

David K. Rehr  
President and CEO



July 15, 2008

Mr. Matthew Berry  
General Counsel  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington DC 20554

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

Dear Mr. Berry:

It is has been reported to me that the Federal Communication Commission's ("FCC" or "Commission") General Counsel's office believes that the concerns raised by the Consumer Coalition for Competition in Satellite Radio ("C3SR") regarding enforcement of the interoperability requirement or the issue of candor of the proposed merging parties can be resolved without further investigation and without a clear and transparent process. This position could not be more inaccurate.

Any Commission finding that the satellite DARs interoperable radio rule, 47 C.F.R. § 25.144(a)(3)(ii), was insufficiently clear to support either an enforcement action or a finding that XM Satellite Radio Holdings Inc. ("XM") and Sirius Satellite Radio Inc. ("Sirius") violated the rule would have a substantial impact on certain arguments raised in the above-referenced proceeding. Specifically, this letter discusses the potential impact of such a finding on arguments (1) that XM and Sirius lacked candor in their dealings with the Commission in connection with their progress on implementing the interoperable receiver requirement, and (2) that XM's and Sirius's history of non-compliance with regard to the letter and spirit of the interoperable radio rule and other FCC requirements raises questions regarding the degree to which the Commission can rely on the companies to comply with any conditions that may be central to any decision of the Commission to approve the merger.

As discussed below, whether XM and Sirius violated the interoperable radio rule is a distinct question from whether the applicants lacked candor in their dealings with the Commission can be relied upon to follow through on any promises they make with regard to the alleged consumer benefits of the proposed merger. Under Commission

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precedent, substantial and material questions of fact regarding an applicant's lack of candor call into question an applicant's reliability and qualifications on a going forward basis, regardless of whether the applicant is found to have violated some specific requirement of the Act or the Commission's rules. The simple fact that the applicant is willing to deceive the Commission raises qualification concerns. Under the Communications Act, the Commission must address as part of the merger proceeding the allegations in the record regarding lack of candor. If it determines that the allegations raise substantial and material questions of fact, it is required by law to designate the applications for hearing. Either way, the candor issue may not legally be deferred to a subsequent enforcement proceeding.

Similarly, NAB and others in this proceeding have demonstrated that XM's and Sirius's compliance history as a whole calls into question XM's and Sirius's reliability more generally. This issue too is critical to the merger proceeding given that XM and Sirius have offered a series of voluntary commitments in an effort to promote the public interest benefits of the proposed merger. If the merged entity cannot be relied upon to comply with these promises, grant of a merger based upon these commitments would be a sham. Again, this question is distinct from the ultimate outcome of any specific enforcement actions, and, in light of the record, must be decided as part of the merger proceeding. Moreover, the Commission may resolve these questions only after making public all the relevant documents consistent with the Enforcement Bureau's June 18, 2007 orders granting in part NAB's Request for Public Disclosure of Certain Documents Designated Highly Confidential and NAB's Motion to Defer Action (filed Oct. 9, 2007).

#### *Lack of Candor*

A lack of candor before the Commission exists whenever an applicant, with intent to deceive, makes factual statements that conceal, evade or fail to be fully forthcoming with respect to facts and information relevant (i.e., of decisional significance) to its application. Further, applicants have an obligation to be forthright in their dealings with the Commission even if the facts they are concealing or evading would not constitute a violation of the Communications Act or the Commission's rules. Simply put, an applicant's willingness to deceive the Commission on a material matter raises fundamental questions about whether the applicant can be relied upon on a going-forward basis regardless of whether the applicant is found to have violated any specific regulatory requirement. For this reason, the Commission views a lack of candor as a potentially disqualifying even if the Commission would not have decided the matter differently had the applicant been fully forthcoming.

XM and Sirius themselves made the deployment of an interoperable satellite radio a central issue in this merger proceeding, arguing aggressively that their ability to introduce interoperable radios if the merger application is granted is a significant merger-related public interest benefit. Parties to this proceeding have raised substantial questions of material fact regarding both whether XM and Sirius violated the interoperable radio rule and whether they lacked candor in their representations to the Commission regarding their progress in developing and deploying such a radio. It is this latter issue which the Commission must set for hearing. In other words, whether XM and Sirius are in violation of the interoperable radio rule is not the key issue. Rather, the Commission must consider the separate question of XM's and Sirius's willingness to deceive the Commission on an issue that they themselves have made material to the merger proceeding. Moreover, the Commission must resolve this issue before it can act on the pending merger application.

#### *Past Violations*

Separate and apart from the lack of candor questions, in a merger such as this where the applicants' voluntary commitment to satisfy certain conditions may be central to any grant of their merger application, it is critical that the Commission have confidence that it can rely on the companies to comply with the conditions. To the extent that the Commission relies on such promises as the basis for finding the merger to be in the public interest, that finding will little more than a fiction unless the Commission has a high degree of confidence that the merged entity will follow through on the applicants' promises. This is particularly true given that the Commission has relatively limited forfeiture authority against non-broadcast, non-common carrier licensees such as XM and Sirius.

In this proceeding, NAB and others have demonstrated that XM's and Sirius's widespread violations of the FM modulator rules and license provisions raise serious questions with regard to the reliability of their promises. Indeed, evidence in the record (including letters from the Enforcement Bureau) suggests that senior officials of the company were involved with, or were aware of, these violations and that some of the violations were intentional. As with the lack of candor question, the implications of XM's and Sirius's compliance history are distinct from the scope and nature of any enforcement action the Commission may take on these matters, and thus must be decided as part of the merger proceeding.

In sum, based on the totality of the evidence in the record, the inescapable conclusion is that XM and Sirius cannot be relied on to comply with the letter and the spirit of any voluntary commitments they make or any merger conditions the Commission may

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impose. The fact that the Commission refuses to place in the record of this proceeding additional information regarding the scope of the companies' malfeasance that the Enforcement Bureau ordered released a year ago underscores this conclusion. Indeed, based on the record of the merger proceeding, the Commission should fully expect that XM and Sirius will make every effort to avoid the requirements of the conditions whenever it suits their business interests to do so.

For the forgoing reasons, the Commission may not legally approve the merger based on the record. It may not legally defer the candor and reliability issues raised in the record to an enforcement proceeding but must address the issues in the merger proceeding.

Best wishes.

Sincerely,

A handwritten signature in black ink that reads "David K. Rehr". The signature is written in a cursive, slightly slanted style.

David K. Rehr