned or waived herein, and subject to the following conditions:

1. Sirius shall operate SIRIUS FM-5 in compliance with all relevant international and bilateral agreements between the United States and the Administrations of Canada and the United Mexican States regarding the provision of SDARS in North America. Prior to commencing operation of SIRIUS FM-5, Sirius shall have received from the Commission notification that the Administrations of Canada and the United Mexican States have been notified of the Sirius application referenced above and have concurred in the operating parameters and characteristics of the SIRIUS FM-5 satellite.

2. Sirius shall prepare the necessary information, as may be required, for submission to the International Telecommunication Union (ITU) to initiate and complete the advance publication, international coordination, due diligence, and notification process of its space stations, in accordance with the ITU Radio Regulations. Sirius shall be held responsible for all cost-recovery fees associated with these ITU filings. We also note that no protection from interference caused by radio stations authorized by other Administrations is guaranteed unless coordination and notification procedures are timely completed or, with respect to individual Administrations, by successfully completing coordination agreements. Any radio station authorization for which coordination has not been completed may be subject to additional terms and conditions as required to effect coordination of the frequency assignments of other Administrations. See 47 C.F.R. § 25.111(b).

3. The authority granted herein to operate SIRIUS FM-5 is without prejudice to any action that the Commission may take regarding Sirius's compliance with the requirement that its system include a receiver that will permit end users to access all licensed SDARS systems that are operational or under construction.

4. The license term for SIRIUS FM-5 is eight years and will begin on the date Sirius certifies to the Commission that the satellite has been successfully launched and put into operation.



File # SAT-LOA-20060901-00096
with attached conditions
Call Sign S2710 Grant Date 4/10/07
(or other identifier) Term Dates
From see conditions To: see conditions
Approved: Robert G. Nelson Chief
Satellite
Division