



The CommLaw Group

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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:

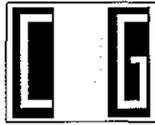
Pursuant to Section 1.1206 of the Commission's Rules, this letter and its attachments is submitted via ECFS for inclusion in the public record of these proceedings, with email copies of this cover letter sent to those listed below. A copy of this letter is being copied to Commissioner Tate and her Legal Advisor, Amy Blankenship.

Respectfully submitted,

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

cc (via email):

Hon. Deborah Taylor Tate, Commissioner
Amy Blankenship, Legal Advisor, Office of Commissioner Tate



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June 25, 2008

VIA EMAIL AND FIRST CLASS MAIL

Hon. Deborah Taylor Tate
Commissioner
Federal Communications Commission
44512th Street, S.W.
Washington, D.C. 20554

Re: XM/Sirius Satellite Radio Proposed Merger – MB Dkt. 07-57
Merger Conditions to Ensure Open Access

Dear Commissioner Tate:

U.S. Electronics, Inc. (USE) participation in this proceeding is and has been to demonstrate that the proposed merger of XM and Sirius would not be in the public interest unless conditions are imposed that ensure that there will be open access to the sole surviving satellite radio network. The conditions USE has proposed require that the merged entity must -

- Be barred from directly or indirectly engaging in or interfering with the design, manufacture or distribution of satellite radio receivers or other digital devices that can access the satellite radio network;
- Publish and make available information on the technical requirements and specifications of its network, including reasonably advanced notice of any changes to any qualified and willing partner;
- Not interfere with consumers' access to, or their choice of, devices by which to access the network;
- Comply with rules and regulations that provide for the compatibility of receivers to ensure that the satellite radio using public has reasonable and non-discriminatory access to the satellite radio network;
- Comply with the FCC's policy that the public has the right to use any device to access and make use of the satellite radio network, consistent with the principles established in the Hush-a-Phone and Carterfone decisions -- as codified in Part 68 of the FCC's Rules,

47 C.F.R. Part 68, and as more recently applied to cable set-top converters; and importantly,

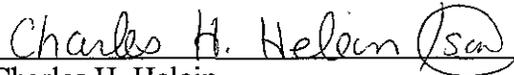
- Be subject to an independent monitor who will ensure compliance with the foregoing conditions and
- Not restrict or interfere with the use of any device to receive the merged entity's services once approved by an independent testing lab.

Since USE first proposed the adoption of these conditions, public interest groups and other businesses have come forward and supported the critical need for open access, or as now referred to, "open device" access. And most importantly, it appears the Commission has been persuaded that this policy is relevant to its consideration of the merger.

Even the applicants have seen the handwriting on the wall. On June 16, 2008, Sirius and XM submitted an ex parte filing to the Chairman in which they purport to make a commitment of ensuring open access to the merged entity's satellite radio network. However, as shown by the attached Analysis of the Sirius/XM June 16th "commitment" on "Equipment," the Applicants' "commitment" will not provide open access but will allow them as the newly created merged entity to continue their present practices of controlling the manufacture and distribution of satellite radio devices.

You and your staff's attention to these matters are appreciated. If it would aid your consideration of these matters to meet and discuss them, we are ready to do so consistent with your schedule.

Respectfully submitted,

A handwritten signature in cursive script that reads "Charles H. Helein" followed by a circled "Jsa" in the right margin. The signature is written over a horizontal line.

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

cc: Amy Blankenship, Legal Advisor

Re: Analysis of Sirius/XM's "Equipment" Commitment in June 16, 2008 Ex Parte to Chairman

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 is quoted at the end of this analysis. However, even a cursory reading indicates that the commitment does not provide for open device access. 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 last bullet point is made clear by the statement 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 procedure allows the combined company to pick and choose among manufacturers based on whatever standard may be to its liking and without any 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

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.