

July 17, 2008

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 Twelfth St., SW
Washington, DC 20554

Re: *Notice of ex parte* presentation in: MB Docket No.07-57

Dear Ms. Dortch:

On July 17, 2008, I submitted the attached letter, via e-mail, to the offices of the Chairman and Commissioners. This letter discusses issues raised in a July 10, 2008 meeting with Chairman regarding the above referenced docket.

In particular, the letter detailed two points of discussion. First, PK/MAP provided model language for an open devices condition on the merger, as requested by Chairman Martin. Second, in support of the suggestion of the appointment of an independent compliance officer, PK/MAP provided evidence of similar enforcement mechanisms required by the FTC and the FCC in previous merger agreements. PK/MAP reiterate their support for the appointment of an independent compliance officer in the XM/Sirius merger.

In accordance with Section 1.1206(b), 47 C.F.R. § 1.1206, this letter is being filed electronically with your office today.

Respectfully submitted,



Gigi B. Sohn
President

cc: Chairman Martin and Commissioners



July 17, 2008

Kevin Martin
Chairman
Federal Communications Commission
445 12th Street, NW
Washington, DC 20554

*Re: Consolidated Application of Authority to Transfer Control of XM
Satellite Radio Holdings Inc. and Sirius Satellite Radio, Inc.
MB Docket 07-57*

Dear Chairman Martin:

Public Knowledge and Media Access Project (PK/MAP) hereby submit this letter to address two issues raised at our July 10th meeting with respect to the above-referenced docket. At that meeting, you had asked for language that would satisfy a condition that would permit any manufacturer to build, and any consumer to attach, any nonharmful device to the satellite radio network. Second, you asked whether there was any precedent for the FCC providing for an independent party to oversee enforcement of a media merger.

Open Device Language

In our letter to you dated July 10¹ and at the July 10 meeting, PK/MAP expressed concern that there were several large loopholes in the open device condition proposed by XM and Sirius in their letter dated June 13.² We were concerned about three things: 1) the one year moratorium on open devices; 2) the review and approval of devices by the merged company; and 3) the lack of language requiring that the company make its technical specifications publicly open and accessible to whoever wants to manufacturer a satellite radio receiver. It was because of these concerns that you asked us to provide you with language that would assuage these concerns.

¹ Letter from Gigi Sohn, Public Knowledge, and Andrew Jay Schwartzman, Media Access Project, to Kevin Martin, Chairman, FCC, at 5 (July 10, 2008) *attached to* Notice of oral ex parte from I. Christina Abello, Media Access Project, to Marlene Dortch, Secretary, FCC, MB Docket 07-57 (July 11, 2008).

² Notice of ex parte presentation from Richard E. Wiley, Counsel, Sirius Satellite Radio, Inc., and Gary M. Epstein, Counsel, XM Satellite Radio Holdings, Inc., to Marlene Dortch, Secretary, FCC, MB Docket 07-57 (June 13, 2008).

PK/MAP believe that the following language would make for an acceptable open device condition.

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. No later than 60 days after the merger is approved, the merged company must, at a minimum, make the technical specifications of its devices and its network publicly open and available to permit any manufacturer to build a satellite radio device. These specifications should contain sufficient information, including specifications for signal reception, conditional access, and encryption, such that a manufacturer can build a device compatible with the combined network. In addition, no later than 60 days after the merger is approved, the combined company shall also offer for license, on commercially reasonable and non-discriminatory terms, the intellectual property it owns and controls that is necessary to independently design, develop and have manufactured satellite radios to any bona fide third party that wishes to design, develop, have manufactured and distribute subscriber equipment compatible with the Sirius system, XM system or both. Such technology license shall contain commercially reasonable terms, including 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. Technical compliance with all requirements, specifications or regulations shall be verified by accredited independent testing facilities prior to a device being offered to consumers at the instigation and expense of the manufacturer or distributor of the receiver.

Independent Monitor

In the July 10 letter, PK/MAP requested that in light of "the gravity of the competitive concerns raised by a merger of the only two satellite radio companies into one and "concerns about prior unfulfilled promises made by the companies regarding the manufacture of an interoperable radio and interference by repeater stations" that the Commission create a mechanism to ensure that these conditions can and will be enforced expeditiously."

In the July 10 meeting, PK/MAP suggested that the Commission appoint an independent monitor to oversee compliance with the conditions. The groups referred to a "Monitor Trustee" appointed by the FTC to oversee the merger of America Online and Time Warner and ensure that its obligations under the merger were met. This individual served at the expense of the merging entities. Although appointment of the Monitor

Trustee was subject to consent by AOL/Time Warner, consent could not be “unreasonably withheld.”³ The rights and duties of the Monitor Trustee included:

- The power and authority to monitor AOL/Time Warner’s compliance with the terms of the consent order;
- Complete access to all personnel, books, records, documents and facilities, though the Monitor Trustee may be required to sign a confidentiality agreement prohibiting disclosure;
- Authority to employ consultants, attorneys, and other assistants as needed and approved by the FTC;
- Report to the FTC thirty days after appointment and every ninety days thereafter until the termination of the order.

You asked whether the FCC has ever required similar oversight.

The answer is yes, but with a caveat. The FCC’s 2002 approval of the merger of AT&T and Comcast required the appointment of a “Corporate Compliance Officer.”⁴ This individual was selected by AT&T Comcast to:

- Oversee AT&T Comcast’s implementation of and compliance with enumerated conditions (safeguards) on the merger;
- Monitor AT&T Comcast’s compliance program;
- Consult with the Chief of the Media Bureau and other relevant parties regarding AT&T Comcast’s compliance with these conditions;
- File a report regarding AT&T Comcast’s compliance with these conditions every six months from the merger closing date until the end of the divestiture period;
- Immediately notify the Chief of the Media Bureau of any material failure on the part of AT&T Comcast to comply with these conditions;

The role of the Compliance Officer would continue until the enumerated conditions had expired.

The caveat is that the Officer was appointed by the merged entity, raising questions about bias and undue influence. The Commission attempted to remedy this problem by requiring that semi-annual reports submitted by the Officer discuss any limitations imposed on the Officer’s responsibilities by AT&T Comcast or “other circumstances that might affect the Corporate Compliance Officer’s opinion.”⁵ While this does provide some protection, PK/MAP’s preference would be for the FCC to appoint the overseer, not the merged company.

³ *Id.* at 12.

⁴ *In the Matter of Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion and Order, MB Docket No. 02-70, at 91 (Nov. 13, 2002).

⁵ *Id.*

We are at your disposal to answer any other questions you might have.

Respectfully submitted,

s/s Gigi B. Sohn

Alex Kanous
Summer Law Clerk
Public Knowledge

Gigi B. Sohn
President
Public Knowledge

s/s Andrew Jay Schwartzman

Andrew Jay Schwartzman
President and CEO
Media Access Project

cc. Commissioner Jonathan Adelstein
Commissioner Michael Copps
Commissioner Robert McDowell
Commissioner Debra Taylor Tate