

Office of the Attorney General



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July 3, 2008

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

ELECTRONIC DELIVERY
VIA ECFS

Re: Notice of Ex Parte Communication in MB Docket 07-57 (Consolidated
Application for Authority to Transfer Control of XM Satellite Radio Holdings,
Inc., and Sirius Satellite Radio, Inc.)

Dear Mrs. Dortch:

On July 1, 2008, the Attorneys General of Tennessee and Connecticut, Robert Cooper and Richard Blumenthal, respectively, along with staff members for the Offices of the Attorneys General of Connecticut, Iowa, Kansas, Louisiana, Maryland, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, Rhode Island, Tennessee, Washington, and Wisconsin, ("the States"), met telephonically with Commissioner Deborah Taylor Tate to discuss the States' concerns regarding the application for authority to transfer license submitted by XM and Sirius ("the Parties").

The States explained that as enforcers of both antitrust laws and consumer protection laws, they have concerns with the proposed merger in light of the important public role played by satellite radio as a national source of information and entertainment for consumers, and the unique role it plays for some consumers due to their location and limited access to local radio markets.

The States advised that several Attorneys General have previously written the Commission expressing concerns about the merger and urging the Commission to consider placing additional terms and conditions on the merger. The States also advised that a number of Attorneys General urge that the application be rejected. These positions were reiterated in the meeting: granting the merger, as proposed by the Parties, would not be in the public interest.

The importance of competition:

The States explained that genuine competition creates competitive pressure that spurs technological innovation, diverse programming, lower prices, and creative marketing options for

the benefit of consumers. They pointed out that the Commission intended to foster competition between the Parties in 1997 when it ordered them to introduce interoperable receivers. They observed that the Parties' evidence of less-than-vigorous competition in the market today was largely the result of their own non-compliance with the Commission's directive.

The States characterized those market conditions as a "stacked deck" being presented to the Commission, because current market conditions are definitely *not* the market conditions that would have existed if the parties had lived up to the Commission's 1997 Order. The States expressed their view that had consumers been offered interoperable equipment, the Parties would have likely already introduced many of the features they now offer in their "voluntary conditions," such as family-friendly programming and a la carte pricing – they would have introduced these services because of their competitive value in the market, and consumers would have benefited.

Leasing of spectrum and facilities as an alternative to spectrum divestiture:

The States noted that, while many Attorneys General supported the outright denial of the application, they asserted that, should the license transfer and merger be approved, the Commission should condition approval upon granting spectrum rights and the ability to provide broadcasting to satellite receivers by a competitor. In this case, in the absence of a wholly self-sufficient new entrant able to produce a competitive offering, this competition could be best achieved by requiring that the Parties *lease* a substantial portion of their licensed spectrum and necessary access facilities, under a commercially-negotiated lease, to enable independent provider(s) to offer competitive programming, which could compete, head-to-head, against the Parties. The States believe that this proposal, and the competition it would foster, would be far superior to the modest concessions offered by the Parties.

The States explained that the new competitor would offer competing channels *outside* of the subscription-only services offered by the Parties. The lease of sufficient spectrum to offer programming desired by most satellite radio customers could inject competitive pressure on the Parties to continue to enhance their own offerings to consumers and to continue to innovate; consumers would have a genuine choice as to whether to subscribe to the Parties' plans because they could still have access to nationally-available programming through the leased spectrum.

A commercial lease arrangement would require the lease of sufficient spectrum for this new firm to offer a commercially viable product in competition with the merged XM-Sirius. While the States do not endorse any particular firm to become the lessee, the States observed that 20% of the spectrum was identified by the Georgetown Partners proposal as the minimum amount necessary for a competitively sufficient alternative array of programming, although they also noted larger divestitures had been recommended by others. A lease of spectrum and facilities could produce competitive benefits akin to an outright divestiture and, most importantly, could do so quickly in the absence of a full-fledged new entrant able to launch their own competing system.

The States encouraged an open environment that would solicit and consider proposals that would restore some of the competition for satellite radio that has remained important for

consumers since the Commission's 1997 order. They further noted the States' proposal could accommodate the important goals of fostering diversity and expanding opportunities for providing non-commercial educational programming.

The need for expedited interoperability and open source design:

The States noted that a number of states are urging that the application be rejected, a divestiture be ordered, or a commercial lease be required. Regardless, the States pointed out, expedited commercialization of interoperable receivers remains of great importance: if there is *any* competitive source of programming preserved by the Commission – which the States urged the Commission to do – the success of that competition in delivering the public interest benefits will likely depend on consumer access to the entire spectrum of satellite programming through interoperable equipment. Accordingly, the States urged prompt deployment of and a stringent timeline for commercialization of such equipment. Additionally, the States urged that the Parties be required to promptly make the intellectual property needed for compatible and competing equipment freely available to ensure that the increased market strength they obtain through their combination is not inappropriately extended into other lines of commerce.

The States expressed skepticism that interoperability and open source design mandates would raise any problems with the Parties' current contracts with automobile manufacturers due to their belief that manufacturers should be substantially more interested in providing automobile purchasers with more robust and flexible equipment. They also encouraged the Commission to consider requiring compatibility with HD radio receivers in conjunction with an order enforcing deployment of interoperable equipment.

Criticism of Proposed Minority Set-Asides:

The States also criticized the Parties' proposed "set-asides" for minority-owned programming as insufficient to provide the level of diversity that should be available through national spectrum and pointed out that the Parties' characterization of "Qualified Entity" inexplicably failed to include women-owned entities. They urged that racial, ethnic, and women-owned programming be considered in any allocation of stations among "Qualified Entities." Finally, the States urged that the process of selecting such entities should be open, transparent, and subject to the Commission's oversight, rather than exclusively within the domain of the parties, thereby ensuring truly independent sources of programming content.

Consumer protection concerns with rate "freezes" and disclosure practices:

The States raised concerns about the Parties' offer of a "rate freeze" noting that, as described in their "voluntary conditions" submitted to the Commission, rates could still be increased based on retroactive increases in the Parties' costs for programming, rendering the value of any "rate freeze" short-lived if not illusory. The States also cautioned the Commission to not endorse *any* of the parties' billing and rate-advertising practices, including their proposed methods for disclosing rate increases, as such actions could raise the specter of pre-emption of the States' existing consumer protection laws which might afford greater protection to consumers in connection with the disclosure of material terms.

Pursuant to Section 1.1206(b) of the Commission's Rules, an original and one copy of this letter are being submitted to the Secretary's office, with a copy to Commissioner Tate. In addition, a copy of this letter is being filed electronically for inclusion in the public record of these proceedings.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Cooper, Jr.", with a stylized flourish extending from the end.

Robert E. Cooper, Jr.
Attorney General & Reporter