



July 11, 2008

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

Re: MB Docket No. 07-57

Dear Ms. Dortch:

Today, the undersigned distributed copies of the attached press article to the media legal advisors of each of the Commissioners. The article is relevant to the Commission's consideration of the proposed merger of Sirius Satellite Radio, Inc. ("Sirius") and XM Satellite Radio Holdings, Inc. ("XM").

More specifically, the article is relevant to the ongoing issue presented by the history of non-compliance by Sirius and XM and allegations of lack of candor before the Commission. These issues have direct bearing on the Commission's ability to make necessary public interest findings or rely on representations by the satellite companies going forward.

Please direct any questions to the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jane E. Mago". The signature is fluid and cursive, with the first name "Jane" and last name "Mago" clearly distinguishable.

Jane E. Mago
Senior Vice President and General Counsel
Legal and Regulatory Affairs

Attachment



<http://seekingalpha.com/article/84518-the-real-story-behind-the-xm-sirius-merger>

[behind-the-xm-sirius-merger](#)

The 'Real' Story Behind the XM/Sirius Merger

by: Michael Hartleib posted on: July 11, 2008 |

I am both a satellite radio listener (consumer) and a major shareholder in Sirius ([SIRI](#)). As an investor, I have studied the technology and closely followed Sirius' operations and those of XM Satellite Radio ([XMSR](#)) - its only competitor. I have also read its filings made over the years with the SEC and I not only have closely followed the merger proposal and the application Sirius and XM made for its approval to the FCC, but have actively participated in that proceeding.

Back in March 2007, approximately, I filed a Petition for Declaratory Ruling with the FCC asking it to determine whether the two companies had complied with the condition the FCC imposed on both XM and Sirius when it granted each their licenses in 1997. That condition, which many consumers and individual shareholders may still be unaware of, required the companies provide an interoperable radio that would permit consumers to receive either XM or Sirius service from a single satellite radio receiver.

I filed the Petition for Declaratory Ruling at the FCC because, though ten years has passed since the FCC imposed the condition and long after XM and Sirius became operational, consumers still do not have access to an interoperable radio capable of receiving services from both companies. Moreover, shareholders have been kept in the dark about the impact that providing an interoperable radio would have on both companies' financial performance.

For consumers, one example of the adverse consequences of not having interoperable radios occurred on January 1, 2007 - to NASCAR fans. These listeners purchased XM radios because it provided NASCAR coverage. But when Sirius acquired the rights to broadcast NASCAR events, these listeners were forced to purchase new equipment, switch their service contracts to Sirius and lose their other XM services. Had the companies complied with the FCC's interoperable radio requirement, these satellite radio consumers would not have been forced to buy new equipment or choose other programming offers in order to retain NASCAR programming.

Both XM and Sirius were well aware of the potential that interoperability provided not only for consumers, but also for the fortunes of both companies. In settling patent litigation between the two companies in 2000, a press release on February 16, 2000 stated:

Sirius Satellite Radio and XM Satellite Radio 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.

The companies both further extolled the unified standard as good news not only for consumers but also for shareholders because they said it would increase consumer use of satellite radio services, which logically was expected to have a positive effect on both companies' revenues. The auto buying public would find particular benefits because the companies announced that no future OEM deals (auto manufacturers) would be exclusive. This would have meant that each vehicle manufactured with an interoperable radio would allow the auto buying public the ability to choose either XM or Sirius or both depending on their personal content preferences.

None of this happened, however. Why? Why are consumers who have spent tens of millions of dollars on non-interoperable radios now faced with the future prospect of having to spend the same amount or more once XM and Sirius merge? How has the lack of interoperable radios all these years affected each company's financials and falling share prices?

Even with the merger, it will be one or more years before the combined programming of XM and Sirius can be received. In the interim, consumers have stopped or slowed their buying of satellite radio services because of the surrounding uncertainty about when and at what price a receiver will be available that can receive the programming of the merged entity. This confusion has only exacerbated an already serious decline in both companies' valuations and their shareholders are the ones being victimized.

As a consumer and shareholder, I have been asking for answers about what happened to the FCC's interoperability mandate and the companies' failure to comply with it. Not only have Sirius' and XM's executives refused to answer, the FCC has refused to address the issue of the companies' failure to comply with its own rule or how its refusal to do so comports with its statutory obligations to protect the public's interests in communications services.

The companies do offer a defense. They say they only had to "design and develop" the interoperable radios... not make them available to consumers. Think of it as a government-forced and shareholder-funded science project that the companies allocated up to 25 million dollars to complete. When specifically asked about this defense, the FCC says it can't talk about it because the matter is pending before the Commission. With all due respect, it's been "pending" for ten years. This seems all too convenient. It permits the FCC to refuse to explain why it hasn't enforced its own rule by its continuous failure to enforce its own rule.

It's been nearly two years since I began to ask questions about the lack of interoperable radios. The companies have defended themselves by silence, by inconsistent, ambiguous, and self-serving statements and even in testimony before Congressional committees. Recently, Senator Brownback obtained documents that have caused him to make inquiry about the truthfulness of the testimony given by Sirius' CEO during some of his appearances before Congressional committees.

The reason this merger has been delayed, at a grave expense to shareholders, is because the companies are not in compliance with their licensing requirements and the FCC does not have the interest to address whether or not the companies have failed to properly serve satellite consumers' interests. But the failure of the FCC regulatory oversight is not the only problem. The Department of Justice granted its approval of this merger precisely because of the companies' failure to comply with the FCC's interoperability mandate. The DOJ's rationalized that because there are no interoperable radios, the companies still use radios capable of receiving only their respective services and hence do not compete with each other. In other words, the companies having prevented competition by violating the FCC regulatory requirement, there is no competition that could be harmed by the merger and hence no antitrust concerns.

Consumers and shareholders have been and are being duped. Shareholders have lost billions of dollars in investment. Consumers have spent hundreds of millions on unnecessary hardware. Why? Because at some point, these companies converted their business plans into a concerted effort to consolidate all of the satellite radio spectrum into one company. To do this, they flaunted the interoperable mandate, negotiated the merger, created a audio entertainment market out of whole cloth and engaged a host of Washington insiders to lobby their plan before the FCC, DOJ and Congress. During the process they kept their exclusive OEM deals, spent outrageous amounts of money for exclusive content, scuttled true competition, saddled consumers with soon to be obsolete equipment and forced consumers to invest in new equipment or forego satellite radio service.

Consumers and shareholders have been cheated and the government appears to be part of the problem or at least unwilling to do anything about it. Congress should investigate. Enough is known to question the candor and credibility of the highest-ranking executives in both companies, but in particular in Sirius. A lack of candor and credibility goes to the heart of the qualifications to be a FCC licensee. Under these circumstances, for the FCC to allow XM and Sirius to consolidate their licenses when it is not clear they are fit to hold such licenses is to favor the private interests of a few executives over the public interest and a failure of the FCC to perform the duties Congress gave it.

Disclosure: Author holds a long position in SIRI