Consumers Union
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Consumer Federation of America

July 9, 2008

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

Re: XM/Sirius Merger (MB Docket No. 07-57)

Dear Ms. Dortch:

After review of the redacted filings of both the Consumer Coalition for Competition in Satellite Radio[1] ("C3SR") and the responsive documents of XM Satellite Radio Holdings Inc. ("XM") and Sirius Satellite Radio Inc. ("Sirius"),[2] Consumers Union and the Consumer Federation of America request that the Commission publicly release certain documents designated "Highly Confidential" by XM and Sirius, relating to whether the companies have been forthright with the agency about their "design" of an interoperable radio as required by the grant of their satellite licenses. These documents do not appear to have any commercially sensitive information.

Public disclosure of this information will allow for a more transparent merger review process, and enable the public to provide more accurate and informed input to the Commission concerning the merger. This is particularly important because the documents may contain pivotal information relevant to one of the primary justifications for the merger suggested by XM and Sirius. Public disclosure of the documents, and a full, open review of the information, will therefore strengthen public confidence in the Commission's ultimate resolution of the merger.

The redacted filings indicate that documents submitted by Sirius on April 10, 2008, subject to the First and Second Protective Orders[3] in this proceeding (the "Highly Confidential Documents"), call into question the candor of the merger parties in their dealings with the Commission both as licensees and during the merger review proceeding. Specifically, the redacted filings suggest that XM and Sirius apparently did not comply with the requirements in each company's license concerning interoperable receivers. In authorizing satellite radio service, the Commission required that all satellite radio licensees design an interoperable receiver capable of accommodating all

[1] Letter from Julian L. Shepard, Counsel to C3SR, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 07-57 (May 27, 2008) ("*C3SR Redacted Filing*").
[2] Letter from Robert L. Pettit, Counsel to Sirius Satellite Radio Inc., and Gary M. Epstein, Counsel to XM Satellite Radio Holdings Inc., to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 07-57 (June 6, 2008) ("*XM/Sirius Redacted Filing*")
[3] Protective Order, MB Docket No. 07-57 (July 11, 2007); Protective Order, MB Docket No. 07-57 (Nov. 16, 2007).

satellite radio services.[4] The purpose of this requirement was to ensure that consumers had the capability to easily access the services of all satellite radio systems from whatever equipment they purchased.[5] Thus, as the Commission intended, consumers would have enjoyed the ability to readily transfer from competing services and not be unfairly tied to any particular provider due solely to the expense and inconvenience involved in switching services. Had XM and Sirius developed and made commercially available interoperable radios, the satellite radio marketplace over the past decade would have been substantially more consumer-friendly.

Moreover, the unavailability of interoperable radios has already had a major impact on the merger review itself. The Department of Justice ("DOJ") approved the proposed merger without imposing any conditions on either party. The DOJ reached this astounding conclusion based on its finding that the two companies did not significantly compete with each other, supposedly evidenced by information showing that subscribers rarely switched between XM and Sirius due to the expense and inconvenience involved. In other words, the DOJ's theory was "these two firms which offer very similar services do not compete because they don't interoperate, yet somehow they do compete with iPods and other devices"—even though they don't interoperate.

However, the DOJ failed to recognize that this market imperfection only existed because the companies did not further develop or make commercially available interoperable radios as required by the FCC. Had such devices existed, consumer behavior may have been freed from the artificial market constraints created by the merger parties. Documents which may reflect a willful imposition of such constraints should be available to the public to allow for an accurate and comprehensive review of XM and Sirius's record.

Consumers have a compelling interest in these documents, as they may shed light on whether the companies can be trusted to comply with any conditions the FCC may impose should the merger go forward. The public interest demands that the Commission bring to light any possible indiscretions that would harm consumers before reaching a final decision on whether to approve the merger. This is particularly true when the merger in question will lead to monopoly control of vast amounts of public spectrum.

Accordingly, in the interests of ensuring the integrity of the Commission's process, and public confidence in the reliability of the Commission's ultimate resolution of the merger, Consumers Union and the Consumer Federation of America respectfully ask that the Commission make publicly available the relevant "Highly Confidential" documents.

Sincerely,

Chris Murray, Senior Counsel
Consumers Union

Dr. Mark Cooper, Research Director
Consumer Federation of America

[4] *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, 12 FCC Rcd 5754, ¶103 (1997).
[5] *Id.* at ¶106 (codified in 47 C.F.R. Sec. 25.144(a)(3)(ii) stating that 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 . . .).