



July 10, 2008

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

Dear Chairman Martin:

Public Knowledge and Media Access Project (PK/MAP) submit this letter to address the June 13, 2008 letter submitted by Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc., which sets out “voluntary commitments” that the companies would abide by should the merger be approved. PK/MAP believe that two of these commitments, *i.e.*, to provide a set-aside of capacity for non-commercial programmers and to “permit any device manufacturer to develop equipment that can deliver the company’s satellite radio service,” fall short of what is necessary to ensure that the merger is in the public interest.

Moreover, the Commission should include in any merger approval an enforcement mechanism by which the Commission or other entity can ensure that the combined company abides by these and other commitments.

Non-Commercial Set-Aside

XM and Sirius commit to set aside “four percent of full-time audio channels on the Sirius platform and on the XM platform,...for noncommercial, educational and informational programming within the meaning of 47 CFR §25.701 (f)(2) of the DBS set-aside rules.” This set-aside is lacking for the reasons set forth below.

Set-Aside as a Percentage of “Full-Time Audio Channels.”

The companies define “full time audio channels” as

the aggregated number of channels of music, news, sports, entertainment or audio programming broadcast on a continuous basis, 24 hours a day, seven days a week, plus part-time channels aggregated on a full-time equivalent basis....”

Basing the non-commercial set-aside on “full-time audio channels,” not only ensures that the set-aside will remain static; it also permits the licensee to engage in brinkmanship to reduce its obligation. For example, the licensee could choose to shut

down each of its full-time stations for 5 minutes a day when listenership is low, thus taking them out of the realm of stations that are “broadcast on a continuous basis, 24 hours a day, seven days a week.” Or the merged company could choose to reduce their “audio” channels in favor of providing more video and data channels, such as the “Sirius Backseat TV” service currently available in several Chrysler vehicle models. While it is an open question whether the DARS spectrum may even be used to provide video or data services,¹ this possibility opens the door to game playing – the merged entity could choose to reduce its audio channels in favor of more video or data channels for the purpose of shrinking the set-aside.

As PK/MAP have stated in previous *ex parte* filings², the set-aside should be based upon the total spectrum capacity, not simply on live audio channels. This will permit the number of actual channels to increase as compression technology improves. And it will prevent any effort by the new company to reduce the set-aside.

Diversity of Programming

The June 13 letter is silent on two of the qualifications for the non-commercial set-aside put forth by PK/MAP to ensure that the capacity promotes a diversity of programming. To that end, PK/MAP have asked the Commission both to “set a limit of one noncommercial programmer per [set aside] channel”³ and to “not count present programming” towards the set-aside.⁴ The Commission prohibits DBS providers from giving more than one set-aside channel to any one programmer. 47 CFR 25.701(f)(4).

If the Commission simply allows the combined entity to count programming which it already carries, and which in many cases includes several channels programmed

¹ While the FCC anticipated use of the DARS spectrum for ancillary services, the Commission noted its concern over any such use that was inconsistent with the international allocation obtained at the 1992 World Administrative Radio Conference (WARC-92). *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Report and Order Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5754, 5792-3 (1997). This allocation “was limited to audio broadcasting by digital modulation.” *Amendment of the Commission’s Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services*, Report and Order, 10 FCC Rcd 2310, 2310 (1995). The limitation to audio only is also reflected in the Commission’s rules, which define Satellite DARS as a “radiocommunication service in which audio programming is digitally transmitted by one or more space stations directly to fixed, mobile, and/or portable stations.” 47 C.F.R. § 25.201 (2007). Indeed, the WCS Coalition, representing communications service providers that occupy bands straddling the DARS spectrum space, has made this point to the FCC. Notice of *ex parte* from Paul J. Sinderbrand, Counsel to the WCS Coalition, Wilkinson Barker Knauer, LLP, to the FCC, IB Docket 95-91 (Apr. 17, 2007) (filed on behalf of the WCS Coalition).

² Notice of *ex parte* from Gigi B. Sohn, Public Knowledge, to Marlene Dortch, Secretary, FCC, MB Docket 07-57 (May 20, 2008); Notice of *ex parte* from Gigi B. Sohn, Public Knowledge, to Marlene Dortch, Secretary, FCC, MB Docket 07-57 (June 18, 2008); Notice of oral *ex parte* from Andrew Jay Schwartzman, MAP, to Marlene Dortch, Secretary, FCC, MB Docket 07-57 (June 18, 2008); Notice of oral *ex parte* from Charles Fisher, MAP, to Marlene Dortch, Secretary, FCC, MB Docket 07-57 (June 25, 2008).

³ Notice of *ex parte* from Gigi B. Sohn, Public Knowledge, to Marlene Dortch, Secretary, FCC, MB Docket 07-57 (May 20, 2008).

⁴ Notice of oral *ex parte* from Charles Fisher, MAP, to Marlene Dortch, Secretary, FCC, MB Docket 07-57 (June 25, 2008).

by the same entity, then this “concession” is no concession at all. Therefore, PK/MAP urge the Commission to require that 1) the noncommercial set-aside be limited to one programmer per channel and 2) the capacity be made available only to programming not currently available on either XM or Sirius.

Open Devices

PK/MAP and other parties have been seeking a condition on the merger that would permit any manufacturer to build, and any consumer to attach, any non-harmful device to the satellite radio network. PK/MAP proposed the condition thusly:

The new company should make the technical specifications of its devices and network open and available to allow device manufacturers to develop, and consumers to use, any device they choose without interference. Pursuant to the Commission rules, these devices must be certified by the FCC for receiving signals on the frequencies licensed to the merged entity and be subject to a minimum “do-no-harm” requirement.

In contrast, the companies propose that

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. Within one year following the consummation of the merger, the combined company shall offer for license, on commercially reasonable and non-discriminatory terms, the intellectual property it owns and controls of the basic functionality of satellite radios that is necessary to independently design, develop and have manufactured satellite radios (other than chip set technology, which technology includes its encryption and conditional access keys) to any bona fide third party that wishes to design, develop, have manufactured and distribute subscriber equipment compatible with the Sirius system, the XM system, or both. Chip sets for satellite radios may be purchased by licensees from manufacturers in negotiated transactions with such manufacturers. Such technology license shall contain commercially reasonable terms, including, without limitation, 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; and require the licensee and qualified manufacturer to satisfy technical and quality assurance standards and tests established by the combined company from time to time and applicable to licensees and qualified manufacturers.

The first two sentences of this paragraph would have made for an acceptable “open device” requirement. However, as discussed below, there are a number of loopholes in the text after those two sentences that threaten to undermine any promise to

permit “any device manufacturer to develop equipment that can deliver” satellite radio service.

One-year moratorium

The companies propose to offer their technology for license “within one year following consummation of the merger....” There is no reason given for this moratorium, nor is one necessary – even if manufacturers start making devices the day after the merger is consummated, it will take between 18 months to three years (in the case of car radios) to bring these devices to market.⁵ The only thing this moratorium will accomplish is a further extension of a 10-year-old vertical monopoly over the network and devices. The Commission should require that the open device requirement be effective starting the day the merger is approved.

Merged Company Approves Devices

The companies propose that competitive device manufacturers “satisfy technical and quality assurance standards and tests established by the combined company from time to time....” While ensuring that devices meet quality and technical standards is certainly important, this vague review process would give the merged company veto power (or equally important, the power to *delay* approval) over competitive devices. Thus, the Commission should prohibit the merged company from undertaking such a task. To the extent that an FCC certification process is insufficient to ensure adequate technical and quality assurance standards, the Commission should require that an independent laboratory undertake such testing. Examples of independent laboratories that undertake compatibility and quality assurance testing for a wide variety of products, including hardware and software, include Intertek (<http://www.intertek.com/>) and PCTest (<http://www.pctestlab.com/>).

Open Technical Specifications

While the companies tout a “principle of openness” for devices, their proposal does not provide enough tools for competitive manufacturers to make that goal a reality. To their credit, the companies agree to license whatever intellectual property they own “at commercially reasonable and nondiscriminatory terms.” But they must do more to ensure a competitive device market. At a minimum, the merged company must 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.

⁵ Tying the beginning of the one-year period to “consummation” of the merger permits even further delay. Is the merger consummated upon FCC approval, or upon transfer of assets, or some other event? That date would be left to the combined company to determine.

Enforcement Mechanism

The fact that the companies have acceded to no fewer than six detailed conditions underscores the gravity of the competitive concerns raised by a merger of the only two satellite radio companies into one. Moreover, a number of parties to this proceeding have raised concerns about prior unfulfilled promises made by the companies regarding the manufacture of an interoperable radio⁶ and interference by repeater stations.⁷ For those reasons, it is critical that the Commission create a mechanism to ensure that these conditions can and will be enforced expeditiously.

It is not enough to require an aggrieved manufacturer, consumer, or programmer to file a petition with the Commission to enforce these conditions or for those parties to wait until the company's license comes up for renewal. The delays inherent in those processes could do irreparable harm to an aggrieved party. There is precedent for the appointment of an independent "Monitor Trustee" to oversee enforcement of merger conditions for media companies⁸. The Commission should either do the same, or create another enforcement mechanism that will permit the speedy resolution of complaints against the merged company.

Conclusion

PK/MAP appreciate the willingness of XM and Sirius to agree to various commitments in exchange for the Commission's approval of their merger. However, those commitments must be both meaningful and enforceable. Thus, the Commission should approve the merger only if the companies modify and clarify their commitments

⁶ See Notice of oral ex parte from Julian L. Shepard, Counsel, Consumer Coalition for Competition in Satellite Radio, to Marlene Dortch, Secretary, FCC, MB Docket 07-57 (June 4, 2008); Notice of ex parte from Mark Cooper, Director of Research, Consumer Federation of America, to Marlene Dortch, Secretary, FCC, MB Docket 07-57 (May 7, 2008).

⁷ See Reply Comments of the WCS Coalition, WT Docket 07-293 (Mar. 17, 2008).

⁸ See *In the Matter of America Online/Time Warner*, Decision and Order, FTC Docket No. C-3989, at 12-14 (Dec. 14, 2000) (allowing the FTC to appoint a Monitor Trustee to oversee that the obligations under the America Online/Time Warner merger are met).

consistent with this letter.

Respectfully submitted,

s/s Gigi B. Sohn

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